REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case no: C350/13

In the matter between:

SA METAL GROUP (PTY) LTD	Applicant
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	First Respondent
STEPHEN BHANA NO	Second Respondent
JAMES BEASLEY	Third Respondent

Date heard: 27 November 2013

Date delivered: 15 April 2014

Summary: Review of an arbitration award; Commissioner's failure to take into account code of good practice on sexual harassment in the workplace

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JUDGMENT

Rabkin-Naicker J

[1] The applicant company seeks an order in terms of section 145 of the LRA reviewing and/or setting aside and/or substituting the arbitration award under

case number WEECT 20103 – 12 dated 25 March 2013. The main focus of this review application is the correct legal approach to be taken to the assessment of factual evidence in sexual harassment cases. Further issues raised on behalf of the applicant in respect of the reviewability of the award is the alleged failure of the first respondent (the Commissioner) to make any finding on one of the charges against third respondent (Beasley), and the manner in which the Commissioner determined compensation.

[2] On the 12 December 2012, Beasley, a divisional director of the applicant company, was charged with sexual harassment of a subordinate female staff member, Linn Ajamdien (the complainant). Beasley was found guilty on 14 December 2012 by the chairperson of an internal disciplinary hearing. At arbitration, the Commissioner found that Beasley's dismissal was substantively unfair and ordered the applicant company to pay him eight months' compensation in the sum of R864,000.00.

[3] The following paragraphs of the award are particularly relevant to a consideration of the review application:

"57. In casu the allegations of sexual harassment contain 3 distinct elements namely verbal/written banter, hugging and kissing. I will deal with each of them seriatum.

58. The verbal/written banter allegedly started with the comment about Linn's shoes. It is undisputed that Beasley made a comment about her shoes on 1 June in his e-mail which read, as PS, " love to the shoes". Linn responded to the comment in a light-hearted manner with thank you… My feet felt beautiful LOL". According to Linn this was the start of the sexual harassment. Further mentioning of the shoes was met in a similar fashion. Linn admitted that she appreciated the comment. Another example highlighted by Linn was Beasley's invitation to Linn to join "us" (my emphasis) for lunch to which Linn replied she would have loved to but can't eat ham otherwise she would be unable to go home. This elicited a reply from Beasley that she could come to his house if she's "skopped out". In another instance Beasley invited Linn for roti and curry lunch at work to which she replied that it seemed "Lekker"

but she had a meeting scheduled. Other examples of alleged sexual innuendo highlighted by then was Beazley's question if she was offering to come and play with him after she suggested he plays Monopoly to relieve his boredom whilst on sick leave. Her response at the time was "I wish!".

59. *At no point did Linn make Beasley aware that this banter was unwelcome; in fact her responses seemed to indicate that she was quite comfortable with it and participated willingly therein. She also initiated closer contact with him after the August meeting by sending him the "Little Love" card for his birthday. None of the evidence presented in respect of the communication between Beasley and Linn contained any explicit sexual connotation. It appeared that Linn attached a subjective sexual interpretation to it to support her testimony in the arbitration, given that only the Whatsapp messages were mentioned in the disciplinary enquiry.*

60. *Linn testified that when she first saw Beasley hug her colleague she knew she would be uncomfortable with it. It is common cause that Beasley did not hug her from the start. Their versions of when the hugging started differ diametrically. It is undisputed that Beasley hugged other females including the HR manager and Gangen. Gangen's testimony that Linn willingly hugged Beasley in her and Granger's presence stands unchallenged. On Linn's own version, she hugged Beasley when he finally came back to their offices and hugged everyone except her. She did not highlight the last hug in November is being unwanted either. It was agreed that after the August meeting there was no physical contact between Linn and Beasley. In light of her own evidence that thereafter she hugged Beasley first, I fail to see how she could have regarded the hug shortly thereafter in November as sexual harassment. There is no evidence that Linn every informed Beasley that hugging was unwelcome which lends credence to his testimony that it was the norm between them.*

