Paying for Stolen Kisses: Sexual harassment and the law

Sutherland, C. (1992). ***Paying for Stolen Kisses: Sexual harassment and the law.*** Paper presented at the Centre for the Study of Violence and Reconciliation, Seminar No. 2, 24 March.

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Date: 24 March 1992

Venue: University of the Witwatersrand, Johannesburg, South Africa

J v M Ltd: A classic case of sexual harassment?

Sexual harassment, depending on the form it takes, violates that right to integrity of the body and personality which belongs to every person and which is protected in our legal system both criminally and civilly. An employer has a duty to ensure that its employees are not subjected to this form of sexual harassment. (J v M Ltd, 1989)

J v M Ltd, the first reported case of sexual harassment in South Africa, was heard in the Industrial Court in February 1989 (Industrial Law Journal, 1989, pp.755-62). The case is worth examining in some detail as it provides a useful framework within which to discuss sexual harassment in South Africa. It highlights many of the problems associated with sexual harassment and illustrates the limited legal protection currently offered to employees. In looking at this legal protection, the focus of the paper is limited, primarily, to the provisions contained within the Labour Relations Act. No serious examination of the options offered by civil and criminal law is entered into.

Summary of the Case

The applicant sexually harassed another complainant, a much older woman, by caressing and/or slapping her buttocks and fondling her breasts. She found his behaviour

offensive and told him not to come near her. Eventually she told him to remain on the other side of the desk whenever he entered the office. (J v M Ltd, 1989)

The case in question concerned a senior executive of an unnamed company. He was charged with sexual harassment at an internal company hearing, following numerous complaints about his behaviour. Specifically he was accused of having "sexually molested and harassed" a female employee "against her will". (Company Charge Sheet, J v M Ltd, 1989)

He was alleged to have "fondled her breasts". This is one of many complaints of similar acts that had been received "from the time the applicant first joined the (company)". The company claimed that the general manager had on "several occasions discussed (the) applicant's behaviour with him", and that he had been issued with a "final warning". This was disputed by the applicant, but accepted by the court. At the disciplinary hearing, chaired by the general manger of the company, he was found guilty of sexual harassment and given the opportunity to resign. This he did, but subsequently withdrew his resignation and was dismissed (J v M Ltd, 1989).

The senior executive then brought an application for re-instatement to the Industrial Court. The application was brought in terms of s43 of the Labour Relations Act 28 of 1956 which gives the Industrial Court the authority to reinstate employees if the court is satisfied that an "alleged unfair labour practice" has taken place. The applicant contended that the company had not followed company procedure and that the sanction imposed had been "two harsh" (J v M Ltd, 1989).

In his defence the applicant argued that his behaviour was "no more than mildly flirtatious … (or) Mediterranean type behaviour". In support of this contention the applicant submitted two petitions. The first was signed by "all the ladies in the office controlled by (the applicant) … pleading for compassion and stating that they did not feel offended or sexually harassed" by his past behaviour. The second was signed by some 500 employees of the company, requesting the management to "reconsider his dismissal" (J v M Ltd, 1989).

The application was dismissed. The court found the senior executive guilty of sexual harassment. Sexual harassment was viewed as a "serious matter which require(d) attention from employers." The sanction imposed by the company, namely dismissal, was upheld, as the seriousness of the matter warranted this action.

Neither of the submitted petitions was given serious consideration by the court. In response to the first De Keck argued that he could "not accept that all of them (the signees), consented to the applicant fondling their buttocks and breasts and took pleasure in his doing so. The evidence that many have objected to and resigned because of his fondling habits is clear". The second petition was dismissed on the grounds that the employees who signed it "(did) not know the facts" and "natural(ly) … would have sympathy with the applicant" (J v M Ltd, 1989:761).

