IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA18/18

In the matter between:

DR C J McGREGOR **Appellant**

and

THE DEPARTMENT OF HEALTH,

WESTERN CAPE **First Respondent**

THE PUBLIC HEALTH & SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL **Second Respondent**

ADV J MATSHEKGA N.O. **Third Respondent**

Heard: **27 February 2020**

Delivered: **13 October 2020**

Summary: *Dismissal ---Sexual harassment--- Supervisor sexually harassing younger female intern---Whether complainant found supervisor's conduct and remarks inappropriate ---Supervisor's conduct and remarks unwelcomed and amounted to sexual harassment. Arbitrator's finding that dismissal substantive unfair based on inconsistency unreasonable as complainant took no issue with pornographic pictures received from another employee. Labour Court's judgment upheld and appeal dismissed with costs.*

Coram: Davis JA, Sutherland JA and Murphy AJA

JUDGMENT

MURPHY AJA

[1] The appellant is a specialist anesthesiologist. He was employed by the third respondent, the Department of Health, Western Cape ('the department") as the head of its anesthesiology department at the George Hospital until his dismissal on 28 December 2016. He was dismissed by the department after being found guilty of sexual harassment of the complainant, Dr Smook, a junior colleague at the hospital.

[2] At the time of his dismissal, the appellant was 57 years old, and the complainant was a 26 year old female intern medical doctor who worked under his supervision.

[3] In October 2016, the appellant and complainant undertook a trip to Riversdale in order to perform services at a local medical facility. The complainant accompanied the appellant in his motor vehicle and stayed at the same guesthouse in Riversdale.

[4] The appellant was charged with four counts of sexual harassment, three of which related to the trip to Riversdale. The charges arising from the Riversdale trip were: i) charge 1 which alleged that whilst on duty on an outreach program to Riversdale and while stopping over at Vleesbaai beach the appellant made an unwelcome suggestion of a sexual nature when he dared the complainant to remove her clothes and swim naked in front of him when he should have known that his behaviour was unwelcome; ii) charge 2 which alleged that the appellant made an unwelcome suggestion with sexual undertones to the complainant that they embark on an affair; and iii) charge 4 which alleged that the appellant made unwelcome sexual advances to the complainant by inappropriately touching her leg when they were travelling in his car together.

[5] Charge 3 related to an incident about a week after the trip to Riversdale. It alleged that on 28 October 2016 the appellant made unwelcome sexual contact with the complainant when he inappropriately pressed himself up against her in the theatre at George Hospital while showing her how to insert a laryngeal mask.

[6] The charges must be understood in the context of the department's sexual harassment policy. Clause 7.2 of the policy defines sexual harassment as follows:

> 'Sexual harassment is unwelcome conduct of a sexual nature that violates the rights of a person. The unwelcome nature of sexual harassment distinguishes it from behaviour that is welcome and mutually acceptable. Such conduct may substantially interfere with an employee's work performance and may create a hostile, offensive and intimidating environment.'

[7] Clause 7.2.1 of the policy provides that certain factors may be taken into account to determine whether conduct constitutes sexual harassment, including the nature and extent of the sexual conduct and the impact of the sexual conduct on the complainant. Clause 7.2.2 provides that sexual attention becomes sexual harassment if: the recipient has made it clear that the behaviour is considered offensive; and/or the perpetrator should have known that the behaviour is regarded as unacceptable; and/or the unwanted behaviour persists. A single incident of harassment can nonetheless constitute sexual harassment. Clause 7.2.3 provides that the complainant's perception and experience of the alleged conduct will largely determine whether the conduct was offensive and unwelcome. Other provisions of the policy set out that the unwelcome conduct may be physical, verbal and non-verbal. Verbal conduct of a sexual nature includes all unwelcome innuendos, suggestions and hints, sexual advances, comments with sexual undertones and sex-related jokes.

[8] After a disciplinary enquiry concluded that he was guilty on all four counts, the appellant was dismissed. The appellant thereafter referred an unfair dismissal dispute to the first respondent, the Public Health and Social Development Sectoral Bargaining Council. After a lengthy arbitration, the arbitrator was satisfied that the department had proved the misconduct comprising charges 1,

2 and 4 but not that alleged in charge 3. He, however, determined that the appellant's dismissal was substantively unfair because the department had been inconsistent in applying discipline for sexual harassment. He also held that as the appellant's evidence on procedural unfairness had not been meaningfully challenged, the dismissal was procedurally unfair. The arbitrator however opted not to reinstate the appellant on the grounds that the misconduct on the three charges had been proved and thus reinstatement would be intolerable. The arbitrator accordingly awarded the appellant compensation equivalent to six months remuneration.

