



ARBITRATION AWARD

Case No: **PSHS823-24/25**

Commissioner: **Gert van der Berg**

Date of award: **14 March 2025**

In the matter between:

PSA obo Heindrich Johnson

Applicant

and

Department of Health- Western Cape

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. The matter was scheduled for arbitration on 06 February 2025 and on 05 March 2025 at Room 1, Ground Floor, A Block Metro East Nursing College at Stikland Hospital Premises. The proceedings were both digitally and manually recorded.
2. The applicant, Heindrich Johnson, was represented by J Botha, a union official from the PSA, whilst the respondent was represented by A Solomons from the Department of Health in Western Cape. The arbitration procedure was explained to the parties prior to proceeding.

ISSUE IN DISPUTE

3. The dispute was referred to the PHSDSBC as a dismissal for misconduct under section 191(1) [191(5(a))] of the Labour Relations Act 66 of 1995 as amended ("the LRA"). I must decide whether the dismissal for sexual harassment whilst on duty was substantively and procedurally fair and thereafter determine the appropriate remedy.
4. The applicant sought retrospective reinstatement.

BACKGROUND TO THE ISSUES

5. The applicant was employed on a permanent contract of employment from 01 September 2007 and appointed as Manager from 01 August 2022, He was dismissed on 08 October 2024. The applicant attended a disciplinary hearing on 24 and 25 July 2024, and he was found guilty on the charges 1-3 on 06 September 2024 and dismissed, and it was confirmed in writing. He occupied the position of Chief Food Services Manager, and his salary was R382 062-00 per year. The applicant was charged for misconduct that he during the period of July 2023 to April 2024 while on duty sexually harassed Ms I Singula. He was further charged that on 14 March 2024 he went to her office, closed the door and hugged her. On 15 March 2024 he closed her office door and gave his cell phone to her requesting her cell number to contact her for drinks.
6. The dispute was referred to PHSDSBC on 13 December 2024 and it was set down for a conciliation process on 09 January 2025 after a certificate of non-resolution was issued. It was then set down for arbitration on 06 February 2025. After the first four (4) witnesses of the respondent testified, the dispute was postponed as a part heard case as a further witness of the respondent must still testify plus the applicant. It was then re-scheduled as a part heard arbitration case on 05 March 2025.
7. The parties presented verbal opening statements. Closing statements were verbally presented by both parties on 12 March 2025 as agreed on 05 March 2025. Both parties were allowed to cross-examine and re-examine during the presentation of their evidence. For the sake of brevity, the details of this will not all be repeated in the award, but it should not be construed that it was not considered.

SURVEY OF EVIDENCE AND ARGUMENT

Documentary evidence

8. Both parties handed in documentation. The bundle of the respondent was marked as “R” pages 1-62, and the bundle of the applicant was marked as “A” pages 1-15. The authenticity of these bundle was not disputed by either party.

RESPONDENT’S EVIDENCE AND ARGUMENT

The respondent call five (5) witnesses who testified after being duly sworn in

1st witness, Itumeleng Sigula, Admin Clerk at Human Resources, testified as follows:

9. She was employed as Admin Clerk on 01 July 2023 at the Human Resources Department at Alexandra Hospital and she was previously employed as an intern. The applicant was not known to her when she started. Mr H Johnson work with her department and her component was paysheets and payslips and distribution of it. The complaint against the applicant was sexual harassment and it started off with small remarks like you are so beautiful, and she started feeling uncomfortable when he continued with remarks and came to her office and close the door and wanted to hug her.
10. On page 12 of bundle “R” appears the five charges against the applicant and after filing a complaint, she testified as a witness during his disciplinary hearing. The applicant called her gorgeous and beautiful when he greeted her in the morning. The complainant found it inappropriate and when it started, she shared it with some of her colleagues in an informal way around 22 to 23 January 2024. It started when the applicant has moved to the Human Resources Building about 2 to 3 months after July 2023. Her supervisor and two other female clerks were involved in the conversations.
11. The witness stated that in March 2024 when she got back from leave after her birthday, the applicant came to the HR Building into her office and closed the door and looking at her. She told him that she was on leave, and he put the files on her desk and walked around with open arms and he said that she must hug him for her birthday. She was looking at the closed door and was feeling uncomfortable, scared and she evaluated the situation. She kept looking back at the closed door and then she stood up and hugged him. He took the files and walked out of her office. The reason he was there was probably to pick up paysheets and payslips. She said that to get out of the situation she hugged him, and he did not force her to hug him, and she wanted him to leave her office. After that she walked to the door and closed it and sat down for a

few minutes. She wanted to tell her colleagues about it, but she felt that he did nothing wrong. She then went to the bathroom and then continued with work.

