REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

Case no: JS 261/2010

In the matter between:

FOSAWU OBO AB & 4 OTHERS **Applicant**

And

FEDICS (PTY) LTD **First Respondent**

NP* **Second Respondent**

Delivered: 04 November 2014

Summary: (Employment Equity Act 55 of 1998 – s 6(3) – unfair discrimination – sexual harassment – demeaning and abusive language amounting to unfair discrimination – whether employer was aware of the allegations and took appropriate action).

JUDGMENT

LAGRANGE, J

Introduction

[1] The union in this matter and five individuals brought a case of unfair discrimination in terms of section 6 (3) of the Employment Equity Act, 55 of

1998 ('the EEA') against the respondent. The essence of their claim is that they were subjected to sexual harassment and abusive denigratory language amounting to direct, or alternatively indirect, unfair discrimination suffered under the second respondent, their immediate superior. They sought an order requiring the second respondent to be subject to disciplinary action and an order of compensation of R 100,000 each in terms of section 50 (1) and (2) of the EEA, or alternatively a maximum amount of compensation payable in terms of that Act.

[2] The respondent ('Fedics') is a company providing, amongst other things, catering services to other companies. The claim concerns events which took place at a catering unit of the respondent situated at Albany Bakeries premises. Apart from denying the specific instances of alleged harassment or abuse, the respondent claims it was never made aware of any of the alleged incidents set out in the applicants' statement of claim, though it concedes it was made aware of certain grievances in January 2010, which it claims it addressed. Moreover, it claims that it had ample policies and procedures, including a sexual harassment policy, which the applicants could have used to address any incidence of unfair discrimination or harassment, but they failed to make use of any of these channels despite having the opportunity to do so.

[3] Apart from the factual disputes about whether certain incidents occurred or not, a major focus of the evidence concerned which grievances of the applicants were actually conveyed to the respondent in January 2010 and whether it had responded adequately to those it was made aware of.

[4] The applicant's witnesses were:

4.1 Ms ABAB, who has worked as a cashier with the respondent since 2006 ('Ms ABAB').

4.2 Ms CD, who was employed as a food assistant by the respondent the same year ('CD').

4.3 Mr EF, a union official of the Future of South Africa Workers' Union ('Mr EF').

[5] The respondents' witnesses were:

5.1 Mr GH, the regional IR Manager of Fedics at the time, who subsequently left the firm. He held an LLB degree and various other post-graduate legal qualifications including one in Labour Law ('GH).

5.2 Ms JK, a cashier who started working for the respondent around January 2009 ('JK').

5.3 Ms LM, a cashier employed by the respondent since August 2005 ('LM').

5.4 The second respondent, Mr NP ('NP'), a catering manager, still currently employed by Fedics.

5.5 Ms QR, the District Manager of 15 years' service, who was responsible for 13 units including the Albany Bakery unit at which the individual applicants were employed ('QR').

5.6 ST, a catering manager employed by the respondent since 1983 who occasionally went to Albany Bakeries unit ('ST').

[6] The matter had been set down for three days starting on 21 May 2012, but only one of the respondent's witnesses had testified at the end of that period, necessitating a postponement of the matter to 20 September 2012.

[7] Two of the individual applicants withdrew as parties to the case in July 2011, after the matter had been set down for default judgment the previous month. They were JK and LM, who both signed statements on 8 October 2010, apparently witnessed by GH. The statements were to the effect that that they 'excluded' themselves from the claims of sexual harassment and unfair discrimination on the basis that their concerns as staff were addressed on 27 January 2010. This was the date a meeting was convened at which grievances of kitchen staff against the second respondent, the catering manager at the Albany Bakeries unit at the time. They were both subpoenaed by the respondent to give evidence.

[8] NP denied having pressurised LM to withdraw from the case by subjecting her to disciplinary action during the latter half of 2010. Correspondingly, LM denied being pressurised to do so by him.

[9] Ms AB said she only became aware that the matter was going to trial one month before it commenced, though she claimed to have been aware that

the employer had applied to postpone the matter. When pressed on whether she had instructed anyone to proceed with the case, she said she assumed the union had done so as they had made it aware of the harassment. When it was put to her that her two colleagues had only found out about the case last year and had not instructed anyone to take it up on their behalf she said she was unaware of that. Mr EF disputed that CD and Ms AB had only known about the case a month before trial commenced, because the union got a mandate to refer the matter to the CCMA and they were both present when the matter was enrolled the previous year on or about 25 September 2010 for default judgment.