[9] The appellant made an application to the Labour Court to review the decision of the arbitrator not to reinstate him. The department brought a cross-review in respect of the arbitrator's findings of unfairness and the award of compensation. The Labour Court (Gush J) dismissed the application for review but varied the award to provide that the dismissal was substantively fair but procedurally unfair. It did not set aside or modify the award of compensation.

[10] The appellant appeals to this court against the finding of the Labour Court that the dismissal was substantively fair and the consequent refusal of reinstatement. The department has not cross-appealed against the finding of procedural unfairness or the award of compensation. It also does not take issue with the finding of the arbitrator in relation to charge 3 that it failed to prove that the appellant inappropriately pressed himself up against the complainant in the theatre at George Hospital while showing her a medical procedure.

The factual background

[11] The events giving rise to the three charges occurred over two days. The charges are not set out in chronological order.

[12] The allegation in charge 2 that the appellant suggested having an affair occurred during the journey from George to Riversdale. While discussing outreach work, the appellant talked about extra-marital affairs on outreach trips and mentioned that a report had been made about him having affairs to Mr Vonk, the CEO, who in response "had fallen off his chair laughing". The complainant felt the discussion was inappropriate and inferred that the

appellant, although speaking hypothetically, meant to communicate that it was feasible to have an affair during an outreach trip and went so far as to say something like: “What happens in Riversdale can stay in Riversdale”. In cross-examination, counsel put it to the complainant that the appellant put a different interpretation on the discussion but nonetheless acknowledged that the appellant had discussed his extra-marital affairs. He claimed though that Vonk had laughed because the notion was ridiculous. In his testimony, the appellant initially inconsistently denied that there had been any discussion about the rumours of his extra-marital affairs but his evidence changed under cross-examination when he (somewhat cryptically) admitted that there had been such a discussion. He denied though that the discussion was tantamount to a proposal of an affair.

[13] The conversation then turned to going to gym, with the complainant saying that she needed to go to gym because she was putting on weight. To this, the appellant replied that she did not need to go to gym as she would make an excellent model and told her that he would love to photograph her.

[14] After arriving in Riversdale and booking into the guesthouse, the complainant accompanied the appellant to a restaurant in Stilbaai for dinner. On the way, while talking about their dinner arrangement as a great “pseudo-date”, the appellant touched the complainant’s leg, on the upper medial thigh (charge 4), causing her to feel uncomfortable. In response, she moved her legs and turned away. She described the touch as a “sexual touch”. The cross-examination of the complainant on charge 4 revealed some inconsistency as to when and where this incident occurred and the possibility that she may have embellished.

[15] Not much turns on the minor inconsistencies, because the appellant admitted that he “brushed” the complainant’s leg with his left hand, but claimed variously that it was either an unintentional touch while gesticulating or merely a friendly pat without sexual undertones. He described the touch as “normal” and “accidental”. He confirmed though the complainant’s discomfort at the touch and described how she moved her legs and looked away from him. He asked her if there was something wrong, explaining that it was “professional trusts”

and “good manners” to enquire as to the reason for her obvious discomfort. She answered, so he said, that the air conditioning was bothering her.

[16] In cross-examination, it was put to the appellant that given their respective positions in the car it was improbable that he would have touched the complainant on the upper medial thigh accidentally while gesticulating. To this, the appellant replied:

> ‘It was a friendly, it was just normal. I touched her by accident. I was using my hand to gesticulate and I did and I had no sinister intentions or anything behind it.’

[17] When pressed on whether the touch was accidental or “friendly” (being intentional), the appellant repeatedly equivocated before eventually accepting the proposition that if it was intentional it was without sexual connotations. Then later, though fully aware of the implications of the difference, continued evasively to describe the touch as both friendly and accidental.

