



UNIVERSITY *of the* WESTERN CAPE

FACULTY OF LAW

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Faculty of Law of the University of the Western Cape

Department of Private Law

**Workplace Bullying: An Evaluation of the Legal Framework on Workplace Bullying in
South Africa: Need for Reform**

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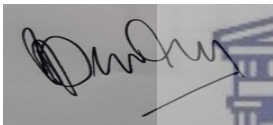

DECLARATION

I, Fayroes Safodien, declare that *Workplace Bullying: An evaluation of the legal framework on workplace bullying in South Africa: Need for reform?* is my own work and that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

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DEDICATION

This work is dedicated to my late mother, Sureida Safodien and my daughter, Tamiya Safodien for her love, encouragement and sacrifice that she had to endure, as it was not easy to have a mother that was studying. “You were patient and understanding and you gave me wings to fly and realize my dream, so that I can be your role model and teach you that anything is possible, no matter how long it takes, you will get there. Thank you for believing in me, my child.”

To all Candidate Attorneys in practice that are still being subjected to unfair treatment and bullying by their Principles.



LIST OF ACRONYMS AND ABBREVIATIONS

Bill of Rights	BOR
Compensation for Occupational Injuries and Diseases Act	COIDA
Centre for Research and Development	CORD
Commission for Conciliation Mediation and Arbitration	CCMA
Employment Equity Act 55 of 1998	EEA
Occupational Health and Safety Act	OHSA
International Labour Organisation 2003	ILO
Labour Court	LC
Labour Relations Act 66 of 1995	LRA
National Economic Development and Labour Council	NEDLAC
National Environment Management Act	NEMA
Protection from Harassment Act 17 of 2011(SA)	PHA
Post-Traumatic Stress Disorder	PTSD
Promotion of Equality and Prevention of Unfair Discrimination Act	PEPUDA
South Africa	SA
United Kingdom	UK
United Nations	UN
Universal Declaration of Human Rights	UDHR
Workplace Bullying Institute	WBI
World Health Organisation	WHO



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ABSTRACT

Workplace bullying is often associated with negative acts such as harassment, discrimination and victimisation,¹ which is the reason that legal certainty is required, for protection against such conduct. Consequently, the legislation under scrutiny includes the Occupational Health and Safety Act 85 of 1993 ('OHSA'), Labour Relations Act 66 of 1995 ('LRA'), Employment Equity Act 55 of 1998 ('EEA'), Protection from Harassment Act 17 of 2011 ('PHA'), Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('PEPUDA') and other statutes. Research shows that employees experience workplace bullying in South Africa ('SA'). These statutes are examined in order to establish whether their provisions adequately protect employees from workplace bullying. In addition, this thesis determines whether workplace bullying is an infringement of workers fundamental rights. South African labour legislation is evaluated to determine which legislative measures protect workers against workplace bullying and whether legislative reform is necessary. In order to draw lessons and establish measures on regulating workplace bullying in SA the United Kingdom's ('UK') legal framework governing workplace bullying is evaluated and discussed. Recommendations are made in order to improve the regulation of workplace bullying in the SA workplaces.



¹ Motsei NDL *Perceptions of Bullying and Organisational Antecedents in the South Africa Workplace* (published PhD thesis University of Pretoria, 2015)2.

KEY WORDS AND PHRASES

Compensation

Constructive Dismissal

Contract of Employment

Employee

Employer

Harassment

Perpetrator

Unfair Discrimination

Victim

Vicarious Liability

Worker

Workplace

Workplace bullying



CHAPTER ONE

INTRODUCTION

“The glaring difference between domestic and workplace psychological violence is that the latter finds the abuser on the employer’s payroll.”²

1.1 BACKGROUND

Historically, SA has a deeply rooted history of racial inequalities and discrimination in its political and legal systems.³ SA’s democracy arguably emerged in 1994 which may have been as a result of political pressure and the fundamental need to protect human rights and values caused by the injustices of the former regime,⁴ latent with apartheid ideologies towards a new dispensation of constitutional sovereignty.⁵ This resulted in the adoption of the Interim Constitution of the Republic of South Africa, Act 200 of 1993 (hereafter referred to as ‘the Interim Constitution’)⁶ and then the Final Constitution of the Republic of South Africa, 1996 (hereafter referred to as ‘the Constitution’).⁷ The Bill of Rights (‘BOR’) is the foundation of SA’s democracy and includes democratic values of human dignity, equality and freedom.⁸ The State has an obligation to respect, advance and protect the rights found in Chapter II of the Constitution,⁹ subject to the limitation clause.¹⁰ The Constitution guarantees that everyone has the same protection and treatment before the law.¹¹

According to the only known survey conducted by the International Labour Organisation (‘ILO’) in 2003, SA’s statistics show that nearly 80% of the respondents who participated in the study indicated that they have experienced hostile behaviour in their work life.¹² Research conducted on workplace bullying has shown that the negative effects on individuals or victims

² Namie G ‘Workplace bullying: Escalated incivility’ (2003) 9B03TF09 *Ivey Business Journal Online* 3 available at https://www.rit.edu/~w-aaup/documents_not_rit/ivey_workplace_bulling.pdf (accessed 24 November 2021).

³ Currie I and De Waal J *The Bill of Rights Handbook* (2013) 6th ed Cape Town: Juta 211.

⁴ The Interim Constitution of the Republic of South Africa, Act 200 of 1993.

⁵ The Interim Constitution of the Republic of South Africa, Act 200 of 1993.

⁶ The Interim Constitution of the Republic of South Africa, Act 200 of 1993.

⁷ Constitution of the Republic of South Africa, 1996.

⁸ Constitution of the Republic of South Africa, 1996, section 7(1).

⁹ Constitution of the Republic of South Africa, 1996, section 7(2).

¹⁰ Constitution of the Republic of South Africa, 1996, section 7(3).

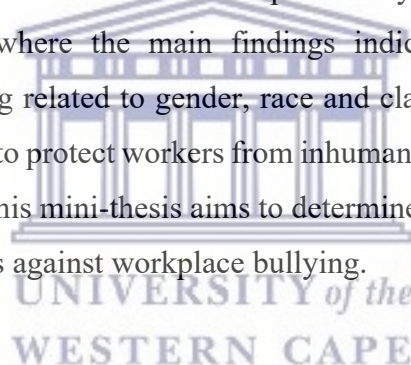
¹¹ Constitution of the Republic of South Africa, 1996, section 9(1).

¹² International Labour Organization ‘Violence at work - A major workplace problem’ (2003b) available at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/genericdocument/wcms_108531.pdf (accessed 10 March 2018) 1.

are depression, low self-esteem, ill-health leading to high employee turnover,¹³ which contributes to a dysfunctional, unproductive workforce. Unfortunately, even with scholarly research on the ‘negative effects’ of workplace bullying research is said to be limited.¹⁴

1.2 THE RESEARCH PROBLEM

Statistics on workplace bullying demonstrate that bullying is a problem in SA. A study in 2000 by the Work Dignity Institute indicated that the prevalence of workplace bullying was under-researched, although 77,8% of South Africans at the time, had experienced workplace bullying,¹⁵ but it has improved and more research has been conducted in other sectors in the workplace, such amongst higher education sector. Conco and others conducted a study in 2021 into the prevalence of bullying and the associated factors with it, amongst a population group of diversified academics, which indicated that “bullying was experience by 58% of respondents, of whom 44% experienced bullying more than once and 64% of participants had witnessed bullying.”¹⁶ A study that explored women academics experiences of workplace bullying suggested that there is a link between workplace bullying and gender transformation in higher education in SA, where the main findings indicated that women academics experienced workplace bullying related to gender, race and class.¹⁷ It is the intention of the Legislature to enact legislation to protect workers from inhumane and degrading circumstances in the workplace. Therefore, this mini-thesis aims to determine the extent to which the South African law protects employees against workplace bullying.



¹³ Salin D ‘Prevalence and forms of bullying among business professionals: A comparison of two different strategies for measuring bullying’ (2001) *European Journal of Work and Organisational Psychology* 10(4) 426.

¹⁴ Smit DM *Bullying in the Workplace: Towards a Uniform Approach in South African Labour Law* (published LLD thesis, University of the Free State, 2014) 21.

¹⁵ Cunniff L & Mostert K ‘Prevalence of workplace bullying of South African employees’ (2012) *10(1) SA Journal of Human Resource Management* 450 2, stated that no recent studies on workplace bullying prevalence is available in South Africa. In addition, only a few studies examined the differences in socio-demographic of groups. Furthermore, there are two studies conducted on gender differences in workplace bullying, but it was limited to health and academic sectors. Most of the studies in workplace bullying in South Africa are mainly focused on the health sector.

¹⁶ CONCO, D N et al. ‘Experiences of workplace bullying among academics in a health sciences faculty at a South African university’ (2021) *South African Medical Journal* available at: <http://www.samj.org.za/index.php/samj/article/view/13252> (accessed 7 November 2022).

¹⁷ Mangolothi B & Mnguni PP ‘Workplace Bullying and Its Implications for Gender Transformation in the South African Higher Education Sector’ (2021) *International Journal of Critical Diversity Studies*. Vol. 4(2) DOI: 10.13169/intecritdivestud.4.2.0061 61 available at <https://www.scienceopen.com/hosted-document?doi=10.13169/intecritdivestud.4.2.0061> (accessed 6 November 2022).

1.3 THE RESEARCH QUESTION

This study answers the research questions below:

1. To what extent does the law in South Africa protect employees from workplace bullying?
2. Which additional legislative measures, if any, should be enacted to provide protection to employees?

1.4 AIMS OF THE STUDY

This mini-thesis will critically examine the South African legislative framework governing workplace bullying. This will consist of a critical analysis of the current provisions contained in the Labour Relations Act 66 of 1995 ('the LRA'),¹⁸ unfair labour practices¹⁹ and unfair dismissals.²⁰ Other statutes that will be analysed include the Employment Equity Act 55 of 1998 ('the EEA')²¹ governs unfair discrimination²² and 'harassment,'²³ Occupational Health and Safety Act 85 of 1993 ('the OHSA'),²⁴ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('PEPUDA')²⁵ and the Protection from Harassment Act, 2011 (hereafter referred to as 'the Harassment Act').²⁶

This mini-thesis compares SA's legal framework with that of United Kingdom ('UK') in addressing workplace bullying to determine whether SA can draw lessons from UK statutes, case law and effects on employees well-being in the workplace. Although, UK does not have specific legislation that directly deals with workplace bullying, it has extended the scope of statutes through caselaw, which is crucial to address and create awareness of workplace bullying in SA. SA's legal framework consists of various influences and English Law forms

¹⁸ Labour Relations Act 66 of 1995 ('the LRA').

section 6(3) states "any unfair act or omission that arises between an employer and an employee..."

¹⁹ Labour Relations Act 66 of 1995, section 186(2) states "any unfair act or omission that arises between an employer and an employee..."

²⁰ Labour Relations Act 66 of 1995, section 186(1) states that an employer unfairly discriminates against an employee directly or indirectly on any arbitrary grounds but not limited to any of the listed grounds; section 186(1)(e) an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee.

²¹ Employment Equity Act 55 of 1998 ('the EEA').

²² Employment Equity Act 55 of 1998, section 6(1).

²³ Employment Equity Act 55 of 1998, section 6(3).

²⁴ Occupational Health and Safety Act 85 of 1993 ('the OHS').

²⁵ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('PEPUDA').

²⁶ Protection from Harassment Act, 2011 (hereafter referred to as 'the Harassment Act').

the Common Law of SA. The Constitution, section 39 states “[w]hen interpreting the Bill of Rights, a court, tribunal or forum-

(a)...

(b) must consider international law; and

(c) may consider foreign law.”²⁷

The application of international law in terms of section 233 of the Constitution, states “[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”²⁸

1.5 LITERATURE REVIEW

Chappell and Di Martino states that bullying constitutes of “*repeated offensive behaviour through vindictive, cruel, malicious or humiliating attempts to undermine an individual or group of employees.*”²⁹ The author’s main thrust for research was workplace violence, which included various aggressive acts that occur in workplaces such as sexual harassment, bullying, threats, assaults, verbal abuse, homicide and mobbing with evidential incidences coupled with severity of workplace violence in different countries.³⁰ Furthermore, it included identifying particular occupations at risk and the economic costs.³¹ In addition, different responses and benefits were evaluated for reducing the risk of workplace violence against the international standards for such actions.³² This mini-thesis focused predominantly on workplace bullying as a form of non-physical behaviour. The research scope is to demonstrate whether South African labour legislation expressly or implicitly regulates the protection of workers against workplace bullying and whether workplace bullying violates their fundamental human rights in the Constitution. Le Roux and colleagues have argued that workplace bullying should be regarded as ‘*moral harassment*’ as there is a correlation between bullying and dignity, therefore

²⁷ The Constitution of the Republic of South Africa, section 39.

²⁸ The Constitution of the Republic of South Africa, section 233.

²⁹ Chappell D, Di Martino (2006) 20-22, 25

arguably indicated that mobbing and bullying appear to have the same impact on the victim. The book provides a basis to understand the nature of violence at work by suggesting preventative best practice methods and drawing positive lessons for the future through scientific research.

³⁰ Chappell D, Di Martino V (2006) vi, 25 identified different responses to violence at work and best solutions such as legislative and regulatory interventions towards the creation of a specific legislation. In addition, attention to preventive strategies, analysis of policies and guidelines, specific occupational guidance and types of violence.

³¹ Chappell D, Di Martino V (2006) vi.

³² Chappell D, Di Martino V (2006) vi.

it should be viewed as a dignity infringement instead of discrimination.³³ This research will take it a step further to not only support the notion that it is a moral obligation, but also a statutory obligation, by State to be protected against workplace bullying. Furthermore, the labour legislation in SA will be evaluated to identify whether statutes protect workplace bullied employees sufficiently. In order to argue this point, the importance of defining workplace bullying to establish, what type of behaviour amounts to workplace bullying and how this fits into ‘unfair conduct’ in the workplace.

Chappell and Di Martino discussed a study conducted by ILO/ICN/WHO/PSI of workers in the health sector that were found to be subjected to all kinds of workplace violence.³⁴ The author makes reference to new evidence emerging with regard to impact and harm caused by psychological violence or non-physical violence.³⁵

Harthill wrote a comparative article that explored how UK addressed the problem of workplace bullying in order to draw lessons for the United States (‘the US’) where workplace bullying is a significant problem, but has no legal remedies.³⁶ Chappell indicated that legal scholars and others have identified and categorised types of workplace conduct such as bullying through prevalence, analysed the individual and societal cost of workplace bullying.³⁷ Harthill discussed UK’s awareness and well-developed workplace bullying policies and laws in contrast to that of US.³⁸ In addition, it suggested that US government and management recognised the vast nature of this problem in order to address workplace bullying, but in order to succeed proposed educating legislators and employers on individual and society costs before resorting to employer self-regulation and new workplace bullying legislation.³⁹ The scope of the article defines workplace bullying, prevalence and costs in UK and US, as well as summarises current laws in Europe, Canada and US.⁴⁰ It also outlines various legislative measures in UK to regulate workplace bullying and concludes that the US should not only use legislation, but emphasize the gap by increasing awareness and social norms against workplace

³³ Le Roux R, Rycroft A, Orleyn T *Harassment in the Workplace: Law, policies and processes* (2010) 1st ed Durban: LexisNexis 52.

³⁴ Chappell D, Di Martino V (2006) 14.

³⁵ Chappell D, Di Martino V (2006) 17, indicates that “psychological” violence caused significant emotional injury to those being victimised.

³⁶ Harthill S ‘Bullying in the Workplace: Lessons from United Kingdom’ (2008) 17(2) 247 *Minnesota Journal of International Law* 248.

³⁷ Chappell D, Di Martino V (2006) 259-72.

³⁸ Harthill S (2008) 251.

³⁹ Harthill S (2008) 253.

⁴⁰ Harthill S (2008) 254-267.

bullying as ‘unacceptable behaviour’ by engaging all stakeholders such as unions, government and employers.⁴¹ Alternatively, this research examines SA’s labour legislation with a view that it provides limited protection against workplace bullying. In addition, it aims to establish that such conduct is a violation of workers’ human rights that deserves protection by legislation in terms of the Constitution.

Smit highlighted that bullying does not fall under a protected ground for victimisation or harassment, which may be described as a ‘sui generis.’⁴² Workplace bullying is a unique type of infringement on an employee, that does not enjoy adequate legislative protection leading to gross violation of employees’ human rights and this research significance is to prove this theory. This mini-thesis will expand and develop legal avenues for workplace bullying in order to provide guidelines to legally manage workplace bullying, towards protecting workers from employers and colleagues in SA. Globally, various legal systems have unfortunately failed to combat ‘workplace bullying’ and providing remedies, that includes SA. Therefore this research is pertinent to bringing awareness and advocating legislative reform in SA in order to address the rising incidents of workplace bullying as a human right violation.

1.6 SIGNIFICANCE OF THE STUDY

The research highlights the plight of workers’ suffering by being bullied in their workplaces. Furthermore, this research is important in recognising that workplace bullying violates workers’ human rights and deserves protection. In order to afford workers’ such protection it is fundamentally important to examine the SA labour law to evaluate the extent of such protection. Employers may also benefit from this research as it will create an awareness and incident management of workplace bullying. Employers may be obliged to incorporate processes, policies and procedures to address workplace bullying in the workplace. Therefore, it is important that workplace bullying is clarified to establish the requirements of what amounts to such conduct and to find remedies for workers subjected to workplace bullying.

⁴¹ Harthill S (2008) 267-302.

⁴² Smit DM (2014) 5, added that bullying in terms of unfair labour practices must be linked to an infringement such as ‘promotion, demotion, benefits or training’ otherwise no remedy will be available.

1.7 RESEARCH METHODOLOGY

The methodology adopted in this research draws from an analysis of primary sources of information such as the South African Constitution, legislation, foreign legislation and case law. The reason for choosing to make use of the Constitution and legislation is to attain whether workers' human rights are violated through workplace bullying and whether there is sufficient protection by legislation of such a violation. Foreign legislation is utilised to compare SA with UK. Case law will be discussed in order to demonstrate the manner in which legislation is applied by the judiciary. The secondary sources such as journal articles, books, journal articles will provide insight on what and how workplace bullying affects workers. Books will provide a more specialised view on specific issues related to workplace bullying and credible internet sources will provide information from international obligatory perspective to SA on workplace bullying.

1.8 CHAPTER OUTLINE

This research comprises of six chapters.

Chapter One contains the introduction which includes *inter alia* the problem statement, research question, aims of the study, literature review, significance of the study, methodology and chapter outline.

Chapter Two contains a discussion on the meaning of workplace bullying, the main features of workplace bullying, the types and the effects of workplace bullying.

Chapter Three examines the South African statutory legal framework to determine which legislative measures exist to protect employees from workplace bullying. The chapter contains a discussion will be provided on workplace bullying and the common law; workplace bullying and the law of delict; workplace bullying and ILO. The labour legislation will be unpacked and evaluated in relation to workplace bullying.

Chapter Four contains a discussion on the relevant rights contained in the Constitution to determine how the Constitution can assist employees who are subjected to workplace bullying.

Chapter Five discusses the approach to workplace bullying in the UK. It also examines UK legal framework in relation to workplace bullying and draws a comparison between UK and South African labour legislation insofar as workplace bullying.

Chapter Six concludes the mini-thesis and making a number of recommendations based on the research findings.



CHAPTER TWO

THE MEANING OF WORKPLACE BULLYING

2.1 INTRODUCTION

Since workplace bullying takes place in SA, it is important to understand what the legal meaning of workplace bullying is. In order to illustrate this, the meaning of workplace bullying will be discussed, as well as the features of workplace bullying, the types of workplace bullying and the effects of workplace bullying.

2.2 DEFINING WORKPLACE BULLYING

Workplace bullying was first identified in 1984 by Swedish psychologist Dr Heinz Leymann.⁴³ Dr Leymann preferred the term ‘mobbing’ to ‘bullying’ to describe hostile behaviour against employees in the workplace.⁴⁴ ‘Mobbing’ is defined as “hostile and unethical communication which is systematically directed by one or more individuals towards another person in order to become helpless and defenceless through continuous mobbing.”⁴⁵ The term ‘workplace bullying’ was coined by Adams, a British journalist in 1992, after she identified bullying as ‘adulthood misery,’⁴⁶ which resulted in an awareness of workplace bullying in Britain.⁴⁷

Workplace bullying is often associated with negative acts such as harassment, discrimination and victimisation,⁴⁸ which is the reason that legal certainty is required. Negative acts contributing to workplace bullying include gossiping, non-promotion, denied training

⁴³ Cunniff L & Mostert K ‘Prevalence of workplace bullying of South African employees’ (2012) *10(1) SA Journal of Human Resource Management* 450 ‘ (2012) 2.

⁴⁴ Rycroft A ‘Workplace Bullying: Unfair Discrimination, Dignity Violation or Unfair Labour Practice?’ (2009) *30 ILJ* 1435.

⁴⁵ Leymann H ‘The Content and Development of Mobbing at Work’ (1996) *5(2) European Journal of Work & Organisational Psychology* 167-68; 175, described bullying as conflict that is over a longer period, which occurs frequently and the victim is unable to defend him or herself of the unequal distribution of power between the victim and the perpetrator. In 1996, Leymann reported that approximately 25% individuals would have been bullied in their careers.

⁴⁶ Namie G ‘Workplace bullying: Escalated incivility’ (2003) *68(2) Ivey Business Journal* 1.

⁴⁷ Motsei NDL *Perceptions of Bullying and Organisational Antecedents in the South Africa Workplace* (published PhD thesis University of Pretoria, 2015) 25, a correlation was made between bad childhood experiences and bad behaviour in adults. In South Africa, Steinman was credited with creating an awareness and interest in workplace bullying and violence.

⁴⁸ Motsei NDL (2015) 2, therefore research over the last three decades focused on defining negative behaviour such as harassment on a non-racial and non-sexual nature in the workplace.

opportunities, being humiliated and shouted at, which generally appears as victimisation.⁴⁹ Cunniff and Mostert's expands on these negative acts to include criticism, verbal abuse, intimidation, public humiliation and spreading rumours,⁵⁰ as forms of bullying. Von Bergen, Zaveletta & Soper points out that there is 'no single agreed definition for workplace bullying' and different names are used.⁵¹ Motsei has the same view, however stated that workplace bullying forms part of harassment in terms of the Protection from Harassment Act 17 of 2011 ('PHA').⁵² In addition, it has been argued that the difficulty in finding an agreed definition may be accredited to the lack of consensus on what workplace bullying actually is.⁵³ Therefore, it is submitted that in the absence of an agreed definition of workplace bullying and as a point of departure certain definitions will be espoused.

The ILO defines 'workplace violence' as

"[i]ncidents where employees are physically or emotionally abused, harassed, threatened or assaulted either overtly (direct), covertly (indirect) in circumstances related to their work including commuting to and from work involving an explicit or implicit challenge to their safety, well-being or health."⁵⁴

In this instance, it is submitted that this general definition of 'workplace violence' encumbers an international prohibition against abusive treatment of workers, which is arguably similar to workplace bullying, as 'workplace violence' and 'workplace bullying' both affect a person's well-being.

Furthermore, Rothmann & Rothmann defines 'bullying' as:

"[r]epeated actions and practices that are directed to one or more workers, which are all unwanted by the victim, which may be done deliberately or

⁴⁹ Hoel H, Glaso L, Hetland J, Cooper GL, Einarsen S 'Leadership Styles as Predictors of Self-reported and Observed Workplace Bullying' (2010) 21(2) *British Journal of Management* 453 468.

⁵⁰ Cunniff L & Mostert K (2012) 1, workplace bullying manifests negatively in a physical and psychological manner on employees and the organisations, which will be discussed further below.

⁵¹ Von Bergen CW, Zaveletta JA & Soper B 'Legal remedies for workplace bullying: grabbing the bully by the horns' (2006) 32(3) *Employee Relations Law Journal* 15, categorises bullying as a form of psychological violence, psychosocial harassment and many other notions.

⁵² Motsei NDL (2015) 13.

⁵³ Quine L 'Workplace bullying in NHS community trust: Staff questionnaire survey' (1999) 318 *British Medical Journal* 228 232.

⁵⁴ International Labour Office/International Council of Nurses/World Health Organisation/Public Services International 'Framework Guidelines for Addressing Workplace Violence in the Health Sector' (2002) Geneva: International Labour Office 3, adapted from European Commission 1.

unconsciously, but clearly cause humiliation, offence, and distress, and that may interfere with job performance and or cause an unpleasant working environment.”⁵⁵

Einarsen’s definition of workplace bullying differs by referring to ‘negative acts’ and ‘individuals’ and reads:

“repeated or persistent negative acts that are directed towards one or more individuals, which are unwanted and may be done deliberately or unconsciously, causing humiliation, offence and distress and may interfere with job performance and or cause an unpleasant work environment.”⁵⁶

Upon close inspection, it is submitted that these definitions have a common thread running through them such as, it should be ‘repeated negative acts or practices,’ in other words a single occurrence does not amount to workplace bullying. Furthermore, the conduct is not wanted by the person being bullied. In addition, the bully humiliates or offends or causes emotional distress either intentionally or unintentionally that is unwanted by the person and hampers the person’s ability to perform their tasks and creating a hostile work environment.⁵⁷ Therefore, for the purposes of this mini-thesis, the above-mentioned definition of Rothmann & Rothmann’s will be used, since this definition makes specific reference to “workers” and is relevant within the South African context.

From Rothmann & Rothmann’s definition the following requirements may be adopted. First, bullying is a ‘repeated action or practice’ to humiliate the victim or victims by one or more workers in a work environment.⁵⁸ Secondly, this offensive act is done over a period of time, not a once-off incident.⁵⁹ Thirdly, bullying creates a hostile environment which starts to affect the person at work and well-being.⁶⁰ Finally, in accordance with international studies results have suggested that usually people in authority or management level are reported to be the perpetrators most of the time.⁶¹ The features of workplace bullying are discussed below.

⁵⁵ Rothmann JC & Rothmann S *The South African Employee Health and Wellness Survey - User manual* 4th ed (2006) Potchefstroom: Afriforte (Pty) Ltd 14.

⁵⁶ Einarsen S ‘The nature and cause of bullying at work’ (1999) *International Journal of Manpower* 20(1&2) 17.

⁵⁷ Einarsen S (1999) 17.

⁵⁸ Rothmann JC & Rothmann S (2006) 14.

⁵⁹ Leymann H (1996) 175.

⁶⁰ Einarsen S (1999) 17.

⁶¹ Visagie J, Havenga W, Herman L & Botha A ‘The prevalence of workplace bullying in a South African mining company’ (2012) *South African Journal of Labour Relations* 36(2) 62 75.

2.3 FEATURES OF WORKPLACE BULLYING

Workplace bullying was first reported to differ from individual to individual, however a pattern of behaviour became apparent when incidents were compared.⁶² It is submitted that three main features were identified in workplace bullying. First, this behaviour consists of repeated hostile behaviour, that attempts to empower the bully at the expense of the victim.⁶³ Secondly, research shows that many victims of workplace bullying suffer psychological harm, that is said to be the same as post-traumatic stress disorder.⁶⁴ Thirdly, in addition, workplace bullying behaviour fluctuates and depends on the bully and victim's status.⁶⁵ In other words, subordinates are bullied differently by supervisors to co-workers that bully each other or supervisors by subordinates.⁶⁶ Bullying behaviour may include giving the silent treatment, rudeness or disrespectful, interference with work, lying and exclusion of the targeted person from group activities.⁶⁷ Bullies have been characterised to abuse people that have less powerful positions and treating those above them with deference.⁶⁸ It is believed that bullies attempt to control their victims by shaming them, dominance and humiliation.⁶⁹ This indicates that there are different types of bullying that victims are subjected to in a workplace. The different types of bullying are discussed below.



Interestingly, Hoel and Cooper conducted a study for the Launch of the Civil Service Race Equality Network in November 2001, which found that 74,7% people in formal or managerial

⁶² Adams A *Bullying at Work: How to Confront and Overcome it* (1992) London: Virago 37, Adams reported first-hand on workplace bullying in the UK.

⁶³ Namie G & Namie R *The Bully at Work: What you can do to stop the hurt and reclaim your dignity on the job* 2nd ed (2003) Naperville IL: Sourcebooks Inc 3; Leymann H (1996) 165; also see Sperry L 'Mobbing and bullying: The influence of individual, work group, and organizational dynamics on abusive workplace behaviour' (2009) 61(3) *Consulting Psychology Journal Practice and Research* 191; see Yamada DC 'Crafting Legislative Response to Workplace Bullying' (2004) 8 *Employee Rights and Employment Policy Journal* 498-99.

⁶⁴ Leymann H & Gustafsson A 'Mobbing at Work and the Development of Post-traumatic Stress Disorder' (1996) 5 *Eur. J work & Organizational Psychol* 252, 254; also see *Media 24 Ltd v Grobler* (2005) 26 ILJ 1007 (SCA), vicarious liability claim for psychological harm or post-traumatic stress disorder was successful.

⁶⁵ Kaplan JF 'Help is on the way: A recent case sheds light on workplace bullying' (2010) 47(1) *Houston Law Review* 142.

⁶⁶ Keashly L & Neuman JH 'Bullying in the Workplace: Its Impact and Management' (2004) 8 *EMP. RTS, & EMP. POL 'Y J* 341; 343.

⁶⁷ Keashly L & Neuman JH (2004) 341-42.

⁶⁸ Sutton RI *THE NO ASSHOLE RULE: Building a Civilized Workplace and Surviving One That Isn't* (2007) New York: Business Plus 8-9, proposed two tests for identifying "assholes."

⁶⁹ Namie G & Namie R 3 (2003) 18-19.

positions are usually the perpetrators in a majority of workplace bullying incidents.⁷⁰ However, bullies are hard to identify, as their behaviour is usually disguised and very manipulative.⁷¹

2.4 TYPES OF WORKPLACE BULLYING

The following discussion will briefly unpack different types of workplace bullying in order to illustrate various ways in which workers may be affected by such offensive conduct in the workplace.

2.4.1 Direct vs. Indirect bullying

Workplace bullying is divided into two categories namely direct and indirect bullying.⁷² Direct bullying manifest itself on an interpersonal face to face level, for example belittling, criticism, humiliation and threats, whereas indirect bullying has a more subtle approach and aims to cause emotional harm, for example intentional gossiping, spreading rumours and exclusion from social events.⁷³

An example of indirect bullying may be marginalisation. Marginalisation is said to be feeling “shunned” and “side-lined.”⁷⁴ Marginalisation of an employee may resonate the feeling of being bullied, as illustrated in *Lombard and KGA Lewens (Pty) Ltd.*⁷⁵ Also in *Marsland v New Way Motor & Diesel Engineering*⁷⁶ the applicant testified that he was excluded from his usual work that he did, to more menial tasks and was instructed not to attend to daily sales and

⁷⁰ Hoel H & Cooper CL ‘Destructive conflict and bullying at work’ (2000) *British Occupational Health Research Foundation (BOHRF)* 3, this study also indicated that 36,7% of colleagues, 6,7% subordinates and 7,8% clients were also the perpetrators.

