

SECTION 60 OF THE EMPLOYMENT EQUITY ACT 1998: WILL A COMPARATIVE APPROACH SHAKE THIS JOKER OUT OF THE PACK?*

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SUMMARY

Section 60 of the Employment Equity Act 1998 provides for the liability of an employer to an employee suffering from discriminatory conduct by another employee. Section 60 also provides two defences that can be raised by the employer in such circumstances. In this article the circumstances under which an employer can be held liable in terms of section 60 are explored. More particularly, the meaning of the requirement that the discriminatory conduct must relate to an employment policy or practice is considered. The possible meaning of harassment in the workplace is also reflected upon with reference to developments and jurisprudence in the context of sexual harassment. The nature and content of the defences available in terms of section 60 are analysed with reference to comparative jurisprudence in Britain, Australia, Canada and the United States of America. In view of this, reservations are expressed about the correctness of the judgment of the Labour Court in *SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Limited and Burger*.

1 INTRODUCTION

The judgment of the Labour Court in *SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Limited and Burger*¹ is hailed by many as a victory in the fight against racism in the workplace. However, while this judgment is about racism in the workplace, it is not in the first place about the right of an employer to dismiss an employee for racist conduct. It is settled law that an

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¹ [2006] 8 BLLR 737 (LC).

employer has such a right in the appropriate circumstances.² Rather, the *Old Mutual* judgment is about the extent to which employers ought to be liable for the racist attitudes of their employees in the workplace. While the employer in this matter was ultimately rapped over the knuckles by the Labour Court, the failure of the court to provide any guidelines on how to interpret section 60 of the Employment Equity Act (EEA)³ must be regretted. Section 60 of the EEA is the only provision in the Act that addresses the employer's liability for discriminatory acts of one employee against another and yet the courts are providing minimal direction on this provision.⁴

There can be no doubt that the employment arena is an important vehicle for transformation and that employers, together with other fundamental societal structures such as the family and the education system, carry an onerous responsibility in this regard. However, it must be asked to what extent employers should take responsibility where society as a whole has failed to change the mindsets of individuals. It is suggested that section 60 of the EEA, if only to a certain extent, endeavours to provide the answer to this question.

After reviewing and commenting on the provisions of section 60 of the EEA, I shall briefly consider comparative legislation and jurisprudence in the UK, Canada, Australia and the USA. After that I shall discuss and analyse the *Old Mutual* judgment. I shall endeavour to illustrate that, while regarded by many as a victory against racism in the workplace, this judgment may actually discourage employers from fighting racism and other discriminatory conduct in the workplace. Finally, I shall reflect on possible lessons to be learnt from this judgment and suggest, based on comparative experience, possible guidelines to employers on how to minimise liability in terms of the EEA.

As a caveat, it should be added that most of the foreign case law⁵ referred to below concerns sexual harassment in the workplace, but I suggest that the principles emerging from these judgments, particularly in the context of employer liability, are equally valid in respect of other forms of discrimination and harassment.

² In *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp* [2002] 6 BLLR 493 (LAC) par 37 the Labour Appeal Court condemned racism in the workplace in the strongest possible terms and suggested that dismissal is often an appropriate sanction.

³ Act 55 of 1998.

⁴ *Ntsabo v Real Security CC* 2003 24 ILJ 2341 (LC).

⁵ Many of the Australian decisions referred to below were handed down by the Federal Magistrates' Court of Australia as well as administrative tribunals. I was unable to find any relevant judgment passed by courts of higher authority. Nonetheless these judgments and awards, while they have no binding force in Australia, provide very useful insights and guidelines on employer liability for discrimination in the workplace. I refer to them fully cognizant of their limitations.

2 SECTION 60

2.1 General

Section 60 of the EEA reads as follows:

- (1) If 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."

Section 60(3) renders the employer liable if one of its employees contravenes a provision of the EEA while at work in respect of another employee and it is immediately brought to the attention of the employer (not necessarily by the victim)⁶ who then fails to take the necessary steps to eliminate the conduct. Upon this failure the conduct of the primary perpetrator is assigned to the employer. However, even if the employer fails to act as contemplated in section 60(2) of the EEA, subsection 4 provides another "escape route" for the employer if it can show that that "it did all that was reasonably practicable to ensure that the employee would not act in contravention of" the EEA.

This section is clearly aimed at encouraging employers to do as much as possible to eradicate discrimination in the workplace, but also reflects, it is suggested, a sentiment that there comes a point when a diligent employer should be rewarded for its efforts to prevent discrimination and not be held liable for the discriminatory conduct of its employees if, nonetheless, the latter do not respond to the employer's efforts.⁷

⁶ *Ntsabo v Real Security CC supra* 2374B-D.

⁷ Le Roux, Orleyn and Rycroft *Sexual Harassment in the Workplace: Law, and Policies and Processes* (2005) 94-98. Also see Grogan *Dismissal, Discrimination & Unfair Labour Practices* (2005) 130. *Cf London Borough of Ealing v Rihal* [2004] EWCA Civ 623 accessed via <http://www.bailii.org> (24 August 2006) where Sedley LJ par 50 commented in respect of a similar provision in the Race Relations Act 1976 (UK) that "The section provides a carrot and a stick. The stick is that employers will ordinarily be liable for the discriminatory acts of their staff. The carrot is that they will escape vicarious liability if they can show that they had done all they reasonably could to prevent their staff from discriminating on grounds of race. The plain purpose is to encourage employers to prevent racial discrimination by the use of procedures, training and monitoring."

