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DECLARATION

I, LAUREN POTGIETER, declare that Bad Office Politics: Victimisation and Intimidation in the Workplace is my own work. It has never been submitted before for any degree or examination in any other university. All the sources that I have used or quoted have been indicated and acknowledged as complete references.

Signed ………………………………

Date:  March 2013

Student Number: 2702473
KEYWORDS

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Policies and Procedures
Canada
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Remedies
DEDICATION

This work is dedicated to every employee who is suffering at the hands of bullying bosses and fellow colleagues.

ACKNOWLEDGEMENTS

I acknowledge with great thanks and gratitude the assistance of the following persons:

Mr Pieter Koornhof, Vanessa Potgieter (my mother), Fanie Potgieter (my father), Jacque Potgieter (my brother) Linda Brazendale (my aunt) and Advocate Lennit Max.
CHAPTER 1: INTRODUCTION

Some employees, unfortunately, are forced to come up against bosses who engage in persistent, malicious, demeaning and fearsome behaviour that lowers the self-esteem and confidence of their subordinates.¹ It is a well-known fact that intimidation and victimisation is rife in South Africa, but it is a pity that very few people seem to be prosecuted for these crimes.² One of the reasons for this is that many people who have been subjected to intimidation, precisely because of the intimidation, are afraid of laying criminal charges of intimidation or of testifying about the commission of the crime in a court.³

This begs the question whether intimidation and victimisation in the workplace constitute an unfair labour practice (whether it is by the employer’s omission to attend to the alleged allegations of victimisation or intimidation; fellow employees intimidating and victimising each other, or the employer intimidating or victimising employees) and are there any remedies available to the affected employees?

Victimisation and intimidation are no strange concepts to society. As for an example that victimisation is a reality, in a recent newspaper article an employee alleged that he was victimised by senior personnel and that such personnel have been making remarks about his speech impairment and feet.⁴ Upon approaching the personnel concerned, the employee claims that the treatment he received was that of being chased out of their offices with crude and vulgar language when approaching them about the remarks that were passed.

Upon adoption of the South African Constitution of 1996, it included, a provision giving everyone the right to fair labour practices.⁵ The Labour Relations Act⁶ fails to define what would constitute a fair labour practice, but defines the concept of an unfair labour practice.⁷

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⁶66 of 1995.
⁷Labour Relations Act, section 186(2).
In the case of *National Education Health and Allied Workers Union v University of Cape Town and Others*\(^8\) the learned judge confirmed

“…[T]he concept of fair labour practice is incapable of precise definition. The problem is compounded by the tension between interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgement. It is therefore neither necessary nor desirable to define this concept....In giving content to this concept the Courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity based jurisprudence generated by the end of the 1956 Labour Relations Act as well as the quantification of unfair labour practice in the Labour Relations Act.”\(^9\)

For an employee to succeed on the allegation of unfair labour practice, the employee must prove that the conduct or practice complained of falls within the terms of one of the forms expressly listed in the definition.\(^10\)

Among others, section 39(1)(b) of the Constitution provides that when courts interpret the Bill of Rights they must consider international law. In this instance, the conventions of the International Labour Organisation are most pertinent. The Constitution further provides that when interpreting any legislation, every court must prefer any reasonable interpretation that is consistent with the international law over any alternative interpretation that is inconsistent with international law.\(^11\) In the case of *NEHAWU v University of Cape Town*\(^12\) the Constitutional Court confirmed this principle

“…[W]henever a court is required to give content to the Bill of Rights or the legislation that gives effect to these fundamental rights, such as the Labour Relations Act, Basic Conditions of Employment Act and the Employment Equity Act, it must first seek guidance from international instruments such as the International Labour Organisation Conventions.”\(^13\)

Such Conventions includes the Discrimination (Employment and Occupation) Convention 111 of 1958, the Occupational and Health Convention 155 of 1981 and the Occupational Health Services Convention 161 of 1985. The Employment Equity Act in section 3(d),

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\(^8\)(2003) 3 SA 1 (CC).
\(^9\)(2003) 3 SA 1 (CC) para 33-34.
\(^10\) *Nawa&Another v Department of Trade & Industry* (1998) 7 BLLR 701 (LC).
\(^11\) The Constitution, section 233.
\(^12\)(2003) 24 ILJ 95 (CC).
\(^13\)(2003) 24 ILJ 95 (CC) 110G-111B.
provides that this Act must be interpreted in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention 111 concerning Discrimination in Respect of Employment and Occupation.

Additionally, it is submitted that there remains the common law right to be dealt with fairly by his or her employer. In the case of *Murray v Minister of Defence* the learned judge concluded with the following

“…[D]eveloped as it must be to promote the spirit, purport and objects of the Bill of Rights, the common-law of employment must be held to impose on all employers a duty of fair dealing at all times with their employees—even those the Labour Relations Act does not cover.”

This common law duty is not the only obligation placed upon the employer. In terms of the Occupational Health and Safety Act 85 of 1993, the employer has a duty to provide a safe and healthy workplace environment for employees. This was confirmed by the court in the case of *Grobler v Naspers Bpk*.

The Labour Relations Act prohibits victimisation by guaranteeing the right to freedom of association of employers and employees (including applicants for employment), and specifically prohibiting the invasion of those rights. The contents of this right are elaborated in numerous international human rights instruments and in conventions and recommendations of the International Labour Organisation. The right to freedom of association is the right of employees to join unions of their choice, and take part in their lawful activities. The prohibition on acting against employees for exercising statutory rights binds all persons, not just employers. The case of *Kroukam v SAAirlink* presents itself as an example of victimisation. The court was compelled to consider the question whether the applicant had

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18 Labour Relations Act, section 4,5,6,7.
21 The Constitution, section 39(1)(b), 231, 232 and 233. Article 1(2)(a) of the International Labour Organisation Convention 98 of 1949 states: Employees and employers without any distinction whatsoever shall have the right…..subject only to the rules of the organisation concerned, to join the organisation of their own choosing without previous authorisation.
23 (2005) 12 BLLR 1172 (LAC).
been dismissed because he had taken action against the respondent by exercising a right conferred by the Labour Relations Act, or for participating in proceedings in terms of the Act. The Labour Appeal Court concluded

“…[T]hat the evidence indicated that the reason for the loss of trust was management’s disenchantment with the manner in which the appellant had sought to represent the interests of the union and its members, in particular by instituting contempt proceedings against top management. This was the dominant reason for the decision to dismiss the appellant, and therefore rendered the dismissal automatically unfair.”

To have a better hypothesis of victimisation, intimidation and workplace violence it is required that each of these concepts be examined individually. Thus, through such examination, insight shall be gained and the finer workings of victimisation, intimidation and workplace violence will be understood. This will be discussed in chapter 2.

Labour legislation fails to divulge a precise definition of workplace violence. However, it is predominantly seen as the persistent and unwelcome conduct, which is hostile or offensive to a reasonable person and induces fear of harm and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences. The courts have accepted the related offence of intimidation as a ground for terminating the contract of employment, provided that it entails threats uttered seriously and that there is proof that the employee concerned actually uttered the threats. In the case of Adcock Ingram Critical Care v CCMA & Others

“The words ‘You can treat this as a threat- there will be more blood on your hands’ were uttered by a shop steward during negotiations. The Labour Appeal Court concluded that these words could only mean that loyal employees would continue to be assaulted and killed by strikers, as before. The learned judge concluded that to

\[24\] (2005) 12 BLLR 1172 (LAC) 1173.
\[25\] (2005) 12 BLLR 1172 (LAC) 1173.
\[28\] (2001) 22 ILJ 1799 (LAC).
constitute intimidation words need not be directed at a particular person(s). Words are intimidatory if they are calculated to terrify, overawe or cow.»²⁹

Canadian legislation has started addressing aspects regarding victimisation, intimidation and workplace violence as De Leseleuc states:

“… [I]n recent years, violence in the workplace has been the subject of increasing public attention. In response to the growing concerns over workplace victimisation, such as assaults and incidents of criminal harassment, both public and private sector workplaces have developed policies to deal with workplace violence and harassment.”³⁰

Specific definitions are incorporated into Canadian legislation pertaining to victimisation, and workplace violence. However, there is no definition for intimidation. Rather, intimidation is characterised as criminal harassment.³¹ The Criminal Code³² delineates criminal harassment as

“…[T]he purpose of compelling another person to abstain from doing anything that he or she has a lawful right to do, or to do anything that he or she has a lawful right to abstain from doing.”³³

Employees who are victims of such acts have to their assistance legislation such as the Canada Labour Code,³⁴ Canada Criminal Code,³⁵ Occupational Health and Safety Act,³⁶ Employment Standards Act,³⁷ Human Rights Act,³⁸ Workers Compensation Act.³⁹

The foundation for this study is to create awareness pertaining to the reality, seriousness, dangers and damage that intimidation and victimisation in the workplace cause and the impacts it has on employees in both their personal and working capacities. Subsequent to this

³³Canada Criminal Code, section 423.
³⁷RSBC 1996.
³⁹1994-95, c.10, s.1.
legislation will be identified that can contribute to and encourage bringing perpetrators of intimidation and victimisation to justice.