12. Two more incidents happened on 15 March 2024 as she left after 08:00 with colleagues and when she came back, she was told that the applicant was looking for her regarding pay sheets. She telephonically contacted him, and he said that he is looking for the pay sheets. She told him it was not ready, and he can get it the following Monday. He said that he is going to come to her office, and he did. When he arrived, he closed the door again and took his cell phone out of his pocket and was doing something on it. He said he wants her number, and she asked why. He said to contact her for drinks, and she told him that she is not taking work outside the workplace. He said that it is a pity, and he left. The part regarding 18 March 2024 did not take place and was not supposed to be part of charge 3.
13. When the applicant closed the door for a second time, she thought what now. She was scared as the first time she was confused and the second time when he asked for her cell phone number, she was very uncomfortable as there was no reason to asked for her number. She approached her colleague and told her about the issue. The colleague said that he made similar comments to her by telling her she is beautiful on different times. On 20 March 2024 was the scheduled long service awards and the applicant came late with a few other colleagues. After the event he was sitting at the table, and she was sitting with her colleagues and taking pictures. After they left, she took pictures of herself, and she felt that people were looking at her. She had conversations with other colleagues about transport as she needed a lift home. While she was sitting on the coach, the applicant walked back and said that she must take a picture with him. He continued by saying that she just took a picture, and she replied that she is not taking photos with other people.
14. She called Mr Plaatjies and asked for transport to go back home. The applicant walked out of the building and one of the colleagues asked what that look was about. The applicant was on the same vehicle that she and the colleague travelled with, and she told her colleague everything. She was sitting at the back and the applicant at the front. On the way to Maitland, she and two other colleagues got off at the garage. The applicant opened the door and step out and the witness also step out. He stepped forward and whispered in her ear and said bye beautiful. In the venue she was not scared as there were other people as well but when he walked out of the venue his facial expression was indicating unfinished business. The applicant was not found guilty on charges 4 and 5.
15. The witness lodged a complaint after this incident, and she decided to speak to her supervisor and Manager, and she lodged a formal complaint. She wanted to speak to the CEO, but he was not available until the following Monday. She had no expectation from the applicant but had the expectation that this harassment must stop immediately. She lodged the complaint on 25 March 2024, and she was feeling uncomfortable since the remarks started.

16. Under cross-examination the first three (3) charges were read and the witness indicated that she agreed with the charges as stated in charge 1 and 2 but the part in charge 3 about 18 March 2024 never took place. She was then referred to page 1 of bundle "A" where the charges appear the same as on page 12 of bundle "R" but with changes made in pen but not signed. She said the changes on dates were made as she could not remember the exact dates. She agreed that she stood up during the incident in her office and hugged him as his arms were open and he hugged her. She said that she made one other case of sexual harassment against another employee, and he was also dismissed as the applicant. She denied that in total she made three (3) cases against employees about sexual harassment as claimed by the representative of the applicant.
17. Under further cross-questioning the witness confirmed that she did not inform the applicant that he is making her feel uncomfortable when he is calling her gorgeous and beautiful. She never asked him to stop. She could not do it as she has not the temperament, personality and ability to do it but things like sexual harassment is not supposed to happen in the workplace. It is not her misinterpretation of his remarks as he called other also by those names, but he did not close other colleagues' doors and hugged then and wanted to take photos with them. She agreed that she is an introvert, and she was not always sitting behind closed doors, but he was not supposed to close the door of her office. She decided to put in a formal complaint when she heard stories about the applicant from her colleagues.
18. She further agreed that she had in mind to greet him back as handsome, but it was before she felt harassed. She stated that she was not aware whether she smiled when he greeted her, but she thinks she had a straight face. She agreed that she had the assumption that he had further intentions with her, and he also left when she did not want to give him her contact number. She never had the intention that the applicant must be dismissed but she believes his dismissal was fair.
19. Under re-examination she confirmed that she is not aware whose handwriting is on page 1 of bundle "A" and there is no proof that the amendments were made. She lodged a complaint about the applicant as he was sexually harassing her. The applicant was aware of the rules as it was forwarded to all employees, and he was dismissed due to the misconduct he was aware of. She agreed that she has not seen the definition of sexual harassment, but she did not go to work to expect to have situations like this. The harassment policy on pages 25 to 50 of bundle "R" was not explained to her.

2nd witness, Robyn Hendriks, Admin Clerk-Alexandra Hospital, testified as follows:

20. She was referred to page 60 of bundle "R" and she confirmed that it is her statement that reads as follows:
"On the 29th of February 2024, I was working in Mr Pedro's office when I heard Mr Johnson greet Itumeleng in the passage "Hi beautiful". He then proceeded to Mr Pedro's office where I confronted him and asked him

not to speak to Itumeleng like that because she does not like it, he then responded "isit soe n party". I then said yes, it is. The next incident took place on the 15th of March 2024. I remember it was before the long service awards which took place 20th of March 2024. I saw Mr Johnson walked pass my office into Itumeleng's office and closed the door. On the 11th of April 2024 I was in my office on a call with Mr Pedro when I saw Mr Johnson walked pass my office to Itumeleng's office and I went to her office while he was standing by her office door and asked her to come to my office and then he left"

21. According to the second witness, she is an Admin Clerk in her own office and are working with colleagues. She explained the incident on 29 February 2024 in detail when she told the applicant not to speak to the first witness the way he is doing, and he must stop with it. This was done in the office of Mr Pedro as she was working in his office. The witness did not explain in debt what made the complainant uncomfortable, and the applicant did not take it seriously. The applicant was in a management position, and she was a Clerk. The complainant shared her feelings with her as his remarks and actions made her uncomfortable. She intervened as the complainant is an introvert and will not inform the applicant to stop and she did it. She expected the applicant to take it seriously, but he did not.
22. She stated that the complaint by the first witness was firstly discussed with her supervisor, and he explained the process to her. After she spoke to the applicant about his behaviour against Itumeleng her colleagues became more protective. He greeted other colleagues in the same way, but they saw it as a compliment.
23. Under cross-examination she confirmed that the complainant told her in January 2024 that she was feeling uncomfortable about the remarks of the applicant, but she was not aware why he called her beautiful. She worked with the applicant since 2022 when he was appointed as manager and before the complainant was appointed. It is her view that when she spoke to the applicant about the complainant, he was not serious about it as his response was in a yoking manner. She was never jealous when the applicant did not tell her that she is beautiful, and the complainant did not ask her to speak to the applicant as she did it on her own.
24. She said that Pedro was behind his desk, and she was standing, and the applicant was in the doorway. On 11 April 2024 when she asked Itumeleng to come to her office the applicant said nothing and left, and he was not doing anything wrong. She agreed that paysheets and pay slips is confidential documents, but it is sealed and therefore there is not a reason to close the door.
25. Under re-examination she confirmed that she considered the feelings of the complainant when she spoke to the applicant and called the complainant to her office. She confirmed that the applicant is a married man.