2 2 The defences

Section 60 has been referred to as creating a form of statutory vicarious liability for the discriminatory conduct of employees.⁸ If this is correct, care should be taken to distinguish it from vicarious liability in the (common law) delictual sense.⁹ The latter is a policy-driven doctrine, rendering an employer liable for a delict committed by an employee during the course and scope of employment, despite preventative measures that the employer may have taken. Furthermore, one of the elements of delict is *dolus* in the form of intent, but it is generally accepted that intent is not a relevant factor in determining liability for unfair discrimination.¹⁰ Common law vicarious liability is dependent on the employee acting within the course and scope of his employment, while liability in terms of section 60 is location-based, rather than activity-based: the conduct must occur *while at work*,¹¹ irrespective of whether the conduct occurs during the course and scope of employment.¹²

However, it is perhaps not correct to regard it as a form of statutory vicarious liability. A simple reading of section 60(3) makes it clear that the employer is liable, not for the discriminatory act of another, but because it (the employer) is deemed to have done something untoward. It is therefore suggested that it is more appropriate to regard section 60 as creating a form of direct liability for failing to address equity in the workplace; hence the two possible defences evolve from the question whether the employer did in fact engage with complaints about discriminatory conduct or implemented anti-discriminatory measures in the workplace.

Section 60(4) is reminiscent of a provision found in many anti-discrimination laws elsewhere. For instance, section 32(3) of the Race Relations Act 1976 (UK) provides:

“In proceedings brought under this Act against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.”

Section 60(4) also echoes section 41(3) in the Sex Discrimination Act 1975 (UK) as well as provisions in Australian federal and state anti-discrimination laws and some Canadian provincial statutes.¹³ Jurisprudence on these laws (whether they regulate a specific ground of discrimination such as sex or race or discrimination generally) can leave one with no doubt that, while the threshold is high, the employer's liability is not intended to be

⁸ Dupper, Garbers, Landman, Christianson, Basson and Strydom (ed) *Essential Employment Discrimination Law* (2004) 251.

⁹ Le Roux *et al* 79-93.

¹⁰ Dupper *et al* 36.

¹¹ In this regard see Dupper *et al* 54.

¹² Also see the comments made by Dickson CJ in *Robichaud v Canada (Treasury Bd)* (1987) 87 CLLC 17, 025 (SCC) par12 on the use of common law vicarious liability in this context.

¹³ Christie, England and Cotter *Employment Law in Canada* 2ed (1993) 371.

absolute and adequate pro-active measures should stand the employer in good stead. This was confirmed in *Martins v Marks & Spencer PLC*,¹⁴ by the UK Court of Appeal (Civil Division), when it declined to hold the employer liable for discrimination on the grounds of race because of the preventative measures taken by the employer. It held that:

“[S] 32(3) is directed to providing a defence for an employer who has taken, *in advance* of the alleged discriminatory treatment, all reasonable and practicable steps to prevent discrimination from occurring”¹⁵ (emphasis added).

Similarly, in *Al-Azzawi v Haringey Council (Haringey Design Partnership Directorate of Technical & Environment Services)*¹⁶ the Employment Appeal Tribunal (UK) held that:

“The section is aimed at the prevention of discrimination ... Subsequent events are therefore relevant only so far as they shed light on what occurred before the act complained of (eg they may demonstrate that an equal opportunities policy which exists on paper is not in fact operated).”¹⁷

The only notable exception to this trend is the Canadian judgment *Robichaud v Canada (Treasury Bd)*.¹⁸ In this matter the Canadian Supreme Court, applying the Canadian Human Rights Act 1976, confirmed the strict liability of an employer for the discriminatory acts of one of its employees on the basis that any other interpretation would discourage employers from taking preventative steps as required by the statute.¹⁹

The origin of the defence in section 60(1)-(2) is less clear, but is possibly founded on the judgments of the United State Supreme Court in *Faragher v City of Boca Raton*²⁰ and *Burlington Industries Inc v Ellerth*.²¹ In these

¹⁴ [1998] IRLR 326.

¹⁵ *Martins v Marks & Spencer PLC supra* 332.

¹⁶ EAT/158/00 accessed via <http://web.lexis-nexis.com/professional/> (5 September 2006).

¹⁷ *Al-Azzawi v Haringey Council (Haringey Design Partnership Directorate of Technical & Environment Services) supra* par 14.

¹⁸ (1987) 87 CLLC 17, 025 (SCC). This judgment does not apply in the provinces where the provincial statutes expressly provide a defence. See *Christie et al* 371.

¹⁹ *Robichaud v Canada (Treasury Bd) supra* pars 13 and 16. It should, however, be noted that statutory defences similar to those listed in section 60 of the EEA are not available under the Canadian statute. It is also to be noted that this Act provides for remedial remedies much narrower than those provided for in s 50 of the EEA. Whereas s 41 of the Canadian statute provides for the payment of compensation for patrimonial loss only, the EEA provides for remedies aimed at addressing both patrimonial and non-patrimonial damages suffered by the victim. Hence in *Ntsabo v Real Security CC supra* 2385C the Labour Court order included payment of general damages including *contumelia* of an amount of R50 000 to an employee who was sexually harassed by her supervisor and in *Christian v Colliers Properties* 2005 26 ILJ 234 (LC) 242E the Labour Court awarded R10 000 general damages to an employee who was sexually harassed by her employer. In both cases the court relied on s 50 of the EEA. Also, in *Robichaud v Canada (Treasury Bd) supra*, the court considered whether the defences available to an employer under the common law doctrine of vicarious liability for a delict committed by its employee would also be available to the employer in the context of the statute.