There are numerous cases in which the courts are left to attend to victimisation and intimidation, where legislatures have failed to implement specific labour legislation concerning victimisation and intimidation in the workplace to guide and assist courts. However, such cases are not left solely to the discretion of courts to resolve situations without any guiding principles. Courts have to their assistance the following instruments:

- The Labour Relations Act 66 of 1995, amongst others focusing on the right to freedom of association,\(^{40}\) unfair labour practices,\(^{41}\) automatically unfair dismissals\(^{42}\) and provides a Code of Good Practice concerning dismissals.\(^{43}\)
- The Employment Equity Act 55 of 1998, prohibiting unfair discrimination\(^{44}\), identifying a breach of confidentiality\(^{45}\), focusing on the liability of the employer,\(^{46}\) providing a Code of Good Practice on the employment of people with disabilities and a Code of Good Practice on the Integration of Employment Equity into Human Resources Policies and Practices with regards to harassment.\(^{47}\)
- The Constitution of the Republic of South Africa 1996 providing a right to dignity\(^{48}\), equality\(^{49}\), freedom of association\(^{50}\) and that the right to fair labour practices.\(^{51}\)
- The Occupational Health and Safety Act 85 of 1993, forbids victimisation,\(^{52}\) enforces a general duty on employers to ensure the health of employees in the working

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\(^{40}\)Labour Relations Act, section 4,5,6,7.
\(^{41}\)Labour Relations Act, section 186(2).
\(^{42}\)Labour Relations Act, section 187
\(^{43}\)Labour Relations Act, schedule 8.
\(^{44}\)Employment Equity Act, section 6.
\(^{45}\)Employment Equity Act, section 59.
\(^{46}\)Employment Equity Act, section 60.
\(^{47}\)Part B number 19.
\(^{48}\)Constitution of South Africa 1996, section 10.
\(^{50}\)Constitution of South Africa 1996, section 18.
\(^{51}\)Constitution of South Africa 1996, section 23.
\(^{52}\)Occupational Health and Safety Act, section 26.
environment and enforces general duties on employees to take care of their own health and the health of fellow employees.

- In addition is the Compensation for Occupational Injuries and Diseases Act 130 of 1993 providing compensation for injuries sustained by means of an occupational injury or occupational disease during the course and scope of employment.

- The Intimidation Act 72 of 1982 prohibits and criminalises intimidation.

- The Protected Disclosures Act 26 of 2000 provides protection to an employee who has made a disclosure from being victimised and intimidated.

- The Protection from Harassment Act 17 of 2011 provides for the issuing of protection orders against harassment in order to afford victims of harassment a remedy against such behaviour.

Canadian legislation provides a guided structure of the approach to victimisation and intimidation in the workplace. To assist the Canadian courts at arriving to a decision regarding a matter of victimisation and intimidation in the workplace, legislatures enacted the following legislation:

- The Canadian Constitution Act 1982 confirms that everyone is equal before the law.


- The Criminal Code R.C.S 1985, c. C-46 provides that intimidation in the workplace is rather classified as criminal harassment than that of intimidation. The Criminal Code further provides examples of behaviour constituting criminal harassment and the consequences thereof.

- The Canadian Occupational Health and Safety Act R.S.P.E.I 2004 c.42 places a burden on the employer to ensure that he or she has taken all reasonable measures to ensure the health of employees.

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55Compensation for Occupational Injuries and Diseases Act, section 65.
56Protected Disclosure Act, section 2.
57Protection from Harassment Act 17 of 2011, preamble.
58Canadian Constitution, section 15.
59Canadian Labour Code, section 94.
60Canadian Criminal Code, section 423.
61Canadian Criminal Code, section 423-425.
62Canadian Occupational Health and Safety Act, section 12.
• The Employment Standard Act RSBC 1996 provides for complaints to be investigated and the consequences of failing to investigate such complaints.  
• The Human Rights Act R.S.C 1985, c. H-6 contains a provision averring harassment in the workplace is a ground of discrimination and that such discrimination is prohibited.

In conclusion, this chapter provides a brief outline of legislation available to employee victims of intimidation and victimisation. It is evident that South African legislation and Canadian legislation are similar as both countries among others provide for liabilities where employers fail to address victimisation and intimidation in the workplace at the same time addresses remedies available to employees. There are also minimal differences between the South African definitions of victimisation and intimidation and the Canadian definitions. Canadian legislation provides a legal framework which is used as a comparative. The chapters to follow will focus on defining the concepts of workplace violence, intimidation, victimisation and harassment, examining the finer workings of victimisation and intimidation and a comparative study of Canadian legislation. This research shall be based upon readings from books, articles, case law, legislation and reliable websites.

63Canadian Employment Standards Act, part 10.
64Canadian Human Rights Act, section 14.
CHAPTER 2: INTIMIDATION AND VICTIMISATION

2.1 INTRODUCTION

This chapter will focus on the finer workings of victimisation and intimidation. Defining each of these concepts and considering the conduct, standards and elements as well as examples of conduct and behaviour, which amount to victimisation and intimidation, will be focused upon. Reference will also be made to the defences and appropriate remedies available for intimidation and victimisation. Further, intimidation and victimisation will be examined to determine whether the victimisation and intimidation constitute an unfair labour practice. Included in this chapter, focus shall be extended to the right to freedom of association, the exercise of statutory rights and the standards of proof of victimisation.

2.2 DEFINING WORKPLACE BULLYING, VICTIMISATION AND INTIMIDATION

What does victimisation, intimidation, workplace bullying and harassment mean, and is there any relationship between these concepts? In order to answer this question, each of these concepts will need to be defined and examined in closer detail. This section will focus on answering that question.

The point of departure will be lodged into defining the concept of harassment. The Promotion of Equality and the Prevention of Unfair Discrimination Act defines harassment as

“...[T]he 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 sex, gender or sexual orientation, or 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.”65

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65 Act 4 of 2000, section 1.
This definition is further confirmed in the Employment Equity Act in the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practice which is defined as

“…[H]arassment is unwanted or solicited attention based on one or more of the prohibited grounds. It involves conduct that is unwanted by the person whom it is directed and who experiences the negative consequences of the conduct. The conduct can be physical, verbal or non-verbal. It affects the dignity of the affected person or creates a hostile working environment. It often contains an element of coercion or abuse of power by the harasser.”\textsuperscript{66}

However, the investigation does not cease merely because the concept of harassment has been defined. Upon further investigation of the phrase “which is related to sex, gender, or sexual orientation, or 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” becomes clear that this phrase is clearly linked to section 6(1) of the Employment Equity Act. Section 6 of the Employment Equity Act and section 9 of the Constitution both prohibit unfair discrimination.

Intimidation is defined as

“…[A]ny person who without lawful reason and with intent to compel or induce any person or persons of a particular nature, class or kind or persons in general to do or to abstain from doing any act or to assume or to abandon a particular standpoint and acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person.”\textsuperscript{67}

The legislature has not allocated a specific provision in legislation regarding victimisation in the workplace. Instead, victimisation is dealt with in an indirect manner. Section 5 of the

\textsuperscript{66} section 19.2.2.
\textsuperscript{67} Intimidation Act 72 of 1982, section 1.
Labour Relations Act provides that no employee may be discriminated against for exercising any rights in terms of the Labour Relations Act, which operates alongside provisions protecting against unfair dismissal and unfair labour practices in sections 185 and 186. Chapter 2 of the Employment Equity Act, which deals with unfair discrimination, also prohibits victimisation in an indirect approach.

Workplace bullying is described as

…[U]nwanted conduct in the workplace which is persistent or serious or demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences.68

Legislation fails to provide a definition for victimisation. However section 5, 185 and 186(2) of the Labour Relations Act alongside chapter 2 of the Employment Equity Act provide examples of conduct which could amount to victimisation.

In summary of this section, each of the concepts as posed in the question has been defined. Victimisation and intimidation is a form of workplace bullying, workplace place bullying is one of the subdivisions of harassment and harassment is covered under unfair discrimination. After much investigation into it is clear that the Employment Equity Act is present and that, there exists a relationship between these concepts.

2.3 INTIMIDATION

2.3.1 INTRODUCTION

Intimidation is dealt with in an indirect manner in South African legislation. This part of the chapter shall focus closely on the conduct, elements, standards of intimidation and provide examples of conduct amounting to intimidation.