[18] On arrival at Stilbaai, before going to the restaurant, they took a walk and the appellant took photographs of the complainant. At dinner, the appellant once again referred to the occasion as a “pseudo-date”. She experienced what he said as sexually suggestive. The appellant’s evidence about his description of the dinner at Stilbaai as a “pseudo date” is revealing. Asked what he had meant by a “pseudo date”, he replied:

> ‘Professional visit, I am twice her daddy’s name (sic), ag twice her age. I am married and I just wanted things to be on the right basis. That she understood that this remained a professional date…This dinner and there were no erosions or boundaries…When I said that maximum this can be considered a pseudo date. This is no, it is just, it is a friendly supper. She was quite impressed that we, that I took her to the restaurant…..It is normal to do this and it is actually good manners and she, she enjoyed that she had this, was treated like this (sic).’

[19] When cross-examined on the topic, the appellant admitted that he had no basis to assume that the complainant had “come on” to him in any way. He was then

referred to his testimony at the disciplinary hearing where he described giving the complainant the following admonition:

> 'I am 30 odd years older than you. I am married and you are my guest, but it remains a professional evening. There is nothing, there is no, let us call it a pseudo date. The rest will carry on.'

Counsel for the department asked the appellant "what on earth" would make him say that to a young intern. To which the appellant replied: "because I think it is important to have the rules right on these trips…that it does not go anywhere". He "just wanted to make it totally clear…in case she had other expectations."

[20] After dinner, they returned to the guesthouse. The complainant went to her room, prepared for bed, changed into loose fitting pants and let down her hair. Before she could get into bed and read, the appellant knocked on her door and suggested that she join him for a nightcap. She reluctantly agreed, tied up her hair and went downstairs to the lounge. While having a drink, the appellant made a comment that she should wear her hair down. After 10 or 15 minutes they went back upstairs where the appellant stood in front of the door to her room and hugged her. The appellant then took her by the shoulders, looked deeply into her eyes, smiled and appeared as if he wanted to kiss her. The complainant did not respond and got into her room. There was no meaningful challenge to these allegations and the appellant was not invited to tender his version on the grounds that they did not form the basis of any charges.

[21] The following morning, the complainant and the appellant had breakfast together before going to work. The appellant brought the conversation round to the previous evening and stated that it was one of the best and most enjoyable dates he had been on "even though he did not have the grand finale". The complainant understood the appellant to be referring to sex. Walking to the car with her luggage, the complainant was carrying her shoes in her hand. The appellant took her shoes from her. When she protested, saying that she had two hands and could carry her own shoes, the appellant said something to the effect that he was carrying her shoes so that he could tell people that she had

left them in his room. She understood this to mean that he wanted to create the impression that he had slept with her. In response to a proposition that the appellant would deny such, the complainant stood firm on her version. When it was put to her that these matters did not form part of the charges against the appellant, she countered that sexual harassment was a "continuous thing".

[22] On the way back to George from Riversdale later that day, the appellant and the complainant detoured to Vleesbaai where they took a walk on the beach. The appellant again took a number of photographs of the complainant. The complainant testified that the appellant suggested that she take a swim (charge 1) as follows:

> 'But why don't you go for a swim? And I said: 'Firstly, because it is cold, and secondly, I don't have a swimsuit'. And he said: 'Don't worry, you don't need a swimsuit. I imagined you naked, and you definitely have nothing to be ashamed of'.'

When asked by counsel what she said to that proposal, the complainant testified:

> 'I tried to make light of it, because this is a very serious thing to say to somebody, especially after all the comments that has been made and the touching of the leg, and I just made light of it. I said: 'Ag no, I don't have clothes – dry clothes with me. I just want to go home'.'

[23] In cross-examination, counsel acknowledged that there had been some talk of swimming naked but asked whether she agreed that the appellant never asked her to undress and swim in the nude. The complainant responded as follows:

> 'He said: "Why don't you take a swim?' and I said: 'Because I don't have a swimsuit' and he said: 'But you could always just go for a swim in the nude – or swim naked, and don't worry about your body. There is nothing to be ashamed of'.'

Counsel responded by saying that the appellant would deny that, but did not specifically challenge the alleged comments about her body.

[24] The appellant admitted that he had suggested that the appellant swim naked but said that when the matter came up he merely said “you can swim with your clothes on or as in Europe you can swim naked”. He went on to say: “It was a joke at the time. It was accepted as a joke and we continued to walk along the beach”. The appellant was reluctant to concede that his remark might have made a young female intern under his supervision uncomfortable or might be seen as a form of grooming. He, however, admitted that during the trip he had on various occasions commented on the complainant’s appearance. Thus, he accepted that he had described her as attractive, stated that she dressed well, observed that she did not have to go to gym to lose weight, and told her that she looked better with her hair down.