3rd witness, A Davey, Administration Clerk HR Development, testified as follows:

26. The witness stated that Itumeleng, complainant, is her colleague and she became aware of her complaint at the long service award function on 20 March 2024. She came back from the bathroom and when she turned around, she saw Mr Johnson sitting next to the complainant. The witness could see that the complainant was uncomfortable and she then also sat there. The applicant got up and left and then the complainant told her that he wanted to take photos with her, and she refused. Both Itumeleng and herself went home with the Quantum vehicle and they sit at the back, and she still told the witness how the applicant made her feel. At the garage the complainant got out and the applicant was standing at the door which he opened. She saw how he was leaning forward and whispered something in the ear of the complainant. He was watching her until she was out of his sight.
27. She stated that she saw what happened as she was sitting at the back and the seats are shorter at the front. She clearly saw the applicant whispering something in the ear of the complainant, but she could not hear what he said. She said that she is working with the complainant, and she is very withdrawn and is working with pay sheets and payslips which the applicant collected from her monthly. The body language of the complainant showed that she was very disgusted after the applicant whispered something to her.
28. Under cross-examination she confirmed that the complainant told her how she felt, and she is only aware of the two incidents in the venue and the vehicle on 20 March 2024. She stated that she does not have to be an expert to read the body language of a human being.
29. Under re-examination no questions were asked.

4th witness, S, Pedro, Administrative Officer at Alexandra Hospital, testified as follows:

30. The witness stated that he is the supervisor of Miss Itumeleng, and he knows the applicant who is a manager and in a higher position than the witness. He became aware of the complaints of the complainant at the end of January 2024 or early February 2024 when the applicant dropped off his registers. He and his subordinates were busy in the kitchen making food and Itumeleng was asking her colleagues whether the applicant was married and all of them confirmed. She stated how would he feel if his wife is telling other men that they are beautiful. She was asked why and the complainant responded that she wants to complain about it as the applicant is calling her names like beautiful and gorgeous.
31. The first witness complained about it in March 2024 after the long service awards. After the complaint Itumeleng, himself and the applicant was called to the office, and he was told that Robyn told him that the complainant does not like it when he was calling her names like beautiful and gorgeous. He said that he called a lot of women beautiful. After the official complaint was lodged there was an investigation, and the

complainant asked to see top management. He did not attend the training on the Western Cape Government Workplace Harassment Policy as he only started working for the respondent in 2023 and he was not aware of the definition of sexual harassment on page 29. He stated that it compulsory for employees to attend training on sexual harassment and the applicant attended the training.

32. Under cross-examination he stated that he is not aware whether the complainant told the applicant not to call her further names as Mrs Hendriks spoke to the applicant in his presence to stop doing it. He stated that the complainant is quit and shy and mostly in her office but not always behind closed doors as they have an open-door policy. He denied that he said during the hearing that the complainant is always sitting in her office behind close doors. He did not answer when he was told that if the complainant told the applicant to stop the process of calling her names like beautiful and gorgeous he would have.
33. Under re-examination he confirmed that the applicant was find guilty on charge 3 during the disciplinary hearing and it did not change the fact that he offended the complainant. He also confirmed that the complainant spend must of lunch times in her office.

5th witness, Caylin Chamberlain-Newman, Labour Relations Officer, testified as follows:

34. The witness testified that she is also the Sexual Harassment Advisor appointed by the Department of Health. She did a preliminary investigation and then made a recommendation on this case. She used the Harassment Policy and Bullying document as reference document and the Harassment policy appears on page 25 and the types of conduct regarding sexual harassment on page 29. It states: *"is any unwanted conduct, which is sexual in nature which constitutes unacceptable behaviours, practices or threats and can be physical, verbal or non-verbal. The conduct must impair the dignity of the person affected or create a negative or hostile environment. Sexual harassment is relevant in a workplace if granting sexual favours becomes a condition of employment, or refusal to do so affects employment decisions, or if it affects the employees' work or creates a hostile environment"*. It was the guiding document in her investigation.
35. She explained the process that firstly she received a complaint and then she established what went wrong. Then she determined the allegations of sexual harassment or unwanted conduct. She determined whether there is a hostile environment. The complainant then became the witness if the process continues. In the investigation she met with the complainant and explained her role. She then read the complaint and observed whether the complainant feel anxious. She determined what possibly happened and in this case the complainant was upset and wanted to proceed formally. The complainant indicated that it continues happened that he was calling her beautiful or gorgeous and she brought it to his attention via a colleague. After the colleague brought it to the attention of the applicant he continued with it. This conversation took place in February 2024 and the applicant continued with his remarks and other mentioned issues.

