



ARBITRATION AWARD

Case No: **PSHS621-24/25**

Commissioner: **Gert van der Berg**

Date of award: **31 March 2025**

In the matter between:

PSA obo Phillip Jeremy Swartz

Applicant

and

Department of Health- Western Cape

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. The matter was scheduled for arbitration on 17 February 2025 and on 20 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, Phillip Jeremy Swartz, was represented by J Botha, an official from PSA, whilst the respondent, Department of Health- Western Cape, 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 and off 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 contract of employment from 05 November 2013, and he was dismissed on 08 August 2024. The applicant attended a final disciplinary hearing on 25 July 2024, and he was found guilty of the charge and dismissed, and it was confirmed in writing. He appealed against the outcome on 19 August 2024 and the appeal outcome confirmed his dismissal on 02 September 2024. He occupied the position of Pest Control Supervisor at Groote Schuur Hospital, and his basic salary was R347133-00 per annum. The applicant was charged for misconduct in that on or about 02 May 2023 whilst on duty in his office, he sexually harassed Ms R Solomon when video called her on WhatsApp while he was naked and placed his hand on his private parts (penis).
6. The dispute was referred to PHSDSBC on 01 October 2024 and it was set down for a conciliation process on 31 October 2024 after a certificate of non-resolution was issued during conciliation. It was then set down for arbitration on 17 February 2025. After the first three (3) witnesses of the respondent testified, the dispute was postponed as a part heard case as a further one (1) witness of the respondent still must testify plus the applicant. It was then re-scheduled as a part heard arbitration case on 20 March 2025 when it was concluded.
7. The parties presented verbal opening statements. Closing statements were presented in writing by both parties on 28 March 2025 as agreed. 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.
8. The issue of inconsistent application of the rules regarding sexual harassment was then raised by the representative of the applicant. He mentioned the name of Mogammed Williams an employee at Groote Schuur Hospital that was found guilty of the same offence as the applicant and he was charged on 01 August 2024 as he asked another employee to wash his back while he was under the shower. His hearing was on 06 January and 06 February 2025. He received a final written warning and one-month unpaid suspension whilst the applicant was dismissed. The representative of the respondent is just surprised that inconsistency was only brought up now and not in the beginning during conciliation. The Commissioner made a ruling ex

tempore that inconsistency can be added and that both parties can bring witnesses to testify about inconsistency if they so wish. Relevant documentation must be provided by the representative of the applicant. Nothing further was testified by either party about inconsistency, or any documentation was provided. It was also not further mentioned in closing argument and no decision is going to be made on this issue.

SURVEY OF EVIDENCE AND ARGUMENT

Documentary evidence

9. Both parties handed in documentation. The bundle of the respondent was marked as “R1” pages 1-56. The bundle of the respondent consists of two pages, and it was marked as “A” pages 1-2. The authenticity of these bundle was not disputed by either party.

RESPONDENT’S EVIDENCE AND ARGUMENT

The respondent called four (4) witnesses who testified after being duly sworn in

1st witness, Ronel Solomon, Housekeeper Supervisor, testified as follows:

10. She stated that she knows the applicant as she worked with him at Groote Schuur Hospital under his supervision and she reported to the controller. Belinda Pieterse and the applicant were close, and she wanted to speak to Belinda Pieterse about a complaint when she returned from leave. The witness explained that on a Wednesday whilst Belinda Pieterse was on leave the applicant gave her a video call and he was naked. She wanted him to be called to the office and told to stop with the messages and the harassment and the applicant was called in the office the first week of June 2023.
11. She further stated that when Belinda Pieterse returned, she went to her office and told her about the whole issue. The witness who is also the complainant was sitting in a chair and Belinda was sitting behind her desk. She stated that she wants the messages to stop which started in March 2023. Messages like come up to my office as he was alone, and she made a lot of excuses. She never did as he requested. On 02 May 2023 the applicant told her to meet him outside and she did and gave him a cigarette. He asked her to be naughty as he is, and she said that she is not naughty at all. When she got home, she saw two miscalls from the applicant. She texted him and said that she saw he called her. Then she received a video call on WhatsApp after work where the applicant was naked.