2.3.2 CONDUCT, ELEMENTS, STANDARDS

The point of departure is to determine which conduct amounts to intimidation in the workplace. Conduct constituting intimidation is characterised by the unlawful use of violence or threats of violence with the purpose of compelling a person to do or abstain from doing something that he or she has the right to do or abstain from doing.\(^6\)\(^9\) In order to prove conduct constituting intimidation there are three elements, that are required to be proved in order to succeed with the allegation of intimidation. In the case of *Jones v Daimler*\(^7\)\(^0\) the arbitrator provided the three elements required to prove that conduct constitutes intimidation in the workplace as:

“(i) a threat must be uttered by the accused person;

(ii) the threat must be intended to convey or be capable of being understood to mean that the other person would be killed, assaulted, or suffer harm as a result of an unlawful act by the accused;

(iii) the aim of the threat must be to induce the other person to do or refrain from doing some act.”\(^7\)\(^1\)

Failing to prove one of these three elements, the conduct fails to amount to intimidation.

There is a standard obligation that obliges employers to provide a reasonably safe working environment for and a climate conducive to the performance of the normal duties by employees.\(^7\)\(^2\) This principle is confirmed by the International Labour Organisation in the Occupational Health and Safety Convention 155 of 1981 in Article 16. This duty is to be read in conjunction with section 24(a) of the Constitution, which provides that every person has the right to an environment that is not harmful to their health or well-being. A reciprocal duty is placed on employees at work to take reasonable care for the health and safety of themselves and of other persons who may be affected by their acts or omissions.\(^7\)\(^3\) The Occupational Health and Safety Act in section 14(b) places a further obligation on the employee to co-operate with the employer on maintaining such safe working environment. This is an obligation underlined in Article 20 of the Occupational Safety and Health Act.

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\(^{6}\)NUMSA obo Tshabalala (2008) 10 BALR 947 (MEIC) 952.

\(^{7}\)\(^0\) (2004) 7 BALR 815 (P).

\(^{7}\)\(^1\) (2004) 7 BALR 815 (P) para 31.

\(^{7}\)\(^2\)Occupational Health and Safety Act, section 8(1).

\(^{7}\)\(^3\)Occupational Health and Safety Act, section 14(a).
Convention 155 of 1981 as prescribed by the International Labour Organisation. Intimidation goes contrary to these provisions provided in the Occupational Health and Safety Act.

### 2.3.3 EXAMPLES OF CONDUCT AMOUNTING TO INTIMIDATION

There are numerous situations in which words are spoken without thought given to what is being said. In some situation, emotions are acted upon, and words are exchanged in the heat of the moment. In other instances, one is conscious of the words that are exchanged and is knowledgeable of the implications involved. Legislation fails to identify conduct constituting intimidation. Therefore case law is relied upon to provide guidance as to which conduct the courts and arbitrators have found constitutes intimidation and conduct failing to constitute intimidation.

In the case of *Adcock v CCMA*, the words "You can treat this as a threat – there will be more blood on your hands" had been uttered by one of the respondents at the negotiating table during a strike. The Labour Appeal Court was required to determine whether these words constituted an act of intimidation. The Court concluded

“…[T]he arbitrator's view that for there to have been intimidation, the respondent's statement should have been directed at a specific individual rather than the whole management team, was incorrect. Although parties enjoy a certain degree of leeway in negotiations, they are still required to show mutual respect. The respondent's conduct did constitute intimidation.”

In the case of *NUMSA obo Masina v Cobra Watertech* an employee articulated to a fellow employee “something bad might happen to him if he did not join strike”. The court concluded

“…[W]hile the offence of intimidation requires proof of intent, it does not require that the accused should intend to induce fear; it is enough that a threat should be made to induce the person against whom it is directed to do or refrain from doing something. The complainant had testified that when he asked the employee what he meant by the

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75 (2001) JOL 8492 (LAC) 1.
77 (2009) 2 BALR 140 (MEIC).
78 (2009) 2 BALR 140 (MEIC) 140.
“tip”, he had been told that “something bad” might happen to him if he worked overtime. In the context in which this was uttered, this was clearly a threat. That nothing in fact happened to the complainant after he disregarded the threat was immaterial. The fact was that to threaten a colleague for performing his duties constituted grave misconduct, for which dismissal was the appropriate penalty.”⁷⁹

Misconduct during a strike may warrant dismissal. In accordance with this, intimidation during a strike may also be regarded as a serious offence. The case of SACWU v Mediterranean Textile Mills,⁸⁰ is an example where intimidation was regarded as such. During the course of the strike the phrase ‘if you get inside we will shoot you and while you are at work I will burn down your house’ was followed by shots fired into the air. The CCMA had to decide whether this conduct amounted to intimidation. The CCMA concluded

“…[W]hat the law does not allow is intimidation, blockades and threats of violence. That is what makes the misconduct of the applicants in this case so serious. I regard the misconduct as serious I do not regard the sanction of dismissal as unfair. In the circumstances I find that dismissal is a fair sanction for the misconduct of each of the applicants.”⁸¹

In the case of SACWU obo Matsau v Goldfields Packers (Pty) Ltd t/a OKK Foods⁸² the applicant employees including all shop stewards of the applicant union, were dismissed after a strike during which the homes of several supervisors were petrol-bombed or stoned.⁸³ The arbitrator concluded

“…[I]ntimidation and serious instances of threatening behaviour are generally regarded as acts of serious misconduct which would, ordinarily, justify dismissal. I was satisfied, on available evidence, that the misconducts involved in this matter were serious and of such gravity as to render continued employment relationship intolerable.”⁸⁴

⁷⁹ (2009) 2 BALR 140 (MEIC) 140.
⁸⁰ (2001) 1 BALR 54 (CCMA).
⁸¹ (2001) 1 BALR 54 (CCMA) 70.
⁸³ (2003) 2 BALR 196 (CCMA) 196.
⁸⁴ (2003) 2 BALR 196 (CCMA) 207.
These examples are not the only examples of conduct amounting to intimidation in the workplace. Further examples as determined by the courts and arbitrators of conduct constituting intimidation include

- physical assault;\(^{85}\)
- obstruction of or interference with the entrance and/or exits of the employers business premises, or with other employees, contract employees, customers or suppliers;\(^{86}\)
- threatening lives of fellow workers during protected strike;\(^{87}\)
- Using realistic toy guns in a strike;\(^{88}\)
- shaping fingers resembling guns;\(^{89}\)
- uttering phrases such as “your time is coming;”;\(^{90}\)
- employees loitering at a time and place without valid reason to be there, such as during interviews;\(^{91}\)
- placards stating “one manager one bullet.”\(^{92}\)

There is conduct that both arbitrators and courts have concluded fails to amount to intimidation in the workplace. Examples of non-intimidatory conduct in the workplace is

- allegations that a respondent assaulted the complainant by slapping him in the face and he was told not to work whilst the individual respondents are on strike (it must be borne in mind that the allegation was found to be hearsay);\(^{93}\)
- threatening a colleague and blocking an access road with a vehicle;\(^{94}\)
- chasing an employee of a neighbouring company who was attempting to go to work (this behaviour did not amount to intimidation but did warrant dismissal);\(^{95}\)
- the sending of an email, which was accidentally distributed to all staff through an error (the behaviour did not amount to intimidation as there had been no intent to cause any harm with such email).\(^{96}\)

\(^{86}\)CEPPAWU v Metrofile (Pty) Ltd (2004) JOL 12464 (LAC).
\(^{87}\)CWIU obo Leburu (1999) 8 BALR 976 (IMSSA).
\(^{88}\)GIWUSA obo Mbele/ Prominent Paints (Pty) Ltd (2010) 3 BALR 243 (NBCCI).
\(^{89}\)NUMSA obo Zondo/ Trident Steel (2004) 5 BALR 626 (MEIBC).
\(^{90}\)Specialised Belting & Hose (Pty) Ltd v Sello NO & Others (2009) 7 BLLR 704 (LC).
\(^{91}\)Govender v Minister of Defence (2009) JOL 24463 (LC).
\(^{93}\)Moolman Mining Projects v Mahlatsi & Others (1997) 10 BLLR 1315 (LC).
\(^{94}\)NEHAWU obo Mowers & Aranes / University of Cape Town (2000) 2 BALR 156 (CCMA).
\(^{95}\)CEPPAWU obo Phiri & Others / Winthrop Pharmaceuticals (Pty) Ltd (2011) JOL 26972 (NBCCI).
These forms of conducts also do not constitute a *numerous clausus* of non-intimidatory conduct. Legislation fails to provide guidelines determining which conduct constitutes intimidation, thus leaving the conduct to the discretion of the arbitrator or courts to determine.