36. Her investigation started in April 2024, and it was completed in May 2024. He also entered the office of the complainant and close the door behind him. She was sitting behind the desk and on enquiring about her absence she told him that she was on leave because of her birthday. He opened his arms, and he hugged her, and she was feeling uncomfortable. At the long service awards function, he wanted to take a photo with her, and she refused and later in the taxi he whispered in her ear again “you are so beautiful”. With all the incidents she was feeling uncomfortable, and it forms part of charge 1. Her facial expression indicated to the witness that she was feeling uncomfortable.
37. She was asked to describe the consultation with the applicant and the witness stated that it was not a formal meeting, and he did not say anything except that he would respond in writing. He did not have much of a facial expression and no representation. The applicant sent a response via email as can be seen on page 63 of bundle “R” on 03 May 2024. It states in a paragraph as follow: *“I did go to her office and close the office door behind me, but this was done as I was standing in for my direct supervisor, the Deputy Director People and Facilities Manager at the time and was sitting there to sign off pay sheets and my component pay sheets which is a confidential document. I remember that I gave her a hug when I wished her on her birthday”*. The complainant was aware of the position of the applicant as she was an Admin Clerk, and he was in a managerial position.
38. All staff received training on the Sexual Harassment Policy and the applicant should have been aware of it in the position he occupied. The incident at the Long Service Awards and in the taxi continued in April 2024 after he was aware that she was uncomfortable with his verbal comments and actions. On page 12 of bundle “R” charge 1 is read: *“It is alleged that you have committed an act of misconduct in that during the period of August 2023 to April 2024 while on duty you sexual harassed Ms I Singula by calling her Beautiful and/or Gorgeous when you greet her and/or commended that she is beautiful”*. She testified at the hearing of the applicant, and it was the behaviour of the applicant that made her uncomfortable after February 2024 at the Long Service Awards function and in the taxi when again he told her she looks beautiful. In her recommendation she indicated that a final investigation must be conducted. After the final investigation the applicant was charged and subjected to a formal disciplinary hearing.
39. It was decided that his attention was unwelcome, and it boils down to sexual harassment as the experience of the complainant was serious unwelcome attention and he did not stop after he was told in February 2024 by a colleague to stop immediately. Under information questions the witness indicated that the background of the complainant was not investigated.
40. Under cross-examination she agreed that her findings were based on what she was told by the complainant but also from the witnesses of the complainant who brought it to the attention of the applicant. She also confirmed that Ms Hendriks was not present at the time when the incidents happened. She was never told

when the applicant closed the door of the office of the complainant, she hugged him as she told him it was his birthday and then he opened his arms, and she stood up and hugged him. She was told that the complainant was responsible that at least two to three other male employees were charged and dismissed because of the same complainant and the witness responded that she is only aware of one. The witness further commended that two people can feel different about calling beautiful by their manager. It was put to her that if the complainant told the applicant to stop calling her names he would probably stop. It was put to the witness that giving somebody a nick name does not amount to sexual harassment, and she responded that will depend how the person is feeling about it.

41. Under re-examination the witness confirmed that the applicant initiated the cell phone number incident, and he continued with the name calling despite he was asked to stop. Her decision to recommend a formal inquiry was based on investigation evidence and statements of witnesses.

APPLICANT'S EVIDENCE AND ARGUMENT AFTER HAVING BEEN SWORN IN

The applicant, Heindrich Johnson, former Chief Food Services, testified as follows:

42. The applicant testified that he is aware of the charges against him on page 12 of bundle "R". Regarding charge 1 he stated that he did not sexually harass the complainant as there was no sexual intention. The complainant never indicated that she did not like it when he called her beautiful and gorgeous. If she had told him to stop, he would have immediately stop. Regarding charge 2 about the hug, he explained that he went to her office with documents in his hands and he put it down on the table. She told him it was her birthday, and he opened his arms, and the complainant came around the table and hugged him. Then he just walked out. She was sitting behind her desk, and he was standing at the side of her desk, and it was only a shoulder hug.
43. He explained regarding charge 3 that he never asked the complainant for her cell phone to put his number on it. He was shocked when he was informed that he sexually harassed the complainant. He is a married man with three (3) kids and the dismissal impacted his job and career. He stated that if he gets an opportunity to address the complainant, he will ask her to forgive him if she believed she was sexually harassed. The applicant felt that the sanction of dismissal is very harsh as he had no intent to sexually harass her and he will never in future greet somebody like that again. He was never disciplined since he was employed in 2007, and it was the first time he was disciplined in such a way. He stated that he was not the only one that was accused of sexual harassment by the complainant as there was other males also charged and dismissed for similar offences. He stated that he never went back to her office on 18 March 2024 and the charge was partly wrongly formulated as stated by the complainant. He stated that sexual

harassment is when an employee is constantly did it and the other person shows told you that she is not liking it.