12. The nature of their relationship was that she did not know him, but they had a few times coffee in a group. The messages were continued as can be seen and he asked if she is available to come up to his office. She told him that she is not interested in any relationship as she was going through a serious breakup with her ex-husband. The charge on page 1 of bundle "R" was again read and it was formulated in terms of Annexure A of PSCBC Resolution 1 of 2003, the Disciplinary Code and Procedures for the Public Service read with PGWC Sexual Harassment Policy, 2011. She lodged a complaint, and in the video, he was sitting in front of her. She saw his naked body with his penis in his hand. The cell phone was in his one hand and his penis in the other hand.
13. On page 20 of bundle "R" the video call of the applicant can be seen as she saved his contact details on her phone, and it is on 02 May 2023 at 16:13 and marked with a video next to it. After the incident she ignored the applicant and on 08 May 2023 the conversation can be seen between her and the applicant since 15:57 up to 16:05. Her statement appears on pages 18 and 19 of bundle "R" and it is dated 29 May 2023 after she was asked to put her complaint in writing. On page 23 appears a further statement on 02 May 2023 after the applicant phoned her and told her that she threw him under the bus and that he would be dismissed.
14. The witness stated she did not have a problem to work over weekend but on 02 May 2023 during a meeting she told him that she was coming from weekend work and is not going to work the following weekend for other to be off to go to a funeral of a colleague who passed on. She confirmed that she did not have any relationship with the applicant.
15. Under cross-examination the witness confirmed that his body during the video call was not under the table, and she could see the cell phone in his one hand and his private parts in the other hand. According to the witness the duration of the video call was a few seconds and then she put her phone down. It was put to her that the applicant is a religious and a family man and would never do what she accused him of. She replied that she is not knowing what was going through his mind at that time. She agreed that people told her that she must not go up to the office of the applicant alone. She stated that it was a video call and not video footage and the moment you put the phone down the pictures is deleted unless it was recorded at that time.
16. The complainant stated that she said that she does not want him to lose his job, and she confirmed the meeting with staff about working on the following weekend was on 02 May 2023. She denied that she was unhappy with him as he expected her to work on the weekend and that was never the reason, she made a sexual harassment case against the applicant. She did not know why he made a video WhatsApp call to her after work and when she answered he never said a word. She again confirmed that the applicant was naked during his WhatsApp call to her.

17. Under re-examination she confirmed that the message on page 22 where he asked her to be naughty is not appropriate from a superior to a subordinate. She confirmed that the rumours about the applicant and her experience of his actions are the same. He contacted her after work and that was the reason for the conversations with him after work. **2nd witness, Belinda Pieterse, Admin Clerk-Control Officer, testified as follow:**
18. She testified that the complainant, R Solomons, is reporting to her and the applicant was her former first line supervisor. She read the charge again on page 1 of bundle "R" and she explained that she was on family and unpaid leave and when she returned the complainant came to her and showed her the WhatsApp discussions between her and the applicant. She sent it to the witness at home and she read all the discussions. The discussions appear on pages 21 to 22 and what stood out is that the complainant was not interested in his naughty things, and she was not interested in anyone.
19. According to the second witness the complainant approached her after 08 May 2023, and she asked the complainant what she wanted her to do as she cannot reprimand the applicant as she can only take it up with Mr De Jager. She explained that the shower is close to the office of the applicant. On page 20 the WhatsApp video call of the applicant appears, and it is dated 02 May 2023 at 16:13. It is clear that it was a video call from the applicant to the complainant. She told the second witness about the WhatsApp chats, and it was not suitable for a married man to have such conversations with the complainant.
20. She stated that on the same day, 02 May 2023, a housekeeper meeting in the presence of the applicant took place about who would work the following weekend for some other employees to attend the funeral of a colleague who passed on. The complainant refused to work the weekend, and the applicant asked other employees to work on the weekend. Mr De Jager took a picture and the two of them discussed the matter further in his office. She described to Mr De Jager what was repeated to her by the complainant.
21. The further process was followed and Mr De Jager dealt with Labour and the witness arranged some counselling for the complainant. The complainant was asked to make a statement in writing about the whole incident about the applicant about the sexual harassment. The complainant testified in the disciplinary hearing of the applicant about the conversations on pages 21 and 22 and she confirmed the video call on 02 May 2023 as she was in possession of the cell phone number of the applicant. The witness stated that she never received similar messages from the applicant.
22. Under cross-examination she confirmed that the complainant did not inform her about the video call on either 03 or 04 May 2023 while she was at work and the communication with the complainant only took place on 28 May 2023 about 26 days after the incident with the video call. When the complainant spoke to her about the whole incident and conversations, she was feeling uncomfortable. The complainant said that