[25] After returning to George, the appellant sent the complainant by “whatsapp” some of the photographs he took at Vleesbaai. One photo shows the complainant apparently posing with her back to the camera and head turned to the side. It is accompanied by a text message which reads: “A picture is worth a 1000 words. Thanks for coming with on outreach. It was great.” The complainant replied immediately saying: “Thank you! Was amazing! And now I have a new profile pic.” At the end of the message, she added an emoji of a winking face. To this, the appellant replied: “It was great fun. You did a great job of the anaesthetics and are a perfect lady to take on outreach.” Later in the “whatsapp” conversation the complainant stated: “See you Monday! And thank you for taking me along…would definitely do it again.” To which the appellant replied: “It will be pleasure to take u along again.”

[26] When it was intimated by counsel for the department that the photographs, messages, the winking emoji and the description of the trip as “amazing” might be construed as inconsistent with her claim of harassment, the complainant said she was trying to normalise the situation. She clarified that she wanted to maintain cordial relations until the appellant signed off her logbook, which she required to complete her internship. She explained that the winking emoji was her standard signature in messaging that she used at the end of all her messages, thus implying that nothing flirtatious could be made of it.

[27] While the appellant's counsel was exploring the photographs taken at Stilbaai and Vleesbaai, the complainant was prompted to comment more generally about the appellant's attitude towards her. She reiterated her view that the sexual harassment was of an ongoing nature. Counsel referred her to a passage of her testimony at the disciplinary enquiry, which read:

> 'The whole time during that time he would tell me that I looked really good, I dress very well and I'm very attractive. We went to Stilbaai for dinner and we went to the harbour, where he took photos of me and told me that I would make an excellent model and that I was really a beautiful girl.'

She explained what she meant by that statement as follows:

> 'So I was saying we went to Stilbaai for dinner, but the whole way, on the way, the whole Stilbaai excursion he would tell me about…(indistinct) and that I was very attractive……And then he took photos of me and told me that I would make a beautiful model.'

[28] The complainant reported her experiences of the Riversdale trip immediately on her return to George to her friend and colleague, Dr Francois Roos. She discussed the matter with other colleagues, one of whom, Dr. Smith, then wrote to Dr North, the manager of medical services. On the following Monday, the complainant was approached by Dr North who asked her to accompany her to her office. There she was asked to explain what had happened with the appellant in Riversdale and to make a statement.

[29] On 28 October 2016, before a formal complaint was made against the appellant, the complainant worked with the appellant in theatre at the George Hospital. She alleged that on that day, the appellant came into close physical contact with her while showing her a medical procedure and inappropriately pushed his pelvis against her. This is the event that formed the basis of Charge 3 which the arbitrator held was not established by sufficient reliable and credible evidence.

[30] Disciplinary steps were subsequently taken against both the appellant and another senior doctor, Dr Nel. The proceedings against Dr Nel have acquired

some relevance, and I will return to the evidence in that regard when discussing the award of the arbitrator.

The other witnesses

[31] Thirteen other witnesses testified at the arbitration hearing. Much of their evidence related to the first reports of sexual harassment by the complainant, similar fact and character evidence about the appellant, the problem of sexual harassment by senior doctors at George Hospital and the most serious allegation of sexual harassment by the appellant, being the alleged inappropriate contact in theatre on 28 October 2016 (charge 3), which the arbitrator held was not sufficiently proved. For reasons that follow, there is no need to canvass that evidence in any detail. Two points deserve mention.

[32] Firstly, Mr Vonk, the CEO of George Hospital, testified that in the past he had received complaints from female doctors about sexual harassment by the appellant and other senior doctors. He had spoken to the appellant about this. He was also approached by Prof Reid from the University of Cape Town about reports of sexual harassment in the anaesthetics department. Prof Reid was concerned about medical students who were undertaking their rotations at George Hospital. The outcome of his discussions with Prof Reid was that "other doctors… should take a leading role in the supervision of the medical students rather than Dr McGregor". That evidence is unchallenged.