The Evidence

Background on relations between Ms AB and NP

[10] The principal witness for the applicants was Ms AB. She has been working for the company since 2006 as a cashier. Not long after she had been employed, NP, who had also been a cashier, was appointed to the position of a manager.

[11] Though her memory of it appeared to be uncertain, Ms AB related an incident which appears to have occurred after work in 2007 in which she had been hijacked, or 'kidnapped' as she put it, and then was robbed and abandoned in a place she did not know. When she reported this to NP he said he would report it to his manager, QR, but he should not think that the company was going to arrange transport for them as a result of the incident. This was not an instance of discrimination but seems to have been mentioned as a way of indirectly illustrating NP's allegedly uncaring attitude towards female staff. Ms AB conceded under cross-examination that NP had actually suggested she reported the matter to the police, but she did not because she could not identify any of the perpetrators.

[12] NP gave evidence after JK and LM. He testified in English. He had been employed initially as a driver by the respondent in 2000 and subsequently became a cashier in 2004 after which he was appointed as a catering manager at the Albany catering unit in 2006. Ms AB had been appointed

as a cashier at the same unit shortly before his promotion to catering manager.

[13] According to NP, her father had phoned him to ask why he had not done anything about the matter; relations between them became more unfriendly. It seemed that her father expected him to report the matter, but QR advised him that there was nothing the respondent could do in the absence of any evidence of what transpired. Ms AB both denied knowing about her father phoning NP or that she had become very hostile towards NP after the incident. The respondent maintained that it was after this incident that relations between Ms AB and NP deteriorated.

Evidence Concerning the Alleged Incidents of Discrimination

Alleged direct sexual harassment of Ms AB

[14] Ms AB testified to a number of incidents involving NP, which mostly took place in 2009. The first incident she mentioned was sometime in August 2009. She was about to leave work when NP told she should wait for him so he could give her a lift and to take her out for a meal. She rebuffed his approach and said she would go home by train. When asked why this incident was not mentioned in the pleadings, Ms AB said she was unaware if it was.

[15] She then related that when she took the day's takings to NP's office he would ask her for a hug or a QR kiss on the cheek, which she also refused. When she did so, he said she must not behave 'like a QR child' and pretend she did not know what he wanted to do. She made it clear she didn't appreciate what he said. She then started to stand at the door when she came with the takings and would not go into the office. Neither of these complaints appeared in the affidavits which were originally filed *in lieu* of a statement of case, nor in the amended statement of case filed later by the applicants' erstwhile attorneys. When asked to explain the omission, Ms AB said it should have been in the pleadings as it was in the petition signed by the workers. There was also a discrepancy between the date when the kissing incident as mentioned in the statement of case took

place, namely November 2008, and August 2009 when she said it took place in her oral testimony. She also said it took place regularly between August and November 2009 at least once or twice a week and other employees were present and must have seen what happened. NP denied these allegations and claimed to have been unaware of any claim of sexual harassment until he read the pleadings in the case. None of the applicants had said anything about it to him prior to that.

[16] During her evidence in chief, CD never mentioned seeing any incidents of direct harassment of Ms AB and said she could not comment on what happened when Ms AB was alone in the office with NP. Ms AB claimed that the Albany staff was aware of NP's general abusive behaviour towards them but she could not identify any who might have witnessed this, except those who advised them to join a union. Ultimately she did not name any of them, even though it was specifically pleaded that Albany workers witnessed the ill-treatment and even intervened.

[17] When Ms AB was asked why she had not complained of the conduct of NP before they joined the union she said that he always told them that he was 'in the company's good books' and there was nothing that would happen if they complained about him.

[18] Under cross-examination, Ms AB was emphatic that the harassment by NP only started in August 2009, despite the statement of claim alleging that the harassment started shortly after NP's promotion, towards the end of 2006. It should be mentioned at this point that NP was appointed as the catering manager in August 2006. Previously he had also worked as a cashier like Ms AB. She denied that she became hostile to him after his promotion or that she referred to him as a 'useless Tsonga manager'. She also would not admit to regularly phoning the previous manager Ms K AB0 ('AB0'), or that she did not accept NP's authority after his promotion. Ms AB likewise denied telling CD that AB0 had eventually told her she must report to her new manager, as LM claims to have overheard her say.

