

# Does a false accusation of racism constitute harassment? Importance of listed grounds when claiming unfair discrimination

Unfair discrimination is prohibited under section 6 of the Employment Equity Act 55 of 1998 (EEA), which also provides that harassment of an employee is a form of unfair discrimination.

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In *Solidarity obo C Kellerman v Western Cape Education Department and Others* [2024] (22 November 2024), the Labour Court had to consider whether an employee who was falsely accused of racism was in fact subjected to unfair discrimination as prohibited by the EEA.

## Factual background

The employee was accused of being racist by one of his subordinates. The Western Cape Education Department (Department) convened a disciplinary enquiry to test the veracity of these allegations. An independent chairperson concluded that the allegations of racism did not have any merit and, consequently no action was taken against the employee for the allegations of racism.

The employee, however, was dissatisfied with the Department's conduct and proceeded to refer a claim in terms of section 6(1) and 6(3) of the EEA on the basis that he had been harassed and thus unfairly discriminated against. Furthermore, the employee sought to hold the Department vicariously liable for the harassment in terms of section 60 of the EEA for failing to take reasonable steps to eliminate the alleged harassment.



## The court's findings

At the onset, the court identified difficulties with the manner in which the employee's case was pleaded and enquired what the exact ground of discrimination was, as it was not readily apparent from the employee's statement of claim. Furthermore, the court noted that the employee did not plead that he was unfairly discriminated against based on listed grounds i.e. that he was accused of being racist by a subordinate because he was a white male (with the listed grounds being race and gender in this example).

Ultimately, the employee's failure to plead his case with sufficient particularity proved to be fatal as the court upheld the Department's application for absolution from the instance.

## Key takeaways

The court considered the principles governing applications for absolution from an instance and confirmed that the test was, in essence, whether the employee had at least produced sufficient evidence to reasonably establish the *prima facie* existence of discrimination in the form of harassment on an unlisted arbitrary ground.



The court considered the employee's testimony, along with undisputed documentary evidence, and concluded that on the employee's own version, he had failed to reasonably establish a *prima facie* case of discrimination on an unlisted ground and granted the Department absolution from the instance, which effectively meant the end of the employee's case.

The court further made the point that "not everything bad, inexplicable or irrational that may happen to an employee is always discrimination" and confirmed that in order to succeed in a unfair discrimination claim on the basis of harassment, a claimant is required to establish a direct nexus or link between the conduct which is complained of and the grounds listed in section 6(1) of the EEA, or the personal attributes or characteristics of the individual.

Put differently, the fact that an employee suffers an "unpleasant" event in the workplace does not necessarily mean that they have been subjected to harassment (as a form of unfair discrimination) as the court will apply an objective test to determine whether the provisions of section 6 of the EEA have been contravened.

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