61. *The most serious and the most contentious element is that kissing. Linn indicated that Beasley kissed her on three occasions, once in*

August on her cheek, once on her mouth trying to get his tongue inside her mouth (also in August) and the last kiss on the cheek in November. It is common cause that Linn addressed the second August kiss with Beasley in a meeting between them. At no point did they agree that the case was as described by Linn. There was no focus in the evidence that the first kiss on the cheek was ever addressed. On Linn's own version she elected not to mention it to Beasley or anyone else. The last alleged kiss on the cheek was hotly denied by Beasley. Beasley's counter version that they kissed numerous times when they greeted at Linn's instigation was also disputed although it was consistent with his testimony in the enquiry. In essence it is very difficult to determine whether the last kiss in November occurred or not. One needs to assess the credibility of the two persons to arrive at a probable conclusion.

62. *Both Linn and Beasley became emotional at some point during their testimonies. Linn however was very articulate and insistent in her testimony, like a person who was well prepared. What was worrying about her version is her very subjective interpretation of events and communications. She assigned sexual meanings to statements of questions which were at best open to wide interpretations and in a narrow sense had to be evaluated within the particular context. This, in light of Borain's testimony, could be a form of hyper vigilance and sensitivity given Linn's past experience of sexual abuse. Another problem with Linn's version is her admitted election not to report these alleged instances of harassment. As HR specialist practitioner, she had direct access to and was in fact a custodian of the respondent's policies and procedures. She reported to the HR manager, also a woman, who described herself as tough. Yet to Linn did not report any of these events/instances to Opperman or what anyone else. On her own version, Beasley is waving his hand in front of her face was the straw that broke the camel's back. She failed to explain how this was part of the sexual harassment. She was a less credible witness than Beasley.*

63. Beasley on the other hand could not be shaken during cross-examination. He admitted that there was kissing in general but that it was consensual and all of it prior to the August meeting. He vehemently denied the alleged tongue kiss in August as well as the cheek case in November. His version that Linn willingly hugged him and brought coffee and muffins to their meetings was supported by his witnesses, both of whom appeared to be credible. It is common cause that he apologised in August for making Linn feel uncomfortable and again in November and had in fact suggested, nay insisted, that they deal with the matter in Opperman's presence. It was undisputed that he and Linn had travelled to Saldanha and Hout Bay without out any incidents. In comparing these two key witnesses I therefore find Beasley's version more probable than that of Linn.

64. I have already alluded to the improbability that the hugging and banter constituted sexual harassment as Beasley was never made aware that it was unwelcome, unwanted war offensive. The August incidents were dealt with by Linn and Beasley and laid to rest on their versions, was not repeated and therefore becomes immaterial. The last incident remains unproven. In essence then the respondent had failed to prove the applicant's guilt on the balance of probabilities. It had failed to prove that the behaviour which the applicant deemed unwanted was persistent."

[4] It is submitted on behalf of the applicant company that the following aspects of the findings reflected above are particularly significant:

4.1 The Commissioner found that none of the evidence presented in respect of the communication between the complainant and Beasley contained any explicit sexual connotation. He also found that the sexual connotation given to it by the complainant was purely subjective and that the sexual connotations attributed to his communications were nothing more than views that she had developed after the fact - the complainant had done this to bolster her evidence in the arbitration. Elsewhere in his findings it is moreover suggested by the Commissioner that she was coached to do so.

4.2 The Commissioner found that the particular nature of her testimony was suspicious and that this articulate testimony accordingly impacted on her credibility as a witness – he noted that in his view she assigned sexual meanings when none were present and that this may also be explained by her past experience of sexual abuse.

4.3 The Commissioner found that Beasley's denial of the tongue kiss in August and the cheek kissing November, must be accepted because Beasley was a credible witness and the complainant was not.