²⁰ 524 US 775 (1998).

judgments the US Supreme Court considered the extent to which an employer ought to be liable under Title VII of the Civil Rights Act of 1964 (US) for the discriminatory conduct of a supervisory employee *vis-a-vis* another employee.²² No defences similar to those under section 60 of the EEA are listed in Title VII, but from an early stage the Supreme Court recognised that liability under Title VII is not absolute.²³ As far as hostile environment harassment not resulting in a tangible employment action is concerned, the court in *Faragher* and *Ellerth* based the employer's liability on negligence.²⁴ In these instances it held that the employer would be liable for unless it can show:

“(a) [T]hat the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise ...”²⁵

The first element above (a) is very similar to the defence listed in section 60(4) of the EEA but, although doubted by some,²⁶ the US Supreme Court made it clear that (a) and (b) are two elements of the same defence and do not represent two alternative defences.²⁷

While these cases may be the origin of the defence in section 60(1)-(2) and even partly the origin of the defence in section 60(4) of the EEA, it will be problematic to rely on US case law to provide content to the defence. The US courts have persistently distinguished between *quid pro quo* and hostile environment harassment on the one hand and between supervisory and

²¹ 524 US 742 (1998). For a discussion of these two judgments see Dilorenzo and Harshbarger “Employer Liability for Supervisor Harassment after *Ellerth* and *Faragher*” 1999 6 *Duke J of Gender Law and Policy* 3; Weitzman “Employer Defenses to Sexual Harassment Claims” 1999 6 *Duke J of Gender Law and Policy* 27; and Robinson, Kirk, and Stephens “Hostile Environment: A Review of the Implications of *Meritor Savings Bank v Vinson*” 1987 38 *Labor LJ (US)* 179.

²² In terms of Title VII it is unlawful for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, term, conditions or privileges of employment because of such individual's race, colour, religion, sex or national origin.

²³ *Meritor Savings Bank v Vinson* 477 US 57 (1986); 106 S Ct 2399 40 EPD (1986).

²⁴ The US Supreme Court proceeded on the premise that the employer cannot be vicariously liable since harassment is not conduct within the scope of employment. It therefore had to find a different basis on which it could hold the employer directly liable. Relying on the principles of agency, it held that an employer will always be liable for the hostile environment resulting in a tangible employment action (for instance, dismissal or demotion) and *quid pro quo* harassment perpetrated by a supervisor since the latter's conduct becomes the conduct of the employer. This is premised on the argument that only supervisory employees are in a position to offer or withdraw employment benefits and can thus be considered agents. In *Burlington Industries Inc v Ellerth supra* par IIID it was stated that “The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.” Also see Robinson, Kirk, and Stephens 1987 38 *Labor LJ (US)* 1233.

²⁵ *Burlington Industries Inc v Ellerth supra* par IIID. Also see *Faragher v City of Baco Raton supra* par IIB2.

²⁶ Skidmore and Kaake “Sexual Harassment: The Supreme Court Couldn't Really Have Meant ‘And’” 2001 52 *Labor LJ (US)* 108.

²⁷ Dilorenzo and Harshbarger 1999 6 *Duke J of Gender Law and Policy* 21.

non-supervisory employees²⁸ on the other hand for purposes of employer liability. No such distinction is apparent from section 60 of the EEA. Furthermore, the two defences listed in section 60, as indicated by use of the word *despite* in subsection 4, are, contrary to the position in the USA, not two elements of the same defence, but two different defences.

2 3 When does section 60 impose liability on the employer?

The liability of the employer envisaged by section 60 of the EEA will only be relevant once it can be 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*. More often than not section 6 of the EEA would be the provision that is contravened.

If the conduct complained of does not amount to harassment, section 60 will only become operative if the victim can show contravention of section 6(1) of the EEA. This subsection provides that *no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice* on the grounds referred to in the rest of the subsection. The question can be asked whether discrimination by an employee driven by the latter's own prejudices can be regarded as an *employment policy or practice*. The phrase is defined in section 1 of the EEA to include, but not be limited to, recruitment procedures, advertising and selection criteria; appointments and the appointment process; job classification and grading; remuneration, employment benefits and terms and conditions of employment; job assignments; the working environment and facilities; training and development; performance evaluation systems; promotion; transfer; demotion; disciplinary measures other than dismissal; and dismissal. While the list is not exhaustive it is difficult to see how isolated conduct by an employee could constitute an employment policy or practice and form the basis of the contravention that would initiate liability in terms of section 60 of the EEA, particularly where the individual's conduct is in fact in direct contrast with an existing employment policy or practice. While a single act could possibly constitute a practice, the troublesome conduct must still "relate to the status or condition of the claimant *qua* employee".²⁹ This is one of the reasons why the US courts are circumspect when imposing liability upon employers for discriminatory conduct unless it is perpetrated by a person in a supervisory position. Non-supervisory employees, in their view, simply do not have the power to determine employment policies or practices or, in their terminology, to effect a *tangible employment action*.³⁰

²⁸ It has been suggested that the defences ought to apply in the case of hostile environment harassment perpetrated by individuals other than the victim's immediate supervisor. See Weitzman 1999 6 *Duke J of Gender Law and Policy* 57.