It seems unlikely that the people who signed the second petition would have done so without any knowledge of what the applicant was accessed of. For instance, it is implausible to suppose that he would have received the support he did if he had been accused of rape, murder or theft. The implication therefore is that sexual harassment

in the workplace, even of the nature that the applicant was found guilty of, is regarded as acceptable or, at the very least, as a somewhat trivial disciplinary offence. The widespread nature of the support offered to the applicant in his place of work may have been instrumental in persuading some of the women under the applicant's authority that what they had experienced was not serious or offensive, hence encouraging them to sign the first petition. While this remains at the level of speculation, these issues do support the more general contention that sexual harassment in South Africa is both widespread and not regarded in a serious light by employers or employees.

Finally, it appears that the court was also persuaded by a concern that "it should be careful not simply to substitute its (the court's) own assessment for that of the employer". It is argued that "the standard of conduct which an employer expects from its employees … is a clear management prerogative". The company's "most senior executives" had decided that the applicant's conduct had "fallen short of what is regarded as acceptable behaviour". He had been warned of this several times and finally dismissed. The court found that there was "no basis" on which to find the "judgement" of the company "clearly unfair or unreasonable". (J v M Ltd, 1989)

Definition of Sexual Harassment

At least until 1976, no one had a name for this collective experience. (Stanko, 1985:61)

The definition of sexual harassment used in J v M Ltd was "unwanted sexual attention in the employment environment". Different forms of sexual harassment were also identified:

(I)n its narrowest form sexual harassment occurs when a woman (or a man) is expected to engage in sexual activity in order to obtain or keep employment or obtain promotion or other favourable working conditions. In its wider view it is, however, any unwanted sexual behaviour or comment which has a negative effect on the recipient. (J v M Ltd, 1989, 10 ILJ, p. 757)

While De Kock, the presiding member of the court, relied largely on an article by Mowatt ("Sexual Harassment – New remedy for an old wrong") for his definition, in recognising different forms of sexual harassment it is very similar in scope and nature to the Equal Employment Opportunity Committee's "Guidelines on Sexual Harassment". These guidelines were adopted by the EEOC, in the United States of America in 1980, and set out the "legal definition" of sexual harassment which has been "analysed extensively by the courts" (Welzenbach, 1986, p. 4). The guidelines define sexual harassment as:

Unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature … when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
(3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. (included in Welzenbach, 1986, p. 23)

The first two sections of this definition deal with what has become known as "quid pro quo" harassment. This occurs when specific employment opportunities or benefits are withheld as a means of coercing sexual favours. In other words, an individual in a position of power, either explicitly or implicitly, uses his/her authority to hire, fire, promote or allocate work to "persuade" an employee to engage in sexual activities. These activities can include complying with requests for dates or sex, being touched or fondled, or responding positively to sexual comments and flirtations (Welzenbach, 1986, p. 4).

The latter section of the definition deals less explicitly with direct power relations in employment. It focuses instead on the work environment. If this is made unpleasant or uncomfortable for anyone on the basis of their sex or sexual preference, then it constitutes sexual harassment. This type of harassment, therefore, can include sexist or homophobic jokes or comments, unwelcome verbal and/or physical advances of a sexual nature, offensive sexual flirtations, graphic comments about an individual's body, sexually degrading words used to describe an individual, and the public display of sexually suggestive objects or pictures. In a "working conditions sexual harassment" case, an employee must demonstrate that a superior has either "create[d] or condone[d]" such an atmosphere (Welzenbach, 1986, p. 4).

Importantly, in J v M Ltd, De Kock recognised both the wide spectrum of activities that constituted sexual harassment, and the fact that these actions could be of a physical or verbal nature. Moreover, unlike many definitions, he argues that these acts do not have to be repeated to be harassment:

Conduct which can constitute sexual harassment ranges from innuendo, inappropriate gestures, suggestions or hints or fondling without consent or by force to its worst form, namely rape. It is in my opinion also not necessary that the conduct must be repeated. A single act can constitute sexual harassment. (J v M Ltd, 1989, p. 757)

Within both of the definitions three points emphasised. Firstly, that the acts are of a sexual nature. Secondly, that *sexual harassment* covers a wide range of activities that may be *either physical or verbal.* Finally, these acts are *unwanted* by the recipient of them. There remains, however, a fundamental distinction.