44. Under cross-examination he confirmed that he had fifteen staff members including three (3) supervisors under his control and he disciplined the subordinates under his supervision. He was aware how to manage sexual harassment in terms of the code of conduct of the Department. He would have listened to both sides of the story and got the statements of witnesses as well. He would also report the incident to his supervisor, Department Director of the Facility and to Human Resources. It was brought to his attention in February 2024 by a colleague of the complainant and the applicant stated that Mr Hendriks told him that one of the staff members is not happy that he told her that she is beautiful.
45. Under further cross-examination he was told that two witnesses testified, and his version totally differed from their statements and evidence presented. He said what they testified is not true. He was also told that he was given a message in February 2024 to stop but he continued with the sexual harassment of the complainant. He stated that Ms Hendriks never told him that the complainant said that he must stop. He stated that when he visited the office of the complainant the door was closed, and he closed it behind him. He suggested a hug and the complaint could have said no and he is not putting all the blame on her but in his department, it was not wrong to give each other a hug during their birthdays. He confirmed that he knew the complainant since 2023, and her office was close to his office. He closed the door due to confidential information on the pay sheets. He agreed that he had training which highlighted sexual harassment.
46. He was asked whether he continued to sexually harass the complainant after February 2024 and he stated that he did not feel he was sexually harassing her as he also greet other women as beautiful. He was told that when he persisted, she reported it to Ms Hendriks, and she told him to stop as the complainant is not liking it. He also denied that he was whispering in the ear of the complainant "beautiful". He was told that his view of sexual harassment is skew, and he responded again that he did not sexually harass the complainant. He was in a position of trust and when acting in a senior position he thought he could do what he wants. He responded that this statement is not true. He said there was no body language from her side.
47. Under re-examination he confirmed that that the complainant testified that there was nothing wrong with a hug.

CLOSING ARGUMENTS

48. Both parties presented written closing arguments and were submitted on 12 April 2025 and the written submissions and arguments were perused and incorporated in the decisions made in the award.

ANALYSIS OF EVIDENCE AND ARGUMENT

49. Dismissal is not in dispute as agreed by the parties. I must therefore decide whether the dismissal was substantively and procedurally fair or unfair. The procedure was not put into dispute. The applicant only claims substantive unfairness in that he did not break the rules and policy regarding sexual harassment and there was no intention to sexually harass the complainant and therefore the penalty of dismissal was too harsh.
50. Section 138 (6) of the LRA further provides that a Commissioner conducting an arbitration must consider any code of good practice issued by NEDLAC and any guidelines published by the PHSDSBC that are relevant to the matter being considered in the arbitration proceedings.
51. Section 192(1) of the LRA, as amended, states that the applicant has a duty to prove that he was dismissed and once that has been proven, the respondent must prove that the dismissal was fair in terms of section 192(2).
52. It is common cause that the applicant was employed on a permanent contract of employment from 01 September 2007 and appointed as Manager from 01 August 2022, He was dismissed on 08 October 2024. The applicant attended a disciplinary hearing on 24 and 25 July 2024, and he was found guilty on the charges 1-3 on 06 September 2024 and dismissed and confirmed in writing. He occupied the position of Chief Food Services Manager, and his salary was R382 062-00 per year. The applicant was charged for misconduct that he during the period of July 2023 to April 2024 while on duty sexually harassed Ms I Singula. He was further charged that on 14 March 2024 he went to her office, closed the door and hugged her. On 15 March 2024 he closed her office door and gave his cell phone to her requesting her cell number to contact her for drinks.
53. Having regard to the guidelines, a three-stage enquiry is adopted in determining whether a dismissal was an appropriate sanction – i.e., an enquiry into the gravity of the contravention or rule; an enquiry into the consistency of the application of the rule or standard; and an enquiry into factors that may have justified an alternative sanction. Inconsistency was not put into dispute by the representative of the applicant. This enquiry evolved from the principles set out in **Sidumo and another v Rustenburg Platinum Mines Ltd & others (2007) 28 ILJ 2405 (CC) where the Constitutional Court per Navsa AJ [at para 78]** held that: *“In approaching the dismissal dispute impartially a commissioner will consider the totality of circumstances. He or she will necessarily consider the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must consider the basis of the employee’s challenge to the dismissal. There are other factors that will require*

consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list."

54. It is acknowledged that given the nature of the respondent's business and the risks involved, it is crucial that it should have rules, policies, codes and procedures in place. A breach of such rules and policies should obviously not be treated lightly as the consequences could be dire not only for the respondent but also for its other employees. However, in considering the appropriate sanction for any breach, the employer is required to do so dispassionately and fairly.
55. The existence, knowledge, and reasonableness of the rules regarding sexual harassment were not in dispute. The contravention of the rules and policy regarding sexual harassment as claimed by the complainant and whether dismissal was an appropriate sanction, were issues placed in dispute and on which I am required to decide.

Substantive fairness

56. Section 185 of the LRA, as amended, stipulates that every employee has the right not to be unfairly dismissed or to be subjected to an unfair labour practice. Section 186 (1) (a) of the LRA, stipulates that dismissal means an employer has terminated employment with or without notice. Section 188 of the LRA, stipulates that a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's conduct and that the dismissal was affected in accordance with a fair procedure.
57. In determining whether the dismissal was substantively fair, I considered the LRA Code of Good Practice: Dismissal in Schedule 8, Item 7. It states that any person who is determining whether a dismissal for misconduct is unfair should consider-(1) Whether or not the employee contravened a rule or standard regulating conduct in, or relevant to, the workplace; (2) If a rule or standard was contravened, whether or not- (a) the rule was a valid or reasonable rule or standard; (b) the employee was aware or could reasonably be aware of the rule or standard; (c) the rule or standard was consistently applied by the employer; and (d) dismissal was the appropriate sanction for the contravention of the rule or standard.

Did the applicant contravene the policy and rules?