[33] Secondly, Dr North confirmed that the first report of the sexual harassment came to her from Dr Smith who intervened on behalf of the complainant. It is clear from the evidence that some of the female doctors at George Hospital banded together to seek disciplinary action against the appellant. This evidence, and the evidence overall, indicates convincingly that there was an ongoing problem of inappropriate sexual conduct by some senior doctors at the hospital. It is common cause, for example, that Dr Nel, a senior doctor in his sixties, was in the habit of regularly sending pornographic images and videos to the complainant.

The arbitrator's award

[34] The arbitrator correctly pointed out that the only direct evidence of the events on the outreach trip was the testimony of the complainant and the appellant. He accordingly framed his task as the weighing of the probabilities of the two versions against each other without having to make specific findings of credibility of all the witnesses.[1] He then, somewhat sweepingly, ruled that the evidence of all the witnesses on behalf of the department except that of the complainant was irrelevant and inadmissible. His ruling is not correct. The evidence related to the first report, similar fact and character was both admissible and relevant. However, in the final analysis, nothing turns on the error.

[35] The arbitrator found that the evidence of what happened in theatre on 28 October 2016 (charge 3) while perhaps demonstrating that the appellant had not respected the complainant's personal space was insufficient to conclude that the appellant had sexually harassed the complainant on that occasion. As discussed earlier, that finding is not in contention on appeal. However, he was satisfied that the other charges had been established.

[36] The arbitrator accepted as probable that the appellant hinted at an affair while discussing the rumours of his extra-marital affairs and discussing a "pseudo date. He was also satisfied that the appellant inappropriately touched the complainant's leg on the way to Stilbaai on the basis that i) the touch was not disputed; ii) the uncontested evidence that the appellant was discussing the "pseudo date" when the touch occurred; and iii) the complainant had turned away in discomfort. He accordingly concluded that the touch was intentional and had sexual undertones.

[37] The arbitrator found that the comments about a swim in the nude constituted sexual harassment on the following basis:

> 'Conversations about nudity with one's colleagues whom you are not acquaintances are wholly inappropriate (sic). Expecting a junior colleague to be nude and/or making a joke about nudity is deplorable. The power relations

[1] *Assamang Ltd (Assamang Chrome Dwarsrivier Mine) v CCMA and others* [2015] 6 BLLR 589 (LC) para 49.

> between the applicant and Smook are such that the applicant should have known that he could not have a conversation with Smook, whatever the label he seeks to attach to it, about nudity. The applicant should have known that such comments were unacceptable and unwelcome.'

[38] Thus, the arbitrator accepted that the misconduct forming the basis of three of the four charges had been proved. He, however, held that the dismissal of the appellant was substantively unfair on grounds inconsistency in that the appellant had not been disciplined equally to Dr Nel. The complainant had complained also about Dr Nel who had sent her several pornographic images. Nel was subject to a disciplinary enquiry two days after the appellant's disciplinary hearing. The record of the Nel hearing forming part of the appeal record is incomplete. However, a document related to the hearing reflects that the complainant acknowledged that although Nel's behaviour was inappropriate she had not communicated that she regarded it as offensive. Moreover, Dr Nel had made no sexual overtures to her. Nel was acquitted at his disciplinary enquiry because his conduct was found not to have been unwelcome. Clause 7.2.3 of the policy provides that "the complainant's perception and experience of the alleged conduct/behaviour will largely determine whether the conduct was offensive and unwelcome".

[39] The arbitrator's finding that the dismissal was substantively unfair for inconsistency was as follows:

> 'The respondent did not favour me with any reliable evidence and /or reasonable explanation why Dr Nel was not disciplined or dismissed despite being similarly placed as the applicant and committing the same, if not more serious misconduct. In the absence of that evidence the conclusion is inevitable that the reason for the distinction is motivated by bias and/or ulterior motives. Accordingly, the dismissal of the applicant while no disciplinary action and/or Dr Nel was acquitted of the same misconduct is unfair (sic). Thus, the dismissal of the applicant was substantively unfair.'

[40] The arbitrator, as mentioned, also found that the dismissal was procedurally unfair. That finding is also not in contention on appeal.

