CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 270/20

In the matter between:

CHARLES JAMES McGREGOR Applicant

and

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL First Respondent

JAMES NGOAKO MATSHEKGA N.O. Second Respondent

DEPARTMENT OF HEALTH, WESTERN CAPE Third Respondent

Neutral citation:	*McGregor v Public Health and Social Development Sectoral Bargaining Council and Others* [2021] ZACC 14
Coram:	Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J
Judgments:	Khampepe J (unanimous)
Decided on:	17 June 2021
Summary:	Labour Relations Act 66 of 1995 — unfair dismissal — sexual harassment — compensation for procedural unfairness — section 193(2)(c) and section 194(1) — compensation award reviewed and reduced

ORDER

On appeal from the Labour Appeal Court, Cape Town (hearing an appeal from the Labour Court, Cape Town):

1. Leave to appeal is refused.
2. The applications for leave to cross-appeal and condonation are granted.
3. The cross-appeal is upheld.
4. Paragraph 104 of the arbitration award is substituted with the following:
   "The Department of Health, Western Cape must pay Dr Charles James McGregor compensation in an amount equivalent to two months' remuneration calculated at his rate of remuneration at the date of dismissal."
5. There is no order as to costs.

JUDGMENT

KHAMPEPE J (Mogoeng CJ, Jafta J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring):

Introduction

[1] "Sexual harassment[1] is the most heinous misconduct that plagues a workplace."[2] Although prohibited under the labour laws of this country,[3] it persists. Its persistence and prevalence "pose a barrier to the achievement of substantive equality in the workplace and is inimical to the constitutional dream of a society founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms . . . and non-sexism".[4] Not only is it demeaning to the victim,[5] but it undermines their dignity, integrity and self-worth, striking at the root of that person's being.[6] Writing in 1989, in its first reported case of sexual harassment, the erstwhile Industrial Court, sounding the alarm that sexual harassment cannot be tolerated, highlighted that "[u]nwanted sexual advances in the employment sphere are not a rare occurrence" and it is "by no means uncommon".[7] Unfortunately, that truth rings as loudly today as it did then. The only difference between now and then is that today we hold in our hands a Constitution that equips us with the tools needed to protect the rights that are violated when sexual harassment occurs. Yet, what this means is that for as

[1] Section 3 of the Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, GN 1357 of 2005 *GG* 27865 (Code of Good Practice), provides a working definition of sexual harassment:

> "Sexual harassment in the working environment is a form of unfair discrimination and is prohibited on the grounds of sex and/or gender and/or sexual orientation."

According to section 4: "sexual harassment is unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace".

And section 5 stipulates that sexual harassment "includes physical, verbal or non-verbal conduct" and "a single incident of unwelcome sexual conduct may constitute sexual harassment".

[2] *Motsamai v Everite Building Products (Pty) Ltd* [2010] ZALAC 23; [2011] 2 BLLR 144 (LAC) at para 20.

[3] Harassment of an employee is a form of unfair discrimination in terms of section 6(3) of the Employment Equity Act 55 of 1998. It is also prohibited under the Protection from Harassment Act 17 of 2011.

[4] See *McGregor v Department of Health, Western Cape*, arbitration award of the Public Health and Social Development Sectoral Bargaining Council, Case No PSHS1121-16/17 (22 August 2017) (Arbitration award) at para 60. The Code of Good Practice above n 1, also recognises that harassment poses a barrier to the achievement of substantive equality in the workplace and undermines the constitutional rights to dignity, equality and non-sexism.

[5] Where the word "victim" is used, it is used with acknowledgement, sensitivity and deference to the fact that those who experience sexual harassment or any form of gender-based violence may prefer to identify as a "complainant", "survivor", "victim" or "victim survivor", or may choose not to identify with those, or any, terms.

[6] *Motsamai* above n 2 at para 20.

[7] *J v M Ltd* (1989) 10 ILJ 755 (IC) (*J v M*) at 757F-I.

long as sexual harassment persists, so the Constitution becomes an eidolon, and its promises of equality and dignity, equally illusive.

[2] The crisp question with which this Court is seized is whether an award of six months' compensation, which was awarded to Dr Charles James McGregor, a senior medical practitioner dismissed on the basis of sexual misconduct in the workplace, is appropriate. If it is not, whether this Court can interfere with the award of compensation. And if so, what constitutes appropriate compensation in the circumstances.

Factual background and litigation history

[3] This matter arises out of a dismissal dispute, the particulars of which traversed various fora before arriving at the door of this Court. In short, Dr McGregor (the applicant) was employed as Head of Anaesthesiology at George Hospital, a public hospital which falls under the Department of Health, Western Cape (Department), the third respondent. In December 2016, Dr McGregor was dismissed by the Department following an internal disciplinary inquiry in which he was found guilty of four charges of misconduct that amounted to sexual harassment, which is prohibited by the Disciplinary Code and Procedures for the Public Service, read with the Sexual Harassment Policy of the Provincial Government of the Western Cape. Each of the incidents on which the four charges were based involved a newly qualified medical practitioner, who was completing an internship under Dr McGregor's supervision and was thirty years his junior. The first charge was that Dr McGregor, while on duty at an outreach clinic with the victim, made unwelcome suggestions of a sexual nature when he dared her to remove her clothes and swim naked. The second charge arose from the same outreach excursion, when he suggested she have an affair with him. The third charge related to an incident whereby, upon their return to George Hospital, Dr McGregor inappropriately pressed himself against the victim whilst demonstrating how to carry out a procedure. The final charge was that Dr McGregor made unwelcome sexual advances and inappropriately touched the victim's leg whilst they were driving

together. It is significant to note that all of the incidents took place whilst Dr McGregor was on duty, acting within his professional, and senior, capacity.