58. This is a purely factual question. Unless the employee concedes to contravention of the rule, evidence must be led from both points of view. That evidence must be carefully analysed and determined on credibility and on balance of probability. The applicant disputes that he broke the rules regarding sexual harassment as he

had no intention to sexually harass the complainant. The first charge states as follow: *“It is alleged that you have committed an act of misconduct in that during the period of August 2023 to April 2024 while on duty you sexual harassed Ms I Singula by calling her Beautiful and/or Gorgeous when you greet her and/or commended that she is beautiful”*. Charge 2 states: *“It is alleged that you have committed an act of misconduct in that on or about 14 March 2024 you went to Ms I Singula’s office, closed her office door and hugged her”*.

59. In **Early Bird Farms (Pty) Ltd v Mlambo (1997) 5 BLLR 541 (LAC) at 544**, it was held that the employer did not have to prove with absolute certainty that the employee was guilty of the alleged misconduct but that proof on a balance of probabilities was sufficient. In other words, even in cases of misconduct that constitute crimes, the onus of proof on the employer alleging this misconduct is that of the civil onus, or a balance of probabilities. See also **SACCAWU & Another v The Click’s Organization (Pty) Ltd (1997) 2 BLLR 164 (IC)**.
60. The representative of the respondent submitted that in response to the applicant’s dispute of unfair dismissal the employer led evidence from various witnesses in terms of the allegations of sexual harassment. The individual witness’s credibility and corroboration was ventilated at a disciplinary hearing, prior to dismissal. The facts presented through the same witnesses’ testimonies form the substantive evidence on arbitration. The applicant did not place procedural fairness in dispute and documentary evidence also sufficiently proved that the process followed was substantively sound and that the rules, regulations, and policies related to handling of sexual harassment has been presented and is credible.
61. The evidence in response to the dispute of alleged unfairness was proven according to the submission of the representative of the respondent, with consideration to the applicant’s awareness of the rule. This was established in terms of his seniority, both in his position as manager and his long service years. It can therefore be concluded that the rule is well established in the workplace and that he is fully aware and/or knowledgeable thereof and/or can reasonably be expected to be knowledgeable thereof.
62. The first witness (complainant) of the respondent assumed duty for the first time as permanent employee at Alexandra Hospital in July 2023. The evidence proved and the applicant concedes that his conduct towards the applicant started in August 2023, a month after she started working at the institution. She stated that whenever he greeted her the applicant referred to “Beautiful” and “Gorgeous”. The applicant did not disprove the respondents’ evidence that he intentionally and selectively isolated/focused his attention on the complainant. No other staff member received similar/the same type of attention from the applicant.
63. It is a further submission that the facts in this case, provided through the testimony of credible witnesses confirms the applicant always disengaging from conversation with complainant when he notices other

colleagues approach/speak to the applicant in his presence. The witnesses testified that a trend of the applicant behaviour was noticed on several occasions, who at that stage was aware that the applicant's attention to the complainant was unwanted and inappropriate after February 2024. Consideration to the full context of the incidences over many months, it cannot be denied as sexual attention on the part of the applicant towards the complainant. Furthermore, that the applicant was made aware of his behaviour being unwelcome, instead of heeding the caution, he escalated and persisted to pursue the complainant. The witnesses testified that they made every effort to ensure that the complainant is not alone with the applicant.

64. According to the witnesses of the respondent it was observed that the applicant always looked for opportunities to engage with the complainant, in isolation of others. The applicant's behaviour and intention were clearly illustrated through his conduct, he closed her office door, that he approached her at the long service award whilst she was sitting alone, he walked away when others join. It is further submitted that under cross-examination the applicant's testimony presented several contradictions; closing the office door of the complainant to hug her for her birthday, then changing it to that he closed it because he signed timesheets which is confidential. He initially conceded to asking the cell phone number and making the statement "it's a shame". However, the applicant then during his evidence in chief denied that there was such an incident. Another inconsistency in his testimony is when he initially agreed with the way the witness described the hug, however that he altered his testimony to state that the hug was different, and she hugged him. The applicant insisted that he is not blameworthy because the complainant never personally informed him of how she felt about his advances.
65. The representative of the respondent concluded in her submissions that the reasoning of the applicant is irrational and undermines the respondent's position on acts of sexual harassment. His reasoning presents him to be a real risk in the workplace (Western Cape Department of Health and Wellness). The applicant's behaviour/conduct furthermore did not preserve the dignity of the complainant. The evidence was confirmed by the second and third witnesses of the respondent.
66. The applicant testified that regarding charge 1 that he did not sexually harass the complainant as there was no sexual intention. The complainant never indicated that she did not like it when he called her beautiful and gorgeous. If she had told him to stop, he would have immediately stop. Regarding charge 2 about the hug, he explained that he went to her office with documents in his hands and he put it down on the table. She told him it was her birthday, and he opened his arms, and the complainant came around the table and hugged him. Then he just walked out. She was sitting behind her desk, and he was standing at the side of her desk, and it was only a shoulder hug. He explained regarding charge 3 that he never asked the complainant for her cell phone to put his number on it. He was shocked when he was informed that he sexually harassed the complainant. He is a married man with three (3) kids and the dismissal impacted his

job and career. He stated that if he gets an opportunity to address the complainant, he shall ask her to forgive him if she believed she was sexually harassed.