In the United States of America sexual harassment is recognised as a form of unlawful sexual discrimination. Under Title VII of the Civil Rights Act (1964) it is an unlawful practice "for an employer to discriminate against applicants or employees on the basis of sex", and, as "by definition, sexual harassment occurs because of the harassed employee's sex" it is unlawful. The EEOC has the "responsibility of administering Title VII" and their guidelines provide a legal definition of sexual harassment (Welzenbach, 1986, p. 9) Moreover, under Title VII, if sexual harassment can be proved, an employer can be held liable for such acts. Under this legislation employees can apply for "interdicts preventing certain conduct" as well as be awarded "back pay (and/or) damages for injured feelings". (Mowatt, 1986, p. 645)

The Law in South Africa

There is reason to suggest that a remedy (for sexual harassment) may now exist in South African law with the introduction of the concept of unfair labour practice. (Mowatt, 1986, 638)

No legal definition of sexual harassment exists in South Africa. According to Mowatt (1986) it is a "wrong which can presently be redressed by the appropriate criminal sanction or civil action". He argues that the "concept of sexual harassment" is covered under the criminal law by such crimes as "rape, through indecent assault, extortion to crimen injuria". Civilly, a victim of sexual harassment "may also be entitled to recover damages under the delictual head of injuria." (Mowatt, 1986: 645)

In J v M Ltd, this view appears to be endorsed as it is argued that sexual harassment "violate[s] that right to integrity of body and personality which belongs to every person and which is protected in our legal system both criminally and civilly". This is different, although not contradictory, from the view that sexual harassment is a form of sexual discrimination.

Mowatt recognises the limitations of this approach in relation to the workplace:

[Criminal or civil] redress is obviously punishment of the offender, or damages for past wrongs, but it essentially fails to compensate the victim for the harm suffered in terms of her work environment. Although justice is done, the woman may have lost her employment, or promotion opportunity, or some other tangible asset. (Mowatt, 1986: 645)

He contends that what might address this issue is the use of the "concept "unfair labour practice" contained in the Labour Relations Act" of 1953 as amended in 1979,

1980 and 1988. (Mowatt, 1986: 646) The 1979 amendments, responsible for the deracialisation of the original Act, also made provision for the establishment of the Industrial Court. The Industrial Court was given the responsibility of defining an "unfair labour practice" as the 1979 definition was "embarrassingly wide … simply "any labour practice which in the opinion of the court is an unfair labour practice"." A year later, and subsequently in 1988, the Act was amended to include a more specific definition of this concept. (See Cameron, 1989: 22, 161-165).

Mowatt, writing prior to the 1988 amendments, argues that subparas *(a)(1)* and *(a)(iv)*, of the 1980 version of the Act, are of "particular significance in the case of sexual harassment". *(a)(1)* defines as "unfair" any practice which has the "affect" of prejudicing or unfairly jeopardising "any employee's or class of employee's" employment opportunities, work security or physical, economic, moral or social welfare." *(a)(iv)* states that any practice which has the effect of "detrimentally" affecting (or doing so in future) "the relationship between employer and employee" is an unfair labour practice. Mowatt suggests that both of these are applicable to sexual harassment, and as such are subject to the jurisdiction and protection of the Industrial Court. (Mowatt, 1986:646-647) His argument remains relevant, however, as these particular aspects of the definition appear in the current, amended Act, as subparas *(o)(I)* and *(iv)* (Cameron, 1989: 165)

While the definition of an "unfair labour practice" expressly includes "the unfair discrimination by the employer against an employee solely on the grounds of … sex …" s(1)(k), a definition that was maintained within the current Act as s(1)(l), Mowatt, whilst recognising that it could be used in relation to sexual harassment, implicitly warns against it:

But a delicate and exotic plant, such as anti-discriminatory legislation, would whither and die in an environment in which discrimination is an "institutionalised form of government". (Mowatt, 1989: 646)

Certainly there is little evidence to suggest that until recently that sexual discrimination would be treated seriously. To the contrary, in Chapter 6 of Part V of the Wiehahn Report, dealing with "Women in Employment" it was reported that "[m]any instances of discrimination against women in employment were recorded", but that "in the limited time available" it was not able to "sponsor any research" into it. (cited in Mowatt, 1989:646) In the current political context, however, there may be greater scope for its use, as, for example, in the ANC Constitutional Guidelines, specific attention is paid in this question.