[4] In January 2017, Dr McGregor lodged an internal appeal against the dismissal, which was dismissed. Aggrieved, Dr McGregor referred an unfair dismissal dispute to the Public Health and Social Development Sectoral Bargaining Council (the first respondent), challenging both the substantive and procedural fairness of the dismissal. The arbitrator (the second respondent) found Dr McGregor guilty of three of the four charges of sexual misconduct. However, he concluded that the dismissal was substantively unfair, because he had not been treated the same as another employee facing similar charges, and procedurally unfair, because Dr McGregor was denied an opportunity to defend himself as relevant evidence was excluded during his disciplinary hearing. The arbitrator, exercising his discretion, opted not to order reinstatement since the misconduct had been proven and reinstatement would be intolerable. Instead, taking into consideration the nature of the misconduct and the extent of the Department's departure from substantive and procedural fairness, the arbitrator awarded Dr McGregor compensation in the amount of R924 679.92, equivalent to six months' remuneration. The award was made in terms of the LRA.[8]

[5] Dr McGregor applied to the Labour Court to have the arbitration award, which found him guilty of three of the charges, and the decision not to reinstate him, reviewed and set aside on the basis that his conduct neither constituted sexual harassment nor did it warrant dismissal. The Department brought a counter-review application in which it too sought to have portions of the arbitration award set aside, namely, the finding that Dr McGregor had not committed misconduct in respect of charge three; the conclusion that the dismissal was procedurally and substantively unfair; and the award of compensation.

[8] Section 193(1)(c) provides for the award of compensation in the event of an unfair dismissal.

[6] The Labour Court found that the arbitrator's findings in respect of the three charges were reasonable and therefore not reviewable. The Court agreed with the arbitrator that the procedure adopted at the disciplinary inquiry was unfair. Nevertheless, it varied the arbitration award in that it found the dismissal to have been substantively fair. It held that to conclude that the dismissal was substantively unfair despite Dr McGregor being guilty of three of the four charges, was not a conclusion at which a reasonable decision maker could arrive. Notwithstanding that it had altered the arbitration award, the Labour Court dismissed the Department's cross-review application and declined to set aside or modify the compensation. The basis for its decision was that because the procedure followed by the Department had been unfair, and there was nothing to suggest that that conclusion was reviewable, it was not appropriate to review the compensation awarded.[9]

[7] Dr McGregor approached the Labour Appeal Court, seeking an order that his dismissal was substantively unfair and that he be reinstated. The Department once again raised a cross-appeal in which it averred that the Labour Court had erred in not revisiting the compensation in view of its finding that the dismissal was substantively fair.

[8] Although the Labour Appeal Court agreed that the dismissal had been procedurally unfair, like the Labour Court, it concluded that the arbitrator had unreasonably ignored the seriousness of the misconduct. Accordingly, the dismissal based on findings of sexual harassment was indeed substantively fair. It further agreed that reinstatement would have been inappropriate. However, notwithstanding that counsel addressed the Court in terms of the Department's cross-appeal, the Labour Appeal Court said that "the Department has not cross-appealed against the finding of procedural unfairness or the award of compensation".[10] As the Court inadvertently omitted to rule on that matter, it did not revisit the award of compensation.

[9] *McGregor v Public Health and Social Development Sectoral Bargaining Council*, unreported judgment of the Labour Court, Cape Town, Case No C564/2017 and C571/2017 (30 October 2018) (Labour Court judgment) at para 58.

[10] *McGregor v Department of Health, Western Cape* (2021) 42 ILJ 514 (LAC) (Labour Appeal Court judgment) at para 10.

Dr McGregor's application before this Court

[9] Dr McGregor approached this Court to appeal against the judgment and order of the Labour Appeal Court; seeking that this Court confirm the findings of the arbitrator that the dismissal was substantively and procedurally unfair; and order his reinstatement. He submits this application engages this Court's constitutional jurisdiction because his dismissal, which he says was based on untrue allegations of sexual misconduct, implicates his rights to fair labour practices under section 23 of the Constitution, and to a fair and impartial hearing in terms of section 34. Further, he submits that it is in the interests of justice for this Court to grant leave because of the prospects of success that his application bears.

[10] The thrust of his argument goes that mere "lip service" was paid to his rights in the internal appeal; that he has been falsely accused; and that none of the forums he has traversed properly assessed the veracity of the charges against him or the credibility of the victim whose account, he submits, was riddled with inconsistencies and whose allegations were "trumped up and false". Instead, he submits, those courts were blinded by "bias and partiality" based on the mere fact that the allegations pertained to sexual misconduct, and that the "emotive nature of the charges" caused them to reach pre-determined conclusions against him.