²⁹ Grogan 90.

³⁰ *Burlington Industries Inc v Ellerth supra* par IIID.

The next question would therefore be whether the conduct complained of constitutes harassment and thus a contravention of section 6(3) of the EEA. This section provides that harassment of an employee on one of the grounds listed in section 6(1) is a form of unfair discrimination and there is no requirement that it be linked to an *employment policy or practice*. If one employee is harassed by another as envisaged by this subsection, there would thus undoubtedly be a contravention of the EEA and the provisions of section 60 ought to apply.

The crucial question is therefore what constitutes harassment. There is no definition of harassment in the EEA. Only sexual harassment is defined in a Code published in terms of the EEA during 2005.³¹ This Code identifies three broad forms of sexual harassment: victimisation, *quid pro quo* harassment and hostile work environment harassment.³² It is suggested that while victimisation and hostile work environment harassment can be associated with almost all the grounds of discrimination listed in section 6(1) of the EEA, *quid pro quo* harassment is most likely to be linked to either sex, gender or sexual orientation or a combination thereof. While not suggesting that harassment (other than sexual harassment) will only manifest in the form of victimisation or a hostile work environment, these forms of harassment would be a good starting place to determine whether harassment (other than sexual harassment) has occurred. Following the guidelines provided by the 2005 Code on sexual harassment, victimisation would occur when an employee is victimised or intimidated on a ground listed in section 6(1) of the EEA; for instance race, religion, culture or language. Hostile work environment harassment is normally not associated with any harm to the victim's career, but creates a workplace environment that is offensive and/or abusive. Once again, borrowing from the 2005 Code, demeaning or offensive comments or jokes with racial, religious or cultural overtones could be examples of such harassment.

Although not specifically aimed at the workplace, this approach is also consistent with the definition of harassment in the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).³³ Section 1 of this Act defines harassment to mean:

"[U]nwanted 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

³¹ The Code of Good Practice on the Handling of Sexual Harassment Cases 2005 GenN 1357 in GG 27865 of 2005-08-04.

³² See Item 5.3 of the Code. The phrase *hostile work environment* is not used in the 2005 Code, but the concept is suggested by the examples listed in respect of verbal and non-verbal conduct that could constitute sexual harassment. See items 5.3.1.2 and 5.3.1.3 of the 2005 Code.

³³ Act 4 of 2000.

(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 group."

Since it is relevant to the discussion that follows, it is also useful to consider the guidelines of the Equal Employment Condition Commission (US) on the meaning of racial harassment in the workplace:

"Racial harassment is unwelcome conduct that unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive work environment. Examples of harassing conduct include: offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. An employer may be held liable for the harassing conduct of supervisors, coworkers, or non-employees (such as customers or business associates) over whom the employer has control.

An isolated incident would not normally create a hostile work environment, unless it is extremely serious (e.g., a racially motivated physical assault or a credible threat of one, or use of a derogatory term, such as the N-word, etc.). On the other hand, an incident of harassment that is not severe, standing alone may create a hostile environment when frequently repeated."³⁴

While the 2005 Code makes it clear that a single incident could constitute sexual harassment³⁵ and the requirement in the definition of harassment in PEPUDA that the unwelcome conduct must be *persistent* is followed by the phrase *or serious and demeaning, humiliates or creates a hostile or intimidating environment*, it is clear that a single incident constituting harassment on any ground would be the exception and that an element of repetitiveness would normally be required before conduct would be regarded as harassment. In this regard Grogan comments that:

"But presumably harassment is not confined to sexual harassment. It would include any form of *systematic action* that is prejudicial or injurious to an employee, provided it is motivated by one of the grounds listed in section 6(1), or a combination thereof"³⁶ (emphasis added).

Given the difficulties with regarding the conduct of an individual as an employment policy or practice (as required before such conduct would be a contravention of s 6(1) of the EEA), it is suggested that unless courts take an expansive view of the meaning of harassment in section 6(3), the discriminatory conduct of an employee *vis-à-vis* a co-employee while at work could fall beyond the parameters of the EEA and more particularly the employer liability as provided for by section 60.

If no contravention of the EEA that would trigger employer liability in terms of section 60 can be shown, the victim would have no cause of action against the employer in terms of the EEA. This does not imply that the victim is without a remedy. However, since the structure of the EEA does not allow

³⁴ Accessed via http://www.eeoc.gov/policy/docs/qanda_race_color.html (5 September 2006).

³⁵ Item 5.3.3.

³⁶ Grogan 90. S 8(3) of the Protection from Harassment Act 1997 (UK) defines harassment to include "causing the person alarm or distress; and a course of conduct must involve conduct on at *least two occasions*" (emphasis added).

the victim to proceed against the perpetrator co-employee in terms of the EEA,³⁷ action could be taken against the perpetrator in terms of the PEPUDA³⁸ and/or against both the perpetrator and the employer on the basis of delict and the common law doctrine of vicarious liability.