[19] Further, she would not be drawn on the issue of whether she regarded NP as a strict manager in comparison with AB0. Instead she simply said that AB0 was only there for a fortnight after she started work as a cashier.

Despite being confronted with minutes of meetings with NP on 26 August 2008 and 21 October 2009 demonstrating a non-compromising attitude by NP towards poor performance, Ms AB maintained he was not strict. Strangely, she claimed ignorance about whether or not NP was an unpopular manager with the staff. CD also said she could not describe NP as strict and when asked if he was nice to work for, she said he was simply 'an ordinary person'.

[20] Ms AB disputed saying that she would not report to a controlling Tsonga or Shangaan manager or that she had told other kitchen staff NP would replace them with Shangaans as LM claimed she had. JK testified that Ms AB was NP's 'favourite' and he would sit with her and teach her how to use the computer, but Ms AB did not like him and would say "I do not like this Shangaan person and why is he following me?" When questioned about what she understood Ms AB to have been referring to, JK declined to speculate. It was only in re-examination that JK said she understood Ms AB to have meant that she did not want NP calling her to teach her because he was Shangaan. JK claims she failed to raise this malicious motive when complaints were made about NP in the meeting of 27 January because she was not always working together with other workers and conceded that some things might have happened without her knowledge. Later, she said she did not raise it then because she thought matters would end with the discussion with GH. Under re-examination she said there was no separation of the kitchen from where the cashiers worked.

[21] LM also said that NP would approach Ms AB and ask if he could help her, but Ms AB would say she did not like him and did not know why he kept 'liking' her. LM understood that Ms AB did not want NP as a manager because he was Shangaan. Later, under cross-examination LM moderated this by saying that in approaching Ms AB he was asking her about her stock and he also asked others in the same way. LM was unaware that NP was supposedly trying to teach Ms AB how to use a computer. She denied that Ms AB was singled out by NP and asserted that they were all treated the same. Under re-examination, she elaborated that NP had explained to them that when he said he 'liked' them it did not

mean they had to do something, it was more like 'a brother and sister' relationship. NP was not cross-examined on this when he testified later in the proceedings.

[22] NP testified that he did not treat Ms AB any differently from the other employees who were all treated fairly. He was of the opinion that Ms AB was a good cashier and could improve with training. Consequently, around 2009, he began training her on stock control, Excel spreadsheets, balancing books and other basic tasks. Under cross-examination, he denied that he had favoured Ms AB or that he had wanted a relationship with her. Under cross-examination he appeared to suggest that he had started training her first, but not with the intention of favouring her *vis-à-vis* others. NP also testified in chief about the way he managed the department and his interaction with staff in monthly meetings during which other staff had the opportunity to make inputs on issues arising for discussion. The apparent purpose of this evidence was to suggest an open and approachable management style on his part, but the nature of these meetings was not canvassed with other witnesses. His own characterisation of his management style was that he was a very strict but very approachable.

[23] LM agreed that AB1 worked at the back with Elsie CD, whereas she worked on a till. When asked how NP could have harassed them collectively when they were all at their different work stations, she explained that she would assist at the back when there were no customers to serve at the till and that is where the harassment took place.

Derogatory remarks about alleged Zulu sexual practices

[24] Ms AB mentioned another incident in which NP teased her when they were in the kitchen and asked if she switched off the light when she slept with her husband. Following this comment he made a derogatory comment about sexual relations amongst Zulus. CD elaborated on the latter issue saying that NP told them that they did not know how to make love to their husbands but simply lay on their backs and 'counted the zinc'. It was clear that CD found it distressing to relate this evidence. Ms AB

claimed that once again she told NP that she did not appreciate his comments, and he retorted, as he had before, that she should not behave like a child.

[25] As far Ms AB recalled, this incident took place sometime in September 2009. Under cross-examination, she disputed the correctness of her affidavit in which she had said that she simply kept quiet and did not answer NP when he made these remarks. The amended statement of case mentioned this incident as occurring in November 2008, but Ms AB was adamant the incident took place on 2009.