⁷¹ Rayner C & Hoel H ‘A summary review of literature relating to workplace bullying’ (1997) *Journal of Community and Applied Social Psychology* 7 181 191, indicated that in public, bullies appear civil and operative, but in private they are ruthless using their social ability and skilful in arguments to destroy targets.

⁷² Landman AA & Ndou MM ‘The Protection from Harassment Act and its implications for the workplace’ (2013) 22(9) *Contemporary Labour Law* 88.

⁷³ Cunniff L & Mostert K (2012) 3, direct bullying is also referred to as overt bullying that can be clearly observed. Indirect bullying is covert bullying, which is hidden and not easily detected by the victim or others such as manipulation of information, bad working conditions and exclusion in decision-making. Research has demonstrated that indirect is more prevalent than direct bullying.

⁷⁴ Rycroft A (2009) 1431 1450.

⁷⁵ *Lombard and KGA Lewens (Pty) Ltd* (2004) 25 ILJ 1770 (CCMA) 1770H; 1772-1773A, the Commissioner held that the Applicant was unfairly dismissed. The Applicant was ignored by the Respondent or (employer) through avoidance, not talking to him and excluding the Applicant from usually attended social activities. Furthermore, the Respondent verbally abused the Applicant by using words such as ‘that he was not prepared to live with a whore’ and Applicant said Respondent told her in Afrikaans “as ek nie maar net wil fokof nie.” However, the Respondent later apologised for this incident. In addition, the Applicant worked long hours, but was excluded from receiving a bonus, in lieu of a holiday that was at the employer’s discretion.

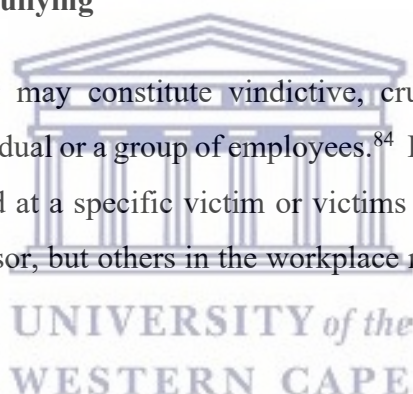
⁷⁶ *Marsland v New Motor & Diesel Engineering (Pty) Ltd* (2009) 30 ILJ 169 (LC) 175I-176D.

production meetings. The Applicant was excluded from any decision-making processes and ostracized by Freed.⁷⁷ The Labour Court held that the dismissal was automatically unfair in terms of section 187(1)(f) of the LRA.⁷⁸

In *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland*, the Respondent had suffered a nervous breakdown, when his wife left him.⁷⁹ The court contended that the Respondent was subjected to discrimination, as a result of his mental health and this impaired his basic human dignity.⁸⁰ In addition, the Respondent had been subjected to brutal attacks through ‘insults, psychological assault and egregious treatment for a long period of time even after his dismissal.’⁸¹ This type of treatment was observed by the Supreme Court of Appeal in *Murray v Minister of Defence* case.⁸² Marginalisation may be more than just social isolation such as refusal to provide opportunities or training or non-disclosure of information.⁸³ It is submitted that marginalisation showed a strong link to workplace bullying through examining case law, indicative that there are similarities to workplace bullying.

2.4.2 Individual vs Group Bullying

Individual workplace bullying may constitute vindictive, cruel, malicious or humiliating attempts to undermine an individual or a group of employees.⁸⁴ Bullying is said to be offensive and harmful behaviour directed at a specific victim or victims by one offender.⁸⁵ The bully may be a co-worker or supervisor, but others in the workplace may not be included, although



⁷⁷ *Marsland v New Motor & Diesel Engineering (Pty) Ltd* (2009) 30 ILJ 169 (LC) 1196H.

⁷⁸ *Marsland v New Motor & Diesel Engineering (Pty) Ltd* (2009) 30 ILJ 169 (LC) 1196H.

⁷⁹ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2875EF, Appellant or employee was hospitalised and, on his return to work there were distinct attitude change by senior management towards him. The Respondent was progressively abusive towards Appellant leading to fear of his physical safety as a result of the Managing Director losing his temper. The Labour Court found that the employee was constructively dismissed and unfairly discriminated on the grounds of mental health problems and automatically unfair in terms of section 187(1)(f) of the LRA 1995. The court awarded employee 24 months’ compensation and ordered the company to pay him leave and overtime.

⁸⁰ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2875IJ-76.

⁸¹ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ (LAC) 2876AB, the court showed that it was against ‘cruel, inhumane and arbitrary treatment’ by the company and its management. The LAC dismissed the appeal with costs.

⁸² *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA) 1386D; 1388E, the Supreme Court of Appeal contended that there was no doubt that the plaintiff’s time at the naval staff college was wretched, as he had nothing to do and being marginalized led to the plaintiff to becoming demoralized with subjective perceptions of suspicion and depression.

⁸³ Rycroft A (2009) 1441, although not obvious hostility like verbal or physical abuse, it may cause anxiety and suspicion.

⁸⁴ Chappell D and Di Martino V (2006) 20.

⁸⁵ Sperry L ‘Mobbing and bullying: The influence of individual, work group, and organizational dynamics on abusive workplace behaviour’ (2009) 61(3) *Consulting Psychology Journal Practice and Research* 191.

may have witnessed the abuse.⁸⁶ A conflict cannot be called bullying, if it is an isolated incidence, or both parties are equal in rank.⁸⁷ The effects of bullying on the individual may be varied from a physical impact such as sleep and eating disorders, skin allergies, weight loss or gain, headaches and sometimes high blood pressure, whereas psychological effects manifest as anxiety, low self-confidence and depression.⁸⁸

Group bullying or ‘mobbing’ as it is known in other jurisdictions is form of collective violence.⁸⁹ Mobbing involves a group of workers targeting an employee and subjecting them to psychological harassment, which involves making continuous negative remarks or criticising them continuously, isolating them from social contact, gossiping or spreading untrue information or by ridiculing them regularly.⁹⁰ Group bullying may lead to an increase in turnover, mistrust, conflict in work teams leading to poor productivity, poor communication, lack of respect for bully supervisors, employer image affected and legal costs.⁹¹ It should be noted that most researchers find no distinction between bullying and mobbing, in so far as the number of perpetrators or targets are involved, as the psychological impact that it has on the victims appeared to be the same.⁹²

Rycroft is of the view, that for behaviour to be classified as workplace bullying, the intensity, frequency and surrounding circumstances have to be taken into consideration.⁹³

2.4.3 Cyber-bullying and Work-related bullying

Cyber-bullying occurs when social and technological communication platforms are used to embarrass, harass, victimise or intimidate others with intention to harm the person.⁹⁴ In cyber-bullying, the perpetrator and the victim are physically distant, which frequently leads to a

⁸⁶ Sperry L (2009) 191.

⁸⁷ Einarsen S, Hoel H, Zapf D & Cooper C (eds) *Bulling and emotional abuse in the workplace: International perspectives in research and practice* (2003b) London/New York: Taylor and Francis 15.

⁸⁸ Abbott P & SA Board for People Practices (SABPP) ‘Fact Sheet: Bullying in the Workplace’ (2018) 2 *SABPP* 9.

⁸⁹ Chappell D and Di Martino V (2006) 21.

⁹⁰ Chappell D and Di Martino V (2006) 21.

⁹¹ Abbott P & SABPP (2018) 9.

⁹² Chappell D and Di Martino V (2006) 22; also see *Centre for Autism Research and Education CC v Commission for Conciliation, Mediation and Arbitration and others* [2020] 11 BLLR 1123 (LC), made reference to ‘bullying’ stating that it is when an employer subjects ‘employees to insulting verbal abuse and humiliating treatment.’

⁹³ Rycroft A (2009) 1438, all the circumstances should be taken into consideration before reaching a conclusion of intolerability in the workplace.

⁹⁴ Abbott P & SABPP (2018) 5.

misunderstanding of the impact it has on the victim.⁹⁵ In addition, the perpetrator's identity is withheld and the harassing messages may spread quickly causing greater impact on the victim.⁹⁶

Work-related bullying usually occurs at work by harassing, offending, socially isolating or negatively affecting someone's work tasks.⁹⁷ The person being bullied becomes the target of negative systematic acts, such as constant criticism on their work or removing their responsibilities, delegating trivial tasks, shouting, humiliating them in public or privately, blocking promotion, overloading them with work and setting unrealistic deadlines and making them feel incompetent, so they will be dismissed or resign.⁹⁸

The discussion that follows will deal with the effects of workplace bullying on the individual.

2.5 EFFECTS OF WORKPLACE BULLYING

This section will deal with the devastating effects that workplace bullying has on its victims or workers in the workplace.

Bullying manifests in a variety of behaviours, which includes intimidation, verbal abuse, public humiliation and criticism, social exclusion, inaccurate accusations, spreading rumours, ignoring people for long periods, undermining victims' professional status and studies have revealed that bullying is a global problem,⁹⁹ where South Africa has the highest percentage of workplace bullying. The consequences of workplace bullying are: a desire to terminate employment, physical disorders in sleep and eating patterns and psychological effects such as depression, self-worthiness and anxiety.¹⁰⁰ Therefore research in this area of law is imperative for legal certainty and to establish legal protection for victims of workplace bullying.

⁹⁵ Abbott P & SABPP (2018) 5.

⁹⁶ Abbott P & SABPP (2018) 5.

⁹⁷ Chappell D and Di Martino V (2006) 21.

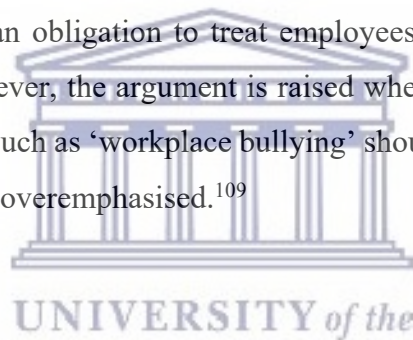
⁹⁸ UNISON '*Tackling bullying at work: A UNISON guide for safety reps*'⁵ available at <https://www.unison.org.uk/content/uploads/2013/07/On-line-Catalogue216953.pdf> (accessed 5 November 2021)

⁹⁹ Cunniff L & Mostert K (2012) 1;15 indicated that Scandinavia has between 1-5%, United States of America (USA) and United Kingdom (UK) 10-30%, Australia 50-57% and in South Africa 77,8% experienced some form of workplace bullying.

¹⁰⁰ Cunniff L & Mostert K (2012) 1-2, states that workplace bullying not only affects the individual, but also companies by creating a hostile environment of distrust, suspicion and anger, that hampers group cohesion.

Furthermore, the cost implications to organisations may be substantial, as a result of loss of productivity, absenteeism and dysfunctional interpersonal relationships¹⁰¹ as workplace bullying is said to be an ‘extreme form of social stress.’¹⁰² Furthermore, workplace bullying is recognised as a ‘multi-faceted phenomenon’ that is escalating and should be immediately addressed by all stakeholders.¹⁰³ Generally, conflict occurs in the workplace but the difference is that workplace bullying by definition is “continuous and a repeated infringement of the employee’s personal dignity.”¹⁰⁴

In *Murray v Minister of Defence*, where the employee terminated his employment as a result of continual unfair ill-treatment and being subjected to a series of incidents such as being arrested, court martialled, withholding promotion and removal from his current position.¹⁰⁵ In the Supreme Court of Appeal, Cameron JA recognised that the employer has a duty of ‘*fair dealing*’ and an obligation not to damage the relationship of confidence and trust with the employee.¹⁰⁶ The plaintiff was subjected to marginalisation, suspicion, demoralisation and depression¹⁰⁷ which is a form of workplace bullying. The concept of ‘*fair dealing*’ theoretically means that the employer has an obligation to treat employees with honesty, dignity and to refrain from bullying.¹⁰⁸ However, the argument is raised whether ‘fair dealing’ may be too wide and a more specific term such as ‘workplace bullying’ should rather be used and the need for a clear definition cannot be overemphasised.¹⁰⁹



¹⁰¹ MacIntosh J ‘Experiences of workplace bullying in a rural area’ (2005) *Issues in Mental Health Nursing* 26 893-910, workplace bullying is known as a ‘phenomenon’ that affects a person’s wellbeing in a physical, mental and emotional manner, even after the person was bullied.

¹⁰² Matthiesen SB & Einarsen S ‘Psychiatric distress and symptoms of PTSD among victims of bullying at work’ (2004) *British Journal of Guidance & Counselling* 32(3) 336.

¹⁰³ Pietersen C ‘Interpersonal bullying behaviours in the workplace’ (2007) *SA Journal of Industrial Psychology* 33(1) 59.

¹⁰⁴ Mikkelsen EG & Einarsen S ‘Bullying in Danish work-life: Prevalence and health correlates’ (2001) *European Journal of Work and Organizational Psychology* 10(4) 394.

¹⁰⁵ *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA) 1369-70A; 1373BC-1374B, the court contended that section 23 of the Bill of Rights provided that members of defence force falls under the ambit for protection for ‘fair labour practices’ that entitles them to the right to dignity. The common-law contract of employment imposes a mutual obligation between parties towards promoting the “spirit, purport and objects of the Bill of Rights.

¹⁰⁶ *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA) 1374B, the court held that even those employees not covered by the LRA is entitled to this duty.

¹⁰⁷ *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA) 1388E; 1390E the court upheld the appeal with costs.

¹⁰⁸ ‘Kotze and Agricultural Research Council of SA’ (2007) 28 ILJ 261 (CCMA) at 267C, is a case where the Commissioner held that honesty is a requirement of management, similar to reciprocal duty of subordinates.

¹⁰⁹ Rycroft A (2009) 1434, further argued that an employer that understood the link between contented employees and job performance should be concerned that corporate bullying may manifest as unhappiness, sleep deprivation, loss of productivity and high employee turnover, even if it is not visible.

2.6 CONCLUSION

In defining workplace bullying Rothmann and Rothmann state that it amounts to actions and practices that are ‘repeated and unwelcome towards one or more workers, either intentional or unintentionally to humiliate, offend and cause anxiety to a point that it affects their work performance and creates a hostile working environment.’¹¹⁰ Einarsen’s definition was compared to Rothmann and Rothmann’s and it was noted that the difference between the two definitions was that Einarsen used the words ‘negative acts’ and ‘individuals’ whereas Rothmann and Rothmann used ‘repeated actions and practices’ and ‘workers’. Therefore, Rothmann and Rothmann’s definition extends not only to actions, but practices and is an acceptable definition for the purposes of this mini-thesis, as it is specific to the workplace. The following requirements should be complied with in order for workplace bullying to manifest as ‘repeated action or practice directed at one or more workers in the workplace, to humiliate them and cause distress.’¹¹¹ In addition, this conduct should be done over a period of time, not a once-off incident.¹¹² The conduct creates a hostile environment that affects the person at work.¹¹³

The main features of workplace bullying were highlighted as being first, that the conduct must be repeated and hostile to overpower the victim.¹¹⁴ Secondly, victims of workplace bullying suffer psychological harm similar to post-traumatic stress disorder (PTSD).¹¹⁵ Thirdly, the conduct fluctuates as a result of the bully and the victim’s status,¹¹⁶ for instance between subordinates, supervisors and co-workers.¹¹⁷ Furthermore, bullying includes not talking to the person, being rude or disrespectful, interfering with their work, lying and exclusion from group activities.¹¹⁸ Bullies were identified as abusive towards people in lower ranks and respectful to those in higher ranks.¹¹⁹ Bullies aim to control their victims by showing dominance, shaming them and causing humiliation.¹²⁰

¹¹⁰ Rothmann JC & Rothmann S (2006) 14.

¹¹¹ Rothmann JC & Rothmann S (2006) 14.

¹¹² Yamada DC ‘Crafting a Legislative Response to Workplace Bullying’ (2004) 8 *Employee Rights and Employment Policy Journal* 498-99.

¹¹³ Einarsen S (1999) 17.

¹¹⁴ Namie G & Namie R (2003) 3; Leymann H (1996) 165.

¹¹⁵ Leymann H & Gustafsson A (1996) 252-254.

¹¹⁶ Kaplan JF (2010) 142.

¹¹⁷ Keashly L & Neuman JH (2004) 341-43.

¹¹⁸ Keashly L & Neuman JH (2004) 341-42.

¹¹⁹ Sutton RI (2007) 8-9.

¹²⁰ Namie G & Namie R (2003) 18-19.

Direct bullying (overt) or face to face bullying is a form of belittling, criticising, humiliating and threatening, alternatively indirect bullying (covert) is more subtle and emotional harm such as gossiping, spreading rumours and excluding them from social gathering.¹²¹

Individual and group bullying is a form of bullying that is malicious and humiliating towards an employee or group of employees.¹²² It is offensive and harmful behaviour specifically directed at one or more victims by one offender.¹²³ Individual bullying may be a bully co-worker or supervisor, but others in workplace are not included, although may have witnessed the abuse.¹²⁴ A distinction between conflict and bullying is that the latter it is not a once off incidence and the former is that parties are on equal levels.¹²⁵ The effects of bullying on the individual range from sleep or eating disorders, high blood pressure, to name only a few, however the psychological effects are anxiety, depression and low self-esteem.¹²⁶

Alternatively, group bullying or ‘mobbing’ is a form of collective violence.¹²⁷ Mobbing involves a group of employees that target an employee and psychological harassment.¹²⁸ This type of bullying has an effect on the organisation, as it increases turnover, mistrust, conflict, poor productivity and a lack of respect for bully supervisors that negatively affects the image and legal costs.¹²⁹

Cyber-bullying is when social and technological communication is used to embarrass, victimise and intimidate others in order to harm them.¹³⁰ In addition, work-related bullying manifests in the workplace through harassing and social isolations that effects the persons performance at work.¹³¹ The person’s work is constantly criticised and responsibilities are removed, delegating trivial tasks and humiliating them in public or privately, overloading them with work and no promotion in order to make them feel incompetent so they can resign or dismissed.¹³²

¹²¹ Cunniff L & Mostert K (2012) 3.

¹²² Chappell D and Di Martino V (2006) 20.

¹²³ Sperry L (2009) 191.

¹²⁴ Sperry L (2009) 191.

¹²⁵ Einarsen S, Hoel H, Zapf D & Cooper C (eds) (2003b) 15.

¹²⁶ Abbott P & SABPP (2018) 9.

¹²⁷ Chappell D and Di Martino V (2006) 21.

¹²⁸ Chappell D and Di Martino V (2006) 21.

¹²⁹ Abbott P & SABPP (2018) 9.

¹³⁰ Abbott P & SABPP (2018) 5.

¹³¹ Chappell D and Di Martino V (2006) 21.

¹³² UNISON (2013) 5.

The devastating effects of workplace bullying on its victims or workers was discussed. Bullying may manifest as a variety of behaviours, such as intimidation, public humiliation, criticism, verbal abuse, social exclusion, wrongful accusations, gossiping and many others and South Africa ranks amongst the highest country with 77,8% of workers that have experienced some form of workplace bullying.¹³³ The effects of workplace bullying has negative consequences such as resignation, sleep and eating disorders, depression, anxiety and self-esteem issues and on the organisation it creates a hostile and mistrust atmosphere.¹³⁴ Therefore, this mini-thesis highlights the urgency that workplace bullying needs legal certainty and legal reform in order to protect workers from such conduct. The cost implications to organisation are quite substantial, due to loss of productivity, dysfunctional relationship, frequent absenteeism,¹³⁵ and leads to extreme social stress.¹³⁶ The incidences of workplace bullying are increasing and all stakeholders should urgently address this issue as it affects the person's well-being, mental and emotional stability even after being bullied.¹³⁷

In the next chapter the South African statutory framework will be examined to establish whether protection is provided by current statutes against workplace bullying, and if not whether statutes should be amended.



¹³³ Cunniff L & Mostert K (2012) 1, 15.

¹³⁴ Cunniff L & Mostert K (2012) 1-2.

¹³⁵ MacIntosh J (2005) 93-910.

¹³⁶ Matthiesen SB & Einarsen S (2004) 336.

¹³⁷ Pietersen C (2007) 59.

CHAPTER THREE

THE SOUTH AFRICAN STATUTORY FRAMEWORK

3.1 INTRODUCTION

Historically, South Africa has a history of systemic discriminatory practices and inequalities that caused violent conflicts.¹³⁸ Chaskalson CJ described South Africa during apartheid as ‘one of most unequal societies in the world with a wicked system of law.’¹³⁹ Hart classified South Africa as a ‘*rights pariah*’¹⁴⁰ as a result of its poor human rights at the time.

The Interim Constitution was adopted in 1993¹⁴¹ and brought significant changes to South Africa’s legal framework and society.¹⁴² South Africa’s transitional democracy was regulated by the Interim Constitution, which was entrenched with several labour rights namely, the protection against unfair labour practices, right to collective bargaining, right of freedom of association, right to strike and lockout¹⁴³ for the protection of workers in the workplace, thereafter the Final Constitution was adopted in 1996.¹⁴⁴

¹³⁸ Smith A ‘Equality constitutional adjudication in South Africa’ (2014) *14 AHRJL* 609.

¹³⁹ Chaskalson A ‘From wickedness to equality: The moral transformation of South African law’ (2003) 1(4) *International Journal of Constitutional Law* 590 591, describes South African law as always having a feature of racial discrimination, which was institutionalized by apartheid into authoritative law. Furthermore, apartheid caused great suffering and poverty by marginalising blacks and privileged whites in all spheres of life. This system was entrenched in law and enforced through a network of security laws imposing constraints on one’s freedom of expression, freedom of assembly and many others. Detentions were sanctioned without trial, prisoners were tortured and some died in detention. Administrative discretion was used as a means of bureaucratic control to implement apartheid policies.

¹⁴⁰ Hart V ‘The contagion of rights: Constitutions as carriers’ in Hanafin P & Williams M (ed) *Identity, rights and constitutional transformation* (1999) London: Routledge 40.

¹⁴¹ Interim Constitution of the Republic of South Africa, Act 200 of 1993.

¹⁴² Mureinik E ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10(1) *SAJHR* 31, stated that the Interim Constitution was a result of Multi-party Negotiations Process at the World Trade Centre, negotiations towards a transitional democracy; Pillay D ‘Giving meaning to workplace equity: The role of courts’ (2003) 24 *ILJ* 56, stated that all political parties participated in drafting the Constitution, which internationally unique; McGregor M ‘A Legal Historical Perspective on Affirmative Action in South Africa’ Part 2 (2007) *13 Fundamina* 99 110 further contended that the Interim Constitution was approved by Negotiating Council as representatives of all political parties and was enacted by Parliament with a few changes.

¹⁴³ Benjamin P ‘Assessing South Africa’s Commission for Conciliation, Mediation and Arbitration (CCMA) DIALOGUE’ (2013) Working Paper 47 International Labour Office: Geneva 1 available at http://www.hopcal.co.za/wp-content/uploads/2018/04/article_files_75_ilo-ccma-final.pdf. (accessed 1 July 2018), the Interim Constitution was a temporary document that provided for the improvement of power-sharing to black majority and created the Bill of Rights and a Constitutional Court to further guarantee a wide-range of human rights. After the adoption of the Interim Constitution a new political dispensation came into being in 1994.

¹⁴⁴ The Constitution of the Republic of South Africa 1996.

In terms of section 9 of the Constitution:

“(1) [e]veryone is equal before the law and has the right to equal protection and benefit of the law.

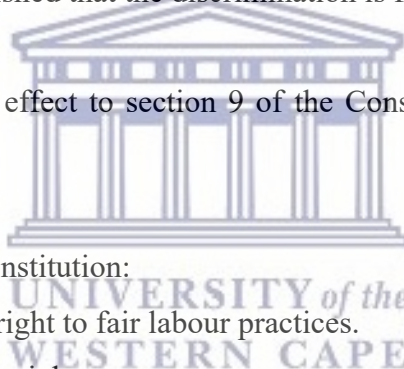
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”¹⁴⁵

The EEA was enacted to give effect to section 9 of the Constitution which is discussed in paragraph 3.5.3 below.



In terms of section 23 of the Constitution:

“(1) [e]veryone has the right to fair labour practices.

(2) Every worker has the right –

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(3) Every employer has the right-

(a) to form and join an employers’ organisation; and

(b) to participate in the activities and programmes of an employers’ organisation.

(4) Every trade union and every employers’ organisation has the right-

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

¹⁴⁵ The Constitution of the Republic of South Africa, Bill of Rights, section 9(1)-(5).

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36 (1).¹⁴⁶

The LRA was *inter alia* to give effect to section 23 of the Constitution and is discussed in paragraph 3.5.2 below.

This chapter consists of a discussion on the statutory framework in relation to workplace bullying. This is discussed to determine which legislative measures exist to protect employees from workplace bullying. This chapter contains a discussion on workplace bullying and the common law; workplace bullying and the law of delict; workplace bullying and ILO and the South African labour legislation.

3.2 WORKPLACE BULLYING AND THE COMMON LAW

The employment relationship is regulated by the common law where legislation does not apply.¹⁴⁷ Unfortunately, the common law provided limited protection to employees against employer prerogative.¹⁴⁸ In terms of the common law employers have a duty to ensure and provide employees with 'reasonably safe and healthy working conditions.'¹⁴⁹ The duty extends to providing proper equipment and machinery, training and knowledgeable supervisors, with a

¹⁴⁶ The Constitution of the Republic of South Africa, section 23.

¹⁴⁷ Grogan J *Workplace Law* 13e ed (2020) Cape Town: Juta & Co (Pty) Ltd 2-3, statutory intervention regulates the employment relationship and common law remains relevant, but is developed should it not be in line with the Constitution. In other words, the common law regulates the contract of employment, if legislation is silent. It became necessary for statutory regulation as common law was outdated due to modern industrialisation and the entrenched fundamental human rights in the Constitution. As a result, common law did not cater to the inequalities in the bargaining power that existed between an employer, as the owner and employees welfare and job security.

¹⁴⁸ Grogan J *Dismissal, discrimination and Unfair Labour Practices* 2nd ed (2007) Cape Town: Juta & Co Ltd 4-5, agreed that freedom of contract was generally accepted by employees and employers on equal basis. The parties incurred reciprocal rights and duties which are either expressly or implied for both parties agreeing to the contract. If not, then each party has a right to termination by giving notice and the contract will then be lawfully terminated, no matter the reason. Prior to statutory intervention employees had no legal right or decision-making powers under common law to demand better working conditions, interest and job security, which lead to exploitation of workers.

¹⁴⁹ Grogan J *Workplace law* 11th ed (2014) Cape Town: Juta & Co 61.

safe system of working.¹⁵⁰ The common law only provides employees with limited protection against workplace bullying.

3.3 WORKPLACE BULLYING AND THE LAW OF DELICT

Employees are allowed to institute delictual claims against their employers. Of importance as far as workplace bullying is concerned, is the notion of vicarious liability. Vicarious liability is described as a 'strict liability of one person for the harm to another.'¹⁵¹ In other words, if an employee commits a delict while performing his job, then the employer will be fully liable for damages.¹⁵² Hence, employers may be vicariously liable, if their employees commit delictual wrongs, during the course and scope of their employment.¹⁵³ In this instance, the victim will be allowed to claim damages in terms of common law.¹⁵⁴

In Rycroft's view, if workplace bullying were to be fitted into a 'legally recognisable wrong,' then the employer may be held vicariously liable under two grounds.¹⁵⁵ The first ground, is 'iniuria' which is an intentional injury to another's dignity, person or reputation.¹⁵⁶ Rycroft suggested that it may provide a potential for vicarious liability claims in a civil court based on 'iniuria' of a co-worker on the employee, as indicated there is no reliable precedence.¹⁵⁷ The second ground is usually used in sexual harassment actions as a 'legal duty to provide a safe working environment.'¹⁵⁸

In *Grobler v Naspers Bpk*¹⁵⁹ the court held that the employer may be vicariously liable in terms of the common law for damages suffered by the victim that had been sexually harassed by a fellow employee.¹⁶⁰ The other ground that could be utilised is the legal duty which rests on an employer to provide a safe working environment, as in the case of *Media 24 Ltd & another*

¹⁵⁰ Grogan J (2014) 62, should an employer fail to meet the obligation, then an employee may refuse to work in such dangerous conditions until it is corrected. The current statute that regulates the health and safety in the workplace is the Occupational Health and Safety Act 85 of 1993.

¹⁵¹ Neethling J, Potgieter JM, Visser PJ *Law of Delict* 5th ed (2006) Durban: LexisNexis 338.

¹⁵² *Isaacs v Centre Guards CC t/a Town Centre Security* (2004) 25 ILJ 667 (C) 669G-H.

¹⁵³ Rycroft A 'Workplace Bullying: Unfair Discrimination, Dignity Violation or Unfair Labour Practice?' (2009) 30 ILJ 1447.

¹⁵⁴ Snyman CR *Criminal Law* 5th ed (2008) Durban: Lexis Nexis 469.

¹⁵⁵ Rycroft A (2009) 1447.

¹⁵⁶ Le Roux R 'Sexual harassment in the workplace: A matter of more questions than answers or do we simply know less the more we find out?' 10 (1) (2006) *Law, Democracy & Development* 49; 58, citing case of *Brenner v Botha* 1956 (3) SA 257 (T) as an example.

¹⁵⁷ Rycroft A (2009) 1447.

¹⁵⁸ Rycroft A (2009) 1447.

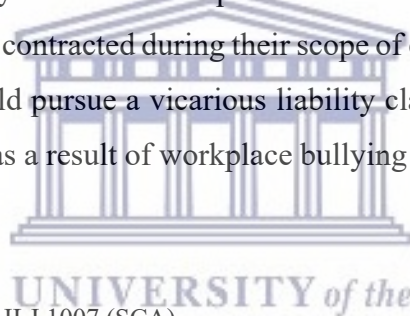
¹⁵⁹ *Grobler v Naspers Bpk* (2004) 25 ILJ 439 (C).

¹⁶⁰ *Grobler v Naspers Bpk* (2004) 25 ILJ 439 (C) 441I-J.

v Grobler.¹⁶¹ The Supreme Court of Appeal held that it is settled in law that an employer has a common-law duty to their employees to take ‘reasonable care’ for their safety and this duty cannot be confined to only physical harm, but includes a duty to protect them from psychological harm caused by being sexually harassed by a co-workers.¹⁶² Therefore employers may be held liable for failure to take ‘reasonable care’ to prevent such conduct¹⁶³ in this instance psychological harm.