2.3.4 CONCLUSION

It is clear that intimidation requires the conduct of threatening or violence towards another which alters the other persons conduct. *Jones v Daimler* provides for the requirements that need to be met and failure to meet one of those requirements the conduct fails to amount to intimidation. It is trite in law that the Occupational Health and Safety Act places an obligation on employers to provide a reasonably safe working environment. The objectives of the Occupational Health and Safety Act confirms the constitutional right in section 24 that everyone has the right to an environment that is not harmful to their health or well-being. Similarly, the employee has a reciprocal duty to assist the employer in obtaining such environment. Just as it is the duty of the employer to provide suitable training, the employees have a corresponding duty to attend all scheduled training and to ask for further training or assistance in any areas, which are not understood. This principle is emphasised in the Occupational Safety and Health Convention 155 of 1981 Article 5. Health and safety in the workplace entail that both the employer and employee share the responsibility for preventing incidents, which could result in injury or occupational illness or disease. Through accumulation of series of events of intimidation or victimisation, the victim requires only 1 event which causes them to have a break—down later emitting into an occupational illness.

2.4 VICTIMISATION

This section on victimisation in the workplace will focus on the standard of proof, freedom of association, exercise of statutory rights, and examples amounting to victimisation.

2.4.1 INTRODUCTION

The Occupational Health and Safety Act prohibits victimisation. The Labour Relations Act also indirectly prohibits aspects of victimisation by guaranteeing the right of freedom of association, the exercise of statutory rights, and the protection of employees and persons seeking employment. The contents of these rights are elaborated in numerous international human rights instruments and in conventions and recommendations of the International Labour Organisation. The Constitution provides every worker with the right to form and join a trade union and to participate in the activities and programmes of a trade union. These rights will each be examined in this section.

2.4.2 FREEDOM OF ASSOCIATION

The Labour Relations Act prohibits victimisation by guaranteeing the right to freedom of association by stating that every employee has a right to participate in forming a trade union or federation of trade unions and, subject to the union’s constitution, to participate in its lawful activities and that this right is protected by prohibition of discrimination or other prejudicial acts against employees for joining or not joining trade unions or workplace forums. This right is also confirmed in section 23(2) of the Constitution. In the case of FAWU v The Cold Chain the court confirmed that...

“…[S]ection 23(2) of the Constitution, provides that every worker has the right to form and join a trade union and to participate in the activities and programmes of that trade union. Clearly, to perform the duties of a shop steward and to be an office-bearer of a trade union are such activities. As the Labour Relations Act was promulgated with a view to give effect to these stated section 23 constitutional rights, section 4(2) of the Labour Relations Act stipulates that every employee has the right to join a trade union, subject to the constitution of that trade union.”

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100 Section 39(1)(b), 231, 232 and 233 of the Constitution.
101 The Constitution of South Africa, section 23(2).
102 Labour Relations Act, section 4 and 5. In SANDU v Minister of Defence (1999) 6 BCLR 615 (CC) the Constitutional Court held that provisions of the Defence Act 44 of 1957, prohibiting permanent force members from joining trade unions and participating in strikes and protests, were unconstitutional. Grogan J Employment Rights 1ed (2010) 266.
103 (2007) 7 BLLR 638 (LC).
This right is further confirmed in the International Labour Organisation in article 2 of the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948.

It follows that no employer may forbid an employee to join a trade union on any grounds even if membership of a trade union is incompatible with the employee’s status or function as an employee.\textsuperscript{105} A trade union is a voluntary association, and as such cannot under the common law be compelled to accept particular persons or members of a particular group.\textsuperscript{106} In the case of \textit{Theron & Others v FAWU & Others}\textsuperscript{107} the Labour Court concluded

“…[I]t accepted that sections 4 and 5 of the Labour Relations Act operate not just against employers, but that trade unions can conceivably also infringe employees’ rights.”\textsuperscript{108}

In summary, the right to freedom of association is a constitutional right and is protected by the Labour Relations Act. The employer has no right prohibiting an employee from joining a trade union in the same manner the employer cannot force an employee to join a trade union. Should an employer prohibit an employee from exercising such statutory right, such conduct would amount to victimisation.

\textbf{2.4.3 EXERCISE OF STATUTORY RIGHTS AND SECTION 187(1) (d)}

This section shall focus upon the situation where employees exercise their statutory rights but are dismissed by the employers for exercising such rights.

The prohibition on acting against employees for exercising statutory rights binds all persons, not just employers.\textsuperscript{109} Protection is also extended to applicants for employment.\textsuperscript{110} The phrase ‘exercising any right conferred by this Act’ refers to all the employee rights conferred by the Labour Relations Act, including organisational rights, the right to strike, the right to refer to disputes for statutory resolution, and the right to disclose information.\textsuperscript{111} The action can take

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\textsuperscript{105}Grogan J \textit{Employment Rights} led (2010) 266.
\textsuperscript{106}Carr v Jockey Club of South Africa (1976) SA 717 (W), para 722H-723E.
\textsuperscript{107}(1997) 18 ILJ 1046 (LC).
\textsuperscript{108}(1997) 18 ILJ 1046 (LC).
\end{flushright}
the form either of a positive inducement not to exercise those rights (a bribe), or of visiting on employees some negative consequence (a penalty).\textsuperscript{112}

Although the Labour Relations Act\textsuperscript{113} places the overall onus of proving that a dismissal was fair on the employer, the courts have held that, in cases involving dismissal for alleged victimisation, the employee must produce sufficient evidence to raise a credible possibility that the main or dominant reason for the dismissal was some form of discrimination.\textsuperscript{114} If that onus is discharged, the burden shifts to the employer to disprove the employee’s \textit{prima facie} case and to satisfy that the dismissal was for a legitimate reason.\textsuperscript{115} If it was found that the dismissal is based on one of the grounds of unfair discrimination the Labour Relations Act places a duty on the employer to prove that the dismissal was fair.

If the employer fails to discharge that burden, the employee must succeed and the defences afforded by the Labour Relations Act on which a dismissal is tainted by discrimination cannot be defended.\textsuperscript{116} However, if the employee fails to raise a \textit{prima facie} case that the dismissal was automatically unfair, and the employer persuades the court that it was for reasons relating to the employees conduct or incapacity, the matter must be stayed and referred for arbitration.\textsuperscript{117}

In the case of \textit{Kroukam v SA Airlin}\textsuperscript{118} Davis JA concluded that

“section 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in section 187 for constituting an automatically unfair dismissal.”\textsuperscript{119}

Upon appeal, the Labour Appeal court found it necessary to investigate the true reasoning for the dismissal. The learned judge of the Labour Appeal Court concluded after investigation

\textsuperscript{113}Code of Good Practice: Dismissal Schedule 8(2)(4).
\textsuperscript{114}Grogan J \textit{Dismissal} (2010) 117.
\textsuperscript{115}Grogan J \textit{Dismissal} (2010) 117.
\textsuperscript{116}Grogan J \textit{Dismissal} (2010) 117.
\textsuperscript{117}\textit{Wardlaw v Supreme Mouldings (Pty) Ltd} (2007) 28 ILJ 1042 (LAC).
\textsuperscript{118}(2007) 28 ILJ 1042 (LAC).
\textsuperscript{119}(2007) 28 ILJ 1042 (LAC) para 28.
“...[T]he evidence indicated that the reason for the loss of trust was management’s disenchantment with the manner in which the appellant had sought to represent the interests of the union and its members, in particular by instituting contempt proceedings against top management. This was the dominant reason for the decision to dismiss the appellant, and therefore rendered the dismissal automatically unfair. If the trust relationship was indeed destroyed, it had been destroyed by the respondent’s illegitimate and unacceptable reaction to the exercise by the appellant of his rights as a union official. To accept the proposition that an employee who has been victimised must lose his job merely because management no longer trusted him would undermine the constitutional right to fair labour practices. An employer who has breached an employee’s fundamental rights must not be permitted to benefit from an alleged breach of the trust relationship. However, the court held further that there was in any event insufficient evidence to prove that the trust relationship had been destroyed.”

Nevertheless, where misconduct is the primary reason for the actions against an employee, it will not constitute victimisation. However, there is an overlap between the provisions aimed at victimisation and those protecting employees against dismissal for exercising rights conferred by the Labour Relations Act or participating in proceedings in terms of the Act. To dismiss an employee for exercising their statutory rights constitutes an automatically unfair dismissal. It is automatically unfair to dismiss employees for trying to exercise their rights in terms of a collective agreement or grievance or disciplinary procedure.

Employees who claim that they have been unfairly dismissed for exercising a right must adduce sufficient evidence to cast doubt on the reason advanced by the employer. In the case of *Ngozo & Others v Scorpion Legal Protection* the Labour Court held

“The version of the applicants that the respondent dismissed them because of them having referred their dispute to the CCMA is unsustainable, for had this been the

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126 (2007) ZALC 78 (LC).
motive then the respondent would in all probabilities have dismissed them soon after
the lodging of the grievance and would not have waited for a period of four months
before taking action against them. The other difficulty with the applicants’ case is
why would the respondent have invited them to apply for alternative positions and
later offered them positions on the same grade and remuneration, if indeed it wished
to dismiss them for lodging the dispute. It is therefore my view that there is
insufficient evidence to cast doubt that the reason for the dismissals of the applicants
were not due to operational reasons as put forward by the respondent but because the
referral of the dispute to the CCMA.”