[41] Having found the dismissal to be unfair, the arbitrator exercised his discretion under section 193(2) of the Labour Relations Act[2] ("the LRA") to award compensation rather than the primary relief of reinstatement. Although he did not explicitly say so, it is clear from his reasoning that he declined to award reinstatement because he believed that the circumstances surrounding the dismissal were such that a continued employment relationship would be intolerable.[3] He reasoned that the appellant's blameworthiness, and the fact that he had been found to have contravened the rule against sexual harassment, militated against ordering reinstatement or re-employment. He noted that had there not been inconsistency the dismissal would have been substantively fair. After considering all relevant factors, he awarded compensation in the amount equivalent to six months remuneration.

The Labour Court proceedings

[42] The appellant's application to review the award focused not only on the decision not to reinstate him but also the findings in relation to the charges. The department brought a cross-review in respect of the arbitrator's findings of unfairness and the award of compensation.

[43] The Labour Court accepted that the arbitrator's findings in relation to the charges were reasonable and not reviewable. However, it held that the arbitrator had misconstrued the evidence and misapplied the principles in relation to inconsistency with the result that the finding on substantive fairness was unreasonable because it ignored the seriousness and nature of the misconduct and the circumstances under which the misconduct took place. To conclude that the dismissal was substantively unfair despite the appellant being guilty of three charges was not a decision to which the arbitrator could reasonably come. Accepting that the dismissal was procedurally unfair, the Labour Court did not interfere with the award of compensation and declined to order either party to pay costs. The Labour Court therefore dismissed the

[2] Act 66 of 1995.
[3] As contemplated in section 193(2)(b) of the LRA.

application for review but varied the arbitration award to provide that the dismissal was substantively fair but procedurally unfair.

[44] The appeal to this court is limited to a challenge to the Labour Court's finding of substantive fairness. The appellant seeks retrospective reinstatement, the costs of the arbitration, costs of the review application and costs of the appeal.

The submissions and considerations on appeal

[45] The appellant argues that the arbitrator erred in finding that there was evidence to support the charges of sexual harassment and in not granting reinstatement. He claims the award was unreasonable principally because the arbitrator premised his finding upon too narrow an enquiry, ignored material evidence and failed to test the conflicting versions of the appellant and the complainant. A fundamental flaw in the award, counsel submitted, was the failure of the arbitrator to even consider the credibility of the witnesses, let alone test their reliability. The arbitrator was presented with mutually irreconcilable and contradictory versions on key aspects of the charges and failed to do a proper assessment of the versions. Moreover, the appellant contended that the arbitrator disregarded "crucial evidence" and set out in his heads of argument a list of 21 instances of such evidence.

[46] Counsel submitted further that the arbitrator's finding that the complaint in respect of the theatre incident necessarily implied that the complainant had been untruthful in her evidence that the appellant had pressed his whole body against her back. From this he should have made an adverse credibility finding when assessing the conflicting versions in respect of the other charges. The failure to do that, counsel submitted, led to an unreasonable award.

[47] The appellant maintained further that there was insufficient evidence that his behaviour was unwelcome or perceived as offensive, and thus it could not constitute sexual harassment. Additionally, even if the charges satisfied the requirements for such harassment, it should not have resulted in dismissal, considering the policy requires progressive discipline.

[48] The appellant's submission about the findings on charge 3 is misleading and does not provide a basis for rejecting the credibility of the complainant. The arbitrator did not "acquit" the appellant on charge 3 on the basis that the complainant was untruthful. He found (probably incorrectly) that the complainant had not alleged that the appellant sexually harassed her on that occasion but only testified that he did not respect her personal space. The department failed to prove sexual harassment on a balance of probabilities. There is no reason to conclude that the complainant lied about what happened. The submission that the arbitrator ignored "crucial evidence" is also unfounded. Of the 21 listed examples, 19 of them relate to charge 3. The arbitrator's ignoring of that evidence, if he indeed ignored it, would not have affected the outcome on charge 3 which was favourable to the appellant.

[49] The other evidence the arbitrator is alleged to have ignored is that the appellant and the complainant exchanged photographs of the trip and the complainant used one of these as her Facebook profile photograph. The contention is not entirely correct. The arbitrator referred in passing to the messaging and the complainant's explanation for its positive tone. He most likely did not consider it sufficiently relevant to his ultimate findings.