A more recent judgment *E v Ikwezi Municipality*¹⁶⁴ and *LP v Minister of Correctional Services*,¹⁶⁵ victims of sexual harassment were successful in claiming damages against their employers based on vicarious liability.¹⁶⁶ In this instance and using it as a precedent, victims of workplace bullying may argue that their employers are vicariously liable for psychological and other damages as a consequence of being bullied by co-employees.

The case of *Media 24* proved that the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (‘COIDA’) did not preclude her from suing her employer and the harasser.¹⁶⁷ COIDA¹⁶⁸ provides that employees will be compensated for disablement due to occupational injuries or diseases sustained or contracted during their scope of employment. This case further indicates that an employee could pursue a vicarious liability claim for psychological harm or post-traumatic stress disorder, as a result of workplace bullying however COIDA may prevent



¹⁶¹ *Media 24 Ltd v Grobler* (2005) 26 ILJ 1007 (SCA).

¹⁶² *Media 24 Ltd v Grobler* (2005) 26 ILJ 1007 (SCA) 65-68, the court contended to determine the legal convictions of the community with regard to sexual harassment in the workplace, one requires that the employer must take ‘reasonable steps’ to prevent employees against such conduct, therefore an employer will be obliged to compensate a victim for the harm, if found to be negligent.

¹⁶³ *Rycroft A* (2009) 1448.

¹⁶⁴ *E v Ikwezi Municipality* 2016 37 ILJ 1799 (ECG).

¹⁶⁵ *LP v Minister of Correctional Services* (27220/2010) [2019] ZAWCHC 144 (5 November 2019).

¹⁶⁶ Calitz K B “Bullying in the Workplace: The Plight of South African Employees” *PER/PELJ* 2022 (25) DOI 18.

¹⁶⁷ Compensation for Occupational Injuries and Diseases Act 130 of 1993, section 35(1) states that an employee or their dependant cannot take action to recover damages in respect of any occupational injury or disease that resulted in death or disablement of the employee against their employer and employer is not liable for compensation save under the provisions of this Act for such disablement or death.

¹⁶⁸ Compensation for Occupational Injuries and Diseases Act 130 of 1993, Preamble, section 1(xvi) defined ‘disablement’ as being disabled from employment or permanent injury or serious disfigurement; (xxx) ‘occupational injury’ is defined as a personal injury due to an accident; (xxix) ‘occupational disease’ is defined as any disease in first column of schedule 3 as a result and contracted during the course of employee’s employment; NOSA SHE ‘Qualifying Criteria and Classification of Incidents’ (AUDP11): An occupational disease as a result of environmental factors one is usually exposed to a certain process, trade or occupation and to which an employee is not generally subjected or exposed to when not at work.’ (03/2011) 3 available at <http://www.nosa.co.za/site/files/7164/NOSA%20SHE%20QUALIFYING%20CRITERIA%2020.04.10.pdf> (accessed 22 February 2020).

such action, as the burden of proof to the commissioner needs to be satisfied, as prescribed by COIDA.¹⁶⁹

Calitz mentioned that there are no judgments in this regard, however bullying victims may be successful in a delictual damages claim against their employers under common law based on negligence or vicarious liability of employers.¹⁷⁰

Therefore, vicarious liability may be a course of action that victims of workplace bullying in terms of employer's failure to stop or prevent such conduct, however the burden of proof lies with the victim, which may be difficult as workplace bullying is not recognised as a wrongful act.

3.4 WORKPLACE BULLYING AND THE ILO

International instruments that have an impact on SA legal framework in relation to bullying will be discussed.

The International Labour Organisation ('ILO') is a specialised agency of the United Nations ('the UN'),¹⁷¹ which SA re-joined in June 1994.¹⁷² Various concerns were expressed about violence at work and calls for action by workers, enterprises and public authorities led to specific initiatives.¹⁷³ Therefore, ensuring a violence-free workplace has become a crucial part of the rights at work strategy in terms of the Decent Work Agenda ('DWA').¹⁷⁴ The ILO has adopted a definition of workplace violence which is subsequently included in its '*Code of*

¹⁶⁹ Compensation for Occupational Injuries and Diseases Act 130 of 1993, section 65(1)(a), subject to the provisions, an employee shall be entitled to compensation, if employee can prove that the employee contracted an occupational disease or (b) contracted a disease other than occupational disease, which arising out and in scope of his employment. By definition 'arising out' and 'in scope of employment' means a causal link between the injury and disease and task performed has to be established.

¹⁷⁰ Calitz K B "Bullying in the Workplace: The Plight of South African Employees" *PER/PELJ* 2022 (25) DOI 18.

¹⁷¹ International Labour Organisation 'History of the ILO' available at <https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> (accessed 15 December 2021).

¹⁷² Benjamin P & International Labour Organisation 'Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)' (2013) Working Paper 47 Industrial and Employment Relations Department 1 available at https://www.ilo.org/ifpdial/information-resources/publications/WCMS_210181/lang--en/index.htm (accessed 1 July 2018).

¹⁷³ Chappell D and Di Martino V *Violence at Work* 3rd ed (2006) Geneva: International Labour Office 266, mentioned specific initiatives for workplace violence such as guidelines by government, trade unions and workplace experts and others to address this problem. Many enterprises have violence prevention programmes and laws.

¹⁷⁴ Chappell D and Di Martino V (2006) 266.

practice on workplace violence in services sectors and measures to combat this phenomenon,¹⁷⁵ which states that workplace violence is defined as “[a]ny action, incident or behaviour that departs from reasonable conduct in which a person is assaulted, threatened, harmed, injured in the course of, or as a direct result of, his or her work.”¹⁷⁶

The ILO states that work violence includes homicide, threats, assault, mobbing, bullying and threats as a form of violence at work.¹⁷⁷ In addition, the ILO commitment is expressed through several fundamental Conventions in order to protect workers’ dignity at work and a safe and productive workplace.¹⁷⁸ The most relevant to violence at work, in this instance is the Discrimination (Employment and Occupation) Convention 111, 1958.¹⁷⁹ Furthermore, the ILO views ‘occupational stress’ being closely related to violence at work.¹⁸⁰

Recently, at the ILO 108th International Labour Conference in June 2019, a new international labour standard was adopted and came into force on the 25 June 2021 to combat violence and harassment at work, namely Violence and Harassment Convention No 190, 2019 (‘V&HC190’).¹⁸¹ The ILO V&HC190 is the “first international treaty to recognise the right of everyone to a world of work free from violence and harassment, including gender-based violence and harassment.”¹⁸² The V&HC190 recognises violence and harassment in the workplace as a human rights violation or abuse, that threatens equal opportunity worldwide and therefore is unacceptable and incompatible with decent work,¹⁸³ however it has been argued that the V&HC190 does not specifically address bullying.

It has been said that the definition of violence and harassment seen as one concept, is sufficiently broad to include bullying.¹⁸⁴ In terms of V&HC190, ‘violence and harassment’

¹⁷⁵ Chappell D and Di Martino V (2006) 30.

¹⁷⁶ International Labour Organisation ‘Code of practice on workplace violence in services sectors and measures to combat this phenomenon’ (2003) 4 available at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/normativeinstrument/wcms_107705.pdf (accessed 18 July 2021).

¹⁷⁷ Chappell D and Di Martino V (2006) 3.

¹⁷⁸ Chappell D and Di Martino V (2006) 266.

¹⁷⁹ Chappell D and Di Martino V (2006) 266.

¹⁸⁰ Chappell D and Di Martino V (2006) 268.

¹⁸¹ Violence and Harassment Convention, No. 190 (2019).

¹⁸² International Labour Organisation ‘Eliminating Violence and Harassment in the World of Work’ available at <https://www.ilo.org/global/topics/violence-harassment/lang--en/index.htm> (assessed 15 November 2021).

¹⁸³ International Labour Conference ‘Convention 190 – Convention concerning the Elimination of Violence and Harassment Convention in the World of Work’ 2 available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_711570.pdf (assessed 15 November 2021).

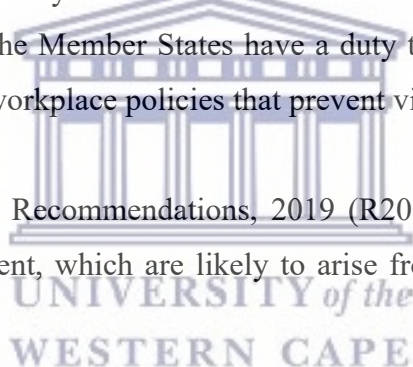
¹⁸⁴ Calitz K B “Bullying in the Workplace: The Plight of South African Employees” *PER/PELJ* 2022 (25) DOI

refers to a ‘range of ‘unacceptable behaviours, practices or threats, either single or repeated occurrence resulting in or likely to result in physical, psychological, economic or sexual harm, gender-based violence and harassment.’¹⁸⁵

Furthermore, V&HC190 aims to highlight ‘the importance of a work culture that is based on mutual respect and dignity for all human beings to prevent violence and harassment.’¹⁸⁶ Members to the Convention have a responsibility to promote a zero tolerance environment to violence and harassment, facilitate prevention of such conduct and practices to address violence and harassment.¹⁸⁷ It is recognised, that violence and harassment at work affect a person’s psychological, physical, sexual health, dignity, family and social environment.’¹⁸⁸

Member States that ratify the V&HC190 may either define “violence and harassment as single concept or as separate concepts.”¹⁸⁹ In terms of V&HC190, Article 4, Member States are obliged to adopt “an inclusive, integrated and gender-responsive approach for the prevention and elimination of violence and harassment in the world of work”,¹⁹⁰ to adopt laws, policies and regulations that promote equality and eliminate discrimination¹⁹¹ and to prohibit workplace violence and harassment.¹⁹² The Member States have a duty to adopt a national policy and requires that employers adopt workplace policies that prevent violence and harassment.¹⁹³

The Violence and Harassment Recommendations, 2019 (R206)¹⁹⁴ outlines the factors that increase violence and harassment, which are likely to arise from work conditions, cultural,



20.

¹⁸⁵ Violence and Harassment Convention No 190 (2019), Article 1(a).

¹⁸⁶ International Labour Conference ‘Convention 190 – Convention concerning the Elimination of Violence and Harassment Convention in the World of Work’ 2 available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_711570.pdf (assessed 15 November 2021).

¹⁸⁷ International Labour Conference ‘Convention 190 – Convention concerning the Elimination of Violence and Harassment Convention in the World of Work’ 2 available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_711570.pdf (accessed 15 November 2021).

¹⁸⁸ International Labour Conference ‘Convention 190 – Convention concerning the Elimination of Violence and Harassment Convention in the World of Work’ 2 available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_711570.pdf (accessed 15 November 2021).

¹⁸⁹ Calitz K B “Bullying in the Workplace: The Plight of South African Employees” *PER/PELJ* 2022 (25) DOI 21.

¹⁹⁰ Violence and Harassment Convention No 190 (2019), Article 4.

¹⁹¹ Violence and Harassment Convention No 190 (2019), Article 6.

¹⁹² Violence and Harassment Convention No 190 (2019), Article 7.

¹⁹³ Violence and Harassment Convention No 190 (2019), Article 9(a).

¹⁹⁴ Violence and Harassment Recommendations, 2019.

social norms or work organisation to be identified as hazards.¹⁹⁵ In addition, Member States are obligated to address violence and harassment in national policies in relation to discrimination, health, safety and migration.¹⁹⁶ Member States have a duty to create awareness and conduct training about violence and harassment in the workplace.¹⁹⁷

On the 29 November 2021, South Africa ratified the V&HC190¹⁹⁸ and therefore is bound to adopt and give effect to the V&HC190 through the promulgation of legislation. The Constitution, section 39(1)(b) states that courts must consider international law when interpreting the BOR.¹⁹⁹ The application of international law in terms of section 233 of the Constitution provides that “[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”²⁰⁰

SA has an obligation to recognise workplace bullying as a violation of workers’ human right to equality, dignity, freedom and security, labour relations and environment that ought to be protected. Therefore, it is imperative that workplace bullying be included as ‘unfair conduct’ in legislation.

3.5 EFFECTIVENESS OF SA LABOUR STATUTES IN WORKPLACE BULLYING CASES

This part of the thesis contains a discussion on specific labour legislations in SA in order to establish whether certain provisions adequately protect victims against workplace bullying. The statutes that are discussed are those in effect at the time this thesis was completed. This mini-thesis does not recommend that all statutes should be amended. This thesis contains a discussion on the way(s) in which the current legislation may be used to bring relief to workplace bullied victims.

¹⁹⁵ Violence and Harassment Convention No 190 (2019), Article, 8.

¹⁹⁶ Violence and Harassment Convention No 190 (2019), Article 11(a).

¹⁹⁷ Calitz K B “Bullying in the Workplace: The Plight of South African Employees” *PER/PELJ* 2022 (25) DOI 21.

¹⁹⁸ Calitz K B “Bullying in the Workplace: The Plight of South African Employees” *PER/PELJ* 2022 (25) DOI 21.

¹⁹⁹ The Constitution of the Republic of South Africa, 1996, section 39(1)(b).

²⁰⁰ The Constitution of the Republic of South Africa, 1996, section 233.

The provisions in SA's statutes are discussed below. In addition, caselaw is discussed to provide an overview on ways in which courts have interpreted the provisions contained in the relevant legislation.

Workplace bullying is often confused with other negative acts such as harassment, discrimination and victimisation, however focus should be more on a non-racial or non-sexual harassment basis, where more research is needed.²⁰¹

In addition, it has been argued that there is a link between workplace bullying and violence, due to the overlap in instances of verbal or physical abuse.²⁰² However, it argued that bullying is a "form of interpersonal aggression or hostile, anti-social behaviour in the workplace."²⁰³ In this context, Steinman the only known study that was conducted in 2003 within the South African health sector, to established a link between workplace bullying and workplace violence.²⁰⁴ It was concluded that 61,9% of all health care workers in SA experienced one form of physical or psychological workplace violence such as verbal abuse, bullying/mobbing, racial harassment and sexual harassment over a period of twelve months.²⁰⁵ It is submitted that research in other sectors of health may have been done since 2003.²⁰⁶ In addition, those that experienced bullying/mobbing all the time was 13,4% and 17,9% respectively.²⁰⁷

A study on the prevalence and incidence rate of bullying in SA was conducted in 2012 and found that 31.1% of 13.911 people surveyed had experienced bullying in the workplace,²⁰⁸ but

²⁰¹ Motsei NDL (2015) 2.

²⁰² Motsei NDL (2015) 18, stated that this is problematic, as violence may happen between strangers and a once-off incident, unlike workplace bullying that is continuous.

²⁰³ Salin D 'Ways of explaining workplace bullying: A review of enabling, motivating and precipitating structures and processes in the work environment' (2003) *Human Relations* 56(10) 1215.

²⁰⁴ Steinman S 'Workplace Violence in the Health Sector Country Case Study: South Africa' (2003) Joint Programme on Workplace Violence in the Health Sector Geneva: *ILO/ICN/WHO/PSI* 6; 24, conducted a study that measured the psychological impact of workplace violence on the well-being of an individual. The analysis of the results indicated that although physical injury was absent in this type of psychological violence, secondary repercussions were present. Emotional violence should not be overlooked as they impact on psychosomatic illnesses, productivity, performance and physical reactions. The study reported that psychological violence is high, especially for verbal abuse. Health workers reported 49,5% verbal abuse, bullying/mobbing 20,4%, racial harassment 22,3% and sexual harassment 4,6%.

²⁰⁵ Steinman S (2003) 21.

²⁰⁶ Conco, D N et al. 'Experiences of workplace bullying among academics in a health sciences faculty at a South African university' *South African Medical Journal* available at: <http://www.samj.org.za/index.php/samj/article/view/13252> (accessed 7 November 2022).

²⁰⁷ Steinman S (2003) 25.

²⁰⁸ International Labour Organisation 'Safe and healthy working environment free from violence and harassment' (2020) Geneva: ILO available at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_751832.pdf (accessed 30 October 2022) 21.

despite this high prevalence, no explicit protection for workers exist in SA's legislation.²⁰⁹ Bullying may take the form of everyday normal interactions,²¹⁰ however to be classified as workplace bullying the conduct needs to be repetitive.²¹¹ These interactions should not be viewed as merely personality clashes or misunderstandings or joking.²¹² Rycroft points out that there is a difference between ordinary conflict and adult bullying, which may be classified as 'unwelcome conduct.'²¹³ Bullied employees deserve their constitutional rights to dignity and respect protected, but despite recent developments in SA law, the protection is still limited.

Leighton's 'floodgates' argument was that the legal system has control mechanisms that prevent courts and tribunals from being overburdened by these types of claims.²¹⁴ However, this begs the question, how can one prevent and be protected against workplace bullying, if there is no legal certainty against such behaviour? In addition, it is submitted that workplace bullying will not overburden courts and tribunals, as victims of workplace bullying should be afforded the opportunity to challenge this serious infringement for the right to fair labour practices, in terms of section 23(1) of the Constitution.²¹⁵

The next section will elucidate the thematic aspects of legislative provisions and provide an evaluation of how courts have interpreted legislative issues that arose.

3.5.1 Occupational Health and Safety Act 85 of 1993 ('OHSA')

The Occupational Health and Safety Act²¹⁶ ('the OHSA') places a duty on the employer to provide and maintain a 'reasonably practicable' working environment that is risk-free and safe

²⁰⁹ Calitz K B "Bullying in the Workplace: The Plight of South African Employees" *PER/PELJ* 2022 (25) DOI 13.

²¹⁰ Leymann H 'The Content and Development of Mobbing at Work' (1996) *European Journal of Work and Organizational Psychology* 5 165-184.

²¹¹ Randall P *Bullying in adulthood: Assessing the bullies and their victims* (2001) New York: Brunner-Routledge 9.

²¹² Von Bergen CW, Zaveletta JA & Soper B 'Legal remedies for workplace bullying: grabbing the bully by the horns' (2006) *Employee Relations Law Journal* 32(3) 15 14-40.

²¹³ Rycroft A (2009) 5, this type of conduct impedes the employee's personal dignity, self-esteem and further career prospects or advancement, which if left unmanaged could severely affect efficiency, profitability and productivity in the workplace.

²¹⁴ Leighton P *Dignity at work: In Building a culture of respect-Managing bullying at work* (2001) ed Therani N New York: Taylor & Francis Inc 97-114.

²¹⁵ Constitution of the Republic of South Africa, section 23(1) states that "[e]veryone has the right to fair labour practices."

²¹⁶ Occupational Health and Safety Act 85 of 1993, was assented on the 23 June 1993 and commenced on the 1 January 1994 obligating employers to provide a working environment that is protected against hazards and work-related activities. In this instance, 'healthy' in terms of section 1 of the Act means "free from illness or injury due to occupational causes" and 'safe' means "free from any hazards."

for the health of their employees.²¹⁷ Workplace bullying affects a person's health and their safety at work. It is submitted that bullying in the workplace should be regarded as an occupational risk to the worker.

The OHS Act's objective is to 'provide for health and safety of persons at work and during use of machinery; protection of persons against hazards in connection with activities at work'.²¹⁸ The duties of employers are outlined in section 8(1) of OHS Act.²¹⁹ These duties should be performed in order to provide a 'psychologically safe' workplace.²²⁰ The definition of 'healthy' seems to suggest that psychological well-being may be included in this definition.²²¹ The Occupational Safety and Health Convention 155 of 1988 (OSHC 1988), Article 3 describes 'health' as not only the absence of disease, but includes "the physical and mental elements affecting health, which are directly related to safety and hygiene at work."²²²

Section 7 of the OHS Act provides that employers should formulate a health and safety policy that addresses the hazards of the specific workplace on instruction of the chief inspector and display it at the workplace.²²³ In terms of section 14(d) of OHS Act, an employee has a duty to report any 'unsafe or unhealthy' situations to his employer or health and safety representative²²⁴ or labour inspector. The employer's duty is confirmed by the ILO as early as 1981, in the Occupational Health and Safety Convention 155 of 1981 (OHS 1981), Article 16.²²⁵

²¹⁷ Occupational Health and Safety Act 85 of 1993, section 8(1) provides for the general duties of the employer; see section 1 defines 'reasonable practicable' as the severity and scope, available knowledge of the risk or hazard and the availability of the means to remove or lessen the risk or hazard and the cost vs benefit to remove.

²¹⁸ Occupational Health and Safety Act 85 of 1993, preamble.

²¹⁹ Occupational Health and Safety Act 85 of 1993, section 8(1) states that the employer shall provide and maintain a 'reasonably practicable' workplace that is safe and without risk to employee's health; 2(a)-(j), provision and maintenance of systems of work, plant and machinery; takes steps eliminate any hazards before personal protection equipment; safety and absence of risks to health related to production, processing, use, handling, storage or transport of substances; identify work hazards and take precautionary measure; providing training and supervision; precautionary measure for operating machinery; requirements of the Act complied with; enforcement of health and safety measures; ensure trained person operates machinery; inform employees of scope of authority;

²²⁰ Calitz K B "Bullying in the Workplace: The Plight of South African Employees" *PER/PELJ* 2022 (25) DOI 19.

²²¹ Occupational Health and Safety Act 85 of 1993, section 1(xviii), 'healthy' means "free from illness or injury attributable to occupational causes".

²²² International Labour Organisation 'Safe and healthy working environment free from violence and harassment' (2020) Geneva: ILO available at

https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_751832.pdf (accessed 30 October 2022) 6; also see Occupational Health and Safety Convention 155 of 1981, Article 3(e).

²²³ Calitz K B "Bullying in the Workplace: The Plight of South African Employees" *PER/PELJ* 2022 (25) DOI 19.

²²⁴ Occupational Health and Safety Act 85 of 1993, section 14(d).

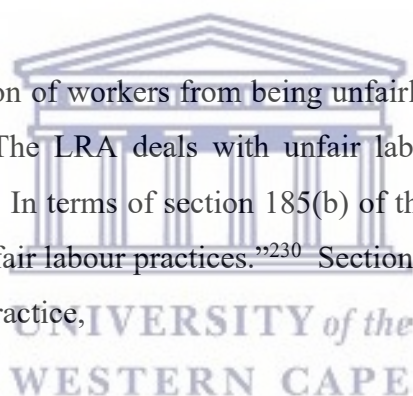
²²⁵ Occupational Health and Safety Convention 155 of 1981, Article 16.

It is important to note, that the ILO Global report ‘acknowledged that violence and harassment is a major threat to the safety and health of workers all over the world, which may amount to a human rights violation or abuse which is opposite to safe and decent work,’²²⁶ which is the reason SA should recognise workplace bullying as a human rights violation that threatens the safety and health of workers. The OSH Directive 89/391/EEC provides that all employers have a legal obligation to protect the occupational safety and health of all employees.²²⁷

3.5.2 Labour Relations Act 66 of 1995

The purpose of the LRA is to advance ‘social justice, economic development, democratisation of the workplace and labour peace’ by fulfilling its primary objectives such as to ‘give effect and regulate the fundamental rights contained in section 27 of the Constitution of the Constitution, to give effect its obligations as a Member State of the ILO, to promote the effective resolution of labour disputes, to provide a legal framework for employee parties and employer parties within which such parties can formulate industrial policy and collectively bargain.’²²⁸

The LRA codified the protection of workers from being unfairly dismissed and reformed the dispute resolution system.²²⁹ The LRA deals with unfair labour practices, which may be relevant to workplace bullying. In terms of section 185(b) of the LRA, an employee has the right not to be “subjected to unfair labour practices.”²³⁰ Section 186(2) of the LRA provides a definition of an unfair labour practice,



²²⁶ International Labour Organisation ‘Safe and healthy working environment free from violence and harassment’ (2020) Geneva: ILO available at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_751832.pdf (accessed 30 October 2022) 6.

²²⁷ Social Dialogue ‘Framework agreement on work-related stress’ (2003-2005) 3; 2 available at https://resourcecentre.etuc.org/sites/default/files/2019-09/Work-related%20Stress%202004_Framework%20Agreement%20-%20EN.pdf (accessed 9 January 2021), stated that ‘stress’ is a condition associated with physical, psychological or social complaints causing the individual to feel inadequate to keep up with expectations on them. Stress is not a disease but exposure over a long period which may reduce the effectiveness and may cause ill health, for example exposure to abusive behaviour. This duty extends to work-related stress, if it poses a risk to health and safety. Article 139 of the Treaty is a voluntary European framework agreement that commits members of UNICE/UEAPME, CEEP and ETUC for the implementation in terms of procedures and practices of management and labour in the Member States and countries of the European Economic Area.

²²⁸ Labour Relations Act 66 of 1995, section 1(a); (b); (c).

²²⁹ Twyman CM ‘Finding Justice in South African Labor Law: The Use of Arbitration to Evaluate Affirmative Action’ (2001) 33(3) *Case W. Res. J.Int’l L.* 321 available at <http://scholarlycommons.law.case.edu/jil/vol33/iss3/2> (accessed 1 July 2018), highlighted the point that before the amendments to the LRA, dismissals of any employees were dealt with in the Industrial Court. The LRA provides protection for unfair dismissals and unfair labour practices.

²³⁰ Labour Relations Act 66 of 1995, section 185(b).

“(2) **unfair labour practice** means 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 provisions of benefits to an employee;
- (b) unfair suspension of an employee or any other unfair or disciplinary action short of dismissal in respect of an employee;
- (c) a failure or refusal by the employer to re-instate or re-employ a former employee in terms of any agreement; and
- (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosure Act, 2000 (Act 26 of 2000), on account of the employee having made a protected disclosure defined in that Act”.²³¹

In support of an argument that an ‘unfair labour practice’ may manifest as workplace bullying in areas such as promotion, training, demotion and benefits,²³² the provision will apply in such cases. In order to succeed in an action based on unfair labour practice, the employee must prove that the conduct or practice falls within one of the listed grounds in the statutory definition.²³³ It has been suggested that this provision is “limited as the employer’s act or omission must fall within the closed list of unfair labour practices.”²³⁴ Unfair conduct has a wider interpretation than unfair discrimination, as conduct may be unfair without being discriminatory.²³⁵

In *Nawa & Another v Department of Trade & Industry*²³⁶ the Labour Court contended that for an employee to be successful with an allegation of an unfair labour practice, the onus rests on the employee to prove that the conduct falls expressly under those listed in the definition, on

²³¹ Labour Relations Act 66 of 1995, section 186 (2).

²³² Rycroft A (2009) 1446, added that in addition the definition provides for ‘occupational detriments’ meaning victimisation as a result of whistleblowing. If an employee is able to link workplace bullying to any of these categories, then the dispute may be referred to CCMA or bargaining council. It has been suggested that by using unfair labour practice provision, the external grievance procedure has the ability to repair, maintain and mend the employment relationship, unlike litigation that may cause humiliation and difficulties, but may provoke bullying by the employer.

²³³ Grogan J *Workplace Law* 13e ed (2020) Cape Town: Juta & Company (Pty) Ltd 137. available at [http://jutastat.juta.co.za/nxt/gateway.dll/iljn/wopl/117/134/143?f=templates\\$fn=default.htm](http://jutastat.juta.co.za/nxt/gateway.dll/iljn/wopl/117/134/143?f=templates$fn=default.htm) (accessed 9 November 2021) 58.

²³⁴ Calitz K B “Bullying in the Workplace: The Plight of South African Employees” *PER/PELJ* 2022 (25) DOI 18.

²³⁵ Grogan J (2020) 59.

²³⁶ *Nawa & Another v Department of Trade & Industry* (1998) 7 BLLR 701 (LC).

the one hand.²³⁷ However, on the other hand, courts opinions have changed from the strict and narrow interpretation on what amounts to an unfair labour practice, as in *Piliso v Old Mutual Life Assurance Co SA Ltd*,²³⁸ where the Labour Court followed a wider interpretation.²³⁹

The difference between narrow and wide interpretation is that the former follows a strict literal meaning of the text which is clear,²⁴⁰ for example definition of unfair labour practice, whereas a wider interpretation takes the purposive and constitutional aspects into consideration to come to a conclusion.²⁴¹ In this instance, the LRA provisions do not ‘literally’ include workplace bullying as unfair conduct, but a wider interpretation may extend this scope to include workplace bullying as an infringement.

The LRA has been instrumental in the establishment of the Commission for Conciliation, Mediation and Arbitration (‘the CCMA’), as an independent juristic institution,²⁴² that is not controlled by any political party, trade union or business,²⁴³ and serves as a forum to deal with labour related matters.

The LRA provides remedies for unfair labour practice which includes re-employment, compensation or re-instatement.²⁴⁴ The CCMA Info Sheet describes ‘harassment’ as a form of ‘bullying,’ therefore bullied victims may sought relief framing workplace bullying as a form of harassment in terms of an unfair labour practice,²⁴⁵ if it is related to prevention of a promotion or training opportunities or abuse of disciplinary proceedings. Should the arbitrator

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²³⁷ *Nawa & Another v Department of Trade & Industry* (1998) 7 BLLR 701 (LC) 2.

²³⁸ Potgieter L (2013) 30 referred to *Piliso v Old Mutual Life Assurance Co SA Ltd* (2007) 28 ILJ 897 (LC) 901-903.

²³⁹ Potgieter L (2013) 32.

²⁴⁰ Botha C *Statutory Interpretation: An Introduction for Students* 5th ed (2012) Cape Town: Juta & Co Ltd 91.

²⁴¹ Botha C (2012) 91.

²⁴² Twyman CM ‘Finding Justice in South African Labor Law: The Use of Arbitration to Evaluate Affirmative Action’ (2001) 33(3) *Case W. Res. J.Int’l L.* 321 available at <http://scholarlycommons.law.case.edu/jil/vol33/iss3/2> (accessed 1 July 2018), viewed the CCMA as a new and improved tribunal applying the principles of fairness and equity of disputes. In addition, she pointed out that the LRA requires that all terminations of employment that was not voluntary, should be both substantively and procedurally fair. In other words, if it found that the employer acted unfairly, then this would result in an unfair labour practice, whereby the employee would either be reinstatement or compensated. The LRA makes specific reference to conduct that is unfair by the employer.

²⁴³ Motsei NDL (2015) 19-20.

²⁴⁴ Du Toit D *Labour Relations Law: A Comprehensive Guide* 6th ed (2015) Durban: LexisNexis 568.