4.4 In the view of the Commissioner, particularly telling was her failure to make it explicit to Beasley that the hugging and banter constituted sexual harassment as in her view, they were unwelcome, unwanted or offensive, this is especially so given that she was an HR specialist.

Grounds of Review

[5] The grounds of review submitted on behalf of the applicant company are the following:

5.1 there is no rational basis to justify the conclusion that there was no sexual connotation contained in the messages sent by Beasley to the complainant;

5.2 the Commissioner failed properly to apply his mind to the material facts;

5.3 the Commissioner failed have adequate regard to the relevant legal principles relating to the strictures placed on the permissible conduct of the director in his interactions with members of the opposite sex, particularly having regard to the substantial power imbalance between the two parties;

5.4 the Commissioner failed have adequate regard to the obligation placed on persons in authority to refrain from any conduct that could contribute to a hostile work environment;

5.5 the finding that the claimant was not a credible witness is not supported by the evidence;

5.6 the finding that the disciplinary proceedings against Beasley were actuated by an ulterior motive is unsupported by the evidence;

5.7 the Commissioner failed to make findings on all of the charges; and

5.8 the Commissioner reached decisions that a reasonable decision maker could not reach.

[6] The submissions on behalf of the applicant proceed to deal extensively with the test for sexual harassment in our case law and in particular the 2005 Code of Good practice on the handling of sexual harassment cases (the 2005 code). International jurisprudence including the Australian code of good practice on sexual harassment is referred to.

Evaluation

[7] The critical issue to be examined on the basis of the approach taken by the applicant in this review, is to answer the following question: Where a Commissioner fails to be guided by the 2005 Code in his treatment of the evidence in an arbitration which deals with sexual harassment, does this render his award susceptible to review?

[8] Section 138(6) of the LRA provides that:

" (6) The commissioner must take into account any code of good practice that has been issued by NEDLAC or guidelines published by the Commission in accordance with the provisions of this Act that is relevant to a matter being considered in the arbitration proceedings."

[9] In the award in question, the Commissioner does refer to a Code in that he quotes the definitions of 'sexual harassment' and 'forms of sexual harassment in the Code'. As I deal with later in this judgment, he does not quote the amended 2005 Code[1] correctly when he sets out the definitions of sexual harassment. In addition, the provisions of the 2005 Code that should inform any arbitrator dealing with a matter such as that before the Commissioner are set out in the following clauses:

"4 Test for Sexual Harassment

[1] GenN 1357 GG 27865 4 August 2005

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, taking into account all of the following factors:

4.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;

4.2 whether the sexual conduct was unwelcome;

4.3 the nature and extent of the sexual conduct; and

4.4 the impact of the sexual conduct on the employee.

5 Factors to establish sexual harassment

5.1 Harassment on a prohibited ground

5.1.1 The grounds of discrimination to establish sexual harassment are sex, gender and sexual orientation.

5.1.2 Same-sex harassment can amount to discrimination on the basis of sex, gender and sexual orientation.

5.2 Unwelcome conduct

5.2.1 There are different ways in which an employee may indicate that sexual conduct is unwelcome, including non-verbal conduct such as walking away or not responding to the perpetrator.

5.2.2 Previous consensual participation in sexual conduct does not necessarily mean that the conduct continues to be welcome.

5.2.3 Where a complainant has difficulty indicating to the perpetrator that the conduct is unwelcome, such complainant may seek the assistance and intervention of another person such as a co-worker, superior, counsellor, human resource official, family member or friend.

5.3 Nature and extent of the conduct

5.3.1 The unwelcome conduct must be of a sexual nature, and includes physical, verbal or non-verbal conduct.

5.3.1.1 Physical conduct of a sexual nature includes all unwelcome physical contact, ranging from touching to sexual assault

and rape, as well as strip search by or in the presence of the opposite sex.

5.3.1.2 Verbal conduct includes unwelcome innuendos, suggestions, hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person's body made in their presence or to them, inappropriate enquiries about a person's sex life, whistling of a sexual nature and the sending by electronic means or otherwise of sexually explicit text.