This remains at the level of speculation as there have been no reported cases that have tested these suggestions. While J v M Ltd did deal with sexual harassment it was both unusual, and ironic, in that being the first to begin to define sexual harassment, it did so, not in the context of a victim of sexual harassment seeking reinstatement, protection, or compensation, but of a perpetrator seeking relief from sanction.

The court did, however, find the applicant "guilty" of sexual harassment and refuse to reinstate him. Given that there is no legal definition of sexual harassment, it is worth examining the grounds on which the applicant was found guilty. The court was

satisfied that the applicant had repeatedly and "without consent" touched "in a sexual way" female employees "under his control". These actions included caressing/slapping buttocks and fondling breasts. That the actions were "unwanted", a critical aspect of sexual harassment, was supported by the fact that there were complaints and resignations in response to the applicant's behaviour from the time he joined the company. Secondly, he was warned several times by more senior executives that his behaviour was unacceptable. Finally the court argues that:

His conduct was also such that if he had been charged criminally, for indecent assault he would have found it difficult to defend himself. (J v M Ltd, 1989, p. 760)

In the absence of a legal definition of sexual harassment this latter point may be of the most significance. It certainly raises the question of how willing the court would have been to find the applicant guilty of sexual harassment if he had engaged in "less serious" forms of it, particularly those that did not involve any physical contact.

There are, however, two more fundamental criticisms of the approach argued for by Mowatt. The first is that the Industrial Court only offers protection and relief to those people already in employment. (Cameron, 1989:139) The unfair labour practice concept does not include people *applying* for employment. The EEOC guidelines specifically recognise that this category of person may be especially vulnerable to sexual harassment and explicitly prohibit employers from engaging in it. Bird (quoted in Cock, 1987) suggests that sexual harassment, including "jobs in exchange for sex", is common:

The position of women workers is too heavy with many things: say you are a woman and you are looking for a job. When you reach a factory, you find the induna there and you ask him. If you like the job the induna will tell you that you must sleep with him before you get the job. And you've got no choice. You want to work and your children are starving in Soweto. So, some women sleep with those men. (quoted in Cock, 1987: 135)

The Industrial Court offers no protection or redress to persons in this situation. Moreover, the Labour Relations Act does not cover all categories of workers. Domestic workers, for example, are exempt from even the limited protection offered by this Act. (Cock, 1987: 134) It is inadequate to offer, as a legal option for the prohibition of sexual harassment in the workplace, legislation that does not cover all categories of workers.

Finally, in his article Mowatt concedes that "[o]ne problem in regarding sexual harassment as an "unfair labour practice" is the relief which the victim may obtain." Prior to the 1988 amendments of the Labour Relations Act, the Industrial Court could only instruct an employer to "cease an unfair labour practice", or to "restore the position to that which prevailed before the introduction of the unfair labour practice." In addition, the Industrial Court could not "award … damages for … humiliation suffered

or for lost promotion opportunities." This led Mowatt to conclude that while the Industrial Court could provide a "remedy" for sexual harassment, "the relief is relatively ineffective." (Mowatt, 1986: 652)

With the 1988 amendments this situation has been addressed. Expressly included in s46(9) is the provision that the Industrial Court may order "compensation", that is, "to order payment of "the value, estimated in money, of something lost"." (Cameron, 1989: 251) Under this provision claims for lost promotion opportunities, as well as humilation or mental anguish could be submitted.