In concluding, section 187(1)(d) does not specifically refer to victimisation, but opens the
scope for victimisation to be able to fit into section 187. Where an employer dismisses an
employee for exercising his / her rights in terms of this section would amount to an
automatically unfair dismissal. Where the relationship of trust between an employee and his / 
her employer has been broken does not necessarily entitle the employer to dismiss the
employee. The employer may dismiss an employee on grounds of misconduct.

2.4.4 EXAMPLES OF CONDUCT AMOUNTING TO VICTIMISATION

Certain conduct in the workplace amounts to victimisation. Reference will be made to such
conduct. The courts and arbitrators have found that the following conduct identified amounts
to victimisation:

- Employees striking over demand for dismissal of employee allegedly responsible for
  harassing shop stewards in fact striking over alleged victimisation;  

- employer paying gratuities to employees who did not take part in protected strike, but
denying same to employees who did strike;  

- employee dismissed for initiating grievances and litigating against employer;  

- employer charging employee with making false allegations during grievance meeting
  initiated by employer, but failing to prove that employee acted maliciously;  

128 Ceramic Industries Ltd t/a Betta Sanitary Ware v NCBAWU (1997) 6 BLLR 697 (LAC).
131 Wright/Automa Multi Strylene (Pty) Ltd (2010) 9 BALR 958 (MEIBC).
• employee retrenched after accepting managerial position but refusing to relinquish posts of shop steward and union office bearer;\(^{132}\)

• senior executive demoted to former post soon after being promoted without being counselled or found guilty of any misconduct;\(^{133}\)

• employee dismissed after lodging grievance in terms of employer’s grievance procedure.\(^{134}\)

There are situations in which the courts and arbitrators have found conduct failing to constitute victimisation in the workplace. Examples of such conduct have been identified:

• unauthorised use of a credit card;\(^{135}\)

• a store food manager, was transferred from one of the respondent’s stores to another, he resigned because of the “management style” at the new store, which he claimed negatively affected his performance;\(^{136}\)

• Lecturer alleging that university's failure to promote him to associate professor is unfair, but failing to prove that decision for any reason other than that he did not satisfy requirements for promotion.\(^{137}\)

This is not a numerous clausus conduct not constituting victimisation. The same potential problems arise relating to victimisation as with intimidation. Failure by legislation to provide guidance to arbitrators and courts has the potential to create confusion as to when, where and which conduct constitutes victimisation.

### 2.4.5 CONCLUSION

Victimisation is expressly prohibited in the Occupational Health and Safety Act and indirectly in the Labour Relations Act. The Labour Relations Act provides every employee the opportunity to participate in the forming of a trade union, participating in its activities and exercising his/her statutory rights.

\(^{132}\) FAWU & Another v The Cold Chain (2007) 7 BLLR 638 (LC).
\(^{133}\) Lehutso v SAA (2010) JOL 24911 (CCMA).
\(^{134}\) Mackay v ABSA Group & Another (1999) 12 BLLR 1317 (LC).
\(^{135}\) Tibbett & Britten (South Africa) (Pty) Ltd v Marks (2005) 7 JOL 14383 (LC).
\(^{137}\) Lumina / University of KwaZulu Natal (2009) JOL 24133 (CCMA).
2.5 DOES INTIMIDATION AND VICTIMISATION CONSTITUTE AN UNFAIR LABOUR PRACTICE?

The Labour Relations Act delineates an unfair labour practice as:

“any unfair act or omission that arises between an employer and an employee involving –

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;

(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

(c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and

(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.”

The Labour Court has clearly stated that for an employee to succeed on an allegation of unfair labour practice the employee must prove that the conduct complained falls within the terms of one of the forms expressly listed in the definition. However, it as though the courts are changing their views of the strict and narrow interpretation of what constitutes an unfair labour practice. The case of Piliso v Old Mutual Life Assurance Co SA Ltd is an example where the courts are changing their view of a strict interpretation. In this case, the employer failed to investigate a sexual harassment complaint. The court concluded that this was an unfair labour practice, which does not fit into the context as set out in the definition of an unfair labour practice. This chapter shall investigate whether an unfair labour practice is limited to only those four items expressly listed in the definition.

At first glance at section 186(2) it appears that, there is no place for a claim of victimisation and intimidation in the workplace. Nevertheless, upon closer examination of section 186(2), the legislature included the phrase of “any unfair act or omission that arises between an

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138 Labour Relations Act, section 186(2).
139 Nawa & Another v Department of Trade & Industry (1998) 7 BLLR 701 (LC).
employer and an employee involving.” To have an improved hypothesis of the meaning the words “any”, “unfair act” and “omission” requires to be defined. The word “any” is defined as an indefinite or unlimited amount or number, any one or more persons, things, or quantities. The phrase “unfair act or conduct” has not strict definition in South African labour legislation however it is seen to be a wider concept than that of unfair discrimination.

“Omission” is explained as failure to perform an act agreed to, where there is a duty to an individual or the public to act (including omitting to take care) or is required by law. Thus, to constitute an unfair labour practice, the act or omission complained of must be between an employee and his or her own employer. The word “involves” means to include. This has the implication of opening the scope for victimisation and intimidation. Section 186(2) makes provisions for other acts and omission.

To test whether victimisation and intimidation amounts to an unfair labour practice it needs to be determined whether it meets the requirements as set out. First, the word “any”, from the definition makes room for victimisation and intimidation, as the legislature failed to limit the conducts amounting to an unfair labour practice. Second, as examined throughout this paper, victimisation and intimidation are unfair conduct. Third, there is legislation that places a duty on employers to ensure the health and safety of their personal and in which the provision of prohibiting victimisation is breach, among others. Last, the victimisation and intimidation (on grounds of case law) shows that this takes place between the employee and his or her employer.

The right to fair labour practices exists not only in a defined and restricted form in section 186(2) of the Labour Relations Act but in an unformulated, generalised sense in section 23(1). The failure by the employer to respond appropriately and promptly to complaints of

141 Labour Relations Act, section 186(2).
sexual harassment is an example of a general unfair labour practice, which does not fit neatly into section 186(2) definition.\textsuperscript{147}

It is clear from the Labour Courts decisions in the case of Piliso that there is no longer a narrow interpretation of an unfair labour practice. The courts are now following a wider interpretation to the definition of an unfair labour practice.

\textbf{2.6 LIABILITY OF EMPLOYERS}

This section will identify the relevant legislation in which the employers are held liable for their failure to act to prevent victimisation and intimidation. This section will further identify the remedies available to the victim employees.

The South African common law fails to recognise victimisation and intimidation as specific offences. However, the common law made provision for harassment in the form of a delict, as this is where the victim has the right to \textit{fama} or good name and the right to feelings.\textsuperscript{148} In terms of this the victim will be entitled to claim damages under the common law. Where an employee acting within the scope of his employment commits a delict, his employer is fully liable for the damage.\textsuperscript{149} This is known as vicarious liability, which is described as the strict liability of one person for the delict of another.\textsuperscript{150} In the case of Grobler v Naspers Bpk\textsuperscript{151} the court concluded that the employer could be vicariously liable at common law for damages suffered by a victim who had been sexually harassed by a fellow employee.\textsuperscript{152}

In terms of the common law there is a general duty that every employer shall provide and maintain, as far as reasonably practicable, a working environment that is safe and without risk

\textsuperscript{147}This was apparently the approach in Piliso v Old Mutual Life Assurance Co (SA) Ltd (2007) 28 ILJ 897 (LC).
\textsuperscript{148}The definition of an unfair labour practice in the Labour Relations Act is far narrower than all possible forms of fair labour practice guaranteed by the Constitution. This has in the past led the Labour Court to hold that an employee alleging an unfair labour practice in terms of the Labour Relations act must show that it falls within the terms of the unfair labour practice definition (Nawa v Department of Trade & Industry 1998 7 BLLR 701 (LC). The Labour Court has however opened the door to a different interpretation;Le Roux R, Rycroft A, Orleyn T Harassment in the Workplace: Law, policies and processes 1ed (2010) 34.
\textsuperscript{149}Snyman CR Criminal Law 5ed (2008) 469.
\textsuperscript{150}Isaacs v Centre Guards CC t/a Town Centre Security (2004) 25 ILJ 667 (C) 669G-H.
\textsuperscript{152}(2004) 25 ILJ 439 (C).
\textsuperscript{153}(2004) 25 ILJ 439 (C) at 514I.
to the health of his employees and prohibit victimisation.\textsuperscript{153} The Occupational Health and Safety Act confirms this.\textsuperscript{154} Failure by any person to comply with such provisions constitutes an offence in terms of statutory legislation.\textsuperscript{155} Failure by the employer can result in a claim for damages for breach of contract under the common law.\textsuperscript{156}