[26] JK denied hearing any remarks by NP about Zulu sexual practices. LM was not even asked about this issue at any stage of her testimony. NP simply denied ever attempting to kiss or hug Ms AB and disputed ever making deprecating remarks about the supposed Zulu sexual practices. He also denied any antipathy towards Zulu speakers or making any derogatory remarks about the union the complainants had joined.

NP's alleged derogatory references to female employees smelling

[27] Ms AB then recounted a further incident of outrageous behaviour allegedly committed by NP. He was addressing the kitchen staff, who were all women, with the exception of AB1. He said that even if they washed themselves, if they stuck their fingers inside themselves they would find they still smelt like fish, or words to that effect. This incident occurred on a Friday when fish was normally cooked in the kitchen.

[28] CD's evidence corresponded to Ms AB's version in most respects regarding NP's comments on sexual practices and derogatory remarks about the kitchen staff smelling of fish, though she recalls them being made in early August 2009. CD said NP told them they smelt of fish on Fridays, which is when they cooked fish. He told them that if they put their fingers in their vaginas they would find they smelt of fish too. He also said they were ignorant and unclean and smelled of sweat when they had spring cleaning days. When it was put to her that fish was only served once a month she disputed and said it was normally twice monthly, unless

specifically requested by customers. NP's remarks were addressed to all the kitchen staff present on those occasions. It was put to her that Ms AB only made the allegation about them smelling of fish in September, but she declined to comment on her evidence. JK claimed that fish was only cooked once a month unless customers specially requested it.

[29] When asked if it was confined to August, CD said this form of abuse continued until November that year. JK denied ever hearing either of these types of comments and under re-examination went so far as to say she had not heard about these issues until she came to court. NP denied making any sexually derogatory remarks about the kitchen staff smelling of fish. NP did not relate the chip cooking incident mentioned by JK and LM, but merely explained how he had responded to the complaint in the meeting of 27 January, namely by correcting their allegation that he said they smelled (of oil). According to him, all he had said was that if they did not put the extractor fan on to 'neutralise the atmosphere', their clothes would smell.

[30] In her evidence, JK said that NP had once found them cooking chips without the fan on. He told them they must activate it to avoid their clothes smelling of oil. When LM was asked about any reference made to the women putting their fingers in their private parts and smelling of fish, she also immediately related the chip frying incident mentioned by JK. In the cross-examination of the applicant's witnesses, this chip related version of the incident was not put to them, but instead they were asked about the oil smell arising when fish was cooked.

[31] Apart from these witness's testimony on what NP's allegedly said in this regard about the staff smelling, a significant portion of the evidence at the trial concerned how this issue was reported and discussed at the meeting held on 27 January 2010. This is dealt with below.

Other derogatory sexual references pertaining to female staff

[32] According to Ms AB, further demeaning comments were allegedly made by NP concerning the underwear of female staffs. These would be

accompanied by accompanied by demeaning taunts that they were 'stuck in Fedics and were going nowhere', and did not even know English. CD also recalled him making demeaning remarks about their alleged lack of education. Ms AB remembered that this occurred sometime in September 2009 and he made these comments to all the female kitchen staff. She said NP also accused them of bewitching him and making him sick because they were jealous he had been made a manager. JK denied ever hearing NP say something like this.

[33] CD disputed LM and AB2's claim they heard none of this verbal abuse. She too maintained that the abuse was directed at them as a group. CD agreed that she, NP and AB1 were only working day shift and that the night shift alternated between AB2, LM and Ms AB. When it was put to her that it was impossible for AB3 and AB2 to have been part of the group witnessing the alleged abuse, CD pointed out that as the night shift started at 14h00 there were times when their presence overlapped with the the day shift.

The 'white sauce' incident

[34] Yet another incident mentioned by Ms AB concerned white sauce which was prepared in the kitchen to accompany fish dishes. Ms AB was washing dishes before knocking off and was busy removing sauce from one of the pans. NP asked where she was taking it, and when she told him she was taking it to 'uncle', a nickname for AB1. NP suggested that AB1 needed the white sauce because he was short of sperm. In her evidence in chief she said this comment was made in the presence of all the kitchen staff. CD also confirmed that NP had made disparaging remarks about AB1 being short of sperm and eating white sauce. She also recalled NP saying AB1 could not 'make babies' because he ate white sauce and it was a matter of scientific fact that this made him sterile. NP allegedly repeated this at the CCMA.