she just wants the witness to take it further and she never said that she just wanted it to stop. It was put to her that how can the complainant be trusted as she changed her story, and the witness did not comment. She agreed that there are no cell numbers on the conversations on pages 21 and 22 of bundle "R". She stated that she knows the applicant for 11 years and he was never previously accused of a similar offence. She has high standards of the applicant, and they were frequently spoken to each other.

23. Under re-examination she confirmed that what the complainant repeated to her was exactly what is the conversation on pages 21 and 22. She confirmed that sometimes she and the complainant were on different shifts and then they did not see each other. She confirmed that it would be possible for the applicant to be naked whilst making the video call to the complainant. She confirmed that she was not told in detail about the nakedness of the applicant on the video.

3rd witness, Busiswe Gxasheka, Assistant Director-Labour Relations, testified as follow:

24. The witness testified that she is the Assistant Director of Labour Relations at the Groote Schuur Hospital and the complaint came to her attention and she scrutinised it. There are limited cases of sexual harassment that came to the attention of the witness. The role of the witness was to investigate, speak to all parties and prepared a preliminary investigation report according to the sexual harassment policy on page 37 of bundle "R".
25. On page 1 to 2 appears the notice to attend a disciplinary hearing of the applicant and the charge formulated is in line with the sexual harassment policy on page 40. The definition and types and examples of sexual harassment appear on pages 44 and 45 of bundle "R". The complaint that was received started when the applicant sent a video call to the complainant on 02 May 2023, and he was naked in his office. The complainant was affected by the incident and further cell phone calls, and she was referred to Health and Wellness in the institution and she accepted services from Wellness. She did a preliminary investigation and then reported it to Head Office. Then an investigation officer was appointed to handle a full-blown investigation and checking all the information.
26. The position of the Department is that all cases of sexual harassment must be referred to Head Office as they have a zero-tolerance policy, and all sexual harassment is seen in a very serious light. The decision to charge the applicant will be based on the merits of the case and there were only a few cases of that nature in the past. These cases must be dealt with speedily and the supervisor had already something in place as the complainant was separated from the applicant as he was never suspended. Page 30 to 36 of bundle "R" represents the Code of Conduct of the Public sector as an abstract of the Public Service Regulations 2016.

27. The witness expected any manager to conduct themselves in a professional way and knows the code of conduct. The comments as can be seen on pages 21 and 22 of bundle "R" is not professional and it is inappropriate, and she received several other messages from the applicant. After the complainant came to the office she was asked to put her complaint in writing. After that she received again a phone call from the applicant that she throws him under the bus, and she was advised to put this also in a second statement as can be seen on page 23 of the bundle. On page 56 appears an email from the witness to the applicant informing him on 01 June 2023 that a complaint was received regarding sexual harassment, and he was invited to consult with her so that she could hear his side. She confirmed with the applicant the conversation he had with the complainant. She stated under information that she is aware of Mogammed Williams sexual harassment case recently.
28. Under cross-examination she stated that it was confirmed by the complainant in the video call that the applicant was naked. The complainant did not go into all the details about holding his private parts in his hand and she never saw the video call as it was not recorded. She was asked if the complainant was affected why did she takes 23 days before reporting it. She responded that it was not her position to ask the complainant why she took so long before she reported the incident. The complainant may be decided to handle the situation differently and her feelings was considered. It is consistent to follow a similar process in cases of sexual harassment cases and the decision to dismiss is always based on the merits of the case. In this case the video call was evaluated at the disciplinary hearing and the applicant gave full co-operation. He was not moved out of the area where he was working but the complainant was moved to a different area.
29. The witness stated that she is not aware whether other females worked under the supervision of the applicant, and she was told that eight other females reported to the applicant. According to the witness the applicant has no previous allegations of sexual harassment against him according to the disciplinary record.
30. Under re-examination she confirmed the facts about sexual harassment is around the video call on 02 February 2023 and the other inappropriate phone calls the applicant made. In the video call, according to the complainant he was naked and holding his private parts in his hand. The complainant was present during the disciplinary hearing of the applicant, and she accepted the counselling of Health and Wellness.