[11] Although this is a labour dispute, which accordingly engages this Court's jurisdiction, it is not in the interests of justice to grant leave in respect of Dr McGregor's appeal against his dismissal (main application) because it constitutes nothing more than a dispute of fact. Dr McGregor harps on about the credibility of the victim; the extent to which the courts a quo failed properly to deal with the evidence; and the extent to which he has not been given a fair and impartial hearing. Those issues were fully ventilated in various courts, and there are no prospects that this Court would find in Dr McGregor's favour. In other words, he has failed to establish that his case is deserving of this Court's intervention.

The Department's cross-appeal before this Court

[12] Along with a condonation application, the Department lodged a cross-appeal on the basis that the Labour Court erred in failing to review the compensation award, and the Labour Appeal Court erred in failing to address the cross-appeal, even though it had been addressed on the question of compensation.

Preliminary issues: condonation and leave to appeal

[13] Of course, I must first dispose of the preliminary issues, namely, condonation and leave to appeal. The Department filed its cross-appeal six days late and seeks condonation for the delay. It submits that it was not aware that the Labour Appeal Court had handed down judgment until 6 November 2020, when Dr McGregor applied for leave to appeal to this Court. There was then a delay in contacting counsel due to logistical challenges caused by the coronavirus pandemic, and the attorney previously seized with the matter was hospitalised. Further, it submits that the cross-appeal has reasonable prospects of success and the short delay will not prejudice Dr McGregor. In *Brummer*, this Court held that condonation should be granted if it is in the interests of justice to do so. This can be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the effect on the administration of justice, the possibility of prejudice to the other party, and the reasonableness of the explanation for the delay.[11] The reasons furnished for the delay are genuine and provide sufficient cause to grant condonation.

[14] The Department submits that the jurisdictional basis for the cross-appeal is section 167(3)(b)(ii) of the Constitution, which provides that this Court may grant leave on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by this Court. The Department submits that the amount of compensation that was awarded by the arbitrator is exorbitantly high, especially given that it will be paid from the State fiscus, which implicates the public

[11] *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

purse.[12] The Department avers that when issues are argued before a court there arises an expectation of a judgment, as contemplated in section 34 of the Constitution, that clarifies the law on the points raised. This did not happen in the Labour Appeal Court. Furthermore, it submits that there are good prospects of success of this Court reducing, if not completely setting aside, the compensation award, given that the arbitrator, Labour Court and Labour Appeal Court all found that Dr McGregor's conduct was repulsive.

[15] It is perspicuous that this matter indeed engages this Court's general jurisdiction for all the reasons the Department sets out. Notably, the failure of the Labour Appeal Court to adjudicate upon the cross-appeal at all, gives rise to constitutional issues which strike at the heart of legality and the rule of law.

[16] As for whether leave should be granted, in *Fry's Metals*, the Supreme Court of Appeal emphasised that where "there has already been an appeal to a specialist tribunal . . . [such that] the applicants have already enjoyed a full appeal before the Labour Appeal Court, [that] will normally weigh heavily against the grant of leave".[13] Citing this, the Supreme Court of Appeal in *Rawlins* stressed that "the principle . . . is that this Court will not lightly interfere with the decisions of the specialist tribunal that has been established to hear appeals in labour disputes"[14] as those courts are the most suited to the task.[15] However, in *NEHAWU*, this Court stated that whether it is in the interests of justice to grant leave involves an assessment of whether there are prospects that an appeal court will materially alter the decision of the court a quo.[16]

[12] The total amount of compensation owing, when interest is taken into account, will exceed R1 000 000.

[13] *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd* [2005] ZASCA 39; 2005 (5) SA 433 (SCA) (*Fry's Metals*) at para 43.

[14] *Rawlins v Kemp t/a Centralmed* [2010] ZASCA 102; (2010) 31 ILJ 2325 (SCA) at para 17.

[15] *Dudley v City of Cape Town* [2004] ZACC 4; 2005 (5) SA 429 (CC); 2004 (8) BCLR 805 (CC) at para 9.

[16] *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*) at para 25.

[17] In this matter, in which it is clear that the Labour Court and Labour Appeal Court misdirected themselves, it is in the interests of justice that leave be granted. Accordingly, the reason for which I apply pen to paper is to address only the Department's cross-appeal and the extent of compensation awarded by the arbitrator.

Submissions before this Court

[18] Turning to the cross-appeal itself then. The thrust of the Department's case is that, since the arbitrator had awarded an amount of compensation that was based partially on the finding of substantive unfairness, which finding of substantive unfairness was set aside by the Labour Court (and confirmed by the Labour Appeal Court), it follows that the extent of the compensation should have been revised accordingly. The Department emphasises that the arbitrator explicitly stated that he had "paid attention to the nature of the misconduct committed . . . and the extent of the respondent's departure from substantive and procedural fairness".[17] Thus, it is evident that compensation flowed from the findings of procedural as well as substantive unfairness. The Labour Court declined to reconsider the compensation in circumstances where it ought to have and, "unfortunately and possibly due to human error", the Labour Appeal Court's judgment incorrectly assumed that "the Department [had] not cross appealed against the finding of procedural unfairness or the award of compensation".[18] Dr McGregor himself concedes as much. In sum, the Labour Appeal Court failed to take into consideration the Department's submissions that the compensation award should be reduced or set aside, which it persists with in this Court.

[19] Dr McGregor opposes the cross-appeal, submitting that a "litany of procedural irregularities . . . riddled [the] disciplinary hearing" because he was not afforded the opportunity to rebut allegations of misconduct, call witnesses or present evidence. Thus, he submits, the Labour Court was correct in finding that the procedural unfairness was not reviewable and thus, he remains entitled to the compensation awarded.