2 4 *Précis*

To conclude this section: once a (victim) employee has overcome the above obstacles the employer can escape liability by relying on either of the defences listed in section 60(2) or (4); the one pro-active and the other reactive. While the latter resembles defences available under UK and Australian discrimination legislation, the former appears to have its origin in US case law, if only partly. It is not clear why two defences were included by the legislature and it might be the result of a misguided effort to capture defences available in terms of UK and Australian legislation as well as those developed by the US courts. One advantage that comes to mind is the fact that a small employer, lacking the means or the capacity to take pro-active steps, can always rely on the section 60(2) defence to escape liability. Nonetheless, the availability of this defence must be questioned since it might serve as a disincentive to employers to take any preventative steps at all. This, in turn, will undermine the object of the EEA³⁹ and the duty imposed by section 5 of the EEA which requires employers to promote (a pro-active step, it is suggested) equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.⁴⁰

3 *OLD MUTUAL: THE FACTS*

During April 2003 an employee (Burger) of Old Mutual made a complaint to her immediate superior about being placed in close proximity to black employees in the office. Finca was one of these black employees. There was some dispute about the words actually uttered by Burger, but Revelas J was satisfied that they included the "k-word".⁴¹

The remark was overheard by another colleague (Jeffries) and she confronted Burger's superior (Van Zyl). At this stage Finca was unaware of the remark. Van Zyl did two things: First, she tried to downplay the

³⁷ While s 6(1) of the EEA prohibits discrimination by anyone (this presumably includes a co-employee), the powers of the Labour Court in terms of s 50 are such that it can make orders against an employer only.

³⁸ S 5(3) of the PEPUDA provides that the Act will only apply to the labour environment to the extent that the EEA does not apply.

³⁹ See s 2(a).

⁴⁰ This view that the availability of a defence might stultify the remedial purpose of the statute was the basis on which the employer was held strictly liable in *Robichaud v Canada (Treasury Bd)* *supra* par 15.

⁴¹ Burger claimed that she asked "Why must I be surrounded by the whole of Khayelitsha?" While the judge did not accept this version, she concluded that both versions of the remark are racist in nature. See *SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Limited and Burger* *supra* par 8.

significance of the remark by claiming that Afrikaans-speaking people do not necessarily use this word in a derogatory sense, and second, clearly sensing that trouble was looming, apparently warned Burger verbally, although the exact nature of the warning, if it was in fact issued, remains vague. Jeffries was not satisfied that the matter was dealt with correctly and decided to tell Finca about the remark and to involve the union. The union recommended that Old Mutual should investigate Van Zyl's actions in view of the fact that she was aware that in its disciplinary code the offence was regarded as serious misconduct that may lead to dismissal, and that it should have been the subject of a formal disciplinary inquiry. Merely issuing a warning was not the appropriate action, or so the union claimed.⁴²

Despite this request by the union and a later grievance lodged by Finca, Old Mutual declined to take any further action. Only after the employment equity manager and the transformation manager intervened did a disciplinary inquiry ensue. This inquiry took place during October and November 2003, six months after the offending remark was uttered. Burger was found guilty of the use of racist language and the chairperson of the disciplinary inquiry, finding that the initial warning was vague, recommended dismissal. Burger appealed against her dismissal. The appeal was heard by Williamson, one of the most senior persons in Old Mutual.

Williamson, while condemning the conduct of Burger and the manner in which Van Zyl and others managed the issue, nonetheless upheld the appeal and reinstated Burger. He held that the initial warning was not vague; the long delay before the disciplinary inquiry commenced created the impression that the matter had been finalized; thus Old Mutual had been estopped from proceeding with a disciplinary inquiry. He thus found that the disciplinary hearing should not have been held.⁴³

It is opportune to mention at this point that it was accepted by Revelas J that Old Mutual had done much by way of training to eradicate racism.⁴⁴

After the outcome of the appeal, the union approached the Labour Court for declarators to the effect that the conduct of Burger and Old Mutual amounted to discrimination; an order setting aside the findings of Williamson; an order for compensation for Finca and a Labour Court directive on steps to be taken to avoid similar conduct in future. While Revelas J found that both Old Mutual's and Burger's conduct amounted to discrimination and ordered the payment of compensation by the employer to Finca, she declined to set Williamson's decision aside⁴⁵ or to issue a Labour Court directive.

⁴² *SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Limited and Burger supra* par 17.

⁴³ *SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Limited and Burger supra* par 33.

⁴⁴ *SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Limited and Burger supra* par 44.

⁴⁵ A discussion of this decision is beyond the purpose of this article, but it is suggested that the approach by Revelas J is correct. *SATAWU obo Finca v Old Mutual Life Insurance*

4 SHOULD OLD MUTUAL BE LIABLE FOR BURGER'S REMARK?

Revelas J was clearly not impressed with the initial efforts by Old Mutual to minimize the incident and identified this approach as the core of the problem:

“At the heart of this matter lies a view, shared by far too many people, that the word ‘kaffir’ is not as hurtful as some others (Africans in particular) would have it. I gained the strong impression in this matter that the incident was regarded by some as a storm in a teacup which would soon blow over, as long as people did not make too much of a fuss about it. It was precisely this type of approach that exacerbated the conflict that emanated from the whole incident.”⁴⁶

She concluded that the remark was clearly racist in nature and that Old Mutual's delay in taking action against Burger and its failure to protect Finca amounted to direct discrimination.⁴⁷

While the judge did not specifically deal with section 60 of the EEA, her finding, it is suggested, is a correct application of section 60(1)-(3) of the EEA, but for one reservation.