5.3.1.3 Non-verbal conduct includes unwelcome gestures, indecent exposure and the display or sending by electronic means or otherwise of sexually explicit pictures or objects.

5.3.2 Sexual harassment may include, but is not limited to, victimization, quid pro quo harassment and sexual favouritism.

5.3.2.1 Victimization occurs where an employee is victimized or intimidated for failing to submit to sexual advances.

5.2.3.2 Quid pro quo harassment occurs where a person such as an owner, employer, supervisor, member of management or co-employee, influences or attempts to influence an employee's employment circumstances (for example engagement, promotion, training, discipline, dismissal, salary increments or other benefits) by coercing or attempting to coerce an employee to surrender to sexual advances. This could include sexual favouritism, which occurs where a person in authority in the workplace rewards only those who respond to his or her sexual advances.

5.3.3 A single incident of unwelcome sexual conduct may constitute sexual harassment.

5.4 Impact of the conduct

The conduct should constitute an impairment of the employee's dignity, taking into account:

5.4.1 the circumstances of the employee; and

5.4.2 the respective positions of the employee and the perpetrator in the workplace."

[10] It is settled law as the jurisprudence stands presently, that the making of award by a CCMA Commissioner constitutes administrative decision-making[2]. The administrator qua Commissioner is enjoined by the empowering statute, in this case the LRA and in particular section 186(6) of that Act, to apply a code such as the 2005 Code when presiding over and making a decision in arbitration proceedings. It is noteworthy that the 2005 Code specifically provides as follows:

"11.4 CCMA commissioners should receive specialized training to deal with sexual harassment cases."

[11] It is peremptory then for a commissioner to apply the 2005 Code when they preside over arbitrations dealing with dismissals for alleged misconduct, in which alleged acts of sexual harassment constitute the said misconduct. This type of case rather than "unfair discrimination" matters is what CCMA commissioners in the main deal with. I now turn to consider whether the Commissioner did take the 2005 Code into account in this matter.

[12] In his analysis of whether there was sexual conduct or not the Commissioner finds that "none of the evidence presented in respect of the communication between Beasley and Linn contained any explicit sexual connotation" and that the complainant's views to the contrary were "purely subjective". In so doing the Commissioner failed to have adequate or any regard to the relevant portions of the 2005 code which makes it explicit that "unwelcome innuendo, suggestions and hints" suffice for purposes of the definition of verbal sexual harassment. The Code does not require communication to include an "explicit" sexual connotation.

[13] It is submitted on behalf of the applicant company that the following comments e-mailed by Beasley to the complainant must be considered in light of the provisions of the Code, as remarks of a sexual nature. These included comments like "can't wait for summer to see you strut your stuff;" "listen, we had better stop "shoe flirting" before we get into trouble with my other

girlfriends."; "We are going to get into trouble for flirting hey. Watch it it's Lekka"; "it's okay you can come to my house tonight if you get skopped out."; "Are you offering to come play with me?". Further it is submitted that Beasley would not be telling someone at work in whom he had no sexual interest that he had a dream about her and that the dream had been "hectic".

[14] The Commissioner drew a negative inference from the passive coping strategies of the complainant and made a credibility finding against her on the basis that she ought to have made it explicit to Beasley that the banter and hugging constituted sexual harassment in her view – particularly as she was an HR practitioner. The 2005 code includes a guideline as to how the reporting of sexual harassment by an employee should be gauged. Reference is made to Section 61 of the Employment Equity Act which requires that conduct in contravention of that act must immediately be brought to the attention of the employer and reads as follows:

> "in instances of sexual harassment, the word " immediately" shall mean, as soon as is reasonably possible in the circumstances and with out undue delay, taking into account the nature of sexual harassment, including that it is a sensitive issue, that the complainant may fear reprisals and the relative positions of the complainant and the alleged perpetrator in the workplace."