[17] See Arbitration award above n 4 at para 101.

[18] Labour Appeal Court judgment above n 10 at para 10.

[20] The first question is whether Dr McGregor was ever entitled to an award of compensation. The second is whether the initial award should have been reviewed. And, finally, what amount of compensation is appropriate in the circumstances.

Compensation in respect of unfair dismissals

[21] The LRA makes provision for various remedies in respect of unfair labour practices. Once a finding is made that a dismissal is unfair, an arbitrator or the Labour Court must exercise a discretion as provided in section 193(1) of the LRA, according to which it may award compensation. Section 193(1) provides that:

> "If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may-
>
> (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;
>
> (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
>
> (c) order the employer to pay compensation to the employee."

[22] Finding that compensation is warranted in terms of section 193(1)(c), the arbitrator or Labour Court must then apply itself to the question of quantum, which, per section 194(1) of the LRA, may not be unlimited:

> "The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal."

The parameter set by section 194(1) is merely the outer limit beyond which an arbitrator or Labour Court may not go, but within which bounds they may make any decision considered to be the correct one.[19]

[23] Providing compensation is an important means of protecting employees' rights to fair labour practices, which derive from the Constitution and are given effect to by the LRA. Therefore, generally speaking, an unfair dismissal ought to earn an employee compensation in circumstances which preclude reinstatement.[20] Given that the arbitrator found that Dr McGregor's dismissal had been both substantively and procedurally unfair, and that his continued employment would be intolerable, the arbitrator was obliged to consider whether an award of compensation to Dr McGregor would be appropriate. Furthermore, although the Labour Court subsequently found the dismissal to have been only procedurally unfair, compensation may have remained an option in terms of relief.

[24] However, the operative word is "may". Although every employee has the right not to be unfairly dismissed in terms of section 185(a) of the LRA, the infringement of that right neither necessarily nor automatically confers a right to a remedy.[21] Specifically, an award of compensation is never guaranteed.[22] To borrow the language of section 193(1)(c), a court or arbitrator is not obliged, but *may* order the employer to pay compensation. It is also trite that section 194(1) visits the arbitrator or the Labour Court with a discretion, albeit not unlimited, as to the extent of the compensation that *may* be awarded. Compensation flows from the findings as to the quality and nature of a dismissal and ultimately, "a whole range of factors must be taken into account to determine whether compensation has to be paid and if so, for how many months".[23] Indeed, "to compensate or not to compensate and if compensation is to be

[19] *Kemp t/a Centralmed v Rawlins* [2009] ZALAC 8; (2009) 30 ILJ 2677 (LAC) (*Kemp*) at para 54.

[20] *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2016] ZACC 38; 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC) (*SARS*) at para 51.

[21] *Kemp* above n 19 at para 50.

[22] *SARS* above n 20 at para 52.

[23] Id.

awarded, for what period, is a function of the judicious exercise of the discretionary power that an arbitrator or the court has in terms of section 194(1) of the LRA".[24] Accordingly, notwithstanding that Dr McGregor may have been considered for an award of compensation, compensation is the stuff of legal discretion[25] in terms of which "the main criterion is that [it] must be just and equitable" in the circumstances.[26]

Interference with an award of compensation

[25] Because a court of appeal will not easily interfere with another court's exercise of discretion, the first question is whether this Court can interfere with the award of compensation at all. In *National Coalition for Gay and Lesbian Equality*, this Court held:

> "[A] court of appeal is not entitled to set aside the decision of a lower court . . . [made] in the exercise of its discretion merely because the court of appeal would itself, on the facts of the matter, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."[27]

[26] Similarly, in *Herholdt*, the Supreme Court of Appeal held that "this Court has made it clear that it will not interfere with a decision of the Labour Appeal Court only because it considers it to be wrong. . . . There must, in addition, be special circumstances that take it out of the ordinary".[28] That said, where a court has materially misdirected itself, interference by an appeal court may be warranted.

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[24] Id at para 50.

[25] *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC) (*Johnson & Johnson*) at para 40 and *Solidarity on behalf of Van Emmenis v Sirius Risk Management (Pty) Ltd* (2015) 36 ILJ 3175 (LC) (*Solidarity*) at para 35.

[26] *Solidarity* id.

[27] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 11.

[28] *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* [2013] ZASCA 97; (2013) 34 ILJ 2795 (SCA) at para 6.

[27] So, when can an appellate court interfere? The Department correctly relies on *Kemp* as authority on when an appeal court can interfere with another court's judicial discretion, in relation to the award and amount of compensation. In *Kemp*, the Labour Appeal Court was faced with the question of whether the Labour Court should have awarded compensation on establishing the dismissal to be substantively unfair, and if so, whether the amount awarded was excessive.[29] The Court drew a careful distinction between the discretion exercised in granting relief in terms of section 193(1)(c) and the discretion that an arbitrator or the Labour Court has in terms of section 194(1).[30] The Court said that the decision to award compensation (in terms of section 193(1)(c)) is a matter of judicial discretion which means that an appeal court's power to interfere in such an award is not circumscribed: "in such a case an appeal court is at large to come to its own decision on the merits".[31] However—

> "in regard to the determination of the amount of compensation [in terms of section 194(1)] the Labour Court or arbitrator exercises a *true or narrow discretion* . . . [which means that] this Court's power to interfere is circumscribed and can only be exercised on the limited grounds. . . . In the absence of one of those grounds this Court has no power to interfere with the amount of compensation."[32]

Those limited grounds include where the tribunal or court:

> "(a) did not exercise a judicial discretion; or
> (b) exercised its discretion capriciously; or
> (c) exercised its discretion upon a wrong principle; or
> (d) has not brought its unbiased judgment to bear on the question; or
> (e) has not acted for substantial reasons; or
> (f) has misconducted itself on the facts; or

[29] *Kemp* above n 19 at para 2.