4th witness, Ronald De Jager, Deputy Director-Support Services, testified as follow:

31. The witness stated that the reason he was called as a witness to the arbitration hearing as the applicant's direct supervisor informed him about the incident of sexual harassment by the applicant and his subsequent dismissal. The incident was reported by R Solomons, Housekeeper, to Mrs Belinda Pieterse. The applicant occupied the position as Pess Control Supervisor involved in environmental health and waste management.

He confirmed that the Occupational Health & Safety Act was in place and the applicant was responsible for pest control in the Department. The department was provided with appropriate equipment, and the chemical was used separate from the workstation.

32. The office of the applicant was opposite the showers and bathroom and the witness explained the setup in more detail. The shower facilities were very accessible from the office of the applicant. As stated, he became aware as Belinda Pieterse informed him about the video call received from the applicant by the complainant. The applicant was naked in the WhatsApp video call on 02 May 2023 at 16:02. The witness arranged a meeting between himself, the complainant and Belinda Pieterse her supervisor. The complainant was not herself, but she explained all the detail of the incident before the video call, the video call and messages after the incident. She stated when she saw the applicant naked in his office with his penis in his hand, she immediately switched off her cell phone.
33. The witness asked the complainant to right a report regarding the incidents and thereafter an investigation followed, and the complainant attended counselling sessions. He sent this report to Labour Relations, and he had a discussion with the applicant, and he removed him from that work area, but he did not suspend him. Later the applicant was charged, and he was subjected to a disciplinary hearing and later dismissed. The witness further stated that sexual harassment in the workplace is very serious, and he must look at the wellness of all the employees in his department and he regarded the incident where he sent a WhatsApp video call to the complainant whilst he was naked as sexual harassment. Further the sex messages as can be seen on pages 21 and 22 of bundle "R" is not appropriate from a manager to a subordinate two levels lower than his position.
34. He explained that A1 is a text message to the applicant on 02 May 2023 where he thanked the applicant for his arrangement with four (4) cleaners for staff members to attend to work on 05 and 06 May 2023. On A2 is the letter dated 02 May 2023 from the applicant to EHS Staff regarding the funeral attendance arrangements. At the end two staff members agreed to work and the other could go to Eastern Cape for the funeral. The complainant indicated that she is not going to work as she worked the previous weekend.
35. Under cross-examination he confirmed that the office of the applicant was opposite the showers. He agreed that he did not see the video call as he was told about it and R Solomons testified about it in the disciplinary hearing and in this arbitration. What he said is not the same as what the complainant said as she probably spoke in more detail. He agreed that the complainant did not ask him to intervene. He stopped the applicant to continue working in the area as a lot of females was working under the jurisdiction of the applicant. He did not make a final decision as he was referring the report and incident to Human Resources. He requested the complainant for a report and within two days she submitted the report. In the disciplinary hearing the chairperson decided that the sexual harassment was serious and eventually the applicant was dismissed.

36. He further confirmed that the complainant responded to the text messages of the applicant, and she told him that she was not interested in any relationship. He confirmed that the incident with the video call took place on the same day as the meeting with the staff about the funeral attendance of the staff in the Eastern Cape. He agreed that the applicant asked the complainant to work the weekend, and she told him that she worked the previous weekend and wants he weekend off. He knew the applicant since he joined the institution, and he is not aware of any disciplinary action against the applicant in 11 years. He was shocked in the disciplinary hearing when he heard in more detail what the applicant had done.
37. Under re-examination he confirmed that it is not a true reflected that the complainant was accused of lying. The witness confirmed that the incident with the video call happened on 02 May 2023 and the test messages was on 08 May 2023 afterwards. What the complainant stated and what the charge stated is not contradictory and it was inappropriate from the applicant to harass a subordinate in such a manner. The directive was taken from the Sexual Harassment Policy, and the complainant was very open and sincere and there was no malice on her side.