The purpose for the implementation of the Compensation for Occupational Injuries and Diseases Act\textsuperscript{157} is to provide for compensation for disablement\textsuperscript{158} caused by occupational injuries\textsuperscript{159} or diseases\textsuperscript{160} sustained or contracted by employees in the course of their employment.\textsuperscript{161} For such an employee to claim compensation from the compensation fund it is necessary to prove to the satisfaction of the commissioner\textsuperscript{162}

(a) That the employee has contracted an occupational disease\textsuperscript{163} or

(b) That an employee has contracted a disease other than an occupational disease and such disease has arisen out of the and in the course of his employment.\textsuperscript{164}

In the case of \textit{Odayar v Compensation Commissioner}\textsuperscript{165} the court was satisfied that section 65 applies to where an employee has suffered Post Traumatic Stress Disorder upon condition that it can be established that it arose as a result of and in the course of the victim’s employment.\textsuperscript{166}

\textsuperscript{153}Media 24 Ltd v Grobler (2005) 26 ILJ 1007 (SCA).
\textsuperscript{155}Occupational Health and Safety Act 85 of 1993. Section 38(1) states that any person who contravenes or fails to comply with the provision shall be liable to a fine not exceeding R50 000 or to imprisonment for a period not exceeding one year or both such fine and such imprisonment.
\textsuperscript{156}Le Roux R et al \textit{Harassment in the Workplace: Law, policies and processes} 1ed (2010) 9.
\textsuperscript{157}130 of 1993.
\textsuperscript{158}130 of 1993, section 1 means disablement for employment, or permanent injury or serious disfigurement.
\textsuperscript{159}130 of 1993, section 1 means a personal injury sustained as a result of an accident.
\textsuperscript{160}NOSA SHE Qualifying Criteria and Classification of Incidents (AUDP11) Edition 03/2011 :An occupational disease is caused by environmental factors, the exposure to which is peculiar to a particular process, trade or occupation, and to which an employee is not ordinarily subjected or exposed to when away from such employment available at \url{http://www.nosa.co.za/site/files/7164/NOSA%20SHE%20QUALIFYING%20CRITERIA%2020.04.10.pdf}(accessed 22 April 2012). Section 1 of COIDA defines occupational disease to mean any disease mentioned in the first column of Schedule 3 arising out of and in the course of an employee’s employment.
\textsuperscript{161}130 of 1993, page 1.
\textsuperscript{162}Compensation for Occupational Injuries and Diseases Act, section 65(1).
\textsuperscript{163}Compensation for Occupational Injuries and Diseases Act, section 65(1)(a).
\textsuperscript{164}Compensation for Occupational Injuries and Diseases Act, section 65(1)(b), NOSA SHE Qualifying Criteria and Classification of Incidents (AUDP11) Edition 03/2011: For clarity purposes arising out of and in the course of employment means resulting from a work activity or environment of employment. Arising out and in the course of employment furthermore means that a causal link between the injury or disease and the task performed should be established available at \url{http://www.nosa.co.za/site/files/7164/NOSA%20SHE%20QUALIFYING%20CRITERIA%2020.04.10.pdf}(accessed 22 April 2012).
\textsuperscript{165}(2006) 27 ILJ 1477 (N).
\textsuperscript{166}(2006) 27 ILJ 1477 (N) 1482G.
The Intimidation Act criminalises intimidation. Any person who intimidates another person shall be guilty of an offence and be liable on conviction for a fine not exceeding R40 000 or imprisonment not exceeding 10 years or to both such fine and imprisonment.\textsuperscript{167}

The Labour Relations Act provides for remedies for unfair dismissals and unfair labour practice. An arbitrator may determine any unfair labour practice on terms that he or she deems reasonable, which may include reinstatement, re-employment or compensation.\textsuperscript{168}

Should the arbitrator find in favour of the employee, then the compensation awarded to the employee in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more that the equivalent of 12 months remuneration.\textsuperscript{169} Where an employee is claiming constructive dismissal due to harassment and such employee has satisfied the arbitrator that the requirements for a constructive dismissal has been met, such dismissal is regard as automatically unfair and the court may award the employee compensation that is just and equitable in all the circumstances, but not more than the equivalent of 24 months remuneration calculated at the employee’s rate of remuneration on the date of dismissal.\textsuperscript{170}

In terms of the Employment Equity Act, section 6(3) provides that the harassment of an employee is a form of unfair discrimination and is prohibited on one of the grounds mention in section 6(1) or a combination of those grounds. Section 50(2) is a combination of the employers liability and the remedies that the court ay award to the employee. This section provides that the court may make any appropriate order that is just and equitable in the circumstance including the payment of compensation by the employer to that employee; payment of damages by the employer to that employee; an order directing the employer to take steps to prevent the same unfair discrimination or similar practice occurring in the future in respect of other employees; an order directing an employer, other than the designated employer, to comply with Chapter III as if it were a designated employer; an order directing the removal of the employer’s name from the register referred to in section 41 or the publication of the court’s order.\textsuperscript{171} An employer can be held directly liable for the

\textsuperscript{167}Intimidation Act 72 of 1982, section 1.
\textsuperscript{169}Labour Relations Act, section 194(4).
\textsuperscript{170}Labour Relations Act, section 194(3).
\textsuperscript{171}Section 50(2)(a)-(f).
discrimination against its employee by a co-employee. However, the Act fails to state the extent of the liability. There is further liability for the employer in terms of section 60. Section 60 states that where the employer fails to uphold the provisions of this section the employer will have been deemed to contravened such section. This was confirmed in the case of Christian v Colliers Properties.

The Protection from Harassment Act 17 of 2011 allows for the victim of harassment to apply for an order against the person causing the harassment. In the event that such person causing the harassment fails to adhere to the court order, he / she is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding five years. This Act is referred to, to provide a quick remedy where the employer refuses to adhere to complaints of harassment.

The Promotion of Equality and Prevention of Unfair Discrimination Act applies to a situation where outside the formal workplace. This is applicable to employees who are consultants that work from “door to door” advertising and selling products. Legislations provides that after holding an inquiry, the court may make an appropriate order in the circumstances, including--

- an interim order;
- a declaratory order;
- an order making a settlement between the parties to the proceedings an order of court;
- an order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment in question;
- after hearing the views of the parties or, in the absence of the respondent, the views of the complainant in the matter, an order for the payment of damages in the form of an award to an appropriate body or organisation;
- an order restraining unfair discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment;

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172Calitz KB “The Liability of Employers for the Harassment of Employees by Non-Employees” (2009) STELL LR 421-422.
174Section 18.
• an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question;
• an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question;
• an order directing the reasonable accommodation of a group or class of persons by the respondent;
• an order that an unconditional apology be made;
• an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court;
• an appropriate order of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the licence of a person;
• a directive requiring the respondent to make regular progress reports to the court or to the relevant constitutional institution regarding the implementation of the court’s order;
• an order directing the clerk of the equality court to submit the matter to the Director of Public Prosecutions having jurisdiction for the possible institution of criminal proceedings in terms of the common law or relevant legislation;
• an appropriate order of costs against any party to the proceedings;
• an order to comply with any provision of the Act.

Over and above these remedies there avails section 60 of the Employment Equity Act. Section 60 makes the employer guilty of failing to address a contravention in terms of the Employment Equity Act. Section 60 will only apply when the harasser and the victim are both employees of the employer.176

The last option available to the employee is that of criminal charges. This is where victimisation or intimidation has taken a physical form. The employee has the option to lay a charge of rape, assault and sexual assault. Among others, an action based on crimen injuria is an option available to an employee. Crimen injuria consists of the unlawful, intentional and serious violation of the dignity or privacy of another.177 The test for determining whether there has been an impairment of dignity is the likely reaction of a reasonable person, not that

175 Section 21(2)(a) –(p).
of a hypersensitive complainant.\textsuperscript{178} There is also the option of charges based on criminal defamation. Criminal defamation consists of the unlawful and intentional publication of matter concerning another which tends seriously to injure his reputation.\textsuperscript{179} However, it is rare that charges for criminal defamation and \textit{crimen injuria} are brought.

In summary of this section, it is clear that there are remedies available to the victim employees. As such, the employers can find themselves incurring liability and even have the possibility of having a warrant of arrest issued for committing the harassment. As for the criminal charges, it is seldom that such charges are brought as the victims are already traumatised by events that they just do not see way forward to bringing charges. There is a financial and criminal impact on the employers stemming out of the legislation. In some instances the court could possibly award compensation to the employee as well as awarding the employer with a fine for the employers failure to act or the employer doing the victimisation or intimidation.