[30] Id at para 53.

[31] Id at para 23.

[32] Id.

(g) reached a decision in which the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."[33]

The distinction between the discretion exercised in terms of sections 193(1)(c) and 194(1) is important as it defines how the reviewing court will consider the matter.[34]

[28] What can be gleaned from *Kemp* is that the decision of the arbitrator to award Dr McGregor compensation was not an exercise of a *narrow* discretion such that the Labour Court was precluded from interfering with it. The decision to award compensation in terms of section 193(1)(c) is reviewable, and what is relevant is whether a reasonable decision maker would have arrived at that decision.[35] However, the decision as to the amount of compensation, awarded in terms of section 194(1), constituting the exercise of a *narrow* discretion, requires that this Court ascertain whether a limited ground for interference exists before it can vary the quantum.

[29] The Department itself acknowledges that this Court is not at liberty to interfere with the quantum of compensation, absent a limited ground. However, it avers that the requisite grounds for intervention are present. It submits that the Labour Court failed to exercise a judicial discretion, because the arbitrator awarded compensation in the specified amount based on the findings of procedural as well as substantive unfairness, yet the Labour Court did not deem it necessary to review the compensation, although it overturned the finding of substantive unfairness. In fact, it failed to even furnish reasons for its failure.

[30] The Department further avers that the only reason the Labour Court refused to reconsider the extent of the compensation, was because the Department did not establish

[33] Id at para 21.

[34] Id at para 55.

[35] *Campbell Scientific Africa (Pty) Ltd v Simmers* [2015] ZALCCT 62; (2016) 37 ILJ 116 (LAC) (*Campbell Scientific Africa*) at para 32, citing *Herholdt* above n 28 at para 25. See also *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration* [2013] ZALAC 28; (2014) 35 ILJ 943 (LAC) at para 31 and *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC).

that the finding of procedural unfairness was reviewable. However, it was never the Department's case on review that the finding of procedural unfairness was reviewable, but rather that the compensation was reviewable irrespective of the procedural unfairness. According to the Department, the Labour Court exercised its discretion capriciously and based its exercise of discretion on a wrong principle.

[31] Finally, the Department avers that the Labour Court reached a decision without due regard to all the relevant facts and legal principles. It should have had regard to the arbitrator's basis for finding procedural unfairness, which was that Dr McGregor had been precluded from tendering evidence consisting of three to four photographs. However, the arbitrator failed to consider the relevance of the evidence and the impact its exclusion had on the internal inquiry. Had the Labour Court properly assessed the arbitrator's analysis, it is inconceivable that the exclusion of the photographs, which had no impact on the result of the inquiry, could attract compensation in the amount awarded.

[32] The Labour Court indeed misdirected itself to the extent that the grounds for review of the extent of the compensation, as set out in *Kemp*, have been met. The Labour Court failed to exercise its discretion to review the compensation judicially, despite the basis for the compensation having been confined to procedural unfairness alone. It misconstrued the Department's case, and it did not apply itself to the relevant facts and legal principles. Similarly, the Labour Appeal Court simply ignored the Department's cross-review where it was legally required to consider it. The result is that since the dismissal was found to be substantively fair, no court has properly applied itself to the appropriateness of the extent of the compensation.

Reasons for reducing the amount of compensation

[33] There are good prospects that, if reviewed, the amount of compensation awarded to Dr McGregor, which is equal to R924 679.92, would be reduced. The Labour Appeal Court in *Kemp* provided a non-exhaustive list of factors that are relevant to the question

of whether a court should order an employer to pay compensation, certain of which are relevant to this matter. These include:

> "(b) whether the unfairness of the dismissal is on substantive or procedural grounds or both substantive and procedural grounds; obviously it counts more in favour of awarding compensation as against not awarding compensation at all that the dismissal is both substantively and procedurally unfair than is the case if it is only substantively unfair, or, even lesser, if it is only procedurally unfair;
>
> (c) insofar as the dismissal is procedurally unfair, the nature and extent of the deviation from the procedural requirements; the less the employer's deviation from what was procedurally required, the greater the chances are that the court or arbitrator may justifiably refuse to award compensation; obviously the more serious the employer's deviation from what was procedurally required, the stronger the case is for the awarding of compensation;
>
> (d) insofar as the reason for dismissal is misconduct, whether or not the employee was guilty or innocent of the misconduct; if he was guilty, whether such misconduct was in the circumstances of the case not sufficient to constitute a fair reason for the dismissal."[36]

[34] Given that the dismissal has been found to be substantively fair, it stands to reason that the award of compensation should not have remained the same. This much is evident when one has regard to the arbitrator's rationale behind awarding compensation in the amount he did:

> "I am of the view that a compensation order equivalent to six months' remuneration . . . is just and equitable in all the circumstances. The applicant was left without an income when Dr Nel could quietly go on retirement in circumstances where he should also have been dismissed."[37]

Evidently, the extent of the Department's departure from substantive fairness weighed heavily on the mind of the arbitrator in determining the extent of compensation. Thus,

[36] *Kemp* above n 19 at para 20.