²⁴⁵ CCMA ‘Preventing and Eliminating Harassment in the workplace Info Sheet 2022-01’ 1 available at <https://www.ccma.org.za/wp-content/uploads/2022/06/Preventing-and-Eliminating-Harassment-in-the-workplace-Info-Sheet-2022-01-1.pdf#index> (accessed 27 October 2022), provides that for bullying to be classified as ‘harassment’ in terms of the EEA, there has to be a link to one or more of the grounds for unfair discrimination. Other acts of bullying, but not limited to, is spreading malicious rumours or insulting someone (gender, race or disability); ridiculing or degrading someone; exclusion or victimisation; unfair treatment, overbearing supervision or misuse of power or position, threatens job security, undermining.

find in favour of the employee, the compensation in respect of an unfair labour practice must be just and equitable in the circumstances, but not more than 12 months remuneration.²⁴⁶ Therefore, in order to link unfair labour practice to workplace bullying, a wider interpretation is required as indicated by case law, which may create a remedy for victims of such conduct.

The LRA also provides for constructive dismissals, which may be relevant for the purposes of workplace bullying. In terms of section 186(1)(e) of the LRA a constructive dismissal takes place when “an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee”.²⁴⁷ The first requirement for constructive dismissal is that an employment relationship must exist at the time the employee resigns from employer’s service.²⁴⁸ The second requirement is that the employee must have ended the relationship.²⁴⁹ In order to discharge such onus that they were constructively dismissed, the employee must prove that continued employment would have been ‘intolerable.’²⁵⁰ Once the employee proved these requirements, ‘the onus shifts to the employer to prove that it did not act unfairly.’²⁵¹

A constructive dismissal may be resorted to by an employee that is subjected to workplace bullying, however this may only provide temporary relief, as the victim may have suffered psychological scars caused by being bullied and the employee would be jobless.²⁵² In cases that are found to be automatically unfair, the compensation must be just and equitable taking all circumstances into consideration, but not more than 24 months, calculated at the employee’s rate of remuneration on the date of dismissal,²⁵³ however if the workplace bullying is not on the listed grounds, then it will not be deemed automatically unfair.

In Marsland v New Way Motor & Diesel Engineering,²⁵⁴ illustrated the intolerance of mental illness by an employer, that led to an extreme case of workplace bullying. In addition, public humiliation is suggested to definitely destroy or seriously damage the relationship of

²⁴⁶ Labour Relations Act 66 of 1995, section 194(4).

²⁴⁷ Labour Relations Act 66 of 1995, section 186(1)(e) may lead to unfair dismissal.

²⁴⁸ Grogan J (2020) 137.

²⁴⁹ Grogan J (2020) 137.

²⁵⁰ Grogan J (2020) 138.

²⁵¹ Grogan J (2020) 141.

²⁵² Rycroft A (2009) 1448; 1431, suggested that there is no assurance that this will never happen again to someone else and whether the employer had dealt with the issue.

²⁵³ Labour Relations Act 66 of 1995, section 194 (3).

²⁵⁴ *Marsland v New Way Motor & Diesel Engineering* (2009) 30 ILJ 169 (LC) 175I-176D, the employer discriminated against the applicant causing intolerable working conditions and his eventual leaving the workplace claiming constructive dismissal.

confidence and trust between employer and employee²⁵⁵ which is similar to workplace bullying. In *Pretoria Society for the Care of the Retarded v Loots*²⁵⁶ the employee claimed compensation for alleged unfair labour practice and that she was constructively dismissed.²⁵⁷ The Industrial Court held that the applicant created a hostile environment to the extent that employee had no choice, but to resign to prevent further deterioration of her health and the respondent appealed this decision in the LAC.²⁵⁸ The LAC held that it was not necessary for the employer to show intention to repudiate the contract, but contended that it is the courts function to look at the conduct of the employer as a whole, to determine the effect and reasonably judge the extent that employee 'cannot be expected to put up with it.'²⁵⁹ The LAC concluded that without reasonable and proper cause the employer conducted itself in a calculated manner that would likely destroy or seriously damage the relationship of confidence and trust between employee and employer.²⁶⁰ The appellant's appeal was dismissed and the respondent was compensated R35 160.

In addition, Rycroft stated that humiliating and demeaning conduct like verbal abuse, should be assessed in consideration of all the facts of the case²⁶¹ and therefore it is submitted that verbal abuse should amount to bullying at work.

In the case of a constructive dismissal the employer's conduct that causes the constructive dismissal must have caused the deterioration of the employment relationship.²⁶² Alternatively, courts may dismiss a claim for constructive dismissal based on a legitimate reason by the employer to counsel the employee by suggesting a mutually satisfactory preferred end, instead of disciplinary or capacity hearing.²⁶³ It may be said that the law governing constructive

²⁵⁵ Rycroft (2009) 1440.

²⁵⁶ *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC), 982BD- 989D, Nicholson JA contended that the employee was suspended without a hearing as a strategy to make employee life unbearable. She was belittled in front of others and denied tasks which she usually performed. Furthermore, the appellant humiliated the respondent publicly by publishing her final written warning in the newsletter to all the parents of inmates, even though it was still on appeal. The respondent's health suffered as a result of stress related illness.

²⁵⁷ *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC), 982BD- 989D.

²⁵⁸ *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC) 983A-991C.

²⁵⁹ *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC) 983A-991C; also see *HC Heat Exchangers (Pty) Ltd v Araujo and Others* (2020) 3 BLLR 280 (LC) 49; also see *Solidarity* on behalf of Van Tonder v Armaments Corporation of SA (SOC) Ltd and Others (2019) 40 ILJ 1539 (LAC) 39.

²⁶⁰ *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC) 983A-991C.

²⁶¹ Rycroft A (2009) 1441.

²⁶² *Dallyn v Woolworths (Pty) Ltd* (1995) 16 ILJ 696 (IC) 699I-708B, the employee was facing disciplinary action and given an option to either resign or be charged. The applicant appealed, but it was dismissed with no cost order.

²⁶³ *Dark and Ex Hex Boerdery (Pty) Ltd* (2008) 29 ILJ 3092 (CCMA) 3097E-3098B, where it was held not to

dismissals may assist as a course of action for workplace bullying. If one considers the definition of constructive dismissals and the requirements, then workplace bullying could be a reason for leaving, although the burden of proof lies with the complainant.

In the *Centre for Autism Research and Education CC v Commission for Conciliation, Mediation and Arbitration and others*²⁶⁴ the employees (special needs teachers) resigned from the applicant's school claiming they had been constructively dismissed because they were forced to resign, as a result of insulting behaviour by the school's owner.²⁶⁵ The employees stated that they had been subjected to offensive, demeaning, insulting language and degrading treatment by their employer.²⁶⁶ The third respondent claimed that the employer had attacked him based on his sexuality and calling him derogatory names, which affected his human dignity.²⁶⁷ The Labour Court held that it was obliged to show disapproval for employer's conduct by making a punitive cost order and the case was dismissed.²⁶⁸ The conduct of the employer in this case fell within the notion of workplace bullying and may serve as authority that appropriate action will be taken by the Commission and the Labour Court, where a constructive dismissal is based on continuous negative treatment of employees by the employer.



be constructive dismissal, as the employee accepted the terms of the resignation.

²⁶⁴ *Centre for Autism Research and Education CC v Commission for Conciliation, Mediation and Arbitration and others* [2020] 11 BLLR 1123 (LC), made reference to 'bullying' stating that it is when an employer subjects 'employees to insulting verbal abuse and humiliating treatment' and that the 'employer's conduct amounting to workplace bullying and justifying claim of constructive dismissal' in terms of section 186(1)(e) of the LRA. In this case the employees resigned as a result of constant bullying by the employer and the claim for constructive dismissal was upheld.

²⁶⁵ *Centre for Autism Research and Education CC v Commission for Conciliation, Mediation and Arbitration and others* [2020] 11 BLLR 1123 (LC) 1124, the respondent Commissioner agreed and awarded compensation to the plaintiff. The Applicant(employer) disagreed stating that the Commissioner had erred by failing to note that employees had not followed the grievance procedure before resigning or to communicate concerns.

²⁶⁶ *Centre for Autism Research and Education CC v Commission for Conciliation, Mediation and Arbitration and others* [2020] 11 BLLR 1123 (LC) 1124, the employer created a toxic working environment for these employees, which amounted to persistent workplace bullying that constituted into harassment and making employment intolerable.

²⁶⁷ *Centre for Autism Research and Education CC v Commission for Conciliation, Mediation and Arbitration and others* [2020] 11 BLLR 1123 (LC) 1125, further other respondents testified that they were publicly embarrassed, shouted at and humiliated.

²⁶⁸ *Centre for Autism Research and Education CC v Commission for Conciliation, Mediation and Arbitration and others* [2020] 11 BLLR 1123 (LC) 1139-1140, the court expressed its concern and displeasure at the treatment of the employees.

Victimisation is not defined in legislation, but dealt with indirectly in section 5,²⁶⁹ section 185²⁷⁰ and section 186(2)²⁷¹ of the LRA. Some instances of victimisation are suggested by Rycroft, such as slandering an employee, intentional denying work-related information, employer impairing employee's performance at work, offensive remarks by the employer and threats.²⁷² It is suggested that victimisation may be linked to workplace bullying, but as there is no clear definition for victimisation it opens the debate to whether it workplace bullying constitutes an "unfair labour practice," as the LRA provides for "any unfair act or omission"²⁷³ which may have application for such conduct. Since victimisation may fall under an unfair labour practice the requirements are similar to this provision, that the employee must prove that the conduct or practice is on a listed ground of the definition. Should victimisation not be based on any of the listed grounds then the employee may seek a course of action in terms of a breach of the contract.

In *Young v Coega Development Corporation (Pty) Ltd*²⁷⁴ Young was a company's Chief Financial Officer and was dismissed due to whistle blowing. The employer's conduct could be seen as a form of bullying towards the employee.

Corporate bullying may manifest itself in disciplinary procedures by abuse of disciplinary processes, as referred to in the case of *Gobey v Grinaker-LTA Duraset*.²⁷⁵ This was orchestrated in a manner to dismiss an employee, as the chairperson was bias.²⁷⁶ A media release published by *Mail & Guardian* stated that the University of KwaZulu-Natal threatened disciplinary action against two professors employed at the university for voicing their

²⁶⁹ Labour Relations Act 66 of 1995, section 5(1), provides that 'no one may discriminate against an employee that exercises any right in the Act.'

²⁷⁰ Labour Relations Act 66 of 1995, section 185, states that an employee has a 'right not to be dismissed unfairly or subjected to unfair labour practice'.

²⁷¹ Labour Relations Act 66 of 1995, section 186(2), defines unfair labour practice as 'any unfair act or absence thereof arising between employer and employee'.

²⁷² Rycroft A (2009) 1435.

²⁷³ Labour Relations Act 66 of 1995, section 186(2).

²⁷⁴ *Young v Coega Development Corporation (Pty) Ltd* 2 (2009) 6 BLLR 607, the employer alleged that the employee's actions had irretrievably destroyed the trust relationship. The court disagreed and found that the dismissal amounted to victimisation and ordered the employer to reinstate Young.

²⁷⁵ Rycroft AJ 'Bringing the Employer into Disrepute' (2008) 29 *ILJ* 1605, formal disciplinary processes are used instead of resolving disputes or conflict with mediation interventions and charges are vague with a 'catch-all' phrase such as 'bringing the employer into disrepute' referred to *Gobey v Grinaker-LTA Duraset* (2007) *JOL* 19017 (MEIBC), the applicant testified that he worked for the employer since October 1994, and that consequently since a change in management in 2003, he found difficulty in performing his duties due to being victimised by his factory manager. In addition, the applicant contended that before 2004 he had a clean disciplinary record, but since then he had been issued a total of six warnings.

²⁷⁶ Rycroft A (2009) 1442, the employee will be forced to go for arbitration with legal costs in order to be reinstated. Should the employee be successful, the employer may take this decision on review to Labour Courts, leading to delays up to a year or two with further legal costs. The employer may argue that reinstating the employee may not be feasible and that the employment relationship has broken down 'irretrievably.'

opinion.²⁷⁷ The fairness of disciplinary proceedings is usually determined at an arbitration, after the employee has been dismissed, which may be too late to salvage the employment relationship, resulting in huge legal costs for both parties in order to be successful.²⁷⁸ Seemingly, abuse of disciplinary processes by the employer are often used to subject employee to intolerable conditions in order for them to leave or be dismissed.

A demotion is essentially a ‘unilateral degrading of employee’s status’ in other words, a breach of employment contract, however it does not end the contract, but the choice vests with the employee to either accept or to terminate it.²⁷⁹ In addition, a unilateral demotion is a form of repudiation, which may cause humiliation and result in a constructive dismissal.²⁸⁰ Demotion or a transfer are procedures that can be used fairly and legitimately, as they are listed in the definition of unfair labour practices and the LRA may protect against some manifestations of bullying, if found to have no justification for such a disciplinary measure or business restructuring.²⁸¹

The provisions contained in the LRA were enacted to protect workers against unfair treatment by an employer in the workplace. Section 186(2) of the LRA provides a course of action for cases of ‘unfair labour practice,’ however workplace bullying is not expressly listed as an ‘unfair act or omission.’ It is suggested that courts should follow a wider interpretation of the provision, so that workplace bullying is included in the meaning of an unfair labour practice. A constructive dismissal may be resorted to by an employee who is subjected to workplace

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²⁷⁷ Stewart A ‘An opinion carries a high price’ *Mail & Guardian* 22 March 2009 available at <http://www.mg.co.za/article/2009-03-22-an-opinion-carries-a-high-price> (accessed 12 March 2019) 1, stated that the university had employed senior counsel to prosecute the professors. In Stewart’s opinion they were being disciplined for expressing their ‘freedom of expression’. In addition, a concern was raised that it was not fair that a staff member had to face prosecution by a team of lawyers, even though the staff member was not afforded the same ‘equality of arms.’ The costs for the staff member were exorbitant and may consequently, ruin them.

²⁷⁸ Rycroft A (2009) 1443.

²⁷⁹ *Mhlambi v CCMA & others* (2006) 27 ILJ 814 (LC) 817D referred to *Steward Wrightson (Pty) Ltd v Thorpe* 1977 (2) 943 (A), the Appellate Division recognised that the unilateral degrading of an employee’s status formed a breach of the employment contract.

²⁸⁰ *Mhlambi v CCMA & others* (2006) 27 ILJ 814 (LC) 817E-G, referred to *Van der Riet v Leisuren Ltd t/a Health & Racquet Club* (1998) 5 BLLR 471 (LAC) and *Van Wyk v Albany Bakeries Ltd* (2003) 12 BLLR 1274 (LC). In the aforesaid cases only the employees’ status was affected, however in this case there was reduction in remuneration and status. The employee found the situation unacceptable, but did not want to resign, but it inevitably resulted in a constructive dismissal. Further, the court held that the demotion was objectively intolerable and unbearable for the employee finding the experience frustrating and humiliating. Therefore, it was found that the employee’s resignation was found to be a reasonable and justifiable in response to the employer’s conceited and unlawful repudiation of the contract of employment; 818C the LAC found that the employee was constructively dismissed and ordered reinstatement retrospectively and remuneration of 12 months.

²⁸¹ Rycroft A (2009) 1443.

bullying in circumstances where continued employment becomes intolerable. The LRA does not provide an express definition of ‘intolerable employment,’ however in *HC Heat Exchangers (Pty) Ltd v Araujo* case,²⁸² the LC held that ‘intolerable’ is a situation that is too great to endure or beyond the limits of tolerance.²⁸³ As a result of this meaning, an employee who is subjected to workplace bullying may be successful with a claim of constructive dismissal where it is proved that the employer’s treatment of the employee results in continued employment being ‘intolerable.’

3.5.3 Employment Equity Act 55 of 1998

The Employment Equity Act 55 of 1998 (‘EEA’) ²⁸⁴ was enacted to promote the constitutional right to equality, to eliminate unfair discrimination in employment, to ensure employment equity redress, to achieve a diversified workplace, to promote economic development in the workforce and to give effect to its obligations as a member of the ILO.²⁸⁵

The EEA states that the purpose of the EEA is to “achieve equity in the workplace by-

- (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce.”²⁸⁶

In terms of section 5 of the EEA, an ‘employer must take steps to promote equal opportunity by eliminating unfair discrimination in any employment policy or practice.’²⁸⁷ The EEA prohibits discrimination on various grounds.²⁸⁸

In terms of section 6(1) of the EEA

“(1)[n]o person may unfairly discriminate directly or indirectly against an employee, in any employment policy or practice, on one or more grounds including race, gender, sex, pregnancy, sex, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability,

²⁸² *HC Heat Exchangers (Pty) Ltd v Araujo and Others* (2020) 3 BLLR 280 (LC).

²⁸³ *HC Heat Exchangers (Pty) Ltd v Araujo and Others* (2020) 3 BLLR 280 (LC) 49; also see *Solidarity on behalf of Van Tonder v Armaments Corporation of SA (SOC) Ltd and Others* (2019) 40 ILJ 1539 (LAC) 39.

²⁸⁴ Employment Equity Act 55 of 1998.

²⁸⁵ Employment Equity Act 55 of 1998, Preamble.

²⁸⁶ Employment Equity Act 55 of 1998, section 2.

²⁸⁷ Employment Equity Act 55 of 1998 Act 55 of 1998, section 5.

²⁸⁸ Employment Equity Act 55 of 1998 Act 55 of 1998, section 6(3); section 6(1).

religion, HIV status, conscience, belief, political opinion, culture, language, birth or any other arbitrary ground.”²⁸⁹

A workplace bullying claim may be instituted in terms of this section, since the EEA provides for protection against ‘harassment,’ however it has to fall within the prohibited listed grounds.

In terms of section 6(3) of the EEA, ‘harassment is a form of unfair discrimination and is prohibited by any one or a combination of the grounds listed in section 6(1) of the EEA.’²⁹⁰ Bullying could fall under this section for ‘harassment’ as a form of unfair discrimination on listed grounds or ‘other arbitrary ground.’

Unfair discrimination is prohibited on the listed grounds contained in section 6(1) of the EEA and prohibited ‘on any arbitrary grounds.’ Discrimination on an arbitrary ground takes place, if the discrimination is based on characteristics or personal attributes which have the potential to impair the fundamental dignity of persons or affect them adversely in a comparably serious way.²⁹¹ It is submitted that in circumstances where an employee who is subjected to workplace bullying is unable to claim unfair discrimination on a listed ground, such as employee may obtain relief by claiming unfair discrimination ‘on any arbitrary ground.’

Sexual harassment within the employment context is a form of unfair discrimination, which is prohibited on the grounds of ‘sex, gender and sexual orientation.’²⁹² A case in point is *Grobler v Naspers*, where the court stated that it is bound by the Constitution, to develop the common law in the interests of justice and policy considerations to protect and promote the right to dignity, freedom, security, body integrity and psychological integrity of women at their workplace.²⁹³ Racial harassment is prohibited by section 6(3) of the EEA.²⁹⁴ In *Crown Chickens*, it was held that racial harassment impacts on employee’s sense of worth, dignity and empowerment.²⁹⁵ These cases illustrate that where harassment is based on prohibited grounds, then the victim will have a course of action and may be successful.

²⁸⁹ Employment Equity Act 55 of 1998 Act 55 of 1998, section 6(1).

²⁹⁰ Employment Equity Act 55 of 1998 Act 55 of 1998, section 6(3).

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²⁹² Employment Equity Act 55 of 1998, schedule 3, section 6; schedule 4 provides for test for “sexual harassment is unwelcome conduct of a sexual nature that violates the rights of an employee...”.

²⁹³ *Grobler v Naspers* (2004) 25(3) *ILJ* (Juta) 439 522 (C) 441F-G.

²⁹⁴ Employment Equity Act 55 of 1998 Act 55 of 1998, section 6(3) provides that “harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).”

²⁹⁵ *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others* (2002) 23 *ILJ* 863 (LAC) 26-35.

The common law doctrine of vicarious liability has been extended by the promulgation of section 60 of the EEA which deals with vicarious liability.

In terms of section 60 of EEA

- “(1) [i]f it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee’s employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.
- (2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.
- (3) If the employer fails to take the necessary steps referred to in subsection 2, and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.
- (4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.”²⁹⁶

However, section 60 of the EEA will only find application if it is shown that an employee while at work contravened a provision of the EEA or engaged in any conduct that, if engaged in by that employee’s employer, would constitute a contravention of a provision of the EEA. In circumstances where an employee is harassed by another as per section 6(3) of the EEA, it would constitute a contravention of the EEA and section 60 of the EEA would apply.²⁹⁷ In other words, both the victim and the harasser should be employees of the employer.²⁹⁸ The employer will be held liable for failing to take required measures to remove alleged conduct, unless the employer is able to prove that every ‘reasonably practicable’ step was taken to ensure that the employee does not contravene the EEA.²⁹⁹

²⁹⁶ Employment Equity Act 55 of 1998 Act 55 of 1998, section 60 (1) – (4).

²⁹⁷ Employment Equity Act 55 of 1998 Act 55 of 1998, section 60.

²⁹⁸ Le Roux R, Rycroft A, Orleyn T *Harassment in the Workplace: Law, policies and processes* (2010) 1st ed Durban: LexisNexis 131.

²⁹⁹ Employment Equity Act 55 of 1998, section 60 (2)-(4), places a duty on employers’ and states that an employee that had allegedly contravened a provision or any conduct while at work, such conduct had to be reported immediately to the employer. The employer is obligated to discuss with all parties and take measures in order eradicate said contravening conduct to comply with the Act. However, if such employer had failed to take required measures to eradicate proven contravention, then employer will be deemed liable, unless the employer can prove that every ‘reasonably practicable’ measure was done to prevent employee’s contravention.

In *SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Ltd and Burger*³⁰⁰ the Labour Court applied section 60 of the EEA to an employee that was subjected to a racial remark. Revelas J concluded that the remark was racist and that the employer had delayed in taking action and failed to protect the victim, which amounted to direct discrimination.³⁰¹

In *Aarons v University of Stellenbosch*³⁰² the applicant alleged that the university did not take necessary steps in terms of section 60 of the EEA, after she complained that her colleague had victimised, harassed and discriminated against her.³⁰³ The applicant also alleged that she was constructively dismissed and that the dismissal was automatically unfair in terms of section 187(1)(f) of the LRA.³⁰⁴ The Labour Court contended that ‘the grounds in section 6(1) of the EEA are no different from section 187(1)(f) of the LRA and harassment may be a form of unfair discrimination in terms of section 187(1)(f) of LRA.’³⁰⁵ However, the employee alleging harassment should make more than a bald allegation, as it should clearly prove why such harassment amounted to unfair discrimination, which the applicant failed to do.³⁰⁶ The Labour Court held that she was constructively dismissed, however the dismissal was not automatically unfair.³⁰⁷ Harassment had to be linked to any prohibited ground, which she failed to prove and her claim was unsuccessful.³⁰⁸ Therefore, if workplace bullying is not linked to a prohibited ground for harassment, then the conduct will not amount to unfair discrimination.

In *Shoprite Checkers (Pty) Ltd v Samka*, the arbitrator accepted that bullying and harassment of the complainant took place, however held that the insults by her colleagues not to be based on race,³⁰⁹ as alleged. The arbitrator found that the bullying resulted because colleagues ‘were fed up of her numerous complaints and grievances, which they found to be petty’.³¹⁰ The Labour Court and the Labour Appeal Court upheld the decision commenting that ‘there is a burden on appellant to show, on the balance of probabilities, that alleged conduct was not

³⁰⁰ *SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Ltd and Burger* (2006) 8 BLLR 737 (LC) 2.

³⁰¹ *SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Ltd and Burger* (2006) 8 BLLR 737 (LC) 39.

³⁰² *Aarons v University of Stellenbosch* 2003 24 ILJ 1123 (LC).

³⁰³ *Aarons v University of Stellenbosch* 2003 24 ILJ 1123 (LC) 1124D.

³⁰⁴ *Aarons v University of Stellenbosch* 2003 24 ILJ 1123 (LC) 1124A.

³⁰⁵ *Aarons v University of Stellenbosch* 2003 24 ILJ 1123 (LC) 1129I.

³⁰⁶ *Aarons v University of Stellenbosch* 2003 24 ILJ 1123 (LC) 1129I.

³⁰⁷ *Aarons v University of Stellenbosch* 2003 24 ILJ 1123 (LC) 1130C.

³⁰⁸ Calitz K B “Bullying in the Workplace: The Plight of South African Employees” *PER/PELJ* 2022 (25) DOI 14.

³⁰⁹ *Shoprite Checkers (Pty) Ltd v Samka* 2018 39 ILJ 2347 (LC) 10.

³¹⁰ *Shoprite Checkers (Pty) Ltd v Samka* 2018 39 ILJ 2347 (LC) 11.

rational and amounts to unfair discrimination.’³¹¹ Furthermore, Labour Court contended that ‘an allegation of harassment even if it did exist, cannot and will not meet the requirements in section 6(3) read with section 11 of the EEA, where more is required before an employer could be held liable in terms of the EEA, as with the appellant that based harassment ‘on an arbitrary ground’ which is clear from the wording of section 11(2) of the EEA.’³¹²

In terms of section 11(2) of the EEA, if the alleged unfair discrimination is based ‘on an arbitrary ground, then the complainant must prove, on the balance of probability that the conduct alleged was not rational, that it amounts to discrimination and discrimination was unfair’.³¹³ Furthermore, the complainant alleged that the employer was liable in terms of section 60 of the EEA for racial abuse by a customer.³¹⁴ In terms of section 60 of the EEA, an employer can be held liable for discriminatory conduct of an employee, if it is reported and the employer did not consult the parties and took no measures to eliminate the conduct.³¹⁵ However, if employer is able to prove that it did all ‘reasonable practicable’ to eliminate the contravened conduct, the employer will not be held liable.³¹⁶ The Labour Appeal Court contended that section 60 only applies to liability of an employer for the conduct of their employees and cannot be held liable for the conduct of a customer.³¹⁷

Similar to the two above-mentioned cases in *Private Sector Workers Trade Union on behalf of Opperman and Gerrie Ebersohn Attorneys*³¹⁸ the employee that failed to prove that crude remarks and unreasonable reprimands was a form of harassment based on prohibited ground.³¹⁹

The EEA’s Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices defines ‘harassment’ as:

³¹¹ *Samka v Shoprite Checkers (Pty) Ltd* 2020 41 ILJ 1945 (LAC) 23.

³¹² *Samka v Shoprite Checkers (Pty) Ltd* 2020 41 ILJ 1945 (LAC) 23.

³¹³ Employment Equity Act 55 of 1998, section 11(2).

³¹⁴ Calitz K B “Bullying in the Workplace: The Plight of South African Employees” *PER/PELJ* 2022 (25) DOI 15.

³¹⁵ Calitz K B “Bullying in the Workplace: The Plight of South African Employees” *PER/PELJ* 2022 (25) DOI 15.

³¹⁶ Calitz K B “Bullying in the Workplace: The Plight of South African Employees” *PER/PELJ* 2022 (25) DOI 15.

³¹⁷ *Samka v Shoprite Checkers (Pty) Ltd* 2020 41 ILJ 1945 (LAC) 13.

³¹⁸ *Private Sector Workers Trade Union on behalf of Opperman and Gerrie Ebersohn Attorneys* 2019 40 ILJ 1159 (CCMA).

³¹⁹ *Private Sector Workers Trade Union on behalf of Opperman and Gerrie Ebersohn Attorneys* (2019) 40 ILJ 1159 (CCMA) 1174A.

“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 to and experiences negative consequences of such 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.”³²⁰

The above definition is linked to section 6(1) and subsection (3) of the EEA.³²¹ It is argued that in the case of workplace bullying an employee may not always be able to claim unfair discrimination on a listed ground, however such an employee may obtain relief by claiming unfair discrimination on any arbitrary ground.³²²

3.5.3.1 Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace Notice

The EEA and the Code of Good Practice on the Handling of Sexual Harassment Cases (hereafter referred to as ‘the Code’) protects employees from sexual harassment in the workplace.³²³ The Code ‘promotes the implementation and development of procedures and policies that creates workplaces that are free from sexual harassment, where employees and employers respect each other’s integrity, dignity, privacy and the right to equality in the workplace.’³²⁴ Since workplace bullying is conduct of a non-sexual nature that does not fall within the definition of ‘sexual harassment,’ the Code does not have find application in such cases and cannot provide protection against such conduct.

3.5.4 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (‘PEPUDA’)

³²⁰ Employment Equity Act 55 of 1998, Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practice in the EEA, section 19.2.2.

³²¹ Constitution of the Republic of South Africa, section 6(1), (3).
directly or indirectly against anyone on one or more grounds in terms of subsection (3).”

³²² Employment Equity Act 55 of 1998, section 6(1) “...or on any other arbitrary ground.”

³²³ Employment Equity Act 55 of 1998, Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, Notice 1357 (2005), schedule 1; schedule 3(1) of the Code defines sexual harassment as ‘unwanted conduct of a sexual nature is distinguished from welcome and mutual behaviour’; see Labour Relations Act 66 of 1995, Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, schedule 1(1);

³²⁴ Amended Code of Good Practice on the Handling of Sexual Harassment Cases, schedule 1.3.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('PEPUDA') prohibits unfair discrimination³²⁵ however, PEPUDA only has application to 'persons' that the EEA does not protect,³²⁶ such as those not defined as an 'employee.' PEPUDA section 1 defines discrimination as "any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly-

- (a) that imposes burdens, obligations or disadvantage on; or
- (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds."³²⁷

PEPUDA provides that it is prohibited for 'any person' to harass another.³²⁸ In addition, PEPUDA places an obligation on the State and all persons to promote equality.³²⁹ The Equality Court has the power to institute inquiry for allegations of unfair discrimination, hate speech or harassment that has taken place and make an appropriate order under certain circumstances.³³⁰

PEPUDA defines harassment as:

"unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to-

- (a) sex, gender or sexual orientation, or
- (b) 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 a group."³³¹

³²⁵ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('PEPUDA'), gives effect to the Constitution in the prevention and prohibition of unfair discrimination and harassment by promoting equality, preventing hate speech and other related matters. South Africa has an international obligation as a signatory of treaties and customary international law in human rights to promote equality and outlaw unfair discrimination. These obligations are in the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Elimination of All Forms of Racial Discrimination.

³²⁶ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 Act 4 of 2000, section 5(3).

³²⁷ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 Act 4 of 2000, section 1.

³²⁸ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 Act 4 of 2000, section 11.

³²⁹ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 Act 4 of 2000, section 24(1)-(2); section 25(1) (a)-(b), states that the State has a duty to promote equality by creating awareness of fundamental rights towards mutual respect, equality and understanding, through creating and executing programmes for this purpose, as well as enacting legislation and other means to promote equality.

³³⁰ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 Act 4 of 2000, section 21(2)(a)-(p), includes an interim order, payment of damages for proven financial loss or in respect of impairment of dignity, pain and suffering, unfair discriminate or harassment and other orders.

³³¹ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 Act 4 of 2000, section 1.