### 2.7 CONCLUSION

Victimisation and intimidation is a everyday reality. It is a daily battle of survival for the victim, trying to cope with the wounds inflicted upon him/her. However, it is not necessary for such a victim to feel that he/she is on his own with no assistance available. It is clear from the Occupational Health and Safety Act that there is a duty on the employer to provide a reasonably safe working environment for employees and failing such duty, there are consequences for the employer. The section on intimidation comes to the rescue where there have been requirements established by the courts to prove the allegation of intimidation. The section on victimisation provides a clear indication that the rights awarded enjoy statutory protection.

With regards to the question whether victimisation and intimidation amount to a unfair labour practice, upon investigation into the phrase ‘any unfair act or omission that arises between an employer and employee involving’ it is apparent that the word involving means to include not limiting just those sections. The case of \textit{Philiso v Old Mutual} has opened the doors to move away from the narrow interpretation of an unfair labour practice.

\textsuperscript{178} \textit{Delang v Costa} (1989) 2 SA 857 (A) 862.
As Newton’s third law provides for every action there is a reaction. Employer’s omission to adhere to complaints of victimisation and intimidation would amount to an employee having a remedy against such employer or fellow employee, which allows the employer to open himself up to liability.

Failing to act upon complaints about victimisation and intimidation, not only is the employee affected but the employer is also affected. The employee suffers silently and has to live with the scars caused by the employer’s failure to act. While the employer has to endure financial and production loss.
CHAPTER 3: COMPARATIVE STUDY- CANADA’S APPROACH TO INTIMIDATION AND VICTIMISATION IN THE WORKPLACE.

3.1 INTRODUCTION

Federal Canadian legislation provides a framework to their approach regarding victimisation and intimidation in the workplace. The South African approach will in the sections to follow be compared to the Canadian approach. The sections in this chapter will focus on definitions of victimisation and intimidation, the approach to victimisation and intimidation in the workplace, liabilities employers open themselves up to and the remedies available to victim employees.

3.2 VICTIMISATION AND INTIMIDATION

The sections will focus on examples of conduct amounting to victimisation and intimidation, liabilities the employer opens himself to, remedies available to the victim employee, the employer’s obligations towards his employees regarding victimisation and intimidation. At the end of each section, there shall be a comparison to the South African approach.

3.2.1 DEFINITIONS OF INTIMIDATION, VICTIMISATION AND WORKPLACE BULLYING

Federal Canada defines workplace bullying as the tendency of individuals to intentionally use aggressive or unreasonable behaviour or comments to hurt or isolate an employee and can include such tactics as verbal, nonverbal, psychological and physical abuse as well as humiliation and degradation.\(^{180}\) The Canadian Occupational Health and Safety Act\(^{181}\) fails to address the issue of workplace bullying in a direct manner. However, the Occupational Health and Safety Act in section 12(1) (a) takes an indirect approach regarding workplace bullying by means of placing a duty upon employers to take reasonable care of workers near or at the workplace.


Federal Canadian legislation makes no individual definitional distinction between victimisation and intimidation, the motivation being that both intimidation and victimisation are categorised under the definition of criminal harassment. Criminal harassment is defined in section 432 of the Criminal Code as someone who wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he or she has a lawful right to do, or to do anything that he or she has a lawful right to abstain from doing such.\textsuperscript{182}

Workplace harassment is defined as harassment, which is any unwanted physical or verbal conduct that offends or humiliates you.\textsuperscript{183} However, this definition is further expanded in the Canadian Human Rights Act in section 14(1) clearly states that harassment is a form of discrimination and discrimination is prohibited on one of the listed grounds.

Comparing the definitions to the South African definition the only difference is that victimisation and intimidation enjoys protection under the concepts of criminal harassment. South Africa does not afford victimisation and intimidation criminal status even though the liability for intimidation could be imprisonment.

To summarise this section, workplace violence, intimidation and victimisation is covered under the umbrella concept of harassment. Harassment is regarded as a form of discrimination. Furthermore, intimidation and victimisation is classified under the concepts of criminal harassment, which is also a form of discrimination.

\section*{3.2.2 CONDUCT}

This section will focus on conduct amounting to victimisation and intimidation. It should be borne in mind that victimisation and intimidation are classified under the umbrella concept of criminal harassment. Accordingly, victimisation and intimidation will be dealt with jointly. The Canadian Courts provide examples through case law of which conduct amounts to victimisation and intimidation in the workplace.

\textsuperscript{182}Canada Criminal Code, section 432(1).
In the case of *Simpson v Consumers Association of Canada*\(^{184}\) the court concluded sexual harassment is a form of harassment. The court went further and relied upon the case of *Bell v Ladas*\(^{185}\) in which the adjudicator concluded that sexual harassment infringes upon the dignity of the victim of harassment.

In the case of *Pawlett v Dominion Protection Service Ltd*\(^{186}\) the court held that being subjected to sexually explicit images on a computer, unwanted physical contact by an attempt to hold hands, putting his hand on her thigh while sitting next to her and slapping or tapping her buttocks when she stood up beside him, attempting to kiss her, and forcing his hand under her shirt, that this had amounted to her dignity begin infringed and subsequently being constructively dismissed.

In the case of *Pleau v Canada (Attorney General)*,\(^{187}\) the court held that where an employee "what he believed to be evidence of misconduct in the operation of a government facility" was reported and such employee was handled differently to the other employees after having reported such case that conduct amounts to harassment. The court came to a similar conclusion in the case *Guenette v Canada (Attorney General)*,\(^{188}\) where two employees in the Department of Foreign Affairs and International Trade complained of punitive steps taken by their superiors because they reported mismanagement and waste of taxpayers’ money in respect of properties held abroad.\(^{189}\)

In the case of *Blagoeva et Commission de contrôle de l’énergieatomique*\(^{190}\) the psychological injury inflicted on a worker by her supervisor was recognized as unfavourable performance appraisals that were not based on any justification and where the employer had not taken any constructive measures to resolve the problems in the workplace.

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\(^{185}\)(1980), 1 C.H.R.R D\(\)1 55.


\(^{187}\)(1999), 182 D.L.R. (4\(\)th) 373 (N.S.C.A).

\(^{188}\)(2002), 60 O.R (3d) 601 (Ont. C.A.).

\(^{189}\)(2002), 60 O.R (3d) 601 (Ont. C.A.) para 1.

In the case of RoulieretMinistère de la Défense nationale\(^{191}\) the court held that the abusive supervision of a worker by a foreman was deemed a source of humiliation and an attack on his dignity and that such supervision also affected the physical and mental health of the worker. For these reasons, the court found that this treatment is a form of harassment.

In the case of Coward v Tower Chrysler Plymouth Ltd\(^{192}\) the court held that the employer was liable due to his failure to address the situation of racial harassment promptly and effectively where the employee brought such a complaint. This is confirmed in the case of Robichaud v Canada (Treasury Board)\(^{193}\), Janzen v Platy Entreprises Ltd\(^{194}\), Bannister v General Motors of Canada Ltd.\(^{195}\)

In the case of Poliquin v Devon Canada Corporation\(^{196}\) the court concluded that employers cannot overlook harassment and discrimination in their workplaces. This is confirmed in the case of Menagh v Hamilton (City.)\(^{197}\). The court further held that there is a duty on the employers to prevent any form of harassment in their workplaces. This is confirmed by the cases of Gonsalves v Catholic Church Extension Society of Canada\(^{198}\) and the case of Tellier v Bank of Montreal.\(^{199}\)

This is not an enclosed list of examples amounting to workplace harassment. The conduct is left to the discretion of the courts and adjudicators. This also creates the potential misinterpretation of which conduct amounts to harassment and which conduct fails harassment. The thinking being that which conduct amount to harassment by one adjudicator or court does not necessarily amount to harassment by another adjudicator or court.


\(^{192}\) Human Rights Panel 2007 Diane Colley – Urguhart.


\(^{197}\) [2005] O.T.C. 898 at paras. 46 & 287 (S.C.J.), aff’d 2007 ONCA 244 (CanLII), 2007 ONCA 244.


\(^{199}\) (1987), 17 C.C.E.L. 1 at 12 (Ont. Dist. Ct.).
In a comparison to the conduct, which South Africa considers intimidation and victimisation, much is seemingly based on the Canadian approach. The conduct amounting to victimisation and intimidation is left to the discretion of the arbitrators and courts, which ultimately poses the same potential problems. It is clear that both South Africa and Federal Canada has legislation strictly dealing with sexual harassment and that in both countries it is a form of unfair discrimination. There is no clear guideline as to which conduct amounts to harassment in Canada and which conduct amounts to victimisation and intimidation in South Africa.