[37] Arbitration award above n 4 at para 101.

once the Labour Court held that the dismissal was substantively fair, the structural integrity of the reasoning for an award of six months fell apart.

[35] The crux of Dr McGregor's submissions is that, notwithstanding that the finding of substantive unfairness was set aside, the procedural irregularities were so gross as to warrant the six months' compensation. It is true that generally speaking, procedural unfairness in a dismissal is not insignificant and invites compensation to ensure that dismissals take place with the "sensitivity and care" properly required when the fate of people's livelihoods is at stake.[38] The rationale behind an award of compensation is to give meaning to the right not to be unfairly dismissed; to discourage a "shotgun approach" to dismissals; and, as Dr McGregor avers, "to recognise the right of an employee to be heard before action is taken against them. It is an acknowledgement of an employee's worth as a person".

[36] However, as the Department submits, the nature and degree of the deviation from the procedural requirements is relevant. An important factor in determining compensation is the degree to which the employer deviated from the requirements of a fair procedure.[39] As was said in *Kemp*, the more minor the employer's deviation from what was procedurally required, the greater the chances are that the court or arbitrator may justifiably refuse to award compensation.[40] It is significant then, that the procedural irregularities in this case were of no major consequence, which is illustrated by the fact that when the excluded evidence was included at the arbitration hearing, three of the four charges were upheld. According to the Department, any reasonably skilled arbitrator would have realised that the procedural unfairness suffered by Dr McGregor was of such insignificance as to be irrelevant. And, Dr McGregor himself recognises that "courts may overlook minor procedural irregularities and where a

[38] *SARS* above n 20 at para 52.

[39] Id. See also *Alpha Plant & Services (Pty) Ltd v Simmonds* [2000] ZALAC 26; (2001) 22 ILJ 359 (LAC) at para 107 and *Scribante v Avgold Ltd (Hartebeesfontein Division)* (2000) 21 ILJ 1864 (LC) at 1872A-B.

[40] *Kemp* above n 19 at para 20.

procedural irregularity is trifling, the courts may exercise their discretion not to grant compensation".

[37] It is also plain from *SARS* and *Tshishonga* that the nature and gravity of the misconduct and the attitude of the perpetrator weigh heavily in the determination of compensation.[41] In fact, there are cases where the conduct of the employee has been deemed so serious as to preclude the granting of compensation, notwithstanding that the dismissal was procedurally unfair.[42] In *Solidarity*, the Labour Court found that the applicant was entitled to only nominal damages of one month's compensation because, inter alia, he was a senior employee and the degree of departure from a fair process was not so serious.[43] In *SARS*, an employee (Dr Kruger) was dismissed for using racial slurs. Although this Court did not set aside the award of compensation, it did state that "a lesser period or no compensation would arguably have been more appropriate. Compensation for the period of six months for misconduct as gross as that of Dr Kruger and the lies he told, is by any standard generous".[44] As the Department avers, sight should not be lost of the nature and reason for Dr McGregor's dismissal. Dr McGregor is guilty of three counts of sexual harassment, which conduct the arbitrator and Labour Court explicitly denounced as "deplorable" and "grossly unacceptable". The misconduct is serious enough to cause the compensation to be reduced, not least because whether the employee was guilty or innocent is a material consideration.[45]

[38] Furthermore, it is not insignificant that the only unfairness suffered by Dr McGregor was procedural. In *Kemp*, the Labour Appeal Court said that it mattered to the award of compensation whether the dismissal was procedurally unfair, substantively unfair, or both: "obviously it counts more in favour of awarding compensation as against not awarding compensation at all that the dismissal is both

[41] *SARS* above n 20 at para 53 and *Minister of Justice and Constitutional Development v Tshishonga* [2009] ZALAC 5; (2009) 30 ILJ 1799 (LAC) (*Tshishonga*) at para 18.

[42] *Solidarity* above n 25 at para 48.

[43] Id at para 53.

[44] *SARS* above n 20 at para 58.

[45] *Kemp* above n 19 at para 20.

substantively and procedurally unfair than is the case if it is only substantively unfair, or, even lesser, if it is only procedurally unfair".[46] And, in *Relton Fred Booysen*, the Labour Court confirmed that substantive unfairness in a dismissal attracts greater compensation than would be the case in respect of a dismissal marred only by procedural unfairness.[47] Dr McGregor's submissions skirt around this. He merely advocates that because "so high a value is placed on procedural fairness", he should be entitled to the same amount of compensation and even reinstatement. Dr McGregor has also submitted that it is not possible to separate the procedural and substantive fairness in respect of the compensation. That is incorrect. As held in *H M Liebowitz*, there is a distinction between compensation payable to an employee who should not have been dismissed (substantive unfairness) and an employee who should have been dismissed but who was subjected to procedural unfairness, and a court deciding on appropriate compensation must reflect this distinction in its award.[48]

[39] It is actually not inconceivable that an award of compensation be set aside completely. In *Johnson & Johnson*, the Labour Appeal Court said that:

> "If a dismissal is found to be unfair solely for want of compliance with a proper procedure the Labour Court, or an arbitrator appointed under the LRA, thus has a discretion whether to award compensation or not."[49]

[40] And, in *Kemp*, it was said:

> "While it is true that, in the case of a dismissal that is both substantively and procedurally unfair, it would be difficult to find a situation where the employee is

[46] Id.