Company (SA) Limited and Burger supra par 44. Also see par 43. If one considers the powers of the Labour Court in s 50 of the EEA, it is simply not within the court's powers to make such an order in terms of the EEA. Having said that, Williamson's decision to uphold Burger's appeal against her dismissal remains a mystery. The Labour Appeal Court has condemned racism in the workplace in the strongest possible terms and has suggested that dismissal is the only appropriate sanction. Meeting the criterion of substantive fairness would therefore not have been a problem. Second, while conceding that a second disciplinary inquiry will only be fair in exceptional cases, the Labour Appeal Court in *BMW (SA) (Pty) Ltd v Van Der Walt* 2000 21 ILJ 113 (LAC) par 12 held that the opening of a further disciplinary inquiry will “depend upon whether it is, in all the circumstances, fair to do so”. In the present circumstances there are a number of factors that suggest it might not have been unfair to commence a further disciplinary inquiry: the fact that all parties, including Burger, must have known that the initial warning was preceded by a hopeless disregard of the disciplinary code, the fact that the victim of the racist remark was unaware of the remark at the time of the initial warning, and the fact that Burger could not have been unaware of the ongoing efforts of Jeffries and the union to resurrect the matter. However, the subsequent resumption of the disciplinary process and the dismissal of Burger by Old Mutual after the trial in *Old Mutual* is to say the least, problematic. (This matter has now been referred to the Labour Court.) Not only could it be a breach of contract since it is doubtful that any disciplinary code would provide for the continuous re-opening of a misconduct matter that had already exhausted all disciplinary processes (cf *Denel (Pty) Ltd v Vorster* 2004 25 ILJ 659 (SCA)), but such conduct would certainly be regarded as unfair. In *BMW (SA) (Pty) Ltd v Van Der Walt supra* par 12 the Labour Appeal Court suggested that a further disciplinary inquiry after the failure of the initial disciplinary process would only be fair in exceptional cases; commencing a third inquiry will certainly be regarded as unfair. If the continued employment of Burger presented a problem it is suggested that a fair dismissal could only have been achieved by means of a dismissal based on incapacity or possibly operational requirements.

⁴⁶ *SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Limited and Burger supra* par 42.

⁴⁷ *SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Limited and Burger supra* par 39.

If section 60(1)–(3) was applied to the facts of this case, Old Mutual failed to consult with all relevant parties and to address Burger’s conduct which was brought to its attention by Jeffries immediately after the remark was uttered and Old Mutual should therefore be held liable.

The reservation relates to the conduct (contravention of the EEA) that actually triggered the application of section 60. Did Burger’s conduct amount to a contravention of section 6(1) of the EEA? This can only be the case if the racist remark can be said to be an employment policy or practice. It was suggested above that such a conclusion is not obvious, particularly in view of the fact that the remark was in fact contrary to the employer’s policy on racism. It is suggested that Van Zyl’s failure to address Burger’s remark (as opposed to the remark itself) in terms of the employer’s policy was more likely to be a contravention of section 6(1) that could initiate the application of section 60. This, however, was not considered in the judgment.

Can it be said that the racist remark by Burger was harassment and thus constituted a contravention of the EEA? If it did, section 60 applies. If, as was suggested above, an expansive meaning of harassment is observed (considering South Africa’s history of racial oppression, this is likely), it is conceivable that Burger’s conduct, in the sense that it created a hostile environment (evidenced by Jeffries’ reaction) could be regarded as harassment. This would constitute a contravention of section 6(3) of the EEA and would trigger the application of section 60. While the conduct undoubtedly constituted discrimination, serious reservation must, however, be expressed whether a private comment that does not set out to humiliate or create a hostile or intimidating environment or is calculated to induce submission can be regarded as *harassment*.

However, assuming a contravention of the EEA and disregarding section 60(4) of the EEA, the judge’s conclusion would be unproblematic. But what about subsection 4? It is part of the statute and it cannot simply be disregarded.

The following remarks by Revelas J are relevant in this context:

“The first respondent led undisputed evidence that it has done much by way of training and other means, to eradicate racism ... The undisputed evidence was that *there was no lack of training* in this particular area of human relationships within the first respondent. It is the *response* to such training, which was the problem in this matter. Some *mindsets* will not respond to training. Swift disciplinary action and damages or compensation as punitive measures, should be imposed when training has failed, as it did fail in this case”⁴⁸ (emphasis added).

This paragraph appears to suggest that the employer had done everything that it could to ensure that its employees did not misbehave in this regard. The judge’s refusal to make an order in respect of the applicant’s prayer requesting a Labour Court directive on steps to be taken by Old Mutual to

⁴⁸ *SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Limited and Burger supra* par 44.

avoid similar conduct in future fortifies this conclusion.⁴⁹ Burger's conduct was the result of her mindset and not the failure of the employer to do all that was reasonably practicable to ensure that employees would not act in contravention of this Act. Should a strict application of subsection 4, based on the judge's view of the problem (mindset as opposed to the lack of proactive steps by the employer), not have absolved Old Mutual from liability? Instead, the judge ordered that compensation be paid to Finca. The parties subsequently settled on an amount of R150 000,00 as compensation.

It almost appears as if the judge required Old Mutual to prove both defences available in section 60.⁵⁰ While satisfied that reasonably practicable steps had been taken, she held Old Mutual liable for its slack disciplinary response. This is simply not what is required, as evidenced by the use of the word *despite* in subsection 4: Once it was clear that the employer had failed to respond to Burger's conduct (in the manner contemplated by subsection 2), the question should have been whether all reasonably practicable steps to prevent discrimination by their employees had been taken by the employer. Depending on which interpretation is followed, vastly different results follow.