APPLICANT'S EVIDENCE AND ARGUMENT AFTER HAVING BEEN SWORN IN

The applicant, Phillip Jeremy Swartz, former Pest Control Supervisor, testified as follow:

38. The applicant testified that on 02 May 2023, Mrs Pieterse contacted him about the staff who wanted to go to the funeral of a staff member who passed away. He arranged a meeting, and all staff wanted to go to the funeral in the Eastern Cape. He told them that they are working in a shift system in teams and some people must stay in the Medical Block as the contract staff was not enough for the full maternity ward. The complainant was present in the meeting as she is a housekeeper under the supervision of Mrs Pieterse. There were only two supervisors available to work and he asked the complainant to work. She became offensive and said that she worked the previous weekend and that she is not going to work on her off weekend. The issue was resolved as can be seen in A1 and A2 and he sent a letter to Mr De Jager.
39. He was the representative for all the facilities outside the main hospital and they reported on a need-to-know basis. After the meeting he submitted A2 and then went to his department as usual. He ran out of cigarettes, and he wanted to communicate to the complainant about what happened during the meeting. The complainant was only in the department for about four (4) months and 98% of the employees working under his control were female employees. Later the day he met with the complainant in the parking lot as he wanted to have a conversation with her about the meeting. She told him to call her later as she was leaving earlier, and she told him not to phone her when she is driving home, and she will call him when she was at home.

40. He stated that his cell phone and the screen was cracked, and he did not have enough airtime, and he made a WhatsApp video call, and she was standing outside having a call. He ended the call after he asked for a meeting and if she is not comfortable, she can bring the union representative with her. The call ended after 16:15. During the disciplinary hearing in October 2023 which was postponed a few times, he showed proof of the screen that was shattered. He stated the allegations of the complainant is false and untrue as it is not according to his character. He was responsible as a manager for about 50 staff members and many females was working under his control. These accusations ripped him to his core, and it seriously affected his reputation and eventually he lost his job. He had always good performance reviews.
41. The applicant was never asked whether he needed counselling, and he never phoned her when he was naked as he never did it and he had no intention to harassed her and the text messages on pages 21 and 22 was taken out of context. He stated that there was a trust relationship between him and the complainant, and she opened and shared information with him. He confirmed that the text messages on pages 21 and 22 was from two people who communicated with each other.
42. Under cross-examination he confirmed that his statement appears on pages 26 and 27 of bundle "R" and he made it on 06 June 2023. He said that it was important to speak to the complainant after the staff meeting on 02 May 2023 as he believed to have a good relationship with all staff members. He said when the meeting ended everybody was satisfied and happy except the complainant and he could not leave it like that. He agreed that he took a particular interest in the complainant as he wanted to clear the air between them. It was put to the applicant that he could have resolved the issue with the complainant through her supervisor and he said that he indeed took it up with her supervisor. He was told that what he testified is totally different than what the witnesses of the respondent testified, and the applicant did not comment.
43. The applicant stated that the complainant shared her private business with him in his office when invited her to his office. He was again told that he was the one who called the complainant via WhatsApp video call, and he stated that there is no proof of the video call where he was co-called naked with his penis in his hand in his office. He denied that he misused the complainant for his own advantage, and he stated that he wanted to see her happy. He agreed that on page 21 and 22 it was text conversation on both 07 and 08 March 2023 and it is clear it is between him and the complainant. He agreed it was not inappropriate text conversation with the complainant, and it was not work related.
44. Under re-examination he confirmed that there were numerous text messages, and it was selectively taken out of context.

CLOSING ARGUMENTS

45. Both parties presented written closing arguments on 28 March 2025 as agreed. Both parties' verbal submissions and arguments were perused and incorporated in the decisions made in the award.

ANALYSIS OF EVIDENCE AND ARGUMENT

46. Dismissal is not in dispute as agreed by the parties. I must therefore decide whether the dismissal was substantively and procedurally fair or unfair. Procedure was not put in 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.
47. 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.
48. 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).
49. The applicant was employed on a contract of employment from 05 November 2013, and he was dismissed on 08 August 2024. The applicant attended a final disciplinary hearing on 25 July 2024, and he was found guilty of the charge and dismissed, and it was confirmed in writing. He appealed against the outcome on 19 August 2024 and the appeal outcome confirmed his dismissal on 02 September 2024. He occupied the position of Pest Control Supervisor at Groote Schuur Hospital, and his basic salary was R347133-00 per annum. The applicant was charged for misconduct in that on or about 02 May 2023 whilst on duty in his office, he sexually harassed Ms R Solomon when video called her on WhatsApp while he was naked and placed his hand on his private parts (penis).
50. 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 originally put into dispute by the representative of the applicant but not further entertained by the representative of both parties.
51. 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."