[47] *Relton Fred Booysen v The Sol Plaatje Municipality*, unreported judgment of the Labour Court, Cape Town, Case No C103/16 (8 December 2017) at para 48.

[48] *H M Liebowitz (Pty) Ltd t/a The Auto Industrial Centre Group of Companies v Fernandes* [2002] ZALAC 1; (2002) 23 ILJ 278 (LAC) (*H M Liebowitz*) at para 15.

[49] *Johnson & Johnson* above n 25 at para 40.

> awarded neither reinstatement nor compensation, this does not mean that there are no such situations."[50]

In that case, notwithstanding procedural and substantive unfairness, the Labour Appeal Court said that "the Labour Court should have refused to make an award of compensation".[51] The award of 12 months' compensation was set aside entirely.

[41] Ultimately, section 194(1) states that the compensation awarded in respect of a dismissal found to be unfair, either procedurally or substantively, must be just and equitable.[52] And, as held in *Gaga*:

> "Much will depend on the circumstances, with the court or commissioner being obliged to have regard to the nature and gravity of the infringement; the impact on the victim; the relationship between the perpetrator and victim; the position and responsibilities of the perpetrator; and whether or not there is a pattern of behaviour evidenced by prior misconduct."[53]

Important considerations and the nature of the harm: sexual harassment and gender-based violence in the workplace

[42] Whilst it is true that compensation for unfair dismissal serves an important purpose, the appropriateness of compensation must be understood within the context of the dismissal. This means that when the reason for the dismissal is sexual harassment, this must be taken into account. This is because our Constitution not only provides for the right to fair labour practices, but maintains that our constitutional democracy is founded on the explicit values of human dignity, integrity and the achievement of

[50] *Kemp* above n 19 at para 27.

[51] Id at paras 57 and 59.

[52] See *Northern Province Local Government Association v Commission for Conciliation, Mediation and Arbitration* (2001) 22 ILJ 1173 (LC) at para 57, where the Labour Court held that "[t]he provisions in section 194(2) requiring an award to be 'just and equitable in all the circumstances' underscores the need for the arbitrator to be properly informed about all the circumstances which would bear on justice and equity".

[53] *Gaga v Anglo Platinum Ltd* [2011] ZALAC 29; (2012) 33 ILJ 329 (LAC) at para 48, citing *SA Broadcasting Corporation Ltd v Grogan N.O.* (2006) 27 ILJ 1519 (LC) (*SA Broadcasting*) at para 51.

equality in a non-racial and non-sexist society under the rule of law.[54] Yet, sexual harassment strips away at the core of a person's dignity and is the antithesis of substantive equality in the workplace.[55] It also promotes a culture of gender–based violence that dictates the lived experiences of women and men within public and private spaces and across personal and professional latitudes.

[43] Furthermore, we know that "[a]t its core, sexual harassment is concerned with the exercise of power and in the main reflects the power relations that exist both in society generally and specifically within a particular workplace".[56] Indeed, between Dr McGregor and his victim crouched an indisputable power imbalance that has to be understood as underpinning this entire matter. Dr McGregor was thirty years the victim's senior, and in a position of authority. Not only does the power imbalance tip according to the professional positions, but it topples in terms of gender at the intersection of age. The Labour Court itself noted that it is impossible to "imagine any circumstances where given the nature of the relationship [between them], [Dr McGregor's] conduct vis-à-vis an intern would be appropriate".[57] And, it went on to state that the conduct would have been "grossly unacceptable" no matter who it was directed at, but "[t]he disparity in age and seniority is clearly an aggravating factor".[58]

[44] Courts have in the past emphasised the importance of considering such power dynamics in sexual harassment matters. In *Campbell Scientific Africa*, the Court was dealing with unwelcome and inappropriate advances directed at a young woman twenty-five years the perpetrator's junior, whose employment had placed her alone in his company. It held that "underlying such advances, lay a power differential that favoured Mr Simmers due to both his age and gender".[59] In *Gaga*, the Court noted that

[54] Section 1(a) to (c) of the Constitution.

[55] *Campbell Scientific Africa* above n 35 at para 21.

[56] Id at para 20.

[57] Labour Court judgment above n 9 at para 24.

[58] Id at para 42.

[59] *Campbell Scientific Africa* above n 35 at para 27. In *SA Broadcasting* above n 53 at para 51, it was emphasised that "sexual harassment by older men in positions of power has become a scourge in the workplace". See also

the victim "was placed in the invidious position of being compelled to balance her sexual dignity and integrity with her duty to respect her superior".[60] Indeed, many years ago, the erstwhile Industrial Court also drew attention to the dilemma facing junior employees subjected to sexual harassment. It said:

> "[Sexual harassment] creates an intimidating, hostile and offensive work environment. . . . Inferiors who are subjected to sexual harassment by their superiors in the employment hierarchy are placed in an invidious position. How should they cope with the situation? It is difficult enough for a young girl to deal with advances from a man who is old enough to be her father. When she has to do so in an atmosphere where rejection of advances may lead to dismissal, lost promotions, inadequate pay rises . . . her position is unenviable. Fear of the consequences of complaining to higher authority . . . often compels the victim to suffer in silence."[61]

Truly, the harshness of the wrong of sexual harassment is compounded when it is suffered at the hands of one's supervisor.[62]

[45] Not only was Dr McGregor at all times oblivious to the power dynamics that undergirded his professional relationship vis-à-vis the victim, he has also vacillated between denying outright that his conduct constituted sexual harassment and flippantly downplaying the significance thereof. Furthermore, instead of showing remorse, Dr McGregor has attempted to impugn the credibility of the victim as a witness. His refusal to recognise his wrongdoing adds insult to injury, and his attack on the victim's credibility is salt to the wound.