It is in this regard that the judgment's failure to apply the statutory provisions and to provide clear guidelines on the meaning of "all reasonably practicable steps" is frustrating. This matter concerned racism, and its emotive nature can easily cloud views, but the provisions of section 60 apply universally to all forms of discrimination. Therefore an ideal opportunity to empower employers with an understanding of the extent of their duties in the context of workplace discrimination was missed.

It is suggested that even with a proper application of section 60(4), the same result could possibly have been achieved. Mention was made of the training and "other means" employed by Old Mutual to address racism, but the judgment does not reveal the nature of the training and the "other means" referred to, except to mention that it had been successful in respect of a few individuals.⁵¹ Whether these steps amounted to "all that was reasonably practicable" we are, apart from the judge's comment concerning the inability of Old Mutual to change mindsets, unable to gather from the judgment. A proper evaluation by the judge of the training and "other means" might have revealed that more could have been done. Section 60(4), after all, requires that *all* (not certain things) that was reasonably practicable must be done. Such an approach, it is suggested, would have been consistent with the structure of the EEA (more particularly section 60) and it would have been instructive to employers.

⁴⁹ *SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Limited and Burger supra* par 44.

⁵⁰ As was suggested by the US Supreme Court in *Burlington Industries Inc v Ellerth supra* par IIID and *Faragher v City of Baco Raton supra* par IIB2.

⁵¹ *SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Limited and Burger supra* par 44.

It is fitting to conclude this section with a quotation from the judgment of the Employment Appeal Tribunal (UK) in *Al-Azzawi v Haringey Council (Haringey Design Partnership Directorate of Technical & Environment Services)*,⁵² a matter where the salient issues surrounding employer liability were remarkably similar to those in *Old Mutual*. The complainant in the matter was of Iraqi Arabic origin and claimed to be the victim of racial discrimination in the workplace. The Employment Tribunal, disregarding the preventative measures taken by the employer, took a dim view of the lenient penalty imposed upon the perpetrator employee and held the employer liable. The Employment Appeal Tribunal reversed this decision on the basis that the events after the act of discrimination are irrelevant and are at best an aid to show that the employer did not take its racial policy seriously:

“The Tribunal expressly rejected the suggestion that the Council [the employer] paid only lip service to the policies. ... the Council had taken all such steps as were reasonable to prevent racial discrimination. It had policies in place; those policies were not just for show; employees were (when breach was provable) disciplined under them; employees were sent on relevant courses ... In our judgment the Tribunal misled itself by looking only at the events after the incident. Had it properly directed itself it would inevitably have come to the conclusion that the Council had made out its defence under s 32(3).”⁵³

5 ALL REASONABLE PRACTICABLE STEPS?

Old Mutual, if nothing else, is a timeous reminder to employers that racism and other discriminatory conduct in the workplace require immediate and strong disciplinary action by the employer. However, in as far as this judgment suggests that training and other preventative means will not stand the employer in good stead, despite the provisions of section 60(4) of the EEA, it is clearly wrong and will discourage employers from implementing any preventative measures.

It is quite clear from the review of comparative case law that the emphasis ought to be on the employer conduct that preceded the act of discrimination. Can any guidance on the meaning of *all reasonable practicable* steps be gathered from these jurisdictions, notably Australia and the UK, where legislative provisions similar to section 60(4) of the EEA are observed?

It is clear from these jurisdictions that there are no precise guidelines for an employer hoping to avoid liability by relying on a section 60(4) type of defence.⁵⁴ A good starting place would be to establish whether a clear policy is in place. The mere existence of a policy, however, is not sufficient.⁵⁵ Evidence of its effective communication - including communication on the

⁵² EAT/158/00 accessed via <http://web.lexis-nexis.com/professional/> (5 September 2005).

⁵³ *Al-Azzawi v Haringey Council (Haringey Design Partnership Directorate of Technical & Environment Services)* *supra* par 21.

⁵⁴ Ronalds and Pepper *Discrimination Law and Practice* 2ed (2004) 149.

⁵⁵ See *Shields v James* [2000] FMCA 2 par 74. Also see MacKen, O'Grady, Sappideen and Warburton *The Law of Employment* 5ed (2002) 640.

consequences for breaches – is essential.⁵⁶ While no formal distinction is made between big and small employers, it is unrealistic to expect all employers to observe a common standard when assessing the reasonableness of the steps taken and the nature of the communication.⁵⁷

Obviously in the case of bigger employers the threshold would be much higher and evidence of continuous training, awareness campaigns, monitoring of the impact and effect of training and the extent to which management actively engages with all employees on these issues would be required.

In workplaces with a history of deeply entrenched gender or racial biases (the army, for instance), it is suggested that the courts will expect a very high standard from the employer when reviewing the preventative steps taken by it.⁵⁸ It is also essential that the policy be clear on how grievances should be handled, not only to ensure that complaints are dealt with expeditiously but also to ensure confidentiality. It is perhaps in this regard that the employer in *Old Mutual* failed to meet the required standard. It is not explored in the judgment, but if one considers Van Zyl's limited action and the subsequent delays in taking further action, it almost appears as if there was great confusion or even ignorance on how to manage an issue of this kind and that, despite the judge's comments, all reasonable steps had possibly not been taken by the employer.

⁵⁶ MacKen et al 645. Also see *Aleksovski v AAA Pty Ltd* (2002) EOC 93-219.