67. It is the submission of the representative of the applicant that he was charged with five charges and found not guilty on charges four and five. Charge one is that the applicant sexually harassed Ms Sigula by calling her beautiful when he greets her. Charge two is that applicant went to the complainant's office, closed the door and hugged her. Charge three is that he gave his phone to the complainant to put her number on his phone. The applicant admitted from the start of the investigation that he called the complainant beautiful but not with sexual intentions.
68. According to the representative of the applicant the complainant testified that in the beginning it did not bother her till she heard stories about the applicant. She further testified that the rumors were never proven, and she does not know whether it is true. She further testified that she never informed the applicant, nor did she ask anyone to address him on her behalf to stop and that she does not like it. She also testified that one morning it was in her mind to greet the applicant "morning handsome". If she was traumatized and felt harassed, she would not think of encouraging the applicant. The representative of the applicant submitted that he also heard through the witnesses' testimony that it was not only the complainant that was addressed as beautiful and that they did not have a problem as for them it was not serious.
69. The complainant further testified that if she did inform the applicant to stop, that this could all have been prevented. Ms Hendricks also testified that the complainant did not ask her to speak to Mr Johnson, but she did it on her own. The complainant testified that the applicant had files in his hand and closed the door. Mr Johnson asked why he had not seen her for a few days, and she informed him it was her birthday. The applicant put the files down and held his arms open. She walked around the table and walked into the hug. She wanted to inform her colleagues what happened but realizes Mr Johnson did nothing wrong. Ms Newman testified that the complainant informed her that she did not know how the applicant knew it was her birthday, but the complainant testified she told him.
70. The complainant further testified that the applicant gave his phone to her on 15 March 2024 to put her number on his phone. She said that Charge 3 is not correct as nothing happened on 18 March 2024 and the wording is wrong with what was said because she got confused with another case. Under cross examination the complainant admitted that she had laid sexual harassment cases against other male colleagues and all the male colleagues were dismissed. This was confirmed by Ms Newman when she confirmed that she was the harassment officer in one other complaint from the same complainant. Ms Newman mentioned that Mr Johnson did not want to state his side in the investigation phase but sent a mail to state his version as she gave him the choice and he opted to respond in writing. The applicant testified that if the complainant informed him, she did not appreciate the way he greeted her, he would have stopped immediately. He never

had the intention of hurting or harassing the complainant. Mr Johnson stayed true to his version that he never gave his phone to the complainant to add her number.

71. In analyzing the evidence presented before me, I find on a balance of probability that the witnesses of the respondent were reliable and credible when they testified. Their evidence convinces the commissioner that the applicant was aware of the consequences of sexual harassment and the procedure to be followed. There were contradictions in the testimony of the applicant, and he was merely in denial about his actions of verbal sexual harassment over several months. On a balance of probabilities, I therefore find it probable that the applicant broke the rules and policy on sexual harassment of a subordinate, and he was in a more senior position.
72. I therefore find that the applicant did contravene the rules and policy regarding sexual harassment as stated in the Sexual Harassment Policy and Code of Conduct. Any reasonable person would arrive at the same conclusion on a balance of probabilities having heard and observed the evidence given during the hearing. I therefore find that the decision to find the applicant guilty on the three (3) charges as formulated was the correct decision.

Is dismissal the appropriate sanction?

73. In **Cash Paymaster Services Northwest (Pty) Ltd v Paul Shabanga NO & others [2009] 5 BLLR 415 (LC)** it was held that the commissioner must consider if the trust relationship was destroyed in evaluating the appropriateness of the sanction. In **Woolworths (Pty) Ltd v Majiba & others (2016) 37 ILJ 1380 (LAC)** it was found that it is always better if evidence regarding the breakdown in the trust relationship is led by people who can testify to such breakdown. Even if the relationship of trust is breached, it would be but one of the factors that should be weighed with others to determine whether the sanction of dismissal was fair. Therefore, the commissioner had to consider the nature of the offence, the seriousness of the misconduct, the nature of the job and the position of the employee. The breakdown in the trust relationship could also be inferred from the seriousness of the offences.
74. The Constitutional Court confirmed in **Sidumo & another v Rustenburg Platinum Mines Ltd 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC)** that an arbitration under the LRA is a *hearing de novo* and that commissioners are charged with determining the fairness of a dismissal based on the evidence presented at the arbitration. The arbitrator's function is to determine if the employer's decision was fair.
75. Item 3(4) of schedule 8 to the Labour Relations Act, being the Code of Good Practice Dismissal, states that: "it is generally not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. According to the

respondent, the applicant was dismissed for a very serious offence of sexual harassment of a complainant in a lower position. According to the representative and some of the respondent witnesses, it is an offence that warrant dismissal or a final written warning depending on the seriousness of the offence.