While this definition of harassment is clear, the problem lies with the application of PEPUDA for victims of workplace bullying, as it excludes ‘any person’ that is protected in the EEA and harassment is prohibited only in terms of ‘sex, gender or sexual orientation or membership of a group’. In this instance, PEPUDA does not apply within a employment context and harassment is limited on the basis of discrimination. Bullied employees may raise a claim in terms of PEPUDA against colleagues or non-employees(customers), however would be unable to have recourse against an employer for their employees conduct.³³²

As a result of the scope of the application of PEPUDA, an employee who is subjected to bullying would be unable to seek relief in terms of PEPUDA.

3.5.5 Protection of Harassment Act 17 of 2011 (‘the PHA’)

The Protection of Harassment Act 17 of 2011 (‘the PHA’) came into force on the 27 April 2013, to provide protection orders against harassment and other matters therewith.³³³ The PHA defines harassment:

“directly or indirectly engaging in conduct that the respondent knows or ought to know-

(a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or related person by unreasonably-

(i) following, watching, pursuing or accosting of complainant or related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;

(ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or

(iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given

³³² Calitz K B “Bullying in the Workplace: The Plight of South African Employees” *PER/PELJ* 2022 (25) DOI 19.

³³³ The Protection of Harassment Act 17 of 2011, also to gives effect for consequential amendments to the Firearms Control Act, 2000 and other matters connected to it.

to, or brought to the attention of, the complainant, or a related person;

or

(b) amounts to sexual harassment of complainant of the complainant or a related Person”.³³⁴

‘Harm’ is defined in the PHA as ‘any mental, physical, psychological or economic harm’.³³⁵ It is submitted that this definition of harassment may apply to workplace bullying, since the conduct may be construed as a form of bullying in terms of ‘psychological harm,’ and may be a form of Delict. The PHA was designed to protect fundamental rights in the Constitution related to personal, employers and management issues.³³⁶

A complainant in terms of the PHA is defined as ‘any person who alleges that he or she is being subjected to harassment’.³³⁷ The PHA defines the respondent as ‘any person against whom proceedings have been lodged in terms of the statute or reasonably suspected of engaging in harassment.’³³⁸ Consequently, complainants of such conduct may apply to a court for a protection order against the person harassing them.³³⁹ Therefore, any person that contravenes the statute or fails to adhere to the protection order, is guilty of a criminal offence and liable on conviction to a fine or imprisonment for a period not exceeding five years.³⁴⁰ The PHA has application to ‘harassment’ inside the workplace and outside the workplace, in other words non-employees may use the PHA as recourse for such conduct.³⁴¹ Clear guidelines are provided by the CCMA on what constitutes harassment and cited ‘bullying’ as an example of harassment.³⁴² Complainant may lodge criminal charges against any person that harasses them

³³⁴ The Protection of Harassment Act 17 of 2011, section 1(1) (a)(i), (ii), (iii); (b).

³³⁵ The Protection of Harassment Act 17 of 2011 section 1(1).

³³⁶ Landman AA & Ndou MM ‘The Protection from Harassment Act and its implications for the workplace’ (2013) 22(9) *Contemporary Labour Law* 81-2; 90, stated that harassment in this Act is defined as both non-sexual harassment and sexual harassment. Landman contended that the Magistrate Court may order a protection order against harassment and must as soon as reasonably possible consider the application.

³³⁷ The Protection of Harassment Act 17 of 2011, section (1)(1);

³³⁸ The Protection of Harassment Act 17 of 2011, section 1(1)(a); (b), includes section 4 harassment by electronic communication; section 5 court investigation to obtain identity and address of respondent; section 6 South African Police Service may obtain name and address of respondent.

³³⁹ The Protection of Harassment Act 17 of 2011, section 2(1)-(3) deals with the application for a protection order. The complainant must apply to the clerk of the court. The clerk of court will inform the person of the remedies the Act offers. Any person with a material interest may apply for a protection order on behalf of the complainant, however written consent of the complainant is required, unless the person is unable to do so. The clerk of the court must immediately submit the application and affidavits to the court for determination. The rationale for the protection order is to protect the person against any further harm; section 10(1), the court may issue a protection order to prevent the respondent from engaging or attempting to engage in harassment.

³⁴⁰ The Protection of Harassment Act 17 of 2011, section 18(1)(a)-(b).

³⁴¹ Landman AA & Ndou MM (2013) 86.

³⁴² CCMA Info Sheet: HARASSMENT (2002) 1 provides that harassment constitutes ‘bullying; spreading malicious rumours or insulting someone (gender, race or disability); ridiculing or degrading someone;

at their workplace. The PHA's definition of harassment includes 'works or carries on business' which indicates that employees are protected in their workplaces.³⁴³

Therefore, harassment in terms of the PHA is seen as an offence and 'any person' that contravenes the statute's provisions will be liable to pay a fine or imprisonment, which is different to other statutes. Notably, the PHA is similar to the Harassment Act 1997 Chapter 40 of the UK, which will be discussed in Chapter 5 below.

3.5.6 Intimidation Act 72 of 1982

The Intimidation Act 72 of 1982 (referred to as 'the Intimidation Act'), criminalises any intimidating conduct that is in contravention of this statute,³⁴⁴ and if any person is found guilty will be liable on conviction for a fine not exceeding R40 000 or imprisonment not more than 10 years or both.³⁴⁵ In cases such as these, to prove conduct manifested as intimidation, there are three elements which should be proven to succeed, as in the case of *Jones v Daimler* that stated:

"The first element is that the threat must be uttered by the accused person. Secondly, the threat must be intended to convey or capable to be understood by the other person as a threat to be killed, assaulted or suffer harm as result of the unlawful act by the accused. Thirdly, the aim of the threat must have induced the other person to do or refrain from doing some act. If these elements fail to be proven, then the conduct will not amount to intimidation."³⁴⁶

It is submitted that these elements may be difficult to prove in a claim for workplace bullying, as there may not be witnesses and bullying may not have amounted to a 'threat.' However, courts have accepted grounds for terminating a contract of employment, if the threats uttered were serious and whether the employee had uttered them.³⁴⁷ In *Adcock Ingram Critical Care*

exclusion or victimisation; unfair treatment; overbearing supervision or misuse of power or position; threatens job security; undermining...'.
³⁴³ The Protection of Harassment Act 17 of 2011, section 1.

³⁴⁴ Intimidation Act 72 of 1982, section 1 states that "any person without a lawful reason and with intention to compel or induce any person or persons to abstain or assume or abandon any act or conduct, fears for his own or others safety or property"; see *NUMSA obo Tshabalala* (2008) 10 BALR 947 (MEIC) 952.

³⁴⁵ Intimidation Act 72 of 1982, section 1.

³⁴⁶ *Jones v Daimler* (2004) 7 BALR 815 (P) 31.

³⁴⁷ *Kompecha v Bite My Sausage CC* (1988) 9 ILJ 1077 (IC) 1081C-1083C, in the court's view intimidation by an employee of co-workers amounts to serious misconduct. Intimidation may be regarded as a serious threat of the employment relationship and employer was summarily entitled to dismiss the employee. The court found the dismissal was substantively fair but procedurally unfair, therefore the dismissal was an unfair

*v CCMA & Others*³⁴⁸ a shop steward had uttered the words “*You can treat this as a threat- there will be more blood on your hands*” during negotiations. The LAC concluded that these words could only mean that loyal employees will continue to be assaulted and killed by strikers, if management do not concede.³⁴⁹ Another analogous case was *Numsa obo Masina v Cobra Watertech*³⁵⁰ an employee threatened a fellow employee that something bad might happen to him, if he did not join the strike is an example of co-worker bullying. This is to illustrate that in cases of intimidation a ‘threat’ may not have to induce fear to succeed only intention.

The argument may be raised on whether workplace bullying could be linked to intimidation, however, all three elements may be difficult to prove, as the conduct may in some instances not manifest as a threat, but caselaw indicated that it may be possible as only intention is required.

3.5.7 Compensation for Occupational Injuries and Diseases Act (‘COIDA’)

COIDA is not labour statute, but a social security legislation that may find application for compensation for work-related illness related to workplace bullying. In this instance, work-related illnesses such as post-traumatic stress disorder (PTSD), as a result of bullying, in terms of COIDA,³⁵¹ and the employee does not have to prove exposure to extreme traumatic event or stressor.³⁵² COIDA does not specifically compensate employees for psychological injuries, however *Urguhart v Compensation Commissioner*³⁵³ and *Odayar v Compensation Commissioner*³⁵⁴ the court held that employees suffering from psychiatric condition which was work-related, as a result of witnessing traumatic events were entitled to compensation.

dismissal; see *Metal & Allied Workers Union & Others v Transvaal Pressed Nuts, Bolts and Rivets (Pty) Ltd* (1988) 9 ILJ 129 (IC) 145B-G; see Grogan J *Workplace Law* 10th ed (2009) Cape Town: Juta 216-7.

³⁴⁸ *Adcock Ingram Critical Care v CCMA & Others* (2001) 22 ILJ 1799 (LAC) 1799I, 1880I, was found guilty for intimidation. The arbitrator found the dismissal substantially unfair and reinstated employee, but employer appealed the decision in the LAC.

³⁴⁹ *Adcock Ingram Critical Care v CCMA & Others* (2001) 22 ILJ 1799 (LAC) 1804G-J-1805H, the court held that to constitute intimidation words need not be directed at a particular person(s), as words are intimidatory, if the intention is to scare or terrify and the appeal was upheld with costs.

³⁵⁰ *Numsa obo Masina v Cobra Watertech* (2009) 2 BALR 140 (MEIC) 140, the court concluded that for an offence of intimidation, proof of intent is required, but intend to induce fear is not required, as it is sufficient to induce the person against whom it directed to do or refrain from doing it. The court held that the threat towards the colleague for performing his duties constituted misconduct, therefore a dismissal was appropriate penalty in this instance.

³⁵¹ Compensation for Occupational Injuries and Diseases Act 130 of 1993.

³⁵² Rycroft A (2009) 1447.

³⁵³ *Urguhart v Compensation Commissioner* 2006 2 All SA 80 (E).

³⁵⁴ *Odayar v Compensation Commissioner* (2006) 27 ILJ 1477 (N) 1482G.

In *Odayar* case, the court was satisfied that section 65 of COIDA only requires the employee to prove that the post-traumatic stress disorder arose ‘*out of and in the course of employment*’.³⁵⁵ Therefore, these judgments indicate that an argument could be raised that they are entitled to compensation for either ‘temporary or permanent psychological disablement caused by bullying.’³⁵⁶ victims of workplace bullying may have an opportunity to pursue a claim for compensation from the fund for such conduct that emanates as a result of and during employment. The burden of proof lies with the victim to prove that the disease arose of the employee’s employment, as psychological diseases such as PTSD are not listed as compensable diseases.³⁵⁷

3.8 CONCLUSION

The purpose of this chapter is to discuss the South African legal framework to determine the measures which exist to protect employees subjected to workplace bullying.

The Violence and Harassment Convention, 2019 (V&HC190) and Violence and Harassment Recommendations, 2019 (R206), recognises violence and harassment at work as a human rights violation or abuse that threatens equal opportunity for decent work. This guarantees that all workers are to be treated with dignity and that any behaviour that causes harm including ‘bullying and mobbing’ are classified as ‘violence at work’. The Convention does not specifically address bullying, but it extends ‘unacceptable conduct’ to physical and psychological harm. SA as a states party to the ILO has ratified V&HC190. The V&HC190 places an obligation on the state to ensure the prevention and elimination of all forms of violence and harassment in the workplace. This includes the adoption of laws, policies and regulations to eliminate discrimination.

The OHSA places an obligation on employers to provide a safe and healthy working environment. The definition of ‘healthy’ suggests that psychological well-being may be included in this definition.³⁵⁸ The OSHC 1988 describes ‘health’ as not only the absence of disease, but includes “the physical and mental elements affecting health, which are directly

³⁵⁵ *Odayar v Compensation Commissioner* (2006) 27 ILJ 1477 (N) 1482G.

³⁵⁶ Malherbe and Calitz 2016 *Stell LR* 476 made this argument (albeit in the context of sexual harassment).

³⁵⁷ Calitz K B “Bullying in the Workplace: The Plight of South African Employees” *PER/PELJ* 2022 (25) DOI 20.

³⁵⁸ Occupational Health and Safety Act 85 of 1993, section 1(xviii), ‘healthy’ means “free from illness or injury attributable to occupational causes”.

related to safety and hygiene at work.”³⁵⁹ Workplace bullying may be regarded as an occupational risk, as it impacts on the worker’s health and safety.

The LRA may be applied to workplace bullying claims. It is submitted that in circumstances where a wide interpretation of unfair labour practice is followed, an employee who is subjected to workplace bullying may obtain recourse in terms of this area of the law. An employee may also claim to have been constructively dismissed where continued employment becomes intolerable.

Workplace bullying may be a form of harassment in terms of the EEA. Unfair discrimination is prohibited on listed ground and ‘on any other arbitrary ground’ or unlisted ground. Therefore, it may be submitted that the EEA may provide protection against workplace bullying or harassment on ‘arbitrary ground.’ In this instance, section 60 of the EEA may find application and may result in employer liability for workplace bullying. Furthermore, section 11(2) of the EEA states that where unfair discrimination is based on arbitrary grounds, the complainant must prove on the balance of probability that the conduct alleged was not rational, that it amounts to discrimination and discrimination was unfair’.

Since PEPUDA excludes persons who are covered by the EEA, it would be difficult to use the provisions of PEPUDA within an employment context without extending the application of the Act. PEPUDA defines harassment as ‘unwanted conduct’ and has requirements based on sex, gender, sexual orientation and group membership, which an even narrow interpretation of harassment. As a result of the scope of application of PEPUDA, an employee who is subjected to bullying would be unable to seek relief in terms of PEPUDA.

PHA provides for protection orders against harassment and is relevant to workplace bullying as it deals with harassment as ‘harm’ or offence. Similar to PHA, the Intimidation Act criminalises conduct that is intimidating. The elements which have to be present for intimidation to exist are, however, difficult to prove in a case of workplace bullying.

³⁵⁹ International Labour Organisation ‘Safe and healthy working environment free from violence and harassment’ (2020) Geneva: ILO available at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_751832.pdf (accessed 30 October 2022) 6; also see Occupational Health and Safety Convention 155 of 1981, Article 3(e).

COIDA may be utilised to claim compensation for work-related illnesses such as post-traumatic stress disorder ('PTSD'). However, it requires that the PTSD arose during the course of employment. Victims of workplace bullying may thus have recourse against the fund.

In the next chapter a discussion on workplace bullying and the Constitution will explore the notion on whether direct reliance on the Constitution is possible in cases of workplace bullying.



CHAPTER FOUR

THE CONSTITUTION AND WORKPLACE BULLYING

4.1 INTRODUCTION

It has been stated that our Constitution is a representation of one of the most egalitarian Constitutions of modern world.³⁶⁰ The constitutional values of freedom, equality and human dignity were envisaged to eradicate past injustices and discriminations in SA.³⁶¹

This chapter consists of a discussion on the workers' rights contained in the Constitution, which are relevant to workplace bullying. This chapter will assess whether a worker may obtain protection by relying directly on the Constitution.

4.2 DIRECT RELIANCE ON THE CONSTITUTION

One of the primary purposes of the LRA is to give effect to the fundamental rights conferred by the Constitution.³⁶² In *Sidumo & another v Rustenburg Platinum Mines LTD and another*³⁶³ the court contended that where legislation was enacted to give effect to the provisions of the Constitution, the litigant is not permitted to side-step that legislation and rely directly on Constitution, if there is no constitutional challenge to the enacted legislation. As in the case of *SANDU v Minister of Defence & others*³⁶⁴ related to section 23(5) of the Constitution, the Court stated that if there is legislation enacted to give effect to a constitutional right, the litigant cannot bypass the legislation and seek relief in terms of the constitutional right directly without challenging the legislation that failed to protect such a constitutional right. In addition, where Legislature enacted legislation in order to meet its constitutional obligations proper, then courts must give effect to such legislative purpose.³⁶⁵

In other words, the litigant has to prove that the legislation or statute so enacted does not protect their constitutional right before attacking the right directly being infringed in terms of the

³⁶⁰ Tladi D 'Breathing constitutional values into the law of contract: Freedom of contract and the Constitution' (2002) 35(2) *De Jure* 306.

³⁶¹ Barnard AJ A *Critical Legal Argument for Contractual Justice in the South African Law of Contract* (published LLD thesis, University of Pretoria, 2006) 137.

³⁶² *Sidumo & another v Rustenburg Platinum Mines LTD and another* (2007) 12 BLLR 1097 (CC) 1117.

³⁶³ *Sidumo & another v Rustenburg Platinum Mines LTD and another* (2007) 12 BLLR 1097 (CC) 1174.

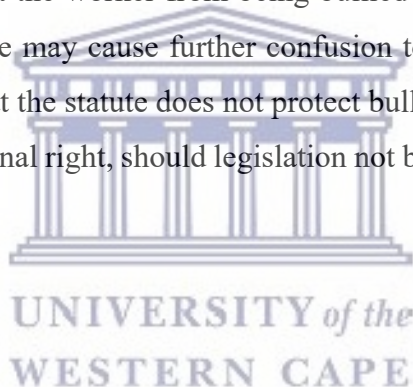
³⁶⁴ *SANDU v Minister of Defence & others* (2007) 9 BLLR 785 (CC) 51.

³⁶⁵ *NEHAWU V University of Cape Town & others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) 14.

Constitution. So first one has to prove that such legislation does not protect the right which it ought to protect under the Constitution, then the right being infringed in terms of the Constitution may form the basis of relief sought and one may challenge the constitutional right directly.

4.2.1 Dignity

The right to dignity is contained in section 10 of the Constitution that states that ‘everyone has a right to dignity and the right to have that dignity respected and protected.’³⁶⁶ Dignity is described as a combined concept that embraces the human claim to respect a person’s sense of ‘self-respect, mental tranquillity and privacy.’³⁶⁷ The PHA, is one of the statutes that gives effect to the aforementioned constitutional right. The right to dignity is one of the main focus points of this mini-thesis, as workplace bullying encroaches the dignity of the victim, seemingly it is not prohibited or legislated.³⁶⁸ The employee may obtain relief in terms of the PHA for a protection order against harassment, for example ‘stalking.’ It is submitted that this statute does not directly protect the worker from being bullied by an employer or co-worker and the ambiguity of the statute may cause further confusion to the extent of the protection. Therefore, it may be argued that the statute does not protect bullied workers and relief may be sought directly from constitutional right, should legislation not be amended and fails to uphold this right to dignity.



4.2.2 Unfair Discrimination

The labour statutes that were enacted to give effect to section 9 of the Constitution are the EEA and PEPUDA. The EEA provides limited protection to bullied workers’ in the workplace bullying, but only if the bullying is based on discrimination on either one or more grounds contained in section 6(1) of the EEA.³⁶⁹ Also ‘harassment’ should be based on the grounds

³⁶⁶ Constitution of the Republic of South Africa, 1996 section 10.

³⁶⁷ Milton J, Hunt PMA & Burchell EM *South African Criminal Law and Procedure Vol II: Common-law Crimes* 3rd ed (1996) Cape Town: Juta & Co 493, further stated that an individual’s self-respect and tranquillity is infringed through insults towards the person and affects their self-respect or self-esteem. Privacy is infringed by invading the person’s personal life and disclosure of their personal information.

³⁶⁸ Mikkelsen EG & Einarsen S ‘Bullying in Danish work-life: Prevalence and health correlates’ (2001) *European Journal of Work and Organizational Psychology* 10(4) 394; *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others* (2002) 23 ILJ 863 (LAC) 26-35; Friedman GS & Whitman JQ ‘The European Transformation of Harassment Law: Discrimination Versus Dignity’ (2003) 9 *Columbia Journal of European Law* 241; Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practice in the EEA, section 19.2.2; Constitution of the Republic of South Africa, 1996 Bill of Rights section 7(1).

³⁶⁹ Employment Equity Act 55 of 1998, section 6(1).

contained in the EEA. However, workplace bullying is not necessarily based on these listed grounds may use ‘on any other arbitrary ground’ to seek protection from unfair discrimination.

Section 9(1)³⁷⁰ of the Constitution states that ‘everyone has the right to be treated equally and entitled to equal protection and benefit from the law’.³⁷¹ In terms of section 9(3) of the Constitution, if the applicant alleges discrimination on a listed grounds, the respondent or employer has the onus to prove that the discrimination was fair.³⁷² Alternatively, if it is not based on the listed grounds the bullied applicant will be unassisted by section 9(3) of the Constitution, as the onus will be on the applicant to prove, that the differentiation had adversely affected them and it was unfair³⁷³ as bullying may be on unspecified grounds. The applicant must also show that this differentiation will impair his or her fundamental dignity, which in most cases may be difficult to prove.³⁷⁴

The Constitutional Court tabulated a test in *Harksen v Lane NO*³⁷⁵ whereby the first stage asks whether the provision differentiates between people or categories of people? Only in circumstances where the differentiation amounts to discrimination, the final question is whether the differentiation amounts to discrimination on the grounds listed and if not, it should be asked whether objectively speaking, the unlisted ground relates to attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings, or to affect them adversely in a comparably serious manner.³⁷⁶ If the

³⁷⁰ The Constitution of the Republic of South Africa, 1996 section 9(1).

³⁷¹ The Constitution of the Republic of South Africa, 1996 section 36, provides that “the Bill of Rights may be limited in terms of the law of general application, to the extent that the limitation is reasonable in an open and democratic society based on human dignity, equality and freedom, taking all the relevant factors into consideration, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.”

³⁷² Constitution of the Republic of South Africa, 1996 section 9(3), (4),(5).

³⁷³ Smith A ‘Equality constitutional adjudication in South Africa’ (2014) 14 *AHRJL* 615-16.

³⁷⁴ *Jordan & Others v S* (2002) 6 SA 642 (CC) 7, the Court contended that in order to enquire about the constitutional validity of a provision it requires the court to engage in a two-step process. The two-stage process is first to determine whether the impugned provision limits a constitutional right. If so, whether the right is justifiable limited in terms of section 36(1).

³⁷⁵ *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC) 44-45, the Constitutional Court adopted the test to include (1) whether the provision differentiated between people or groups and if there is a rational connection towards a legitimate government purpose. However, if the provision or Act has a rational connection, the Court will inquire if it amounts to unfair discrimination in terms of section 8(2), if not then it violates section 8(1) of the Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution and is unconstitutional.

³⁷⁶ *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC) 45 & 47, if discrimination on listed grounds then discrimination is established and unfairness would be presumed in terms of section 8(1) of the Interim Constitution, if not then it is based on attributes and characteristics which may impair one’s fundamental human dignity or adversely affect them and the discrimination could be either direct or indirect resulting from an act or omission. Secondly, if it is unfair discrimination on unspecified grounds, then unfairness must be established by the complainant.

discrimination is based on a listed ground, it will be presumed to be unfair, however if discrimination is on an unlisted ground, unfairness will have to be proven by the complainant.

Consequently, the *Harksen* test may be used in cases of unfair discrimination, but it may have application to workplace bullying cases. The test is used to determine whether differential treatment in legislation is constitutional in terms of the equality clause and not to determine whether a private employer's conduct towards an employee amounts to unfair discrimination. Section 9(4) of the Constitution provides that "unfair discrimination either directly or indirectly against anyone on one or more grounds in terms of section (3). National legislation must be enacted to prevent or prohibit unfair discrimination."³⁷⁷

So, the only option open to such employees would be to challenge the constitutionality of the EEA or to seek relief in terms of section 9 of the Constitution directly, as presently the legislation so enacted, fails to protect the right to equality of all bullied workers. This will then provide an avenue to those employees that are not protected by the EEA and PEPUDA to challenge the right in the Constitution directly. However, if legislation is amended, the statute may find application to workplace bullying as unfair conduct and only then will the provision be subjected to section 36 of Constitution.

4.2.3 Unfair Labour Practices

Section 23(1) of the Constitution provides the right to fair labour practice by protecting workers from unfair treatment by their employers.³⁷⁸ The LRA was enacted to give effect to section 23(1) of the Constitution. An employee is protected by the LRA and the Constitution, but those that are not classified as an "employee" have recourse through section 23(1) of the Constitution, if an employer treats them unfairly. However, as workplace bullying is not expressly listed as ground for protection under the LRA, employees may have to seek relief for instance from provisions such as unfair labour practice in terms section 186(2) of LRA.³⁷⁹ However, this still remains a challenge using the LRA, as the provision identifies specific requirements related to an unfair labour practice and workplace bullying fails to fall within the statutory definition.³⁸⁰

³⁷⁷ The Constitution of the Republic of South Africa, section 9(4).

³⁷⁸ The Constitution of the Republic of South Africa, 1996 section 23(1).

³⁷⁹ Labour Relations Act, section 186(2), 'means an unfair act or omission between an employee and an employer'.

³⁸⁰ *Nawa & Another v Department of Trade & Industry* (1998) 7 BLLR 701 (LC) 703, the respondents were

In *National Education Health and Allied Workers Union v University of Cape Town and Others*³⁸¹ the judge confirmed that the concept of ‘fair labour practice’ was difficult to define, but the link between workers and employers’ interest is essential in labour relations. This could be challenging in workplace bullying cases as it is not a listed ground, however with a wider interpretation of ‘unfair conduct’ in terms of section 186 (2) of LRA it may be extended to include workplace bullying unlike unfair discrimination.³⁸² Consequently, even with a wider interpretation of this provision, claimants may still have to relate it to the requirements of subsection 2(a), (b), (c) and (d) of the LRA.³⁸³ Therefore, as the provision does not protect the rights of the bullied employee, relief may be sought in terms of section 23(1) of the Constitution directly.

In addition, section 39(1)(b) of the Constitution provides that when courts interpret the BOR they must consider international law and the Conventions of the IOL that are useful.³⁸⁴ The United Nations Declaration of Human Rights³⁸⁵ should be included in this interpretation. In *NEHAWU v University of Cape Town*,³⁸⁶ the Constitutional Court confirmed these principles, that a court was required to give content to BOR or legislation and give effect to fundamental rights contained in the LRA, BCEA and EEA, it must first look for assistance from international instruments such as ILO Conventions.

In addition, the use of international law instruments and conventions widens the application of the current jurisprudence for cases of workplace bullying, as foreign law and international law must be considered when interpreting BOR.³⁸⁷ Workplace bullying is recognised as a human

allegedly victimising the applicants and claimed that their right to fair labour practice have been infringed or will be infringed in terms of LRA, schedule 7 Part B item 2(1)(b). Landman J found that the decentralisation agreement will not infringe the Act. Furthermore, the court held that there was no prima facie case for a claim of victimisation.

³⁸¹ *National Education Health and Allied Workers Union v University of Cape Town and Others* (2003) 3 SA 1 (CC) 33-34, the Court contended that to determine fairness in a case, is dependent on the circumstances of that case and involves a value judgment. Furthermore, defining this concept is not essential or wanted, as courts and tribunals seek assistance from domestic and international platforms. Domestic case law highlights equity jurisprudence of the old LRA 1956 and the quantities of unfair labour practice cases.

³⁸² Grogan J *Workplace Law* 10th ed (2009) Cape Town: Juta 74.

³⁸³ Labour Relations Act, section 186(2)(a)-(d).

³⁸⁴ The Constitution of Republic of South Africa 1996, section 39(1); section 233 states that 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.

³⁸⁵ United Nations Declaration of Human Rights, 1948.

³⁸⁶ *NEHAWU v University of Cape Town* (2003) 24 ILJ 95 (CC), 110G -111B; see EEA section 3(d); Conventions includes the Discrimination Convention 111 of 1958 for Employment and Occupation, The Occupational and Health Convention 155 of 1981 (ILO Convention) and the Occupational Health Services Convention 161 of 1985 and so forth.

³⁸⁷ Constitution of the Republic of South Africa, 1996, section 39(1)(b)-(c).

rights violation internationally and SA has limited jurisprudence in cases of workplace bullying, therefore using foreign cases opens the path for legal interpretation in claims of this nature.

4.2.4 Safe and healthy working environment

Section 24(a) of the Constitution states that ‘everyone has the right to an environment that is not harmful to their well-being or health, therefore the OHSA was enacted to give effect to this constitutional right.³⁸⁸ The definition of ‘health’ suggests that the duty extends to psychological well-being and may have application for workplace bullying cases. Most employees spend most of their time at work and it is obligatory that this environment should be reasonably safe and healthy for workers, however many workers are still being subjected to workplace bullying on a daily basis. This presents a problem, as workplace bullying significantly affects the environment in which people work by compromising their safety and health in an adverse and detrimental manner, as was indicated in Chapter Two by creating a toxic environment to employees. The ILO Convention, Article 16 confirms this principle,³⁸⁹ read in conjunction with section 24(a) of the Constitution ‘that a person has the right to an environment that is not harmful to their well-being.’³⁹⁰

Furthermore, a reciprocal duty is placed on employees at work, to take reasonable care of their own health and safety and that of others affected by their omissions and acts,³⁹¹ as workplace bullying takes place vertically and horizontally by employer and co-workers.

In terms of section 24 of the Constitution, the right to health and well-being in a workplace or work environment that is not harmful, which is not defined in the Constitution, but may find clarity in the National Environmental Management Act (‘NEMA’).³⁹² Although, section 24 is

³⁸⁸ Constitution of the Republic of South Africa, 1996 section 24(a), the right to environment.

³⁸⁹ Occupational Health and Safety Convention 155 of 1981, Article 16(1) reads that an employer is required to provide a ‘reasonable practicable’ workplace, processes, equipment and machinery controlled by them are safe and risk-free to health is applicable.

³⁹⁰ Constitution of the Republic of South Africa, 1996 section 24(a).

³⁹¹ Occupational Health and Safety Act 85 of 1993, section 14(a).

³⁹² National Environmental Management Act 107 of 1998, defines environment as “the surroundings within which humans exist ...”.

not confined to this definition, it provides a wider interpretation to include humans in an urban environment,³⁹³ such as a working environment.³⁹⁴

The World Health Organisation ('WHO') defines health as a "state of complete physical, mental and social well-being".³⁹⁵ In addition, Kidd supports the notion that 'a person's well-being may be detrimentally affected when environment is threatened or damaged'.³⁹⁶ This opinion has been inferred throughout this mini-thesis, that workplace bullying threatens a worker's right to a safe and healthy working environment, that affects their 'well-being.' The OHS Act was enacted to protect the employee at work from risks and diseases during the course and scope of employment, which is a physical injury to the worker's well-being. Workplace bullying affects the psychological well-being of the employee and OHS Act has a duty to protect them. Seemingly, it is submitted that as the statute does not recognise workplace bullying as a psychological injury, which infringes section 24(a) of the Constitution and therefore direct relief may be sought for the right to a healthy and safe environment in the Constitution.