The judgement offered by J v M Ltd, however, remains significant. Within the limitations already explored, the Industrial Court sounded a firm warning to employers that sexual harassment would not be tolerated. Moreover, it was argued that it was an *employer's responsibility* to see that it did not occur:

An employer undoubtably has a duty to ensure that its employees are not subjected to this form of violation (sexual harassment) within the work-place. (J v M Ltd, 1989, p. 758)

Particular significance is attached to this in a case note on J v M Ltd. Employers are "advised" to "take immediate appropriate action" if an allegation of sexual harassment is brought to their attention, as failure to do so,

could lead to an allegation of the employer committing an ULP (unfair labour practice). In addition, the failure to act could possibly be regarded as constituting breach of contract or form the basis for other common law liabilities. (Labour Law Briefs, April 1989, p. 70)

The Law in South Africa: Caveat emptor

… the standard of conduct which an employer expects from its employees … is a clear management prerogative. (J v M Ltd, 1989)

J v M Ltd, as the only reported judgement on sexual harassment has many positive points that need to be welcomed. Firstly, it identifies sexual harassment in the workplace as a serious problem that needs to be dealt with. Secondly, and perhaps most importantly, it stresses that it is an employer's responsibility to ensure that it does not occur. (J v M Ltd, 1989, p. 755)

While these points are made explicitly in the judgement given, there are other factors within the case that need to be stressed. Firstly, De Kock appears to recognise and appreciate many of the problems associated with sexual harassment. He dismisses the petitions offered in defence of the applicant. While he does so on technical

grounds, ruling that they are inadmissible, it is to be welcomed that he is not swayed by the common misperceptions and myths about sexual violence that form the basis of both petitions. Moreover, in dismissing as mitigating evidence the fact that the complainant withdrew her accusations he asserts that:

> **The first complainant subsequently sought to withdraw her complaint on the basis that the applicant did not intend to harass her sexually. She at no time withdrew the facts. The facts establish sexual harassment. The fact that she subsequently felt sorry for the applicant proves no more than that she is a nice person. (J v M Ltd, 1989, p. 760)**

There are, however, some aspects to the judgement that give cause to concern. The first is the stress placed on conduct within the workplace being "a clear management prerogative". In South Africa, as elsewhere, management structures are dominated by men. A range of studies (see for example Kronrad and Gutek, 1986) have shown that men, as a group, are less willing than women to both identify sexual behaviour in the workplace as sexual harassment and to see it as a serious issue. In this context it does not seem adequate to place the responsibility of dealing with sexual harassment with this group of people. The applicant himself was a senior member of the firm, responsibly presumably for determining the code of conduct within the area that he controlled. It took four years for management to effectively deal with what the court labelled as "a serious matter" (J v M Ltd, 1989, p. 755). This approach, at the very least, begs the question of what would happen if employees labelled particular behaviour as sexual harassment, while management did not. De Kock's judgement suggests that the Industrial Court might, in such an instance, find in favour of management and not offer relief to the victims.

This concern is heightened in the context of De Kock's argument against a previous judgement of the Industrial Court. In the case referred to, a female employee and a senior partner in the firm had a consential affair. Both parties were married. The affair was terminated when the wife of the partner found out about it. Subsequently, the female employee was asked to resign on the grounds that the manager found it stressful to work with her, and because of his wife's concern that the affair might begin again. The employee refused to do this, and instituted a means of continuing with her work while limiting work related contact with the manager concerned. He was not happy with this situation and the employee was subsequently fired on the basis of a number of "unsubstantiated allegations against her." These included that she showed a "perceptible reluctance to take instructions from other partners or even consider their wishes" and that she displayed "an air of superiority which was not warranted" (G v K, 1987, p. 316) She filed an unfair labour practice suit, and was subsequently reinstated by the Industrial Court. (G v K, 1987, ILJ 9 (1988) p. 314)

In this situation, a particular code of conduct is being endorsed by the management of the firm concerned. It is considered as "acceptable" that members of management engage in sexual relations with employees and when those sexual relations are terminated, that the employment relationship is also ended. De Kock implicitly endorses this practise, as he concludes that the Industrial Court should not have reinstated the employee. Instead he argues that the stress caused by the presence of the employee in the workplace would have a negative effect not only on the business

but also on the marriage of both the manager and the employee. In such an instance he argues that "the other directors (of the firm) are surely in a far better position to judge what is in everyone's interest, bearing in mind the natural tension evoked by the situation." As such the Industrial Court should not have "substitute[d] its own opinion in a matter of [this] nature." (J v M Ltd, 1989, p. 762)