76. The applicant felt that the sanction of dismissal is very harsh as he had no intent to sexually harass her and he will never in future greet somebody like that again. He was never disciplined since he was employed in 2007, and it was the first time he was disciplined in such a way. He stated that he was not the only one that was accused of sexual harassment by the complainant as there were other males also charged and dismissed for similar offences. He stated that he never went back to her office on 18 March 2024 and the charge was partly wrongly formulated as stated by the complainant. He stated that sexual harassment is when an employee constantly did it and the other person told you that she is not liking it. It is further submitted that the applicant is not guilty of sexually harassing the complainant as he never had any motive addressing her as beautiful and considering that the harassment officer testified herself that it cannot be harassment if you ask only once for a telephone number.
77. It is the submission of the representative of the applicant that if it is found that the applicant is guilty of sexual harassment, they request that the sanction is too harsh. Ms Newman mentioned on a few occasions that dismissal is not the only sanction and that any sanction can be given. The applicant has a clean record with no disciplinary actions against him for the thirteen years' service, but the employer found it fit to go the ultimate when deciding on an appropriate sanction. Their plea is that the applicant be found not guilty of the charges brought against him. Alternatively, if he is found guilty that the sanction will be short of dismissal and be reinstated retrospectively with all benefits.
78. It is the submission of the representative of the respondent that as an adult the rules and conduct is common knowledge, and the applicant should have known that such behavior is not acceptable for an employee in her position. According to the respondent the nature of the transgression is of such gravity, that it does affect the trust relationship between the respondent and the applicant. The nature and gravity of the offence is enough to consider that the trust relationship had irrevocably broken down. The second witness of the respondent stated that the trust relationship was broken beyond repair due to the actions of the applicant.
79. According to the Code of Good Practice on the prevention and elimination of harassment in the workplace on 18 March 2022 it states that sexual harassment of an employee is a form of unfair discrimination and is prohibited on the grounds of sex, gender, or social orientation. Factors to establish sexual harassment is unwanted conduct and the nature and extent of the conduct. The fact that the complainant does not indicate that the conduct is unwanted does not entail that there has not been sexual harassment, if the conduct is such that the harasser/perpetrator ought to have known it could be regarded as unwanted. The conduct

should constitute an impairment of the employee's dignity, considering the circumstances of the employee, and the respective positions of the employee and the perpetrator in the workplace.

80. Sexual harassment is unwelcome conduct of a sexual nature, whether direct or indirect, that the perpetrator knows or ought to know is not welcome. Sexual harassment may be offensive to the complainant, make the complainant feel uncomfortable or cause harm or inspire the reasonable belief that the complainant may be harmed. Sexual harassment violates the rights of an employee and constitutes a barrier to equality in the workplace. The test for establishing whether there has been sexual harassment takes into account the following factors: (1) whether the harassment is on the prohibited grounds of sex, and/or gender and/or sexual orientation; (2) whether the sexual conduct was unwanted or unacceptable; (3) the nature and extent of the sexual conduct; and (4) the impact of the sexual conduct on the employee. I find that the sexual harassment of the complainant was indeed unwanted, and the nature of the sexual conduct was continued and serious and it impacted the complainant that she was feeling uncomfortable and emotional.
81. The test to decide whether dismissal is an appropriate sanction is whether the respondent could have imposed the sanction of dismissal in the circumstances, either because the misconduct rendered the continued employment intolerable, or because of the cumulative effect of the misconduct when taken together with other instances of misconduct. Determining whether dismissal was an appropriate sanction involves three enquiries: (1) an enquiry into the gravity of the intervention of the rule; (2) an enquiry into the consistent application of the rule and sanction; and (3) an enquiry into factors that may have justified a different sanction.
82. I find that the gravity of the sexual harassment was serious although it was only verbal harassment, and the complainant never told the applicant to stop. The complainant stated that she previously made similar cases against at least one other male employee, and he was also dismissed. It seems from testimony it can be at least two other male employees that were dismissed because of sexual harassment against the complainant.
83. Item 3(4) of the Code of Good Practice: Dismissal, promulgated in terms of the Labour Relations Act, 66 of 1995, as amended, directs that: "Generally, it is not appropriate to dismiss employees for a first offence, except if misconduct is serious and of such gravity that it makes a continued employment relationship intolerable". Item 3(5) of the same code directs that: "When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself. The length of service

and the position of the applicant made the verbal sexual harassment even worse as he was aware of the harassment policy and how to conduct himself with a subordinate.

84. I find that because the applicant is indeed guilty of sexual harassment against the complainant over several months that the trust relationship between the respondent and the applicant had irreparably been broken down because of the sexual harassment. This is due to the difference in the positions between the applicant (managerial position) and the complainant (admin clerk) in the offences and the nature of the offences.
85. The employment relationship has been broken due to the actions of the applicant regarding sexual harassment against the complainant. The applicant was found guilty of the first three (3) charges as testified by the witnesses of the respondent. I find that the respondent had discharged the onus of proof by showing on a balance of probability that the applicant was guilty of the first three (3) charges. According to the respondents they prove that the offences that the applicant was found guilty on can warrant dismissal due to the seriousness of the offences over several months.
86. I find that the dismissal of the applicant was substantively fair. In the light of the above, I further find that the dismissal of the applicant was an appropriate sanction because of the factors and aggravating circumstances mentioned above. There is a range of appropriate sanctions proportionate to the seriousness of the sexual harassment. Warnings may be used for minor instances of sexual harassment. Where the sexual harassment is serious then summary dismissal may be appropriate.

Procedural fairness

87. Procedural fairness was not put into dispute by the representative of the applicant and this issue is not going to be further entertained. Considering the above, I find that the applicant's dismissal was procedurally fair.
88. I therefore find that the dismissal of the applicant was substantively unfair and procedurally fair.

AWARD

89. The dismissal of the applicant, Heindrich Johnson, was substantively and procedurally fair. The case of the applicant is dismissed, and both parties must be informed accordingly, and the case must be closed by the Bargaining Council.

A handwritten signature in cursive script, reading "Gert van der Berg", written in dark ink on a light background.

Gert van der Berg