4.2.5 Application of section 9 of the Constitution

It has been established that presently there is no law that governs workplace bullying and this has caused a lacuna or gap in law. As a result, it cannot be tested against section 36 of the Constitution, as it does not fall within the general application of the law as workplace bullying is not recognised as unfair conduct in statutes.³⁹⁷ Statutes were enacted to protect the human rights of individuals in terms of the Constitution, however this protection does not extend to victims subjected to workplace bullying. Therefore it is submitted that in order to provide a remedy to victims of workplace bullying, one will have to resort to directly challenging the rights infringed in terms of the Constitution such as section 9 or the equality clause. The equality clause guarantees everyone equal protection of the law and the right to have one's case heard.³⁹⁸

³⁹³ Glazewski J 'The Bill of Rights and environmental law' in Glazewski J & Du Toit L (eds) *Environmental Law in South Africa* 2nd ed (2005) Butterworth: LexisNexis 76.

³⁹⁴ Du Plessis 'South Africa's Constitutional Environmental Right (Generously) Interpreted: What is in it for Poverty?' (2011) 27 *SAJHR* 279 292 293.

³⁹⁵ The Constitution of the World Health Organisation (1978), preamble.

³⁹⁶ Kidd M 'Environment' in Currie I & De Waal J (eds) *The Bill of Rights Handbook* 6th ed (2018) Cape Town: Juta 522.

³⁹⁷ *August v Electoral Commission* 1999 (3) SA 1 (CC) 23, the Commission's omission had effectively denied prisoners the right to vote and because there was no authoritative law, there was no justifying the infringement in terms of section 36.

³⁹⁸ The Constitution of the Republic of South Africa, 1996 section 9(1).

Disputes related to the BOR as direct applicable law, supersedes ordinary law and any inconsistent conduct to the extent that the legal remedies are inadequate or gives an improper effect of the fundamental rights, then the BOR creates its own remedies.³⁹⁹ As a result of no law or provision against workplace bullying, the limitation clause or section 36 of the Constitution cannot be tested in order to establish whether this limitation perpetuates unequal treatment of victims subjected to workplace bullying. In other words, had such legislation existed, then application of section 36 of the Constitution would have been possible. As a result, the argument could be raised that in the absence of such legislation/statute, direct reliance on the Constitution may be possible.

In this instance, if one is to seek a remedy in the Constitutional Court for a victim of workplace bullying using section 9 of the Constitution, then it would allow the Court to adjudicate on the matter in order to compel the legislator, to enact/amend such legislation so that it could be tested in terms of section 36 of the Constitution. As there is no known precedence for such a case placed in front of the Court, the outcome of such a matter is still unknown. Consequently, *Harksen v Lane NO*⁴⁰⁰ might provide a benchmark for an inquiry into the violation of the equality clause by providing a two stage analysis for a violation of the right to equality and whether it amounts to unfair discrimination, as discussed above. This Constitutional Court judgment provided a test that could serve as an avenue for complainants of workplace bullying in the absence of legislation and an opportunity to explore the outcome of such a matter.

Therefore, one could draw an hypothesis that as a result of no legislation to regulate workplace bullying it cannot be subjected to section 36 of the Constitution and as the Constitutional Court had not dealt with such an issue, as it is novel. The *Harksen* case will serve as a measure to determine whether legislation should be enacted for workplace bullying.

It may be concluded that if such a matter were to be adjudicated in the Constitutional Court it might provide an order that legislation should be enacted, insofar as providing application for section 36 of the Constitution. Furthermore, it might establish that the right to equality and to be treated fairly should be extended to victims of workplace bullying, as the current legislation lacks such protection. This right is guaranteed by the Constitution however, statutes fail to

³⁹⁹ Currie I & De Waal *The Bill of Rights Handbook* (2013) 6th ed Cape Town: Juta & Co (Pty) Ltd 31.

⁴⁰⁰ *Harksen v Lane NO* 1998 (1) SA 300 (CC) 44-47.

protect workers against such conduct and therefore direct reliance on the Constitution is the way forward.

4.3 CONCLUSION

This chapter provided a discussion on worker's rights guaranteed in the Constitution which are relevant to workplace bullying. Furthermore, it provided an assessment on workers' direct reliance on the Constitution. South Africa's Constitution provides constitutional values based on freedom, equality and human dignity in order to remove injustices and discriminations from its historical past.⁴⁰¹

Therefore, the Constitution developed and enacted statutes in order to give effect to these fundamental rights. One of these statutes is the LRA, which primary purpose was to bring workers' rights in line with the Constitution. Where legislation has been enacted to give effect to constitutional provisions a litigant should seek relief in terms of the legislation.⁴⁰² In other words, the litigant may only bypass legislation and seek relief in terms of the Constitution directly, if there is a constitutional challenge to the statute in question. However, in order to directly challenge a constitutional right in the Constitution the legislation that failed to protect such a right must be challenged before circumventing it.⁴⁰³

The right to dignity in terms of section 10 of the Constitution guarantees that 'everyone dignity should be protected and respected.'⁴⁰⁴ It is submitted that the dignity of victims subjected to workplace bullying is infringed. Dignity was described as a human claim to respect the person and their mental stability which may be affected through insults and invading their privacy.⁴⁰⁵ The statute that gives effect to section 10 of the Constitution is the PHA. The PHA was enacted to protect and respect the dignity of workers in terms of the Constitution, but it fails to expressly recognised workplace bullying as an infringement of workers' rights. Employees may seek relief in terms of section 10 of the Constitution directly in order to protect them against workplace bullying which infringes their dignity in the workplace.

In cases of unfair discrimination, an employee who is subjected to workplace bullying has to prove that the bullying is based on one or more grounds contained in the EEA. The employee

⁴⁰¹ Barnard AJ (2006) 137.

⁴⁰² *Sidumo & another v Rustenburg Platinum Mines LTD and another* (2007) 12 BLLR 1097 (CC) 1174.

⁴⁰³ *SANDU v Minister of Defence & others* (2007) 9 BLLR 785 (CC) 51.

⁴⁰⁴ Constitution of the Republic of South Africa, 1996 section 10.

⁴⁰⁵ Milton J, Hunt PMA & Burchell EM (1996) 493.

has no recourse if workplace bullying is not based on listed grounds, however may rely ‘on any arbitrary ground,’ but must prove that it amounts to unfair discrimination. The EEA and PEPUDA were enacted to protect employees from unfair discrimination where it is based on grounds provided for in the statutes. Consequently, the employee is not protected against workplace bullying and therefore has to seek direct reliance of section 9 of the Constitution to be treated equally.

Furthermore, section 23(1) of the Constitution provides the ‘right to a fair labour practice’ to prevent unfair treatment by employers.⁴⁰⁶ Those workers that are by definition ‘employees’ under the protection of the LRA, may use this right to challenge unfair treatment, however if you are not an employee by definition in terms of the LRA, you may seek relief directly from section 23 of the Constitution. However, employees that are workplace bullied may not find protection, as the statute is not specific to such conduct. The employee may use constructive dismissal as ‘employer made continued employment intolerable’ in section 186 (1)(e) of the LRA and also unfair labour practice in terms of 186 (2) of the LRA as ‘unfair act or omission.’

Unfortunately, the former only applies in cases of dismissals and workplace bullying does not fall into the requirements of the latter. However, if the statute includes workplace bullying as ‘unfair conduct,’ then the provision may have application.

Employees have a right to a safe and healthy environment in terms of section 24 of the Constitution, which is obligatory of an employer. Workplace bullying affects this right, as it is detrimental to their health and safety by creating a toxic environment as illustrated in Chapter Two. OHSA⁴⁰⁷ was enacted *inter alia* to give effect to section 24 of the Constitution. The trajectory throughout this mini-thesis was to establish whether the current statutes protect workers’ rights from workplace bullying and whether amendments are required to extend such protection. The OHSA protects workers’ health and safety in the workplace if it is related to the scope of their jobs, but the duty includes ‘psychological well-being.’ Workplace bullying threatens the well-being and health of an employee, and therefore workplace bullying should be regarded as a psychological injury at work.

Section 24 of the Constitution guarantees that ‘everyone has a right to an environment that is not harmful to their health and well-being’. The OHSA definition of ‘health’ includes

⁴⁰⁶ The Constitution of the Republic of South Africa, 1996 section 23(1).

⁴⁰⁷ Occupational Health and Safety Act 85 of 1993.

psychological well-being in terms of section 1 of the OHS Act. In addition, caselaw indicated that courts may hold employers vicariously liable for negligence. Therefore, jurisprudence has extended the protection to psychological harm, however the statute does not recognise workplace bullying as a psychological harm. In this instance, the statute does not protect a bullied worker and relief may be sought in terms of section 24 of the Constitution directly, in the absence of amendment.

It may be concluded that presently there is a gap or lacuna in law for protection against workplace bullying. Therefore, section 36 of the Constitution does not have general application of the law for workplace bullying. As a result, direct application of sections of the Constitution may be possible, such as section 9 (equality clause) in order to protect the right to be treated equally in the absence of legislation. This may provide an opportunity for the Constitutional Court to adjudicate on the matter, insofar as a remedy that may direct Legislature to enact legislation for workplace bullying in order to test the provision in terms of section 36 of the Constitution. The Court may compel Legislature to protect victims from such conduct by enactment of statute.

It is submitted that workplace bullying is an infringement of workers' fundamental rights, such as human dignity, equality and fair labour practices. This chapter illustrated the circumstances under which employees who are subjected to workplace bullying may seek relief in terms of the Constitution directly, as a result of the shortcomings in legislation. South Africa is still lagging behind several countries, like the UK, to seriously address workplace bullying in employment legislation and case law. This will be discussed in detail in Chapter Five.

The chapter that follows contains a discussion on the UK's approach to workplace bullying. It will compare the statutory framework in SA with the laws in the UK which exist in regulating workplace bullying.

CHAPTER FIVE

APPROACH TO WORKPLACE BULLYING IN THE UNITED KINGDOM

5.1 INTRODUCTION

Workplace bullying interest and awareness emerged in the UK in the 1990s.⁴⁰⁸ Over the next decade bullying resonated with a many of the UK public and supported by empirical evidence, it was suggested that a substantial part of UK's working population perceived themselves to be bullied.⁴⁰⁹

The UK has no constitution that is in a written constitutional instrument, however the legal system is founded in statutes passed by Parliament and in the common law, which was developed over time in court judgments.⁴¹⁰

The UK has a parliamentary system of governance, Westminster Parliament being the supreme law-making body. Furthermore, the 'doctrine of supremacy (or sovereignty) of Parliament is that the courts accept that legislation enacted by Parliament takes precedence over the common law (judge-made law developed through cases).'⁴¹¹ The UK joined the European Community ('EU') on the 1 January 1973 and the European law was incorporated into UK law by the European Communities Act 1972 ('ECA').⁴¹² However, the EU law that was applied under the provisions of the ECA, only applied until the 31 January 2022 when UK exited.⁴¹³ As a

⁴⁰⁸ Hoel H 'Workplace Bullying in United Kingdom' in *Workplace Bullying and Harassment: 2013 JILPT Seminar on Workplace Bullying and Harassment* (2013) in JILPT Report *The Japan Institute for Labour Policy and Training (JILPT) 12* 61, attributed this awareness to Andrea Adams, who is believed to be the originator of the term 'workplace bullying' exploring the problems and significance within UK workplaces.

⁴⁰⁹ Smith A 'Equality constitutional adjudication in South Africa' (2014) 14 *AHRJL* 616, stated that the implications for organisations, individual and society gradually moved this issue towards trade union agenda, private and public sectors, as well as governmental agencies.

⁴¹⁰ The justice system and the constitution available at <https://www.judiciary.uk/about-the-judiciary/our-justice-system/jud-acc-ind/justice-sys-and-constitution/> (accessed 31 October 2022).

⁴¹¹ Rab S 'Legal systems in the UK (England and Wales): Overview' Thomson Reuters Practical Law available at [https://uk.practicallaw.thomsonreuters.com/5-636-2498?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/5-636-2498?transitionType=Default&contextData=(sc.Default)&firstPage=true) (accessed on 1 November 2022).

⁴¹² Rab S 'Legal systems in the UK (England and Wales): Overview' Thomson Reuters Practical Law available at [https://uk.practicallaw.thomsonreuters.com/5-636-2498?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a127154](https://uk.practicallaw.thomsonreuters.com/5-636-2498?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a127154) (accessed 1 November 2022) 11.

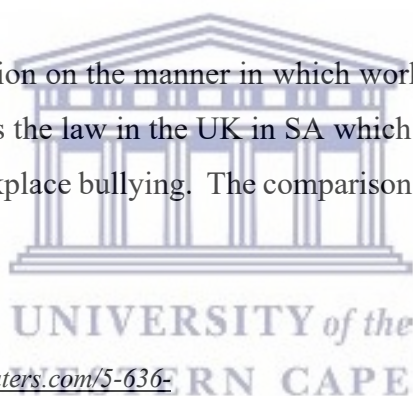
⁴¹³ Rab S 'Legal systems in the UK (England and Wales): Overview' Thomson Reuters Practical Law available at

result, the EU law continued to apply in and to the UK, during the transitional period, as if it was still a Member State until 31 December 2020, whereby the EU law in force at the time, became part of UK's domestic legal framework.⁴¹⁴ UK is one of five permanent members of United Nations ('UN') and part of the UN Security Council.⁴¹⁵

A point to note, is that SA legal system draws from various legal systems and English common law is amongst them.⁴¹⁶ SA's courts often refer to English jurisprudence as precedence, when applying the law.⁴¹⁷

The UK has been identifying and addressing workplace bullying since 1997 at political, organisational and legislative platforms.⁴¹⁸ The UK took the first steps towards addressing workplace bullying in 1997 through government, trade unions and employers initiatives.⁴¹⁹ The UK's National Bullying Helpline (hereafter referred to as 'Bullying Helpline'), is a charitable organisation that provides advice and assistance to individuals with various types of bullying issues in UK.⁴²⁰

This chapter contains a discussion on the manner in which workplace bullying is regulated in the UK. This chapter compares the law in the UK in SA which may be used by employees to protect themselves against workplace bullying. The comparison between the countries is made



[https://uk.practicallaw.thomsonreuters.com/5-636-2498?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a127154](https://uk.practicallaw.thomsonreuters.com/5-636-2498?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a127154) (accessed 1 November 2022) 11.

⁴¹⁴ Rab S 'Legal systems in the UK (England and Wales): Overview' Thomson Reuters Practical Law available at

[https://uk.practicallaw.thomsonreuters.com/5-636-2498?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a127154](https://uk.practicallaw.thomsonreuters.com/5-636-2498?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a127154) (accessed 1 November 2022) 11.

⁴¹⁵ Butchard P 'The UK at the United Nations: How the UN Works' Brief Paper (2021) 9210 *House of Commons Library* 4-5, UK holds significant influence and holds a permanent seat with veto power on the Security Council.

⁴¹⁶ Lawrence H, Pekeur A & Nathan E 'Legal systems in South Africa: overview' Thomson Reuters Practical Law available at

[https://uk.practicallaw.thomsonreuters.com/w-030-7871?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-030-7871?transitionType=Default&contextData=(sc.Default)&firstPage=true) (accessed 1 November 2022).

⁴¹⁷ Harthill S 'Bullying in the Workplace: Lessons from United Kingdom' (2008) 17(2) 247 *Minnesota Journal of International Law* 269.

⁴¹⁸ Harthill S (2008) 251 viewed UK as having a rich experience in preventing workplace bullying, but this had not been examined or drawn upon for comparative purposes.

⁴¹⁹ Harthill S (2008) 267, 272, in this instance, trade unions played a major role in the UK in placing workplace bullying on the legislative agenda and partnering with government and employers.

⁴²⁰ National Bullying Helpline 'About the National Bullying Helpline' 1 available at <http://www.bullyonline.org/workbully/worbal.htm>. (accessed 10 July 2019).

to determine whether SA can learn any lessons from the UK, insofar as workplace bullying is concerned.

5.2 PREVALENCE OF WORKPLACE BULLYING IN THE UK

A study in 2000 was conducted by Hoel and Cooper based on 5,288 individuals out of one million people from more than 70 organisations to establish the prevalence of workplace bullying in workplaces, reported that one in ten people (10.6%) have been bullied within last six months.⁴²¹ In 2009, the Centre for Organisation Research and Development ('CORD') published a report known as 'Workplace Harassment and Bullying in 2009: Report to UNISON,' which found that over a third of Union of Public Service Employees ('UNISON') members were bullied over a period of six months and more than quarter of them had left their jobs in order to end the situation.⁴²² UNISON conducted survey on bullying in 2011 by Portsmouth University for over 6000 UNISON members, where it was found that six(6) out of ten (10) (60%) workers had been bullied or witnessed bullying over a period of six months.⁴²³

Then in 2015, Incomes Data Research on behalf of UNISON conducted a survey called UNISON Local Government Membership Survey, where it was reported that since 2008 abusive incidences at work was on the increase by 60%, with respondents subjected to some form of abuse such as bullying or harassment or verbal or physical threats and sometimes violence.⁴²⁴ The impact, costs and consequences of bullying in the UK has received enormous attention.⁴²⁵

⁴²¹ Hoel H & Cooper CL 'Destructive conflict and bullying at work report' (2000) University of Manchester Institute of Science and Technology British Occupational Health Research Foundation (BOHRF) available at <http://www.bollettinoadapt.it/old/files/document/19764Destructiveconfl.pdf> (accessed 10 June 2019) 3- 5, this study reported an increase from one in four (24.7%) when the period was extended to five years and one in two (46.5%) had witness bullying in the same period. This was the 'first nation-wide survey of workplace bullying across a number of occupations and industrial sectors in Britain.' The purpose of the study was to put mechanisms in place to prevent and reduce the prevalence of workplace bullying.

⁴²² UNISON 'Tackling bullying at work: A UNISON guide for safety reps' 4; 7 available at <https://www.unison.org.uk/content/uploads/2013/07/On-line-Catalogue216953.pdf> (accessed 10 August 2019), the survey showed the impact of workplace bullying on the health of staff was high. A UNISON survey in 2009 found that 795 (10.7%) of members had been harassed in the last six month at work.

⁴²³ UNISON 'Tackling bullying at work: A UNISON guide for safety reps' 7 available at <https://www.unison.org.uk/content/uploads/2013/07/On-line-Catalogue216953.pdf> (accessed 10 August 2019).

⁴²⁴ UNISON 'Harassment at work: A UNISON guide' (2016) 5 available at <https://www.unison.org.uk/content/uploads/2016/12/24159.pdf> (accessed 10 August 2019).

⁴²⁵ Hoel H (2013) 62-63, however in many countries the focus seems to be on the individual consequences of bullying, unlike the UK the costs consequences for the organisation was the main focus.

The Interagency Round Table on Workplace Bullying indicated that victims do not report their experiences of workplace bullying via grievance and cooperate investigations, because they fear their perpetrators.⁴²⁶ Consequently, the Dignity at Work Partnership commissioned a report assessing the cost of workplace bullying.⁴²⁷ Several countries have implemented codes of good practice and legislation to regulate workplace bullying,⁴²⁸ however a comprehensive comparative analysis is beyond the scope of this mini-thesis and limited to only a few highlights such as UK's approach to workplace bullying remains the main focus of this chapter.

5.3 DEFINING WORKPLACE BULLYING IN THE UK

Bullying is not specifically defined in UK law, similarly to SA however, there are seemingly commonalities on the effect of this unwelcome negative conduct on the bullied victim. Notwithstanding the fact that there is no "accepted" definition in the UK Rayner & Cooper defines bullying as "[a] situation where one or several individuals persistently over a period of time perceive themselves to be on the receiving end of negative actions from one or several persons, in a situation where the target of bullying has difficulty defending him or herself against these actions".⁴²⁹ A once-off incident is not a form of bullying.⁴³⁰ It may be noted that the common thread in these definitions, is that workplace bullying is 'negative behaviour' that

⁴²⁶ Interagency Round Table *Workplace Bullying Preventing workplace bullying: A practical guide for employers* (2008a) New South Wales: Work Cover Inc 6, summarized guidelines of consequences, if bullying is unreported, identified and handled. Individual consequences (for example anxiety, panic attacks) cause severe psychological and physical problems and impact peers, customers, clients, family members and others. Cost consequences (for example reduced productivity, profitability, absenteeism, increase recruitment and training).

⁴²⁷ Giga SI, Hoel H & Lewis D *The costs of Workplace Bullying* (2008a) Unite the union/Department for Business, Enterprise and Regulatory Reform: London 3-4, reported on a systematic review research on the costs and implications of bullying on the individuals, organisations and society. The evidence presented indicated a substantial cost to the individual, society and organisations. The recommendation was that employees, employee representatives and employers should regard bullying as a serious matter and allocate time and resources to prevent and control such incidences. The consequences of bullying for the individual are psychological, economic, physical and social and organisation is faced with an increase in absenteeism and high turnover, decrease in performance and productivity; see also Hoel H, Faragher B and Cooper CL 'Bullying is detrimental to health, but all bullying behaviours are not necessarily equally damaging' (2004) 32(3) *British Journal of Guidance and Counselling* 384; Quine L 'Workplace bullying in NHS community trust: staff questionnaire survey' (1999) 318 *British Medical Journal* 228; Quine L 'Workplace bullying in nurses' (2001) 6(1) *Journal of Health Psychology* 74.

⁴²⁸ Rycroft A 'Workplace Bullying: Unfair Discrimination, Dignity Violation or Unfair Labour Practice?' (2009) 30 *ILJ* 1448, highlighted that only a few countries have undertaken to deal with discrimination by clearly differentiating bullying from harassment, for example in Ireland workplace bullying has a distinct category and harassment must be on one of the nine grounds to prevent discrimination; see also Kaplan JF 'Help is on the way: A recent case sheds light on workplace bullying' (2010) 47 *Houston Law Review* 142, in France and Sweden legislation was passed outlawing workplace bullying making it illegal, Germany developed a common law approach and England uses the Protection from Harassment Act.

⁴²⁹ Rayner C & Cooper C 'Workplace bullying: myth or reality – can we afford to ignore it?' (1997) 18(4) *Leadership & Organization Development Journal* 211.

⁴³⁰ Rayner C, Hoel H & CL Cooper 'Workplace bullying: What we know, who is to blame, and what can we do?' (2002) London: Taylor Francis 24.

causes harm and humiliation to the victim or a group by one or more persons. The UK does not have a specific statute to regulate workplace bullying,⁴³¹ which is similar to SA.

5.4 UK COMMON LAW

In terms of UK Common law, employees subjected to bullying may use one of several implied terms of the contract of employment, for instance where the employer should not subject employee to bullying, as employer has a duty to provide a safe working environment and prevent risks against psychiatric or even physical injury.⁴³²

In Walden's opinion, employers must not only have a general approach to foreseeable risks, but also ought to be reasonably aware that employees are susceptible to other risks.⁴³³

In *Swan v Monash Law Book Co-operative*⁴³⁴ the case concerned workplace bullying. The plaintiff claimed damages for pain and suffering and pecuniary loss from defendant (employer) she sustained during her scope of employment.⁴³⁵ The plaintiff complained of book being thrown at her and threats of termination.⁴³⁶ She reported that the defendant was moody, aggressive and nasty with her and other staff members.⁴³⁷ The Board had assured her that they would put measures in place to address this matter and that it would not happen again, but this was not done.⁴³⁸ On one occasion, plaintiff and defendant had a major conflict and she left the work site complaining of workplace bullying, which may have precipitated a breakdown causing depression and anxiety.⁴³⁹ The Court found the defendant's conduct towards the

⁴³¹ Suff Rachel 'Harassment and bullying at the work: Understand the legal positions of bullying and harassment at work, and how employers and employees can address the problem' (2022) available at <https://www.cipd.co.uk/knowledge/fundamentals/emp-law/harassment/factsheet#ref> (accessed 1 November 2022).

⁴³² Suff Rachel 'Harassment and bullying at the work: Understand the legal positions of bullying and harassment at work, and how employers and employees can address the problem' (2022) available at <https://www.cipd.co.uk/knowledge/fundamentals/emp-law/harassment/factsheet#ref> (accessed 1 November 2022).

⁴³³ Walden RM and Hoel H 'A preliminary analysis of how bullying and harassment issues are filtered through the constructs of UK law' (2004) *The Fourth International Conference on Bullying and Harassment in the Workplace* University of Bergen Norway 115.

⁴³⁴ *Swan v Monash Law Book Co-operative* (2013) VSC 326 WL 3220357, the Court had to adjudicate the scope of duty of care of the employer, after employee complained about bullying by another employee (manager) and whether employer breached such duty by failing to act on complaints of such an employee.

⁴³⁵ *Swan v Monash Law Book Co-operative* (2013) VSC 326 WL 3220357 1, the plaintiff alleged that as a result of the negligence to the defendant, she was exposed to an unsafe workplace that subjected her to bullying, harassing and intimidating conduct. She was employed as an assistant to manager that allegedly bullied, harassed and intimidated her.

⁴³⁶ *Swan v Monash Law Book Co-operative* (2013) VSC 326 WL 3220357 38.

⁴³⁷ *Swan v Monash Law Book Co-operative* (2013) VSC 326 WL 3220357 55.

⁴³⁸ *Swan v Monash Law Book Co-operative* (2013) VSC 326 WL 3220357 56.

⁴³⁹ *Swan v Monash Law Book Co-operative* (2013) VSC 326 WL 3220357 57, also two months later, the

plaintiff to be disrespectful, arrogant and uncaring.⁴⁴⁰ The Court held that the defendant's conduct in the workplace was threatening and damaged the mental health and wellbeing of the plaintiff during her scope of employment with defendant.⁴⁴¹ The Court held further that the defendant did not exercise the standard of care reasonably expected of an employer in these circumstances.⁴⁴² The Court contended that defendant failed to take reasonable care for the safety of the plaintiff, in terms of her mental health in this respect.⁴⁴³ The plaintiff was awarded damages for pain and suffering and loss of enjoyment of life in the sum of \$ 300,000.⁴⁴⁴ In SA the Law of Delict is a form of Tort.

The SA common law is similar to the law in the UK in that both impose a duty on employers to take reasonable care of the safety of their employees in the workplace.⁴⁴⁵ SA legislation supports the common law in obligating employers to take reasonable and practicable measures to ensure that the workplace is safe and healthy.⁴⁴⁶

5.5 TORT OF HARASSMENT

Criminal law of harassment had substantial developments, such as the judicial recognition of the doctrine of psychological assault, criminal public nuisance and telephonic assault.⁴⁴⁷ There are several factors in the UK that contributed to this development such as employee expectations and behaviour, which resulted in employers implementing and enforcing anti-bullying policies.⁴⁴⁸ In addition, Parliament also passed several anti-harassment criminal laws, but to establish course of action for bullying may be difficult to prove criminal intent.⁴⁴⁹ As a result of the lacuna in criminal and civil law to address stalking and high-profile acquittals, the

defendant resigned as manager of the bookshop. The employer failed to implement contracts, job descriptions and policies promised. The plaintiff complained that the Board was slow to act, causing inconsistencies and contributed to the plaintiff's stress in the workplace.

⁴⁴⁰ *Swan v Monash Law Book Co-operative* (2013) VSC 326 WL 3220357 62.

⁴⁴¹ *Swan v Monash Law Book Co-operative* (2013) VSC 326 WL 3220357 153.

⁴⁴² *Swan v Monash Law Book Co-operative* (2013) VSC 326 WL 3220357 170, the Court cautioned that UK cases must be approached with care.

⁴⁴³ *Swan v Monash Law Book Co-operative* (2013) VSC 326 WL 3220357 177.

⁴⁴⁴ *Swan v Monash Law Book Co-operative* (2013) VSC 326 WL 3220357 264.

⁴⁴⁵ Tshoose C 'Employer's Duty to Provide a Safe Working Environment: A South African Perspective' (2011) 6(3) *JICLT* 165, SA common law does not include Torts.

⁴⁴⁶ Tshoose C (2011) 165.

⁴⁴⁷ Lawson-Cruttendon T & Addison N (1997) 4-6; *Regina v Bristow* *TIMES* (London) 1996; *Regina v Ireland* *TIMES* (London) 1996; *Regina v Johnston* *TIMES* (London) 1996. During 1980s and 1990s Parliament had passed several anti-harassment criminal laws.

⁴⁴⁸ Harthill S (2008) 251.

⁴⁴⁹ Lawson-Cruttendon T & Addison N (1997) 5-6, criminal laws required that an "intentional wrongdoing" had to be established in bullying conduct, which limited the application even with "psychological harm" was present.

court contended that although perpetrators engaged in “compulsive stalking” intent was insufficient.⁴⁵⁰ Thus, criminal law was arguably inadequate to deal with stalking-type behaviour.⁴⁵¹

In SA, the Law of Delict may be used for cases of *iniuria* (invasion of another’s rights for which one may bring an action)⁴⁵² or psychological harm caused by harmful conduct and civil action instituted, not criminal. The legal framework in SA recognises harassment as a Delict. It is submitted that in SA, vicarious liability could be a course of action against an employers for ‘harm’ caused by negligence and failure to take steps to prevent such conduct. In both instances, in order to instituted criminal charges, intent needs to be present, even if psychological harm was caused, therefore civil charges may be better suited in cases of workplace bullying.

5.6 INTERNATIONAL LAW OBLIGATIONS AND UK

The ILO has recognised workplace bullying within a broader context of violence at work.⁴⁵³ Consequently, this position has now been amended by the 108th International Labour Conference in June 2019, as discussed in Chapter Three.⁴⁵⁴

European studies have recently indicated that psychological violence and harassment presents a greater threat than physical violence to most workers.⁴⁵⁵ Furthermore, a study of workplace violence and harassment was conducted in 2003 by the European Foundation for the Improvement of Living and Working Conditions (hereafter referred to as ‘the Foundation’) drew considerable attention to bullying.⁴⁵⁶ The Foundation directives are not directed at

⁴⁵⁰ Lawson-Cruttenden T & Addison N (1997) 6-7.

⁴⁵¹ Harthill S ‘Bullying in the Workplace: Lessons from United Kingdom’ (2008) 17(2) 247 *Minnesota Journal of International Law* 275.

⁴⁵² Merriam-Webster ‘injury’ available at <https://www.merriam-webster.com/legal/injury> (5 November 2022).

⁴⁵³ Yamada DC ‘Crafting a Legislative Response to Workplace Bullying’ (2004) 8 *Employee Rights and Employment Policy Journal* 514.

⁴⁵⁴ International Labour Conference, Convention 190, 2019.