He fails to recognise that the directors would be likely to act, not in "everyone's interest", but in their own interests, without regard to the position of employees. It is this point that is made within the original judgement of G v K:

For this court to approve of the applicant's dismissal would be tantamount to rendering every female employee vulnerable and expendable once she has slept or cavorted with her employer. It would also imply that in any amatory situation it is the employee who is to be regarded as the party who bears the guilt and, therefore, the one who must come out the worst for it. Such discriminatory treatment would be completely at variance with the standards of fairness and equity laid down by this court in its numerous standards. (G v K, 1987, p. 317)

It is on these grounds that the employee was reinstated. In addition, the court is highly critical of the code of conduct endorsed by the management, and subsequently by De Kock:

There is no basis, whether in law or in equity, for the proposition that when an employer has had an affair with his employee he may dismiss her once the affair is over on the ground that the employee's presence is a source of embarrassment for him. In casu the senior director should have, at the outset, have been acutely aware of the possible consequences which the affair held in store, not only for himself but also for his wife and his company. … The words of Catullus, the Latin poet, spring here to mind:

The kiss I stole, … how dear for it I paid! (G v K, 1987, p. 316)

Secondly, throughout his judgement, De Kock is at pains to stress that the social code of conduct he is referring to is part of Western culture:

This case concerns relations between people who belong to the Western culture. In Western culture one expects gentlemanly conduct. Sexual harassment is unacceptable at

any level in Western society. No warning or counselling is required and certainly no at senior management level. (J v M Ltd, 1989, p. 761)

There are obvious problems with his stereotyped understanding of acceptable roles for men and women, and the fact that "gentlemanly conduct" can in his view include firing ex-mistresses. The cause for particular concern, however, is that in a multi-cultural society like South Africa the implication is that in some cultures sexual harassment is acceptable. All employees,whatever their cultural background, deserve protection from harassers in the workplace whatever their particular background. For the Industrial Court to suggest otherwise is to render women, in particular, but all employees, not from a "Western culture", vulnerable to sexual harassment and denies them the full protection they are entitled to by the Court. What makes this particular argument offered by De Kock the more surprising is that prior to this he states that "sexual harassment … violates that right to integrity of the body and personality which belongs to every person and which is protected in our legal system both criminally and civilly" (J v M Ltd, 1989, p. 755). "[I]ntegrity of body and personality" is a right that belongs to everybody. To suggest, as De Kock does, that a court of law, such as the Industrial Court, cannot intrude into the cultural integrity of "groups" which are not part of "Western culture" in order to offer protection from violations of "body and personality" is unacceptable.

All of these suggest that what is needed within the "unfair labour practice" code is an explicit definition of what constitutes sexual harassment. In other words, while it should remain an employers responsibility to see that sexual harassment does not occur in the workplace, it should not be their prerogative to define it. Such a process would afford much greater protection to employees and could encourage the reporting of such acts.

Prevention is Better than Cure: Rules about Sexual Harassment

Employers have already recognized the necessity of introducing rules in regard to racial tension. Perhaps they should also consider introducing rules expressly prohibiting sexual harassment. (Mowatt, 1986, p. 652)

Mowatt (1986) concludes that at best the law offers limited protection and redress to victims of sexual harassment. (p. 652) Moreover, it is the powerless that have the least access to redress in the courts, as the process is often time-consuming, expensive and alienating. For example, in a South African context, it is difficult to imagine a black female domestic worker taking her white male employer to court for sexual harassment.

Mowatt, in the same article, draws a useful parallel between racial and sexual harassment and points to the advantages that have been gained through establishing rules of appropriate conduct around racial tensions in the workplace. He suggests that a similar approach should be adopted with regard to sexual harassment (p. 652). Explicit guidelines around sexual harassment, by making it clear what behaviour

constitutes sexual harassment, and asserting that such behaviour was "unacceptable" (indeed, illegal), could encourage the labelling and reporting of inappropriate sexual conduct in the workplace. Rules localised in the workplace, and supported by legislations expressly outlawing such behaviour, could act as a deterrent to perpetrators, as well as an encouragement to victims to report such actions.