52. 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.
53. 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

54. 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.
55. 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?

56. 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 charge states as follow: "The charge on page 1 of bundle "R" was formulated in terms of Annexure A of PSCBC Resolution 1 of 2003, the Disciplinary Code and Procedures for the Public Service read with PGWC Sexual Harassment Policy, 2011 in that on or about 02 May 2023 whilst on duty in your office, you sexually harassed Ms Solomon when you video called her on WhatsApp while you were naked, placed your hand on your private parts (penis)".
57. 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)**.
58. The representative of the respondent submitted that regarding the dismissal of the applicant the respondent's witnesses' testimonies in terms of the allegations of sexual harassment are credible. The facts were corroborated, and all the facts were ventilated. Documentary evidence sufficiently proves that the process followed was substantively sound and the rules, regulations, and policies related to handling sexual harassment has been presented and is credible.
59. It is further submitted that the applicant was aware of the rules, policies and procedures regarding sexual harassment. This was established in terms of his seniority, both because of his seniority in service years and his position as manager. It was therefore proven by facts 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. The evidence proves that the applicant concedes that his interest in the complainant emerged whilst he engaged with her and other colleagues over morning coffee 'meets'. The applicant took a keen interest in the complainant, whereby he on several occasions contacted the complainant privately and invited her to meet with him. He further concedes that his actual interest in the complainant was not on the premise of a professional work relationship, hence his explicit WhatsApp communication. The applicant did not disprove the complainant's contention that the sexual attention she received from the applicant was unwanted.
60. The respondents' evidence proves that the applicant had the intention, opportunity, and by virtue of his position sexually harassed the complainant. In terms of the applicant's own evidence in chief and in the

attempt to discredit the complainant, many inconsistencies in his own version were revealed i.e. timeline and reason why he made the WhatsApp video call to the complainant, the resource of ablution facilities (shower) in his office, that he left work at 16h30, approximately 17 minutes after he made the video call. He is not credible as a witness and/or trustworthy according to the representative of the respondent. He did not disprove that he used information that was entrusted to him by the complainant (subordinate staff member) and that he used her vulnerability about her private matters to seduce her sexually. The complainant, aware of his behaviour being unwelcome, escalated and persisted in pursuing her.

61. The complainant testified that she made every effort to ensure that she was not alone with the applicant and that she did not entertain his sexual advances towards her. When she realised that he would not stop and that he became more explicit when he video called her, being completely naked, she decided to make the respondent aware of the applicant's behaviour/conduct and how it is affecting her work life negatively and contributing towards her feelings of distress. It is common that the applicant in his capacity as manager, with a significant staff capacity reporting to him, is duly bound to ensure that his conduct and behaviour should remain beyond reproach. His conduct and reasoning about it confirm that he is a real risk for the workplace because he failed through his own conduct to preserve the dignity of the complainant, and the role entrusted to him.
62. 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.
63. The applicant testified that regarding charge 1 that he never sexually harassed the complainant, and he never break the rules regarding sexual harassment as he did not send the complainant a video call on 02 May 2025 when he was naked. He stated that his cell phone and the screen was cracked, and he did not have enough airtime, and he made a WhatsApp video call, and she was standing outside having a call. He ended the call after he asked for a meeting and if she is not comfortable, she can bring the union representative with her. The call ended after 16:15. During the disciplinary hearing in October 2023 which was postponed a few times, he showed proof of the screen that was shattered. He stated the allegations of the complainant is false and untrue as it is not according to his character. He was responsible as a manager for about 50 staff members and many females was working under his control. These accusations ripped him to his core, and it seriously affected his reputation and eventually he lost his job. He had always good performance reviews.