⁴⁵⁵ Di Martino V, Hoel H & Cooper CL ‘Preventing violence and harassment in the workplace’ (2003) *European Foundation for the Improvement of Living and Working Conditions* Luxemburg: Office for Official Publications of the European Communities 1 available at <http://www.eurofound.europa.eu/pubdocs/2002/109/en/1/ef02109en.pdf> (accessed 4 January 2021), an increase awareness of this problem was followed up by an upsurge in activity and initiative with regard to violence and harassment within the legal framework especially for psychological violence. Violence and harassment in the workplace has considerable costs to individuals leading to ill health and aspects of the employment relationship. Best practice modules although lacking theoretical basis and effectiveness assessment.

⁴⁵⁶ Di Martino V, Hoel H & Cooper CL (2003) 39; 49, the report indicated that surveys for harassment and bullying was steadily on the increase. The rise in surveys may be indicating that bullying and harassment

dealing with workplace bullying, as it is of an opinion that the existing directives cover ‘moral harassment.’⁴⁵⁷ The Framework Agreement on Harassment and Violence at Work highlighted that mutual respect for dignity in all levels within the workplace was the key characteristic of a successful organisation.⁴⁵⁸ The aim for this agreement was to heighten awareness and understanding of employers, workers and their representatives and provide an action-oriented framework to prevent, identify, manage harassment and violence at work.⁴⁵⁹ The signatory parties invites member organisations in to incorporate the agreement within three years after date of signature in 2007.⁴⁶⁰

Globalisation plays a major role in workplace conditions and transnational bodies and policies should address these more seriously.⁴⁶¹ The EU proposed a strategy to promote health and safety at work in the EU from 2007 to 2012, which was one of the important and most developed aspects of EU policy on employment and social affairs.⁴⁶²

The ILO has identified workplace bullying as ‘*violence at work*.’⁴⁶³ With the adoption of the Violence and Harassment Convention, 2019 (No. 190) and Recommendation (No. 206), the ILO acknowledged that violence and harassment is a major threat to the safety and health of workers and persons in world of work and that may constitute a human rights violation or abuse

was still not being seriously addressed by policy-makers and employers. The Commission stresses the need to adapt the legal system to cover emerging psycho-social risks as it poses a risk to health, safety and well-being at work.

⁴⁵⁷ Guerrero MIS ‘The Development of Moral Harassment (or Mobbing) Law in Sweden and France As A Step Towards EU Legislation’ (2004) 27(2) *B.C International & Comp. L. Rev* 493-94.

⁴⁵⁸ European Social Dialogue ‘Framework Agreement on Harassment and Violence at Work’ (2007) 1 available at <https://drive.google.com/file/d/0B9RTV08-rjErYURTckhMzZFETEk/view?resourcekey=0-buzTanzA3dlfJHzVf4TmmQ> (accessed 15 December 2021), the EU and national law defines that the employers’ duty to protect workers against harassment and violence in the workplace. The European social partners acknowledged that harassment and violence affect any workplace and any worker, but some might be more at risk than others.

⁴⁵⁹ European Social Dialogue (2007) 2-3, harassment and violence are unacceptable behaviour that “occurs when one or more workers or manager are repeatedly and deliberately abused, threatened and/or humiliated in circumstances relating to work”.

⁴⁶⁰ European Social Dialogue (2007) 4, the signatory parties shall evaluate and review agreement after five years.

⁴⁶¹ Yamada DC ‘Crafting a Legislative Response to Workplace Bullying’ (2004) 8 *Employee Rights and Employment Policy Journal* 475; 514 both ILO and the EU are addressing workplace bullying as ‘violence.’

⁴⁶² Communication from Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Improving quality and productivity at work: Community strategy 2007-2012 on health and safety at work (2007) 62 final 1 available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0062:FIN:EN:HTML> (accessed 2 October 2019), the policy is based on Article 137 of the EC Treaty.

⁴⁶³ Chappell D & Di Martino V *Violence in Work* 2nd ed (2000) Geneva: ILO 12, in 2000 a monograph monitored workplace bullying behaviour stating that alone may be minor, but together it is a serious form of violence.

to a safe and decent work.⁴⁶⁴ It has been suggested that global efforts to address ill-health at work may be by improving strategies such as policies, technology and interventions.⁴⁶⁵ However, the data collected by the ILO and WHO is only a reflection of injuries and illnesses in formal, registered workplaces.⁴⁶⁶ The ILO has approved and published several international treaties, related to worker issues and workplaces, such as working conditions, discrimination in workplace, health and safety, and employment contracts.⁴⁶⁷

WHO's has an all-round definition of a 'healthy workplace'⁴⁶⁸ that may find application against the employer to provide a healthy workplace and protection against workplace bullying. In addition, the World Health Assembly of WHO had endorsed a Global Plan of Action on Workers Health in 2008 to 2017 that provided a drive for action by Member States.⁴⁶⁹ In 2008, the XVIII World Congress on Safety and Health at Work was held in Republic of Korea, where participants adopted and signed the Seoul Declaration on Safety and Health at Work which acknowledges that a safe and healthy working environment is a fundamental human right.⁴⁷⁰ The European Agency for Safety and Health at Work and the European Parliament ratified the Declaration, which SA also ratified through the Department of Labour South Africa.⁴⁷¹ This

⁴⁶⁴ International Labour Organization 'Safe and healthy working environments free from violence and harassment (2020) 6; 10 available at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_751832.pdf (accessed 18 December 2021), this includes psychological violence and harassment, bullying and mobbing and cyber-bullying.

⁴⁶⁵ Pruss-Ustun A and Corvalan C 'Preventing disease through healthy environments: Towards an estimate of the environmental burden of disease' (2006) *World Health Organisation* 6 available at <https://apps.who.int/iris/handle/10665/43457> (accessed 11 January 2021).

⁴⁶⁶ World Health Organisation ('WHO') & Burton J (2010) WHO healthy workplace framework and model: Background and Supporting Literature and Practices 1 available at <https://apps.who.int/iris/handle/10665/113144> (accessed 8 November 2021), in most countries a majority of workers in the informal sector have no record work-related injuries or illnesses or prevention programmes that are in place. Therefore, this carries a heavy burden in economic cost and human resources for unhealthy workplaces creating a great challenge to a country's economic sector, health policymakers and practitioners.

⁴⁶⁷ WHO & Burton J (2010) 36-37.

⁴⁶⁸ WHO & Burton J (2010) 1, a 'healthy workplace is one where workers and managers work together towards continuous improvement for the protection and promotion of health, safety and well-being for all this includes physical work, psychosocial environment, improving community participation.

⁴⁶⁹ WHO & Burton J (2010) 10, the 1996 World Health Assembly Global Strategy on Occupational Health for All, the Stresa Declaration on Workers' Health (2006), the ILO Promotional Framework for Occupational Health and Safety Convention and the Bangkok Charter for Health Promotion in a Globalised World (2005) provided important orientation points.

⁴⁷⁰ International Labour Organisation 'Seoul Declaration on Safety and Health at Work' (2008) 2 available at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/meetingdocument/wcms_151736.pdf (accessed 19 July 2019), the Declaration recognises this as a fundamental human right in terms of Article 23 of the Universal Declaration of Human Rights.

⁴⁷¹ International Labour Organisation 'Seoul Declaration on Safety and Health at Work' (2008) 2 available at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/meetingdocument/wcms_151736.pdf (accessed 19 July 2019),

supports the notion that a ‘*healthy workplace*’ does not harm one’s mental, or physical health, safety or well-being of a worker and should be a moral imperative.⁴⁷²

5.7 LEGISLATIVE FRAMEWORK IN THE UK

The statutes that are relevant to workplace bullying are discussed below.

5.7.1 Health and Safety at Work Act etc. 1974 (‘Safety Act’)

The Safety Act provides for the ‘health, safety and welfare of persons at work, protecting others against risks to health or safety related persons’ work activities, controlling the use and preventing unlawful acquisition, possession and use of dangerous substances, pollution, provision of medical advisory service, amend building regulations and Building and connected purposes.’⁴⁷³

Bullied victims may find a course of action in statutory provisions contained in the Health and Safety at Work Act 1974 (hereafter referred to as ‘the Safety Act’)⁴⁷⁴ as well as related regulations including the Management of Health and Safety at Work Regulations 1999.⁴⁷⁵ The Safety Act imposes an obligation or ‘duty of care’ on the employer to provide for the health, safety and welfare of their employees, where ‘reasonable practicable.’ This duty extends to personal injury protection which is defined as “*any disease and any impairment of a person’s physical or mental condition, which could lead to criminal prosecution by the labour inspectorate*”.⁴⁷⁶

The Safety Act, section 2(6) provides that an employer has a duty to ensure the health, safety and welfare of employees at work that is ‘reasonably practicable,’⁴⁷⁷ and requires employer to consult with safety representatives with the objective of maintaining and checking effectiveness of such measures, to ensure the health and safety of employees at work.⁴⁷⁸

Walden drew attention to cases that involved bullying and harassment, where employers’ legal duty towards protecting their employees psychiatric/psychological health and integrity caused

⁴⁷² WHO & Burton J (2010) 6.

⁴⁷³ Health and Safety at Work Act 1974, Preamble.

⁴⁷⁴ Health and Safety at Work Act 1974, section 2.

⁴⁷⁵ Management of Health and Safety at Work Regulations 1999.

⁴⁷⁶ Management of Health and Safety at Work Regulations 1999.

⁴⁷⁷ Health and Safety at Work Act 1974, section 2(1).

⁴⁷⁸ Health and Safety at Work Act 1974, section 2(6).

by work risks and psychological stressors.⁴⁷⁹ The Safety Act and the SA's OHS Act impose the same duties on the employer for the health and safety of their employees in the workplace and therefore the position is the same for both countries.

The general duties of employers to their health and safety of their employees.

Safety Act, section 2(1) "[i]t shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees." The Safety Act includes 'welfare' to their employees.

The OHS Act, section 8(1), [e]very employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees."

The OHS Act includes 'risk.'

5.7.2 Anti-discrimination legislation

The Equality Act 2010 (hereafter referred to as 'the Equality Act') protects employees from being subjected to employment discrimination and harassment based on sex, race, sexual orientation, religion, belief, age and gender reassignment.⁴⁸⁰ It is submitted that the Equality Act lists these as protected characteristics. Discrimination, harassment and victimisation are listed as prohibited conduct.⁴⁸¹ The employer may be held vicariously liable for third party harassment (customer), only in the event of the incident having occurred more than once and the employer must have been aware, but failed to take action or prohibit victimisation of person at work.⁴⁸²



In *Sheffield City Council v Norouzi*⁴⁸³ concerned employees that were repeatedly subjected to racial offensive comments by individuals (clients), where the employer was made aware of the

⁴⁷⁹ Walden RM and Hoel H (2004) 115-16.

⁴⁸⁰ Equality Act 2010, Chapter 15, section 26 defines harassment when

“(1) A person (A) harasses another (B) if-

a) A engages in unwanted conduct related to a relevant protected characteristic, and

b) The conduct has the purpose or effect of-

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”

(4) However, to assess whether the conduct has the effect indicated in (1)(b) the following factors need to be considered: “a) the perception of B, b) the other circumstances of the case and c) whether it is reasonable for the conduct to have that effect.”

⁴⁸¹ Equality Act 2010, Chapter 2.

⁴⁸² Hoel H (2013) 67, stated that the Equality Act provides for cases of victimisation where the complainant is mistreated because they complained or is aggrieved or had the intention of filing a complaint, but does not exclude malicious or false complaints under the protection of victimisation.

⁴⁸³ *Sheffield City Council v Norouzi* [2011] UKEAT 0497_10_1406 27 37 40.

comments and took some ineffective action.⁴⁸⁴ The employer appealed the decision of the Employment Tribunal for liability for acts of racial harassment and discrimination perpetrated by a child in care home in the Employment Appeal Tribunal, where the appeal was dismissed.⁴⁸⁵

The Equality Act's relevance to workplace bullying is that it protects employees from unfair discrimination, victimisation, harassment, however this protection is only extended if it is based on listed grounds or a protected group.⁴⁸⁶ This is similar to the EEA in SA, the employer may be held liable if unfair discrimination is proven. In addition, the Equality Act explicitly prohibits the violation of person's dignity or creating 'a hostile, intimidating, degrading, humiliating or offensive environment,⁴⁸⁷ which distinguishes it from the SA EEA, which does not include such a prohibition to the environment. In SA unfair discrimination is prohibited on listed grounds and on arbitrary grounds. Employees in SA who are subjected to workplace bullying may seek relief by claiming unfair discrimination on an arbitrary ground for workplace bullying.

5.7.3 The Employment Rights Act 1996 ('Employment Act')

The Employment Rights Act (hereafter referred to as the 'Employment Act') contains provisions that deal with unfair dismissals, redundancy payments, wage protection, contracts of employment, work hours and termination of employment.⁴⁸⁸ The Employment Act distinguishes between an 'employee' and a 'worker.' The former refers to an individual with an employment contract and the latter refers to an individual with or without an employment contract, whether expressly (oral or written) or implied.⁴⁸⁹ Some rights are only available to "employees" and some to "workers" in the UK⁴⁹⁰ in contrast to the LRA that applies to anyone defined as an 'employee.'

Section 94 of the Employment Act provides for right not to be unfairly dismissed

⁴⁸⁴ *Sheffield City Council v Norouzi* [2011] UKEAT 0497_10_1406 27 37 111.

⁴⁸⁵ *Sheffield City Council v Norouzi* [2011] UKEAT 0497_10_1406 27 29.

⁴⁸⁶ Pyper D 'Key Employment Rights' (2018) CBP 7245 Commons Library Briefing 18 available at <http://researchbriefings.files.parliament.uk/documents/CBP7245/CBP-7245.pdf> (accessed 21 October 2021), harassment related to protected characteristic and victimisation is a "detriment" or "protected act".

⁴⁸⁷ Equality Act 2010, Chapter 15, section 26 (1)(b) (i) - (ii).

⁴⁸⁸ Employment Rights Act, Chapter 18.

⁴⁸⁹ Employment Rights Act, Chapter 18, section 230 (1) – (3).

⁴⁹⁰ Pyper D (2018) 5, provides a briefing of statutory employment rights. The primary means to claim an employment right through an employment tribunal within a strict three-month time period and waived only in exceptional circumstances.

- (1) An employee has the right not to be unfairly dismissed by his employer.
- (2) Subsection (1) has effect subject to the following provisions of this Part (in particular section 108 to 110) and the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).⁴⁹¹

Furthermore, an employee may be excluded from the protection of section 94 in terms of section 108 of the Employment Act by qualifying period of employment

- (1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than one year ending with the effective date of termination.⁴⁹²

Section 98 of the Employment Act determines the fairness of the employee's dismissal. The employer should disclose the reason or reasons for dismissal and that the reason falls within subsection (2) or some other reason to justify the dismissal.⁴⁹³

Section 95(1)(c) of the Employment Act determines the dismissal of an employee, if ⁴⁹⁴ “the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct.” In this regard, ‘constructive dismissal’ takes place where the employee voluntarily resigns as a result of the employer's breach of an express or implied term of the contract of employment.⁴⁹⁵

In *Abbey National PLC v Robinson*, the Employment Appeal Tribunal (referred to as ‘the Tribunal’) upheld a finding of constructive dismissal where the worker's manager “had been bullying and harassing her in the workplace to a degree she found insufferable.”⁴⁹⁶

⁴⁹¹ The Employment Rights Act 1996, section 94.

⁴⁹² The Employment Rights Act 1996, section 108.

⁴⁹³ The Employment Rights Act 1996, section 98(1)(a)-(b).

⁴⁹⁴ The Employment Rights Act 1996, section, 95(1)(c).

⁴⁹⁵ The Employment Rights Act 1996, chapter 18, section 95(1)(c); see Lewis D ‘Workplace bullying and harassment: building a culture of respect’ (2006) 4 *ACAS Policy Discussion Papers* 3, states that an employee has a claim against the employer, if they failed to maintain trust and confidence and breached their employment contract.

⁴⁹⁶ *Abbey National PLC v Janet Elizabeth Robinson* 2000 WL 1741415 (Employment Appeal Tribunal Nov. 20 2000); see Yamada DC ‘Workplace bullying and the law: towards a national consensus?’ in *Bullying and emotional abuse in the workplace International perspectives in research and practice* London/New York: Taylor and Frances (2004) 513.

Walden and Hoel stated that compensation may be awarded in general unfair dismissal cases based on “real” injury to an employee’s feelings or self-respect and had to leave his employment as a result, continuous “harassment and undermining” by co-workers or line manager.⁴⁹⁷ *Ezekiel v The Court. Service* the Employment Tribunal held that an employee was properly dismissed under the Employment Rights Act because he engaged in severe bullying and mistreatment of several co-workers.⁴⁹⁸

In SA constructive dismissal cases are regulated by section 186(1)(e) of the LRA.⁴⁹⁹ In such circumstances the employee terminated employment with or without notice because the employer made ‘continued employment intolerable for the employee’.⁵⁰⁰ LRA places the onus on the employee to establish the dismissal and the employer must establish that the dismissal was fair.⁵⁰¹ The Employment Act protects both the those defined as an ‘employee’ and a ‘worker’ employment rights, whereas the LRA does not provide protection to those that are not defined as an ‘employee.’⁵⁰²

The LRA contain a statutory definition for unfair labour practice and grounds⁵⁰³ and unfair dismissals however, the Employment Act does not have an unfair labour practice provision.

5.7.4 The Protection from Harassment Act 1997 (‘the Harassment Act’)

The Protection from Harassment Law of 1997 (‘the Harassment Act’) or anti-stalking law⁵⁰⁴ provides for criminal and civil redress to prevent ‘stalking’ which means contact that was non-consensual by love-obsessed individual through following or calling them.⁵⁰⁵ However, the Harassment Act does not expressly recognise workplace bullying and provides no definition for ‘harassment.’⁵⁰⁶ It may be noted that the sponsor of the Act had explained that it did not define ‘harassment’ because the courts had regularly interpreted the concept since 1986.⁵⁰⁷

⁴⁹⁷ Walden RM and Hoel H (2004) 116.

⁴⁹⁸ *Ezekiel v The Court. Service*. 2000 WL 1274032 (EAT).

⁴⁹⁹ Labour Relations Act 66 of 1995, section 186(1)(e).

⁵⁰⁰ Labour Relations Act 66 of 1995, section 186(1)(e).

⁵⁰¹ Labour Relations Act 66 of 1995, section 192.

⁵⁰² Labour Relations Act 66 of 1995, Code of Good Practice: Who is an Employee? Part 1, Reg 3.

⁵⁰³ Labour Relations Act 66 of 1995, section 186(2).

⁵⁰⁴ Protection from Harassment Act 1997 chapter 40, section 1; 287 Parl Deb HC (6th ser) (1996) 781.

⁵⁰⁵ Protection from Harassment Act 1997 chapter 40, section 1.

⁵⁰⁶ Harthill S (2008) 276.

⁵⁰⁷ Harthill S (2008) 276.

While the Harassment Act does not define ‘harassment’ it does state “...the person whose course of conduct is in question, ought to know that it amounts to harassment of another, if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other”.⁵⁰⁸ Courts in UK have successfully applied the Harassment Act, as a course of action for bullying behaviour.⁵⁰⁹

The Harassment Act established a “new statutory civil tort and two criminal offences” that gives civil courts the authority to award damages and issue orders in harassment cases.⁵¹⁰ The Harassment Act is also referred to as the “The Stalker’s Act,” however it regulates all forms of harassment, not only ‘stalking’ and ‘harassment’ in a workplace.⁵¹¹ Furthermore, the Harassment Act may be utilised for workplace and racial harassment, domestic violence and includes civil protests.⁵¹² In addition, Harassment Act is directed at the perpetrator of harassment not the employer, but Britain courts and employment tribunals have successfully extended liability to employers’ for employees behaviour.⁵¹³

Although workplace bullying is not expressly mentioned in the Harassment Act, it been debated that it should extend to harassment at work.⁵¹⁴ In addition, the Harassment Act describes it as conduct that is ‘alarming the person or causing the person distress.’⁵¹⁵ Hence, it is at the courts discretion to interpret what harassment constitutes.⁵¹⁶ In *Majrowski* where the meaning of “harassment” in the Harassment Act was addressed and was used in the ruling of *Green v DB Group Services (UK) Ltd.*⁵¹⁷ The court stated that harassment constituted conduct that occurred at least twice and it was directed at the claimant to cause distress and objectively judged as ‘unreasonable and oppressive’. The bully should be aware that the conduct amounts to harassment. The judge was of the opinion that this definition may exclude

⁵⁰⁸ Protection from Harassment Act 1997 chapter 40, section 1.

⁵⁰⁹ Kaplan JF (2010) 154.

⁵¹⁰ Protection from Harassment Act 1997 chapter 40 8-11.

⁵¹¹ Harthill S (2008) 274.

⁵¹² *Director of Public Prosecutions v Moseley Selvanayagam and Wooding* [1999] EWHC Admin 528 available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/1999/528.html> (accessed 16 August 2019).

⁵¹³ *Majrowski v Guy’s and St Thomas’s NHS Trust* 2005 EWCA (Civ) 251, this case will be further discussed in section below.

⁵¹⁴ PARL DEB HC (6th ser) 287 (1996) 985.

⁵¹⁵ Protection from Harassment Act 1997, chapter 40 section 7(2).

⁵¹⁶ Harthill S (2008) 277.

⁵¹⁷ *Majrowski v Guy’s and St Thomas’s NHS Trust* 2005 EWCA (Civ) 251 81-82; Q.B. 848, 872-73.

‘reasonable conduct’ that may cause distress, but may be valid criticism of the employee’s work.⁵¹⁸

In addition, in terms of section 1 of the statute “[a] person must not pursue conduct a) which amounts to harassment of another, and b) which he knows or ought to know amounts to harassment of the other.”⁵¹⁹ However, the reasonable person test is applied in cases of harassment.⁵²⁰ This means that the perpetrator cannot use ignorance of his conduct towards the victim, and intent need not be established only that harasser ought to have been aware that he or she was harassing the person. Harassment claims may be lodge in civil proceedings,⁵²¹ for damages in form of compensation and emotional distress.⁵²²

5.7.4.1 The Effect of the Harassment Act

Harassment is a criminal offence,⁵²³ and the offender may be subjected to a summary conviction that may amount to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale or both.⁵²⁴ The Harassment Act also makes provision for more severe penalties for “putting people in fear of violence”⁵²⁵ to a term not exceeding five years or a fine or both⁵²⁶ and the plaintiff may apply for a restraining order with a warrant of arrest of the defendant.⁵²⁷ In addition, the Harassment Act⁵²⁸ creates a criminal offence and civil remedies for damages for harassment.⁵²⁹

In *Green v DB Group Services (UK) Ltd*, the court held that Deutsche Bank Group Services was vicariously liable under the Harassment Act and was obliged to pay the former employee more than £850,000 in compensation, as a result of her psychiatric injury for harassment due

⁵¹⁸ *Green v DB Group Services (UK) Ltd* 2006 EWHC (QB) 12-14.

⁵¹⁹ Protection from Harassment Act 1997, chapter 40, section 1(a); (b).

⁵²⁰ Protection from Harassment Act 1997, section 1(2), states “a person whose course of conduct is in question ought to know that it amounts to harassment of another, if a reasonable person with same information would regard conduct as harassment of the other;” section 7 defines a “course of conduct” as conduct occurring two or more times so an element of repetitiveness is essential to workplace definitions.

⁵²¹ Protection from Harassment Act 1997, chapter 40 section 3(1), applies to harassment both inside and outside employment, which allows the bullied worker to bypass employment tribunals.

⁵²² Protection from Harassment Act 1997, chapter 40, section 3(2), where damages may be awarded for anxiety caused by the harassment and financial loss.

⁵²³ Protection from Harassment Act 1997, chapter 40, section 2(1), (3).

⁵²⁴ Protection from Harassment Act 1997, chapter 40, section 2(2).

⁵²⁵ Protection from Harassment Act 1997, chapter 40, section 4.

⁵²⁶ Protection from Harassment Act 1997, chapter 40, section 4(4).

⁵²⁷ Protection from Harassment Act 1997, chapter 40, section 3(3) (a), (b).

⁵²⁸ United Kingdom the Protection from Harassment Act 1997 available at http://www.opsi.gov.uk/acts/acts1997/ukpga_19970040_en_1 (accessed 24 December 2018).

⁵²⁹ *Majrowski v Guys’s & St Thomas’s NHS Trust* [2006] 4 All ER 395 (HL) 34.

to a sustained campaign of emotional abuse by some of her co-workers and the manager's lack of intervention.⁵³⁰ The court found that the employer should not have allowed the bullying in the first place and not providing a safe work environment for Ms. Green, after she returned back to work.⁵³¹ In instances such as these, argued that employers should take responsibility to prevent a culture of bullying, if it is evident.⁵³²

In *Majrowski* case, the court contended that harassment at work is similar to stalking and “[i]t is the very place, where harassment is often encountered and from which its victim is often powerless to escape.”⁵³³ Earlier court decisions using the Harassment Act followed this maxim against individual bullies at work⁵³⁴ but not all courts found the alleged conduct to be harassment under Harassment Act.⁵³⁵ The victim's remedy against the individual bully was literal interpretation of the statutory language, but later courts were challenged to broaden the scope to hold the employer liable for the employee's misconduct.⁵³⁶ Although the UK courts have attempted to avoid the issue of vicarious liability⁵³⁷ the Court of Appeal was faced with this very challenge in *Majrowski* case by imposing vicarious liability.⁵³⁸ The plaintiff in *Majrowski* case, claimed that he was bullied, intimidated and harassed by his departmental

⁵³⁰ *Green v DB Group Services (UK) Ltd* [2006] EWHC (QB) 1898 35; 41; 70; 172-191, Green was employed as a secretary and she was subjected to colleagues making her work very difficult by laughing at her, ignoring and excluding her from meetings and making rude remarks at her. She further developed depression and attempted suicide and hospitalised. The Deutsche-Bank paid for her undergo counselling for stress, but failed to reprimand and dismiss colleagues or intervene. The British court under the anti-bullying law awarded her damages.

⁵³¹ *Green v DB Group Services (UK) Ltd* [2006] EWHC (QB) 1898 101-102. The reasoning of the court was that other employees had reported bullying behaviour, which was a major consideration; paras 81-86, stated that several employees were bullied and the court was of the view that Deutsche-Bank should have foreseen the consequences of the behaviour.

⁵³² Walden RM and Hoel H (2004) 115.

⁵³³ *Majrowski v Guy's & St Thomas's NHS Trust* [2005] EWCA Civ 251, 56.

⁵³⁴ *Merelie v Newcastle Primary Care Trust* [2004] EWHC 2554 (QB) 13-15, where the court denied employer's motion for a summary judgment. Plaintiff claimed individual employees and a supervisor had collectively falsified information about the plaintiff and schemed complaints against the plaintiff leading to his dismissal; *First Global Locums Ltd v Cosias* [2005] EWHC 1147 (QB) 33, the court granted a restraining order against defendant employee who was offensive and hostile towards other employees by swearing, shouting and threatening to kill them. The court ordered that restraining orders in the Harassment Act should be least possible restraint and time limited.

⁵³⁵ *Crossland v Wilkinson Hardware Stores Ltd* [2005] EWHC 481(QB) 80-81, the court granted a summary judgment against the defendant on claim that the plaintiff was harassed. The court contended that a broad interpretation of Harassment Act might interfere with free speech rights under Article 10 of the European Convention on Human Rights.

⁵³⁶ Harthill S (2008) 281; Black's Law Dictionary 6th ed (1991) 1566, defines vicarious liability as “the imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons ...”

⁵³⁷ *Banks v Ablex Ltd* [2005] EWCA 173, Court of Appeal found that ‘a single incident of shouting and swearing at plaintiff’ with waving and pointing a finger was not “course of conduct” under the PHA.

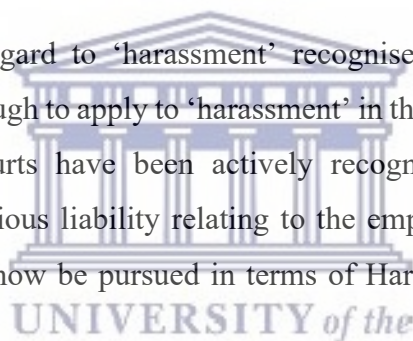
⁵³⁸ *Majrowski v Guy's & St Thomas's NHS Trust* [2005] EWCA Civ 251, involved public humiliation, verbal abuse and given unreasonable deadlines and being ignored.

manager during the scope of his employment.⁵³⁹ The court contended that the ‘bullying’ amounted to harassment in terms of the Harassment Act.⁵⁴⁰ The employee stated that the manager was excessive and strict in his time-keeping and work, as well as isolating him by refusing to communicate with him and treating him different to other staff.⁵⁴¹ The court *a quo* judge dismissed *Majrowski’s* claim and concluded that that section 3 of the Harassment Act did not create a ‘statutory tort’ to hold the employer vicariously liable.⁵⁴²

However, the Court of Appeal reversed the court *a quo’s* decision, holding that unless the statute expressly or implicitly states otherwise, the Common Law Doctrine of Vicarious Liability does apply.⁵⁴³ The Court came to this decision, after objections and potential problems of vicarious liability for bullying of employees were discussed, but concluded that the ‘benefits of liability for the protection of victims that are vulnerable, far outweighs the harms’.⁵⁴⁴ This was on Appeal by the appellant, but the House of Lords confirmed the order.⁵⁴⁵

5.7.4.2 The Application of Harassment Act to workplace bullying

Parliamentary debates with regard to ‘harassment’ recognised that the Harassment Act’s statutory language is broad enough to apply to ‘harassment’ in the workplace.⁵⁴⁶ Harthill states that since the enactment, courts have been actively recognising new claims under the Harassment Act, such as vicarious liability relating to the employer.⁵⁴⁷ It is submitted that workplace bullying cases can now be pursued in terms of Harassment Act. Originally, this



⁵³⁹ *Majrowski v Guys’s & St Thomas’s NHS Trust* [2006] 4 All ER 395 (UKHL) 34 I AC 224.

⁵⁴⁰ *Majrowski v Guys’s & St Thomas’s NHS Trust* [2005] EWCA Civ 251 1, [2005] Q.B. 848, the issue of employer liability and defining harassment was addressed.

⁵⁴¹ *Majrowski v Guys’s & St Thomas’s NHS Trust* [2005] EWCA Civ 251 1& 8; [2005] Q.B. 852, the manager was rude and abusive to him in front of other staff and imposed targets on his performance that were unrealistic and threatened him with disciplinary action, if he does not achieve them.

⁵⁴² *Majrowski v Guys’s & St Thomas’s NHS Trust* [2005] EWCA Civ 251 1 &10, [2005] Q.B. 853.

⁵⁴³ *Majrowski v Guys’s & St Thomas’s NHS Trust* [2005] EWCA Civ 251 1 28; 74-75; [2005] Q.B. paras 871-72.