Such a situation exists in the United States of America. The EEOC guidelines on sexual harassment were adopted in 1980. In assessing the effect of these and specific rules in workplaces, Welzenbach concludes that these need to be supplemented with training and education. It has already been argued that sexual harassment is often regarded as normal and acceptable behaviour. It is this attitude that needs to be addressed if sexual harassment is to be effectively dealt with. Changing accepted ways of co-workers and managers and workers relating to one another cannot only be done with rules. A more successful approach is through education and training:

Training … is a proven mechanism for promoting an organization's policies and procedures, while increasing awareness of managers and supervisors of their roles and obligations under these policies. … having a training program may well be the best defence for an institution in a sexual harassment case, both as a preventative measure and as a remedy. … By providing appropriate training, the institution can apprise both mangers and employees, as well as other potential victims, of methods for handling situations involving harassing behaviour. Training can stop such behaviour that is not so intended. Training can help to eliminate an environment that encourages situations of sexual harassment. (Welzenbach, L., 1986, p. 19)

The Role of Trade Unions

Over the years there have been many complaints about sexual harassment and exploitation of women members of management and particularly middle management such as foremen. … What became clear to us was that it is all very well discussing the issue as it manifests itself with management, but sexual exploitation was taking place within our own union structures. (Barrett, J. (TGWU General Secretary) Work in Progress, June 1989, p. 30)

Wilson (1983) argues that it was "struggle" to get trade unions in the United Kingdom to address sexual harassment. Women within union structures had to be organised in order to "insist" that the issue be taken up (p. 181). But she argues that "it is even harder for women in non-unionized workplaces to get sexual harassment dealt with" (p. 182).

At the 1989 Cosatu Congress a motion on sexual exploitation was put forward by the Transport and General Workers Union. It identified "sexually exploitative" behaviour and sexual harassment, as a problem within the ranks of the union:

… male comrades in our organisation often get involved in relationships with newly recruited women members of our affiliates, … these relationships are often characterised by an imbalance of power because of the greater political experience and organisational seniority of the male comrade … when these unequal relationships collapse, the women often drop out of the organisation. In other case, divisions start to develop in the organisation because of the broken relationship. … many incidents of sexual harassment of women comrades by male comrades have occurred. (TGWU resolution, quoted in SALB, Vol. 14, No. 4, 1989, p. 33)

No resolution was passed, as "delegations from most unions disagree[d] about the issue." Perhaps of greatest importance, however, was not so much the motion itself as the debate that it generated on the Congress floor:

Women say that it is a fact that men in the unions take advantage of their leadership positions as organisers or shopstewards. They make sexual advances towards women. … But most men saw the resolution differently. Unionists say that the whole tone of the congress changed when the sexual conduct resolution was discussed. Before delegates were tired and serious, but suddenly there was excitement, laughter and lots of joking. (Klugman, B., 1989, p. 33)

This response points to the significant problems that will be encountered in addressing sexual harassment. Some of the points raised in the debate demonstrate the nature of these problems. These are in keeping with the problems identified previously:

Some delegates argued that there was no such thing as sexual exploitation – that women asked for it and that women can say no. Others argued that it was a problem of discipline but that it did not warrant debate at national congress. (Barrett, 1989, p. 32)

Barrett, the TGWU general secretary, in assessing the response to the motion that argued that "[i]t was no surprise that there was not overwhelming support for the resolutions". However, she recognised the value of the issue being raised and concluded that this was the start to a process that in "the next few years" would result in a "shift in consciousness" (Barrett, 1989, 31). The judgement offered by J v M Ltd, and the encouraging signs of organised labour finally addressing this problem suggest that in South Africa, this pervasive and until now almost invisible problem may at last be getting the attention it deserves.

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