[15] It is apparent on the face of the award in question that the Commissioner failed to have adequate regard to the power imbalances between the complainant and Beasley and her explanation in the arbitration that she failed to report the harassment earlier, as she was trying to ensure that she preserved her position as a newcomer in the applicant's employ. In **Gaga v Anglo Platinum Ltd and others**[3] Murphy J held as follows:

> "the rule against sexual harassment targets, amongst other things, reprehensible expressions of misplaced authority by superiors towards their subordinates. The fact that the subordinate may present as ambivalent, or even momentarily be flattered by the attention, is no excuse; particularly where at some stage in an ongoing situation she

[3] (2012) 33 ILG 329 (LAC)

signals her discomfort. If not the initial behaviour, then, at the very least, the persistence therein is unacceptable."

[16] I must agree with the submissions made on behalf the applicant company that the Commissioner ought to have considered that the behaviour and attention directed at the complainant by Beasley was inappropriate. The Commissioner does not seem to have taken into account that Beasley had an obligation placed on him in his senior managerial position to refrain from any conduct which would contribute to a hostile work environment. This obligation became stronger in circumstances where the complainant signaled her discomfort and advised Beasley in August that contact was unwelcome. On Beasley's version of what happened on 26 November, he did hug the complainant (but denied kissing her). This evidence of should have been weighed taking the provisions of the 2005 Code into consideration. It was not.

[17] It is concerning that the Commissioner in his assessment of the "credibility" of the complainant and the alleged perpetrator, includes the comment that the complainant "however was very articulate and insistent in her testimony, like a person who was well prepared. She assigned sexual meanings to statements and versions which were at best open to wide interpretation…" The Commissioner also appears to doubt her credibility based on the fact that as a HR specialist that knew about the sexual harassment policies of the employer, she failed to complain about the conduct at the time that it happened and then claimed at the arbitration that she viewed the same conduct as constituting sexual harassment.

[18] It would seem to me that where an alleged victim of sexual harassment has been empowered to present her evidence in a manner that reflects she is well prepared, this should not be a relevant consideration in evaluating the credibility of such a witness. The further reasoning that if a person works in human resources, she should be expected to take more immediate action in reporting sexual harassment cannot be considered a rational general proposition or relevant consideration in a credibility finding. In this case moreover it was common cause that the complainant had made it clear to the company and to Beasley that she had suffered sexual abuse as a child.

[19] A further ground of review is contained in the applicant's papers and that is that the Commissioner did not make findings on the fourth charge at the disciplinary hearing which was that Beasley was guilty of "demonstrating judgment, not befitting of the divisional director of the company". It is submitted that even if the Commissioner was of the view that Beasley had not committed sexual harassment he was still obliged during the de novo hearing at arbitration to consider all the charges for which the dismissed employee had been found guilty, and yet he failed to do so. Reliance is placed on the matter of **Dairy Bell (Pty) Ltd versus Commission for Conciliation, Mediation and Arbitration & others**[4] in which the court held that where there were several charges of misconduct, each ought to be separately dealt with and the arbitrator's analysis and conclusion in relation to each count ought to be clearly set out to meet the required standard of justifiability. Where in a case such as this a Commissioner is required to take into account the 2005 Code and so should have been alert to the issue of the status of the respective parties in the hierarchy of the company, the omission to make such a finding becomes even more problematic.

[20] The heads of argument on behalf of Beasley include the submission that: "Until such time as the alleged offender is made aware that the conduct is unwelcome there can be no sexual harassment. It was therefore appropriate for the arbitrator to distinguish the events prior to the meeting at the end of August 2012 from the events thereafter as the third respondent had no indication prior to this that his conduct may have been unwelcome." This proposition cannot be sustained given the definition of sexual harassment in the 2005 code:

> "(1) Sexual harassment is unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.
>
> (2) Sexual attention becomes sexual harassment if-

[4] (1999) 4 LLD 629 (LC)

(a) the behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; **and/or**

(b) the recipient has made it clear that the behaviour is considered offensive; and/or

(c) the perpetrator should have known that the behaviour is is regarded as unacceptable."[5]

[21] A reading of this definition makes it clear that such an assertion is unsustainable. It is also important to note that the definition as recorded in the award did not include the words '**and/or**' between sub clauses (a) and (b) of the definition. Nor did it include the phrase **"although a single incident of harassment can constitute sexual harassment**".