### 3.2.2 OBLIGATIONS ON EMPLOYERS

The Occupational Health and Safety Act in section 12(1) places a duty on the employer to take reasonable care of workers health and safety near or at the workplace and to take the necessary steps to ensure such safety. The Occupational Health and Safety Act further, compels employers to put the following in place to ensure the health and safety of his / her employees by:

- Preparing and posting workplace violence and workplace harassment policies and which policies must be in a conspicuous place;
- Reviewing policies on a regular basis (at least annually);
- Assessing risks of violence in the workplace (such assessment must take into account the nature and type of work done, risks that would be common in similar workplaces and risks specific their organization) and,
- Providing a copy of the completed risk assessment to the organization’s Joint Health and Safety Committee or Safety Representative, or posted for all employees.

In a comparison to the South African Occupational Health and Safety Act, victimisation is expressly prohibited in section 26. In terms of the Canadian Occupational Health and Safety Act, the act merely refers to the prohibition of discriminatory action. The South African act also places a reciprocal obligation on its employees to take reasonable care of the health and safety of themselves and of others regarding their acts.

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200 Occupational Health and Safety Act R.S.P.E.I section 24(1)
202 Occupational Health and Safety Act R.S.P.E.I section 23(4)
In summary of this section, it is clear that in both South African and Canadian legislation there is a duty on the employer to ensure a safe and healthy working environment for his employees. Canadian legislation is specific as to the employer’s obligations while the South African legislation just makes provision for a policy in the Code of Good Practice on the Integration of Employment Equity into Human Resources Policies and Practices.

### 3.2.4 LIABILITIES AND REMEDIES

Failure to comply with legislation could create liability for employers and offending employees in terms of payments of fines or serving prison time. This section will focus on the liabilities the employers can incur when failing to adhere to complaints of victimisation and intimidation as well as the remedies available to employee victims.

The Canadian Occupational Health and Safety Act, section 43(1) and (2) provides that if any section of this act is contravened, the offender is guilty of an offence and liable on conviction to a fine not exceeding $250,000, alternatively one month imprisonment, or both. However, should it be found that there is a continuation of the contravention the offender could be fined an additional $5000 per day.

In terms of the Canadian Human Rights Act, section 60 provides that should a person be found guilty of an offence they may be fined up to an amount not exceeding $50,000. The Canadian Criminal Code provides in section 264 should such a person be found guilty, such person is punishable by imprisonment for a term not exceeding five years. The Canadian Labour Code in section 101 further provides that any person who contravenes any section of the act is liable upon conviction to a fine not exceeding $1000.

Employee victims are not left without remedies. The Ontario Tribunal could award up to $10,000 for an injury to a complainant's dignity, feelings, and self-worth and can further order an offender to monetary compensation for loss due to the infringements of their rights or by placing the victim in the position, he or she would have been in had the discrimination not taken place.\(^{204}\)

\(^{204}\)Ontario Women’s Justice Network ‘Legal Remedies for Workplace Violence and/or Harassment – Human Right legislation’ available at
Options available to Canadian employers in responding to a finding of harassment include demanding an apology for the complainant; providing counselling and/or training to the harasser and other staff; disciplining or dismissing the harasser; or changing the location, assignment or reporting relationship between the complainant and harasser.\textsuperscript{205}

\section*{3.3 CONCLUSION}

Victimisation and intimidation is no foreign concept to any country. It is a global phenomenon, which requires immediate attention. It has rippling effects and if ignored can cause serious harm. Canada addressed victimisation and intimidation as soon as it became an issue by implementing legislation.

Victimisation and intimidation is dealt with in terms of criminal harassment. Criminal harassment is dealt with in terms of the Canadian Criminal Code but is not limited to this code only, unlike South Africa, which deals with the concepts of victimisation and intimidation in the workplace individually. However, as identified in chapter 2, not all conduct amounts to intimidation and victimisation in South Africa and the same applies to Federal Canada states.

The Occupational Health and Safety Act in section 12(1) places a duty of employers to ensure a reasonably safe working environment for their employees free from harassment. The South African Occupational Health and Safety Act places a duty on the employers to provide a reasonably safe working environment alongside a reciprocal duty, which is placed on employees to take reasonable care of their and their colleagues’ health and safety. The Canadian Human Rights Act places much emphasis in section (14) that harassment is a form of discrimination. The Canadian Human Rights Act in section 60 makes provision for liability where there are infringements in terms of this Act.

The employer’s failure to address complaints of victimisation and intimidation does not mean that he/she escapes liability. On the contrary, legislation provides hefty fines and


imprisonment to such employers and offender employees. While the act addresses liability, it at the same time addresses the remedies available to the employees.

It is not only the employees who suffer the results of being victimised and intimidated. The employers also suffer the financial burden of not addressing victimisation and intimidation in his/her workplace.

CHAPTER 4: RECOMMENDATIONS AND CONCLUSION

The aims of this paper was to:

1. Investigate intimidation and victimisation in the workplace and indicate examples of behaviour amounting to intimidation and victimisation in the workplace.
2. Investigate whether there are specific provisions in South African legislation concerned with intimidation and victimisation.
3. Identify whether intimidation and victimisation constitutes an unfair labour practice and whether there are any remedies available to the employee affected by the victimisation and intimidation.

Both employers and employees globally acknowledge the concepts of victimisation and intimidation. It is also recognised as an international concern. Victimisation and intimidation is not gender specific and has no positive impacts on and in the workplace.

Countries have different approaches to handling victimisation and intimidation in the workplace. With regard to South African legislation, there is no one specific act, which approaches victimisation and intimidation. Instead, victimisation and intimidation is dealt with in a range of Acts. Victimisation and intimidation are branches of workplace bullying, which in turn is seen to be a branch of harassment. Harassment in the workplace is placed as a category of unfair discrimination. Unfair discrimination is dealt with in terms of the Employment Equity Act.

Canada on the other hand, provides for specific legislation handling victimisation and intimidation in the workplace. Legislation provides that victimisation and intimidation is a form of criminal harassment. Criminal harassment is dealt with in terms of the Canadian Criminal Code. Harassment is regarded as a form of discrimination, which is prohibited by the Canadian Human Rights Act.
In both countries the Occupational Health and Safety Act places obligations on the employers to ensure that they provide for reasonably safe and healthy working environments for their employees. The employees also have a duty towards the employer. The employees have to support the employer in his duty to provide this safe environment. The employees also have to keep a look out for the health and safety of their fellow employees and have to report any behaviour or conduct which would put them at risk.

Employers who fail to adhere to complaints of victimisation and intimidation open themselves to potential civil and criminal liability. The employer, if found guilty, could be fined, receive imprisonment or both. The employer could find himself in a situation in which criminal charges are brought against him for failing to act when he was required to. This may also leave the employer carrying the financial burden of rehabilitation for the victim, compensation and even costs if cost orders are awarded by the courts.

Even where the employee is compensated for the victimisation or intimidation, the employee has suffered psychologically. Such employee has to carry the scars, the memories and fears of ending up a victim again. The victim’s family and friends suffers at the hands of such victim, as that victim carries home with him or her, the anger, hurt, frustration and depression and takes it out on those closest to them. Not only does the employee end up a victim but the employer ends up being a financial victim. The explanation being that due to the lack of self-esteem, concentration, perseverance, the employee is at greater risks of making errors, produces less, increases the risks of an incident or accident occurring.

The big question after examining what victimisation and intimidation is, what behaviour is regarded as victimisation and intimidation, investigation of the liabilities and remedies and considering the impact of victimisation, is whether the failure by an employer amounts to an unfair labour practice?

Taking into consideration the manner, in which an unfair labour practice is defined, the words ‘any’ and ‘involving’ opens the scope to a wider interpretation of an unfair labour practice rather than being limited to those situations provided for in the definitions. Case law indicates that the courts are moving away from the traditional strict and narrow approach and interpretation of the definition of an unfair labour practice. Is it possible that the courts are realising that the legislature never intended to limit an unfair labour practice to only those given situations?
For an employer to avoid the vicious circle as demonstrated the following is recommended to the employer:

1. Develop own company policies or codes of conduct regulating victimisation and intimidation in their workplace;
2. Develop a confidentiality system by which employees can report such behaviour;
3. Investigate complaints and claim of victimisation and/or intimidation;
4. Educate staff on which conduct amounts to victimisation and intimidation;
5. Designated staff should be trained in investigative procedures;
6. Above mentioned staff is to sign a confidentiality agreement before being appointed and after termination of employment contract;
7. Absenteeism should be monitored on a monthly basis;
8. Policies, codes and procedures are to be reviewed and updated annually.

By implementation of such steps, employers would be showing employees that they are serious as to erode victimisation and intimidation in the workplace and limit the consequences thereof.

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