⁵⁴⁴ *Majrowski v Guys’s & St Thomas’s NHS Trust* [2005] EWCA Civ 251 1 52-61; [2005] Q.B. 865-69 “[w]ork is the very place where harassment is often encountered and from which its victims is often powerless to escape.”

⁵⁴⁵ *Majrowski v Guys’s & St Thomas’s NHS Trust* [2007] 1 A.C. 224 225; 248.

⁵⁴⁶ PARL. DEB. HC 6th ser 287 (1996) 985 comments of Hon Maclean identifying the aim of the Bill to protect against the harm of harassment: “all forms of harassment- whether stalking, racial abuse, neighbor or work disputes are covered.”) 802 (comments of Hon Maddock “Although the Bill is generally perceived to be about the stalking, its tentacles are likely to spread far wider”).

⁵⁴⁷ Harthill S (2008) 279, during a parliamentary debate of the PHA it was noted that the statutory language may be extended to apply to harassment at the workplace; 251, 272 Harthill noted that by the mid-1990s, UK had made significant advances through common law and statutory framework; Lawson-Cruttendon T Addison N (1997), stated that bullied victims found support by courts since the development of the new-common law tort of general harassment and have been applied to include claims of vicarious liability to the employer.

statute was intended to be applied to personal stalking and not particularly in the workplace,⁵⁴⁸ however this position changed when it was applied in a homophobic workplace bullying case, which extended the scope for legal recourse.⁵⁴⁹

However, the conduct prohibited by the Harassment Act, in its definition provides an opportunity for the employer to avoid vicarious liability, as it is dependent on whether harassment consisted of a ‘single act or a course of conduct.’⁵⁵⁰ In *Iqbal v Dean Manson Solicitors*, the Court of Appeal remarked that the statute is concerned with ‘courses of conduct’ that amounts to harassment, not the single instances of harassment.⁵⁵¹

Beale and Hoel commented that it is surprising, that under the Harassment Act, the complainant is not required to establish injury to health, but rather that anxiety which resulted from the harassment was sufficient.⁵⁵² As a result, the courts have ruled that by invoking the Harassment Act, victims could receive enormous monetary compensation for ‘injured feelings’ and ‘loss of earnings’ reaching compensation levels of £1 million.⁵⁵³ Therefore the enactment of the Harassment Act have allowed courts to recognised new rights by applying vicarious liability to the employer.⁵⁵⁴

The PHA in SA provides for harassment and other matters connected therewith in order to protect the rights of South African citizens which is different to the Harassment Act. The Harassment Act regulates conduct such as mental, physical, psychological and economic harm and the victim may apply for a protection order, similarly to the PHA. The Harassment Act does not expressly recognised workplace bullying, as offence, but extends it’s scope to include course of action for workplace bullying, under the auspice of ‘harassment.’ The PHA, is similar to UK’s Harassment Act for workplace bullying and may extend in cases for psychological harm and harassment is clearly defined.

⁵⁴⁸ Protection from Harassment Act 1997, chapter 40 section 3 the Act creates application within the employment setting.

⁵⁴⁹ Walden RM and Hoel H (2004) 116.

⁵⁵⁰ Landman AA & Ndou MM (2013) 22(9) *Contemporary Labour Law* 86, the English courts have interpreted the PHA to require ‘a course of conduct.’

⁵⁵¹ *Iqbal v Dean Manson Solicitors* [2011] EWCA Civ 123.

⁵⁵² Beale D and Hoel H (2010) 105.

⁵⁵³ Hoel H (2013) 68.

⁵⁵⁴ Harthill S (2008) 251, before the enactment of Harassment Act, bullied workers have found English courts supportive, as from 1997 courts recognise new rights for bullied workers.

5.7.5 Report on the Review of UK Anti-Discrimination Legislation and Dignity at Work Bill

This discussion highlights past arguments for legislation to protect workers from workplace bullying and provides an overview UK has no statutes to protect workplace bullied workers.

In 2000, two statutory proposals were submitted to combat workplace bullying, such as the “Dignity at Work Bill” (hereafter referred to as ‘the Dignity Bill’) introduced in the House of Lords⁵⁵⁵ and Bob Hepple et al *Equality: A New Framework*.⁵⁵⁶

Before the Dignity Bill, in 2000 a panel of blue-ribbon experts at Cambridge University released a comprehensive, independent review of the UK’s anti-discrimination legislation with one of the recommendations that “a statutory tort of harassment and bullying at work” be enacted.⁵⁵⁷ Trade unions and organisations were instrumental in bringing a strong focus on workplace bullying into the public domain and Legislature in 1996 by introducing this Dignity at Work Campaign.⁵⁵⁸ In addition, Hoel and Cooper sponsored by the British Occupational Health Research Foundation published the first nation-wide survey of bullying in Britain,⁵⁵⁹ as discussed above.

The Dignity Bill would enforce a civil liability on an employer for bullying and similar acts, including “*behaviour on more than one occasion which is offensive, abusive, malicious, insulting or intimidating.*”⁵⁶⁰ The objective of the Dignity Bill was to encourage employers to

⁵⁵⁵ Dignity at Work Bill H.L. Bill 31, was introduced 3 December 2001, reference and drafted by Yamada DC (2004) 513-14.

⁵⁵⁶ Hepple B, Coussey & Choudhury T *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (2000) Oxford: Hart Publishing, reference by Yamada DC (2004) 514.

⁵⁵⁷ Hepple B, Coussey & Choudhury T (2000) 514, motivated that the elements of such a tort must indicate that such acts or conduct is offensive and unwelcome to the person receiving it; that is ‘reasonable’ to regard such conduct as hostile, offensive, humiliating and intimidating within a work environment; that the person on the receiving end will suffer or likely suffer either physical, psychological or emotional harm (anxiety or hurt to one’s feelings); referenced by Yamada DC (2004) 516 made reference and added that the Healthy Workplace Bill attempted to provide bullied workers with a legal remedy and incentivized employers to incorporate preventive mechanisms against such behavior. Yamada is of the view is that it should be tested and refined for adoption at a national level taking documented evidence into consideration of the harm done by bullying to workers and employers’ it is long overdue.

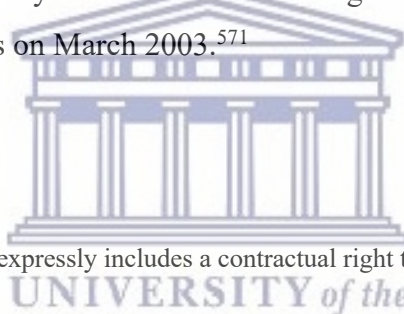
⁵⁵⁸ Harthill S (2008) 252.

⁵⁵⁹ Hoel H & Cooper CL (2000) 3, 5 available at <http://www.esren.gov.uk/UMISTreportHelgeHoell.pdf> (accessed 20 December 2021), the British Government relied on Hoel and Cooper’s survey in the debate for the Dignity at Work Bill I 2002. The survey was intended to increase organisational awareness of the issue and suggested mechanisms to prevent workplace bullying. The report indicated a weak correlation between self-reported bullying and total exposure to negative acts, on one side and other side sickness absenteeism, on the other side. It was noted that victims of bullying reported more days off than those that not been bullied.

⁵⁶⁰ Dignity at Work Bill (1996) H.L. Bill 31, the Bill was intended to provide protection to bullied employees, similar to current protection afforded to sexual and racial harassment.

create and maintain a culture, where all employees are respected. The Dignity Bill would provide a statutory right to dignity at work for all employees that included independent contractors.⁵⁶¹ In addition, the Dignity Bill would not only incorporate the Harassment Act's civil claim for harassment, but extend the rights of employees by providing a cause of action for "victimisation"⁵⁶² and vicarious liability against the employer.⁵⁶³ The Dignity Bill would provide a claim for Damages and an injunctive relief that includes "injury to feelings."⁵⁶⁴ These claims would be brought in the Employment Tribunal, instead of direct access to courts through the Harassment Act.⁵⁶⁵ Nonetheless, the UK traditionally does not base harassment law on the concept of protecting people's dignity.⁵⁶⁶

The Dignity Bill passed successfully in House of Lords, but failed in the House of Parliament in 1997 and 2001, as a result of successive governments blocking it.⁵⁶⁷ On the second reading in the House of Lords in March 2002 the Dignity Bill was extensively debated.⁵⁶⁸ On the question why a separate statute was necessary, Baroness Gibson responded.⁵⁶⁹ The argument was raised that the existing laws for workplace bullying caused confusion, as to what types of conduct was prohibited, availability of redress and no clear guidance was provided.⁵⁷⁰ The Bill reached the House of Commons on March 2003.⁵⁷¹



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- ⁵⁶¹ Dignity at Work Bill section 1(1), expressly includes a contractual right to dignity at work for all employment contracts.
- ⁵⁶² Dignity at Work Bill section 2.
- ⁵⁶³ Dignity at Work Bill section 5, however the employer had a defence in Dignity At Work policy and grievance procedures that employer followed and take remedial action.
- ⁵⁶⁴ Dignity at Work Bill, section 6.
- ⁵⁶⁵ Dignity at Work Bill, section 4; section 4(1) however does pre-empt any private remedies for repudiation of the contract of the right to dignity at work.
- ⁵⁶⁶ Clarke L 'Sexual Harassment Law in the United States, the United Kingdom and European Union: Discriminatory Wrongs and Dignitary Harms' (2007) *Comm L World Rev* 36(2) 79 99-100, contended that the implementation of the Equal Treatment Directive had made significant changes in the United Kingdom. Further, with the revised Equal Treatment Directive Member States are only required to outlaw harassment that violated dignity and affected the work environment.
- ⁵⁶⁷ Unite 'Dignity at Work: Unacceptable Behaviour, Bullying and Harassment' (2007) available at <http://www.amicustheunion.org/pdf/Dignity%20at%20guide%20final.pdf>. (accessed 10 July 2019).
- ⁵⁶⁸ Harthill S (2008) 287, debates and acknowledged the existing legislation such as the PHA, but argued whether additional legislation would be necessary for this increasing problem; 633 Parl. Deb. H.L. 6th ser. (2002) 343, (comments of Lord Rotherwick).
- ⁵⁶⁹ PARL. DEB. H.L. 6th ser 633 (2002) 331 Baroness Gibson of Market Rasen commented that the current statutes do not adequately protect employees and exposes employers to liabilities without providing legal guidance before bullying becomes serious. The current laws do not provide employers mechanisms to deal with bullying in the workplace and has limited financial compensation to employees that have lost their jobs or health issues or both.
- ⁵⁷⁰ PARL. DEB. H.L. 6th ser 633 (2002) 334.
- ⁵⁷¹ PARL. DEB. H.C. 6th serv 404 (2003) 1WH, 21WH-23WH, the prevalence and costs of bullying was acknowledged but the Bill failed as it lacked government support.

Although the Dignity Bill was not enacted, British legislators acknowledged workers' rights to dignity.⁵⁷² Legislators adopted the view that the existing legal framework provided sufficient protection, which led to a government project in combatting workplace bullying.⁵⁷³ This project was termed as “the world’s largest anti-bullying project” funded by the British government.⁵⁷⁴ These awareness campaigns and codes of practice had indicated a decline in reported cases of workplace bullying from 10% in 2000 to 3.8% in 2005-2006, which suggests that governments efforts were not misguided.⁵⁷⁵

It should be noted, that cases of workplace bullying has increased since 2006.

5.8 CONCLUSION

This chapter contains a discussion on the manner(s) in which workplace bullying is regulated in the UK. Furthermore, it drew comparisons between the SA and UK statutory framework to determine whether SA may draw lessons insofar as workplace bullying is concerned. UK has no specific statutes that makes specific reference to workplace bullying, which is also similar to SA.

Workplace bullying is not specifically defined in terms of UK law, as is the case with SA, but seemingly the effects of workplace bullying are commonly noted as ‘unwelcome negative conduct’ on the bullied worker. It is well known that there is no ‘accepted’ definition of workplace bullying, however Rayner espoused a definition for bullying as “[a] situation where one or several individuals persistently over a period of time perceive themselves to be on the receiving end of negative actions from one or several persons, in a situation where the target

⁵⁷² PARL. DEB. H.C. 6th serv 404 (2003) 15WH-18WH, 21WH, the Minister stated that there is a shared objective in that bullying and degrading treatment had to stop, as it would lead to good work relations and good culture in the workplace, but inherently to treat people with dignity and right to be free from harassment.

⁵⁷³ Kaplan JF (2010) 154, the project identified vulnerable groups, women and disabled and the policies are voluntarily adopted by English employers.

⁵⁷⁴ Harthill S (2008) 252, referred to an increase attention by government and management regarding workplace bullying, UK Department of Trade & Industry (referred to as ‘the Trade Industry’) recently completed “the world’s largest project” to eradicate bullying and discrimination at work. The Trade Industry, together with UK trade union helped to develop practical guidance and policies to unions, employers and executives; The Dignity at Work Partnership *Dignity at Work* available at <http://www.dignityatwork.org/> (accessed 10 July 2019); Guidance Documents available at <http://www.dignityatwork.org/downloads.asp> (accessed 10 July 2019).

⁵⁷⁵ PARL. DEB. H.C. 6th serv 404 (2003) 23WH; see The First Fair Treatment at Work Survey 2007 available at <http://www.dti.gov.uk/files/files/fil138386.pdf> (assessed 1 April 2020) 5, Department of Trade and Industry (DTI Report).

of bullying has difficulty defending him or herself against these actions”,⁵⁷⁶ and excluded a once-off incident as a form of bullying. Notably, the common thread espoused in SA definition and UK definition, is that workplace bullying is negative behaviour that harms and humiliates the victim or group by one or more persons. As mentioned, UK has no single legislation that specifically provides for workplace bullying,⁵⁷⁷ similarly to SA.

Although SA Common Law has the same principles as UK Common Law, it does not include Torts that imposes a duty on the employer for ‘reasonable care’ for the safety of their employees at work. However, SA legislation supports Common Law in obligating employers to take ‘reasonable and practicable’ measures to ensure a safe and healthy workplace.

In terms of the Safety Act that provides for the health, safety and welfare of persons at work, bullied workers may have recourse using the statutory provisions. The Safety Act imposes an obligation on the employer for the health, safety and welfare of their employees, where ‘reasonable practicable’ extends to personal injury protection, in this instance ‘impairment of person’s physical or mental condition,’ which could lead to criminal prosecution.⁵⁷⁸ It has been argued that employers have a legal duty to protect employees psychiatric and psychological health caused by work risks and psychological stressors.⁵⁷⁹ The Common Law duty of the employer for ‘reasonable care’ was developed to psychological or psychiatric injury,⁵⁸⁰ which may have application for bullied employees.

The Equality Act protects employees from employment and harassment on protected characteristics such as sex, race, sexual orientation, religion, belief, age and gender reassignment.⁵⁸¹ The employer may be held vicariously liable for third party harassment, but only if the incident occurred more than once and the employer must have been aware of it, but failed to take action. The relevance of Equality Act to workplace bullying is that it protects employees from unfair discrimination, victimisation, harassment, however this protection is only if the alleged conduct is based on the listed grounds or protected group.

⁵⁷⁶ Rayner C & Cooper C ‘Workplace bullying: myth or reality – can we afford to ignore it?’ (1997) 18(4) *Leadership & Organization Development Journal* 211.

⁵⁷⁷ Suff Rachel ‘Harassment and bullying at the work: Understand the legal positions of bullying and harassment at work, and how employers and employees can address the problem’ (2022) available at <https://www.cipd.co.uk/knowledge/fundamentals/emp-law/harassment/factsheet#ref> (accessed 1 November 2022).

⁵⁷⁸ Health and Safety at Work Act 1974, section 2(1).

⁵⁷⁹ Walden RM and Hoel H (2004) 115-16.

⁵⁸⁰ Hoel H (2013) 65.

⁵⁸¹ Equality Act 2010, Chapter 15, section 26.

In SA, the EEA prohibits unfair discrimination or harassment on listed grounds and on arbitrary grounds. The Equality Act expressly prohibits the violation of a person's dignity or creating 'a hostile, intimidating, degrading, humiliating or offensive environment',⁵⁸² which distinguishes it from the EEA that does not include 'environment.' While the EEA does not make reference to the 'environment', an employee who is subjected to workplace bullying may be capable of seeking relief by claiming unfair discrimination on an arbitrary ground.

Section 94 of the Employment Act provides for the right not to be unfairly dismissed subject to exclusions in other provisions.⁵⁸³

Constructive dismissal in terms of section 95(1)(c) of the Employment Act determines dismissal, where the employee terminates the contract with or without notice as a result of the employer's conduct or breach of an express or implied term of the contract of employment.

In the LRA, constructive dismissal cases the employer made 'continued employment intolerable for the employee'.⁵⁸⁴ LRA places the onus lies with the employee to establish a dismissal and the employer must establish that the dismissal was fair.

The Harassment Act or anti-stalking law provides for criminal and civil redress to prevent 'stalking' which is defined as 'contact that was non-consensual.' The Harassment Act does not expressly protect workplace bullying and provides no definition for 'harassment,' as it is said that it is left for court to interpretation. The interpretation of 'harassment' is the objective test 'reasonable person.'

The Harassment Act regulates conduct such as mental, physical, psychological and economic harm and the victim may apply for a protection order, similarly to the PHA. The Harassment Act does not expressly recognised workplace bullying, but extends it's scope to include course of action for workplace bullying under the auspice of 'harassment.' Harassment in PHA is clearly defined and in the Harassment Act it is not. The Harassment Act has extended 'harassment' to the workplace for vicarious liability against the employer.

⁵⁸² Equality Act 2010, Chapter 15, section 26 (1)(b) (i) - (ii).

⁵⁸³ The Employment Rights Act 1996, section 94.

⁵⁸⁴ Labour Relations Act 66 of 1995, section 186(1)(e).

The PHA in SA provides for harassment and other matters connected therewith in order to protect the rights of South African citizens which is different to the Harassment Act. The Harassment Act regulates conduct such as mental, physical, psychological and economic harm and the victim may apply for a protection order, similarly to the PHA. The Harassment Act does not expressly recognised workplace bullying, as offence but extends its scope to include course of action for workplace bullying, under the auspice of ‘harassment.’ UK courts have been actively recognising new claims under the Harassment Act, such as vicarious liability relating to the employer. The PHA, is similar to UK’s Harassment Act for a course of action for workplace bullying and may extend in case for psychological harm however, ‘harassment’ is clearly defined in this PHA.

The chapter that follows contains the conclusion and recommendations.



CHAPTER SIX

6.1 CONCLUSION

The objective of this thesis is to determine the extent to which South African law protects employees from workplace bullying and whether additional measures should be promulgated to provide protection to employees.

This mini-thesis includes a definition of workplace bullying. The definition describes workplace bullying as ‘hostile behaviour in the workplace’.⁵⁸⁵ Rothmann and Rothmann’s defines ‘bullying’ as

“repeated actions and practices that are directed to one or more workers, which are all unwanted by the victim, which may be done deliberately or unconsciously, but clearly cause humiliation, offence, and distress, and that may interfere with job performance and or cause an unpleasant working environment.”⁵⁸⁶

Negative acts such as ‘harassment’, ‘discrimination’ and ‘victimisation’ are often associated with workplace bullying, which has a negative effect on the physical and psychological well-being of the employee with costs to the organisation.

It has been established that academic writers described bullying as a form of psychological violence and psychosocial harassment. It was found that to amount to workplace bullying actions and practices should be ‘repeated and unwelcome’ and could affect more than one person creating a ‘hostile environment.’ International organisations such as the ILO describes ‘harassment’ as a form of ‘workplace violence that threatens the safety, well-being and health of employees and established an international prohibition on abusive treatment of workers.

Workplace bullying has been identified as ‘repeated hostile behaviour’ that causes ‘psychological harm’ and is determined by the relationship between the bully and the victim.

⁵⁸⁵ Cunniff L & Mostert K ‘Prevalence of workplace bullying of South African employees’ (2012) *10(1) SA Journal of Human Resource Management* 450 2.

⁵⁸⁶ Rothmann JC & Rothmann S *The South African Employee Health and Wellness Survey - User manual* 4th ed (2006) Potchefstroom: Afriforte (Pty) Ltd 14.

Furthermore, different types of workplace bullying was examined, such as direct and indirect bullying; individual and group bullying; cyber-bullying and work-related bullying. Direct bullying or ‘overt’ bullying was described as ‘face to face’ and includes acts like belittling, criticising or humiliating the person, whereas indirect or ‘covert’ bullying is more subtle causing ‘emotional harm. Case law discussed revealed that ‘marginalisation’ is form of indirect bullying.⁵⁸⁷ Workplace bullying was described as ‘offensive harmful behaviour’ that could be directed at a co-worker or supervisor and may result in sleep or eating disorders, anxiety, depression and low self-esteem.

Group bullying or ‘mobbing’ has been found to have effects on the organisation causing an increase in turnover, mistrust, poor productivity and losing respect for supervisors that bully leading to cost to the organisation. It was also shown in case law that bullies could be found guilty by making the workplace ‘intolerable.’ Cyberbullying is victimising or intimidating a person via a social media platform and work-related bullying by socially isolating the victim that affects work performance.

The effects of workplace bullying include, sleep and eating disorders, depression, anxiety and a lack of self-esteem which may cause an atmosphere of mistrust in the organisation. It was established that workplace bullying incidences are increasing and a need exist to address the detrimental effects it has on the worker’s well-being, mental and emotional stability, as well as a continuous infringement of the employee’s dignity.

The South African statutory framework was evaluated to determine whether any statutes protect workers from workplace bullying and if amendments are needed.

The Law of Delict established that an employer has a ‘duty of care’ and may be held vicariously liable for ‘psychological harm’ caused by another employee, ‘during the course of employment,’ which may provide a course of action for bullied employees.

Furthermore, international instruments, such as the ILO recognise ‘violence and harassment’ as a human rights violation that is ‘unacceptable and incompatible with decent work.’ was discussed. The Violence and Harassment Convention, 2019 and Violence and Harassment

⁵⁸⁷ *Lombard and KGA Lewens (Pty) Ltd* (2004) 25 ILJ 1770 (CCMA) 1770H.

Recommendations, 2019 adoption recognised ‘bullying and mobbing’ as harmful conduct in terms of ‘violence at work.’ SA has ratified this Convention.

Labour legislation was examined to determine the extent to which employees are protected from workplace bullying. The OHS Act places a duty on the employer to provide a ‘safe and healthy working environment,’ and the definition of ‘health’ contained in the OHS Act suggests that it includes psychological well-being. For this reason an employee who is subjected to workplace bullying may seek relief in terms of the OHS Act. An employee who is subjected to workplace bullying also has the option of claiming to have been constructively dismissed by the employer in terms of the LRA. Where the EEA is used by an employee who is subjected to workplace bullying, such an employee may institute legal proceedings against the employer on the basis of unfair discrimination on an arbitrary ground.

Workplace bullying and the reliance on the Constitution was discussed. It was established that the Constitution is premised on constitutional values based on freedom, equality and human dignity and the removal of injustices and discriminations. Furthermore, litigants may not rely directly on the Constitution, if legislation so enacted gives effect to the provisions of the Constitution.⁵⁸⁸ It was found that litigants could only bypass legislation and seek relief in terms of the Constitution directly, if there is a constitutional challenge to the statute⁵⁸⁹ that was enacted to give effect to the right in the Constitution.⁵⁹⁰

The Constitutional rights were evaluated and it was established that when an employee is unable to seek relief in terms of the PHA, then direct reliance on the right to dignity contained in the Constitution may take place. It was argued that legislation does not protect employees against workplace bullying in certain cases, so direct reliance may be possible. The right to equality was established in order to provide equal treatment and protection before the law. The EEA and PEPUDA was enacted to give effect to section 9 of the Constitution.

It has been shown that UK lacks a uniform definition, but similar characteristics are observed for workplace bullying such as unwanted negative behaviour, persistency, duration and power dynamics between victim and bully.

⁵⁸⁸ *Sidumo & another v Rustenburg Platinum Mines LTD and another* (2007) 12 BLLR 1097 (CC) 1174.

⁵⁸⁹ *NEHAWU V University of Cape Town & others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) 14.

⁵⁹⁰ *SANDU v Minister of Defence & others* (2007) 9 BLLR 785 (CC) 51.

The Common Law in UK was evaluated and it demonstrated that a duty on the employer to provide a safe and healthy work environment with ‘reasonable care’ against risk of physical injury or disease, but it also extended to psychological, psychiatric injury and general approach to foreseeable risks. Case law indicated that workers may sue an employer for negligence and claim damages for mental health, if employer had not taken steps to circumvent it. This extended the law beyond work-related harms to ‘mental harm.’ UK Common Law is similar to Common Law in SA as it imposes a duty on the employer for ‘reasonable care’ for health and safety of employees in the workplace in conjunction with statutory regulation.

Harassment has been shown to be classified as a form of Tort in UK, which is now extended to include psychiatric injury and workplace bullying victims have a claim for damages in pain and suffering and pecuniary loss against the employer.⁵⁹¹ In SA, the Law of Delict deals with ‘psychological harm’ through civil action, not criminal as in UK.

UK is a signatory of the ILO and a previous member of the EU. The ILO regulates international labour standards, but it remains a voluntary to Member States.

The Safety Act obliges the employer with a ‘duty of care’ for the health, safety and welfare of employees, but extends to ‘mental condition’ in caselaw psychological and psychiatric injury. Victims of workplace bullying may utilise for recourse, same as the OHSA.

The Equality Act is an anti-discriminatory statute that prohibits employment discrimination and harassment on listed grounds. The employer may be held vicariously liable for third party harassment on these listed grounds. The EEA also has the same burden of proof that the ‘harassment’ amounted to unfair discrimination on listed grounds. However, victims of workplace bullying may have recourse using the provision based on ‘on any other arbitrary ground.’⁵⁹² In the UK, the Equality Act prohibits the violation of a person’s dignity and extends to the ‘environment,’ if it ‘creates a hostile, intimidating, degrading, humiliating or offensive environment,’ and employees may have course of action in this instance. The Equality Act holds the employer vicariously liable and it is a criminal offence, but the EEA an action could be broad in the Equality Court.

⁵⁹¹ *Swan v Monash Law Book Co-operative* (2013) VSC 326 WL 3220357 1.

⁵⁹² Employment Equity Act 55 of 1998, section 60.

The Employment Act in the UK governs the right not to be unfairly dismissed. In constructive dismissal the employee voluntarily resigns as result of a breach of contract of employment. It demonstrated that bullied employees, who have been constructively dismissed may claim compensation that may have led to depression related to PTSD. The LRA regulates constructive dismissal cases in SA and the onus is on the employee to prove the dismissal, whereas the Employment Act the onus lies with the employer.

The Harassment Act in UK provides both criminal and civil redress, which does not expressly extend to workplace bullying. The statute does not provide a definition for ‘harassment,’ but the objective test is used. In the UK a wide interpretation to the meaning of ‘harassment’ is applied to include workplace bullying. The Harassment Act applies inside and outside the workplace, similar to SA. SA cases have used the same rationale to hold employer vicariously liable for ‘harassment’ of an employee. The PHA provides a definition for ‘harassment’ and makes provision for an applicant to apply for a protection order for stalking, however the PHA does not expressly recognised workplace bullying as unlawful conduct or infringement of workers’ rights.

6.2 RECOMMENDATIONS

Legislative Reform and Recognition

As demonstrated, not clearly defining what workplace bullying constitutes, leads to employees resorting to provisions that do not adequately address this problem. In order to protect employees, workplace bullying should be clearly defined. The LRA, EEA, OHSA, PEPUDA and PHA protects workers from discrimination, harassment and ensures a safe and healthy workplace.

The OHSA definition of ‘health’ suggests that psychological well-being of employees is included in this duty, and for this reason employees who are subjected to workplace bullying may be in a position to obtain relief in terms of the OHSA. Similar to Safety Act in the UK, the OHSA should also place an obligation on employers to consult with safety representatives to develop measures to ensure that employees are safe at the workplace.

The Equality Act in the UK protects employees from discrimination and harassment, and prohibits the violation of person’s dignity which extends to environment, whereas the EEA

does not include environment. It is thus recommended that a provision be inserted in the EEA, similar to the UK, which prohibits the violation of a person's dignity and that it also extends to the environment where it creates a hostile, intimidating, degrading, humiliating or offensive environment. This may be of assistance to employees who are subjected to workplace bullying in SA.

The Harassment Act in the UK and the PHA in SA are similar statutes for 'stalking' and 'harassment.' The Harassment Act has been very instrumental for bullied workers, as it was previously directed only on the perpetrator, but case law has extended its application to hold the employer vicariously liable for an employee's behaviour. Courts in UK have ordered that in terms of the statute the employer had to pay for psychiatric injury to the employee. Also, the statute not only applies within the workplace, but also provides protection outside the workplace. Insofar as the Harassment Act in UK it now applies to workplace bullying cases to claim vicarious liability on the employer. The PHA in SA does not recognise workplace bullying as unlawful conduct or an infringement of a right. It is suggested that the meaning of harassment contained in the PHA be extended, so that it makes express provision for workplace bullying. In other words, the provision should include workplace bullying as a form of harassment.

It may be recommended that the South African Law Commission should investigate workplace bullying in SA, in order to define workplace bullying specifically, this is critical. All stakeholder participation is paramount such as unions, employers and business representatives,⁵⁹³ to bring awareness to this harmful conduct. Furthermore, in drafting such a definition, it should take cognisance of ILO Conventions and Recommendation as provided in this mini-thesis to be complied with international standards.

This thesis highlighted the lessons that SA can learn from UK's approach to workplace bullying. UK courts have also posed a legal duty on employers to protect employees' psychiatric or psychological health, as a work-related risk in terms of Common Law. Workplace bullying awareness in UK is growing with campaigns that are supported by trade unions, government and organisations. While this thesis shows that South African legislation

⁵⁹³ Smit DM *Bullying in the Workplace: Towards a Uniform Approach in South African Labour Law* (published LLD thesis, University of the Free State, 2014) 343.

does protect employees from workplace bullying to a certain extent, the thesis also shows that where the recommendations suggested are promulgated, employees may be even more protected than what they are at the present.



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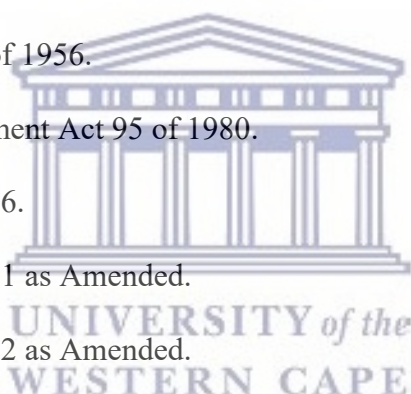
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