[50] As for the assessment of credibility, the evidence in respect of charges 1 and 4 is largely common cause. The appellant admitted that around the time he referred to a "pseudo date" while travelling to Stilbaai he touched the complainant's leg thereby causing her visible discomfort. He vacillated between having "accidentally" touched her leg and having just touched it in a "friendly" manner. He also admitted that he invited the complainant to swim naked. There too the difference between the two witnesses was one of inference and interpretation. The appellant considered it a joke. Considering the evidence of the first report to Roos and later to the other doctors, the complainant clearly did not. To her it was unwelcome. It is thus not correct to say that the arbitrator was presented with mutually irreconcilable and contradictory versions on key aspects of the charges. He was not. Certainly in relation to charges 1 and 4, and to a lesser extent charge 2, the decisive consideration was whether the proved facts permitted a reasonable inference of sexual harassment. That, as

the arbitrator correctly held, is more a question of probability and legal inference than one of credibility.

[51] The question the Labour Court was required to consider was whether the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. The relevant outcome reached by the arbitrator was that the dismissal was substantively unfair but that reinstatement was not the appropriate remedy. The method to be followed in reviewing arbitration awards was enunciated in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* [4] as follows:

> 'That test involves the reviewing court examining the merits of the case "in the round" by determining whether, in the light of the issues raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator…The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether apart from those reasons, the result is one that a reasonable decision-maker could reach in the light of the issues and the evidence.'

[52] The arbitrator's finding in relation to inconsistency was not rationally connected to the evidence. Nel was acquitted of the charges against him because the evidence was insufficient since the complainant had conceded that her interactions with Nel did not amount to sexual harassment. The parity principle does not require guilty offenders to be treated in the same way as those found not guilty of a similar offence because the employer could not prove the alleged misconduct. In so far as the arbitrator held that the dismissal was substantively unfair only because of inconsistency, and would otherwise have been substantively fair, the result reached by the route he followed was not reasonable. The Labour Court did not err in reaching that conclusion. However, in accordance with the method in *Herholdt*, that is not the end of the enquiry.

[4] [2013] 11 BLLR 1074 (SCA) para 12.

The court must still consider whether apart from those flawed reasons, the result remains reasonable in light of the issues and the evidence.

[53] The evidence in relation to charge 4 (the leg touching) laid a sound basis to reasonably conclude that the appellant had committed sexual harassment. The manner in which the appellant sought to explain the leg touching, equivocating between a friendly and accidental touch; the common cause fact of the complainant's discomfort and evasion; and the contemporaneous discussion of a "pseudo date", cumulatively provided a sufficient evidentiary basis for the arbitrator to conclude that the touch was unwelcome physical conduct with sexual undertones.

[54] The appellant's "joking" proposal that the complainant swim naked (charge 1) was likewise inappropriate conduct on the part of a head of department in conversation with a young, attractive female intern for whose supervision he was responsible. The remark crossed a boundary by conjuring an image of the intern naked and the possibility of sexual appreciation and connotation. All the more so when it was preceded by the appellant's other behaviour, including the inappropriate leg touching and his supposed setting of the boundaries of a "pseudo date" at dinner in Stilbaai in which he evoked the possibility of sexual interest, purportedly only to dismiss it. Jokes and unwelcome graphic comments are verbal conduct of a sexual nature which may be sexual harassment.

[55] The appellant baldly denied that he made an innuendo about having an affair. The evidence most favouring the complainant's version is the appellant's admission of the discussion he initiated about extra-marital affairs on the journey between George and Riversdale. The appellant's tactless discussion about his personal sex-life with a junior colleague gives some credence to the allegation that he was hinting at an affair. As the arbitrator correctly observed, the complainant's interpretation of the appellant's intentions is further bolstered by his repeated refrain about a "pseudo date" later that day. The arbitrator's conclusion on this charge was accordingly reasonable.

[56] In the final analysis, therefore, the appellant committed three counts of sexual harassment, which admittedly at first glance were not gross in nature. However, when assessed cumulatively, with regard to the surrounding circumstances, the appellant's position and responsibilities, and the appellant's behaviour throughout the trip, the misconduct is nonetheless serious.