[22] My judgment is that this award is susceptible to review. The applicant has, referring to the jurisprudence on the test for review of awards quoted the judgment of the Supreme Court of Appeal in **Herholdt**[6] as follows:

"[25] In summary, the position regarding the review of CCMA awards is this: a review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by sS 145 (2) (a) (ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach of all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, not in and of themselves sufficient for an award to be set aside, but are only of any consequence if there affect is to render the outcome unreasonable."

[23] Since the above judgment was handed down there has been a further judgment of consequence in the Labour Appeal Court in the matter of **Goldfields Mining South Africa (Pty) Ltd (Kloof Goldmine) versus CCMA**

[5] Clause 4 of the 2005 Code
[6] Herholdt v Nedbank Ltd (701/2012) [2013] ZASCA 97 (5 September 2013)

and others,[7] in which the Labour Appeal Court summarised the questions a reviewing court should ask in a matter such as the one before me as follows:

> "The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? And (v) is the arbitrator's decision one that another decision maker could reasonably have arrived at based on the evidence?"[8]

[24] I return to the question I raised regarding the duty imposed on the administrative decision-maker qua Commissioner by section 138 (d) of the LRA to apply the relevant code of good practice when he or she is arbitrating a dispute. In my judgment a reviewing court may treat the omission to do so as a failure to understand the nature of the dispute he or she was required to arbitrate. On the **Herholdt** test, this would be characterized as a gross irregularity This is particularly so in a matter which concerns alleged sexual harassment where it is recognised that specific guidelines are necessary to follow in order to treat the evidence appropriately. The inclusion of a clause in the Code requiring CCMA commissioners to be trained in order to be skilled in dealing with these matters is pertinent.

[25] I find that the failure to take proper account of the 2005 Code in dealing with the evidence before him, led the Commissioner to arrive at a result which a reasonable decision maker could not make. The Commissioner specifically failed to take the correct definition of sexual harassment as contained in the 2005 Code into account, and further was not guided by the principles and guidelines set out in that Code when he evaluated the respective testimonies of the complainant, and the alleged perpetrator. In addition, he failed to deal with one of the findings in the disciplinary hearing for which Beasley was

[7] (JA2/2012) [ZALAC] 28 (4.11.13]
[8] JA2/2012 at paragraph 20

dismissed, as referred to above. I am therefore going to rule that the award should be reviewed and set aside.

[26] The question as to whether this court should substitute its decision for that of the Commissioner needs to be considered. I see no point in referring the matter back to the CCMA given that the complete record is before me. I have no doubt that Beasley was guilty of demonstrating judgment not befitting of a divisional director of the company. And as the chairperson of Beasley's disciplinary hearing said in respect of his engagement in inappropriate physical contact after the August meeting: "The definition of sexual harassment encompasses a situation where there is persistence in unwanted physical contact of any kind and Beasley's conduct clearly meets this definition." The sanction of dismissal was fair in these circumstances.

[27] I do not consider it apposite to make a costs order against Beasley for opposing the review. I therefore make the following order:

1. The award made by the second respondent acting under the auspices of the first respondent, under case number W ECT 20103 – 12, dated 25 March 2013, is reviewed, set aside and substituted as follows:

2. "The dismissal of James Beasley was substantively fair."

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Rabkin-Naicker J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant : C.S. Kahanovitz (SC) with M O'Sullivan instructed by Guy & Associates

For the Third Respondent: L Myburgh instructed by Greenberg and Associates