⁵⁷ See Ronalds et al 149-150. Also see *Johanson v Micheal Blackledge Meats* [2001] FMCA 6 par 102. In this regard the strategy (concerning sexual harassment, but equally useful in respect of other forms of harassment) recommended to very small businesses by the Human Rights and Equal Opportunity Commission in Australia is useful:

1. Orally inform all employees that sexual harassment will not be tolerated under any circumstances and that disciplinary action will be taken against an employee who sexually harasses a co-worker, client or customer;
2. Provide staff with brochures containing information on sexual harassment;
3. Inform new staff that it is a condition of their employment that they do not sexually harass a co-worker, client or customer;
4. Keep a diary note when staff are informed of the employers' policy on sexual harassment which can then be used as evidence to show that the employer took steps to prevent sexual harassment if a complaint is later made to an external agency;
5. Have a recommended form of complaint handling procedure in place; and
6. Attend relevant seminars or training sessions and obtain any available resources on discrimination, harassment and their legal responsibilities from employer organisations.

Accessed via http://www.hreoc.gov.au/sex_discrimination/code_practice/data/6_guidelines.html (4 September 2006).

⁵⁸ In *Hopper v Mount Isa Mines Ltd and others* [1997] QADT 3, the Queensland Anti-Discrimination Tribunal considered the liability of the employer for the sexual harassment of a female apprentice diesel fitter mechanic, the first woman selected for this position by the employer in a very male dominated and anti-women environment. In holding the employer liable, the tribunal criticised the employer's failure to prepare the all-male workplace for the introduction of women, the lack of training of supervisors on how to communicate the new workplace policy on sex discrimination, the failure of the employer in monitoring the success or not of education on anti-discrimination and sexual harassment and the failure to monitor the attrition rate of female apprentices.

The test, ultimately, ought not to be whether the employer took every possible step to ensure that the discrimination does not happen, but simply whether it took reasonable steps.⁵⁹ In *Caniffe v East Riding of Yorkshire Council*⁶⁰ the following approach was suggested by the Employment Appeal Tribunal (UK): First establish whether the employers took any steps at all to prevent the employee from doing the act(s) complained of in the course of employment and then, having identified these steps, if any, that the employer took, consider whether there were any further steps that they could have taken which were reasonably practicable. Whether these steps would have been successful in preventing the acts of discrimination, while relevant, is not determinative. In this regard the judge suggested that:

“On the one hand, the employer, if he takes steps which are reasonably practicable, will not be inculpated if those steps are not successful; indeed, the matter would not be before the court if the steps had been successful, and so the whole availability of the defence suggests the necessity that someone will have committed the act of discrimination, notwithstanding the taking of reasonable steps.”⁶¹

In summary, reasonable practicable steps, irrespective of the size of the employer would require an employer to at least:

- Develop clear written comprehensive policies on discrimination and harassment – including the consequences of breaching the policies.
- Disseminate those policies to employees, train employees - particularly managers – regularly on their obligations and duties under discrimination law and keep the policies accessible.
- Establish clear written procedures for the handling of grievances with a view to ensure ensure that complaints are dealt with promptly and confidentially and follow the requirements of natural justice.
- Monitor the workplace to ensure that the policies are effectively implemented.⁶²

6 CONCLUSION

Section 60 of the EEA provides, irrespective of the ground of discrimination or the position of the perpetrator employee, two alternative defences to the employer against liability for discriminatory conduct of one employee *vis-a-vis* another employee. If *Old Mutual* suggests that the two defences listed in section 60 are in fact two elements of the same defence (as is apparently the view in the USA), it is clearly wrong. Such an interpretation is not only inconsistent with the wording of section 60, but also with foreign

⁵⁹ *McAlister v SEQ Aboriginal Corporation & Anor* [2002] FMCA 109 par 147.

⁶⁰ [2000] IRLR 555. Also see *Croft v Royal Mail Group Ltd* [2003] IRLR 592; and *Balgobin v London Borough of Tower Hamlets* [1987] IRLR 401. Also see Bowers *Practical Approach to Employment Law* 7ed (2005) 177-179.

⁶¹ *Caniffe v East Riding of Yorkshire Council supra* par 14.

⁶² See MacKen *et al* 645.

jurisprudence observing similar legislative provisions. Furthermore, if this judgment suggests that employer liability can only be avoided by reacting effectively to a grievance in this regard, employers will fail to see the need to take any pro-active steps and will rather deal with discrimination as and when it arises, an approach that would undermine the purpose of the EEA. If *Old Mutual* is correct, the irony would be that the employer who takes all reasonable preventative steps but fails to prevent discrimination, will not have a defence, but the employer who sits back and does nothing in advance, but reacts aggressively to a discriminatory act by an employee, will have a defence.

Section 60 of the EEA, and more specifically employer liability for discrimination by its employees, is not as sweeping as it might appear at first glance. The liability envisaged by it will only arise if a contravention of a provision of the EEA can be established. Isolated conduct by a recalcitrant employee, unless it can be said to be harassment (and the meaning of this is not settled either) and thus a contravention of section 6(3) of the EEA, will fall foul of the requirement in section 6(1) that the discrimination must be in an *employment policy or practice*.

A correct application of section 60(4) of the EEA will provide an employer that has taken all reasonable practicable steps in advance to prevent discrimination from being perpetrated by its employee with an absolute defence if, nonetheless, the discrimination happens. However, as suggested by comparative experience, the standard required in respect of preventative measures is high and will require extreme dedication by an employer.

Until the Labour Court provides a proper interpretation of this section, it will remain the capricious joker in the pack that could lead us down a path that should remain untravelled.