64. The representative of the applicant submitted that the applicant was charged with only one charge in that on 02 May 2023 he video called the complainant (R Solomon) while holding his penis in his hand. The complainant testified that the applicant video called her while sitting naked behind his desk with his penis in his hand. She testified further that she got a shock and immediately dropped the call. She also testified that she did not want the applicant to be dismissed but she only asked Belinda Pieterse to talk to the applicant to stop. Belinda Pieterse testified that the complainant never indicated that to her. When Belinda Pieterse was asked who was lying, she was clear that she was not lying.
65. According to the submission of the representative of the applicant, Ronald de Jager testified that the complainant told him that the applicant was video calling her while he was coming out of the shower. This case is based on hearsay as nobody saw the content of the call and the complainant cannot be trusted as she kept on changing her version. The messages that were sent were sent on 07 and 08 May 2023 but the video call was made on 02 May 2023. The complainant testified that she was traumatized by what she saw when the applicant was naked, yet five (5) days later she had a two-way conversation with him on WhatsApp and not once mentioned that she did not want to be part of the conversation, nor did she end the conversation. She gladly participates in the conversation.
66. The fact is that the employees had a meeting regarding who can go to a funeral of a colleague and the complainant was not happy that the applicant asked her to work the weekend. The complainant testified that she gave the applicant a cigarette before she left work and that was confirmed by him. The applicant testified that the complainant told him to phone her when she is at home, which he did. The employer never disputed this. The fact is that the complainant trapped the applicant by asking him to phone her so that she can lay this complaint against him.
67. It is further submitted by the representative of the applicant that Belinda Pieterse and Ronald de Jager testified that they were shocked when they heard about the allegations as it is out of the character of the applicant. He was never suspended during the whole process. Fact is that the respondent only asked that the complainant not report to the applicant but allowed the applicant to still supervise the rest of the staff reporting to him, of which 98% is female. If the respondent truly belief the allegations, then why would the respondent put the rest of the females in danger.
68. Busiswe Gxasheka testified that the applicant did not respond to the allegations verbally but in writing via email. The respondent wanted to create a picture that applicant did not cooperate with, but under cross examination confirmed that the applicant was given the choice to respond in writing. The applicant stayed true to his version that he did not call the complainant while he was naked and never disputed that he did call her. The applicant further testified that he never even intended to video call, but normal voice call the complainant. He further testified that he showed his broken screen in the hearing that you cannot see if you

have a video or voice call. The respondent did not dispute that. The fact is that the applicant did not phone the complainant while he was naked. The complainant fabricated her version because she was unhappy because she was asked to work the weekend.

69. 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 rules, policy and 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 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.
70. 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 charge as formulated was the correct decision.

Is dismissal the appropriate sanction?

71. 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 offence.
72. 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.

73. 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.
74. It is the submission of the representative of the applicant that the applicant must be found not guilty of the allegation against him. If it is found that the applicant is guilty of sexual harassment, he requests that the sanction is too harsh as dismissal and a lesser sanction can be given. He has a clean record with no disciplinary actions against him for the eleven years’ service, but the respondent found it fit to go the ultimate when deciding on an appropriate sanction. Alternatively, if the applicant is found guilty the sanction will be short of dismissal and be reinstated retrospectively with all benefits.
75. 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.
76. 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.
77. 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.

78. 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.
79. Item 3(5) of the same code directs that: "When deciding whether 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.
80. I find that because the applicant is indeed guilty of sexual harassment against the complainant since March 2023 to May 2023 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 (Housekeeper) in the offences and the nature of the offence.
81. 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 charge 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 formulated charge. According to the respondents, they prove that the offence that the applicant was found guilty on can warrant dismissal due to the seriousness of the offence.
82. 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

83. Procedural fairness was not put into dispute by the representative of the applicant, and it is not going to be further entertained. Considering the above, I find that the applicant's dismissal was procedurally fair.

84. I therefore find that the dismissal of the applicant was substantive and procedurally fair.

AWARD

85. The dismissal of the applicant, Phillip Jeremy Swartz, was substantively and procedurally fair.

86. The case of the applicant is dismissed, and both parties must be informed accordingly.

A handwritten signature in dark ink, appearing to read 'Gert van der Berg', is shown on a light background.

Gert van der Berg