Gaga above n 53 at para 41, where the Labour Appeal Court noted that "the rule against sexual harassment targets, amongst other things, reprehensible expressions of misplaced authority by superiors towards their subordinates".

[60] *Gaga* id at para 42.

[61] *J v M* above n 7 at 758A-E, which has been cited in a number of labour law matters since, including *Gaga* id at para 42 and *SA Broadcasting* above n 53 at para 42.

[62] *Motsamai* above n 2 at para 20.

Conclusion

[46] This is a curious case. The Labour Court failed to give any cogent reason as to why it saw fit to leave the (not insignificant) award of compensation untouched, despite having varied a significant portion of the arbitration award from which it flowed. The misdirection was then compounded by the Labour Appeal Court's inexplicable conclusion that it would not revisit the compensation award because it (incorrectly) believed it had never been asked to.

[47] These curious misdirections are particularly unfortunate because this matter relates to sexual harassment in the workplace, perpetrated by a senior medical practitioner who has remained unrepentant for his misconduct with apparent oblivion to the fact that his behaviour constitutes the marrow in the backbone of a culture of sexual harassment that plagues this country's workplaces. Sexual harassment occurs at the intersection of gender and power, producing a potent stench of subordination, disempowerment and inequality that so seeps through the fabric of our society that it stains its core. Eradicating the scourge of sexual harassment will be a Sisyphean task if its perpetrators are compensated lavishly for their misconduct.

[48] It is difficult to comprehend that Dr McGregor could walk away with almost R1 000 000 to be paid from a barren public purse. Dr McGregor is of the view that the "gross" procedural unfairness justified that amount, as a bare minimum. I am of the view that six months' compensation, for minor procedural hiccups in respect of gross misconduct, is entirely too generous. I cannot but conclude that, on a conspectus of all of the above, the Labour Court should have reviewed and reduced the compensation. And, all of the above would have been considered by the Labour Appeal Court had it applied itself to the Department's cross-appeal, as it should have done. What would have become crystal clear much sooner is that the award of compensation in the amount awarded by the arbitrator is exorbitantly high and at odds with the principles of equity and justice. I have contemplated the appropriateness of removing the compensation in its entirety on account of the gravity of the factual matrix before me. That being said, I am aware of the fact that employees, including Dr McGregor, are entitled to fair labour

practices and procedurally regular dismissals. In the result, I reduce the award of compensation to an equivalent of two months' remuneration.

[49] In *Campbell Scientific Africa*, the Labour Appeal Court said that a sanction serves an important purpose in that it "sends out an unequivocal message that employees who perpetrate sexual harassment do so at their peril and should more often than not expect to face the harshest penalty".[63] Let a message be sent: "this is the protection which our Constitution affords".[64]

Costs

[50] Turning finally to address the issue of costs, I am guided by *Dorkin*, in which it was enunciated that the rule of practice that costs follow the result does not govern the making of orders of costs in labour related matters. The reason for this is because courts should seek to strike a fair balance between not unduly discouraging workers or employers from approaching them, and not encouraging frivolous cases.[65] In *Zungu*, this Court held that both of the courts a quo had followed the rule that costs follow the result notwithstanding that the matter was a labour dispute, to which it definitively said: "this is not correct".[66] Notwithstanding the abhorrence of Dr McGregor's conduct, I see no reason that warrants mulcting him with an adverse costs order. Each party is ordered to bear their own costs.

Order

[51] In the result, the following order is made:

1. Leave to appeal is refused.
2. The applications for leave to cross-appeal and condonation are granted.

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[63] *Campbell Scientific Africa* above n 35 at para 35. See also *Gaga* above n 53 at para 48.

[64] *Campbell Scientific Africa* id at para 33.

[65] *Member of the Executive Council for Finance, KwaZulu-Natal v Dorkin N.O.* [2007] ZALAC 41; (2008) 29 ILJ 1707 (LAC) (*Dorkin*) at para 19. See also *Zungu v Premier of the Province of KwaZulu-Natal* [2018] ZACC 1; (2018) 39 ILJ 523 (CC); 2018 (6) BCLR 686 (CC) at para 24.

[66] *Zungu* id at para 25.

3. The cross-appeal is upheld.
4. Paragraph 104 of the arbitration award is substituted with the following:
   "The Department of Health, Western Cape must pay Dr Charles James McGregor compensation in an amount equivalent to two months' remuneration calculated at his rate of remuneration at the date of dismissal."
5. There is no order as to costs.

For the Applicant:	R Stelzner SC and A Thiart instructed by Van der Vyver Incorporated
For the Third Respondent:	J Van der Schyff instructed by State Attorney, Cape Town