[57] The charges against the appellant were narrowly drawn. He was not charged with the ongoing or continuous sexual harassment to which the complainant alluded in her evidence. The issue remains though whether the findings on the three charges provide a sufficient basis to conclude that dismissal was the appropriate sanction. When deciding whether or not to impose the penalty of dismissal, the employer may in addition to the gravity of the misconduct consider factors such as the employee's position in the organisation, the nature of his job and the circumstances of the infringements.[5] In other words, when determining the substantive fairness of the dismissal, the three proven instances of misconduct fall to be construed within the context of the appellant's behaviour overall. An arbitrator is generally required to examine the circumstances surrounding the dismissal and to make a judgment on whether the totality of those circumstances, including but not limited to the proven misconduct with which the employee was charged, has rendered a continued employment relationship intolerable. The question of intolerability generally addresses trust relationship issues between the employer and employee.[6] There must be a rational connection between the factual circumstances and the conclusion of intolerability or a breakdown in the trust relationship.

[58] The arbitrator held that despite his finding of substantive unfairness the appellant's blameworthiness and contravention of the rule against sexual harassment militated against ordering reinstatement or re-employment because a continued employment relationship had become intolerable. The trust relationship was irretrievably damaged. The arbitrator erred in not concluding that in such light dismissal was in fact the appropriate sanction. His error on this issue was material and led to the unreasonable outcome that the

[5] Item 3(4) of Schedule 8 of the LRA.
[6] *Potgieter v Tubatse Ferrochrome & others* (2014) 35 ILJ 2419 (LAC) para 37.

dismissal was substantively unfair. As the Labour Court correctly held, the arbitrator unreasonably ignored the seriousness of the misconduct and the circumstances in which it was committed. The conclusion of the Labour Court is fortified by additional considerations that it did not mention, but which appear in the record and of which it and the arbitrator were evidently aware.

[59] One thing that can be said with certainty is that the appellant had sex on his mind during the outreach trip he took with the complainant to Riversdale. On the first leg of the journey, he talked about his extra-marital affairs and hinted at having one with the complainant; on the trip to Stilbaai he spoke of a "pseudo date" and inappropriately touched the complainant's leg; at dinner, he gave a little speech advising the complainant to restrain any sexual interest she might have in him; at the guesthouse, he stood in front of her bedroom door, took her by the shoulders, looked deeply into her eyes and suggestively hoped for a kiss which was unforthcoming; the next day he spoke of a grand finale; he invited her to swim naked in front of him, conjuring the image of her naked body; he made repeated references to her attractiveness, her body and her hair; and subsequently engaged in a flirtation on "whatsapp" describing her as "a perfect lady".

[60] The appellant's own account of his cautioning the complainant at dinner in Stilbaai to maintain a professional distance and avoid any sexual designs on him, besides its pathos, is especially revealing. As counsel rightly asked, one has to wonder what prompted the appellant to say such a thing. The complainant is a young woman. She testified that she did not find the appellant attractive and had not communicated otherwise. The assumption in his "pseudo date" speech that she might have any sexual interest in him, in respect of which he, the more mature protagonist, had to impose professional boundaries, discloses an unconscious projection that surely would have propagated an embarrassing and uncomfortable experience for the complainant; and adds credence to both the complainant's account of what occurred outside her bedroom door a few hours later and her testimony regarding his comments about a grand finale and her shoes the next morning.

[61] Conduct of this order on the part of a consultant anaesthesiologist and head of department, with responsibility for supervising young female interns and medical students, has undoubtedly compromised the substratum of trust required for the continuation of an employment relationship. The appellant's disrespectful behaviour reflects a lack of insight into the power dynamic or imbalance and is demeaning of the relationship between superior and subordinate. The department, the George Hospital and the University of Cape Town justifiably would prefer not to have such a man in charge. As employers and educators, they have a duty to provide a safe and healthy work environment for their employees and students, including protection from senior employees of predatory disposition.

[62] In the premises, the arbitrator's decision that the dismissal was substantively unfair was unreasonable and the Labour Court did not err in modifying the award on that basis.

[63] This is a matter in which costs fairly should follow the result.

[64] In the premises, the appeal is dismissed with costs.

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JR Murphy

Acting Judge of Appeal

I agree

I agree

_____

DM Davis

Judge of Appeal

_____

R Sutherland

Judge of Appealt

APPEARANCES:

FOR THE APPELLANT:	Adv R Steltzner SC Instructed by: Brand & Van der Bergh Attorneys
FOR THE FIRST RESPONDENT:	Adv J van der Schyff Instructed by the State Attorney