[35] Ms AB denied that this association of the white sauce with sperm was a standing joke amongst the kitchen and Albany staff. According to her it happened only once. She could not comment on NP's claim that he did

not know that they were offended by his comment, but she said that he never apologised for making it, contrary to his claim that he did make an apology for the way he treated staff at the meeting on 29 January after it was reported that he had been issued with a warning.

[36] Ms AB was tested on the discrepancy between her recollection during her testimony that this incident took place towards the end of November 2009, before they had joined the union, whereas in the statement of case it was recorded as taking place in January 2010. She could not explain this discrepancy but was adamant it occurred in 2009. Likewise, she could not give an explanation why her affidavit of 14 April 2010 described the incident as occurring in January 2010. At first, she readily agreed she had signed the affidavit but when confronted with the discrepancy in the dates she then tried to suggest the affidavit had not been signed by her, before reluctantly agreeing it was her signature. Later she denied knowledge of the document again on the basis of the signature. In an effort to repair the discrepancies in her testimony about the documents her representative asked her to confirm her educational qualifications and she confirmed she had matriculated. Under re-examination she repudiated the contents of the affidavit and reaffirmed her oral testimony in court. She further stated that the union had liaised with the attorneys about the case but she had not been in contact with them. If there was a discrepancy between the pleaded case and her testimony, her testimony should be relied on as the truth. Mr EF testified that he had drafted the affidavit for Ms AB and assumed she had signed it at the police station. He pointed out that in the letter sent by the complainants to management she had also signed it with a double 'B'. On the reference to the white sauce incident in the affidavit occurring in January 2010, he explained that a mistake was easily made about the year, but as far as he recalled she said it happened in January 2009. On the discrepancies between CD and Ms AB's recollection at trial about when the white sauce incident took place, Mr EF's explanation was that they were not in the habit of recording the time and date of an event like he might be, as an organiser.

[37] Under cross-examination, Ms AB confirmed that the 'white sauce' comment relating to AB1 was a once off occurrence. When asked why the

allegation did not correspond with the incident related in her affidavit, in which she claimed NP had asked *her* if *she* was 'short of sperm' and indicated that he had no shortage, she attributed this to a possible typing error in the affidavit and again suggested that the affidavit was not hers as she normally signed her name with two 'B's". Ultimately she claimed she did not remember the affidavit and it confused her because of the signature. Mr EF did not see a contradiction, because he pointed out that no distinction would be drawn in their language between a ova and sperm, so the dialogue had gone along the following lines: NP had asked Ms AB if the white sauce was for her and when she explained it was for AB1 and NP then made the remark that AB1 must be short of sperm.

[38] JK's recollection of NP referring to white sauce was altogether more bland. All she could remember was an occasion in May 2009 when he had told staff to eat white sauce so their bodies would 'be OK'. Under cross-examination she claimed only to have heard this when NP mentioned it in the meeting of 27 January and denied ever hearing staff joking about it in the kitchen, but pointed out that she was only on duty until 14h00. Later, when confronted with the respondent's claim in its answering statement that the staff regularly joked about 'white sauce' she then said that she did not know about it because the day it was spoken about by staff, she only got to work after 14h00. Immediately thereafter she said she did not know if other staff besides NP had spoken about white sauce. LM also said she worked on the afternoon shift so she could not have witnessed harassment of Ms AB.

[39] Much was made of Mr EF's claim (even though it was hearsay) that AB1 was present when the 'white sauce' remarks were made, whereas Ms AB had supposedly said that AB1 was not present when the 'white sauce' comments were made. Further, AB1's affidavit of April 2010 stated that he was told about the remarks by Ms AB, implying he was not present when they were made. However, in her oral testimony Ms AB did not say that AB1 was not present. In fact, in her evidence in chief she said all kitchen staff was present when the comment was made and she was not tested on this issue under cross-examination.

[40] NP testified that he had initiated the discussion about the white sauce when he saw AB1 making some and Ms AB was dishing it up. He had then made a joke about it, by asking if she was eating it to try and increase sperm mobility. All the kitchen staff laughed. Under cross-examination, he denied saying that AB1 was short of sperm and disputed that AB1 was involved in the incident at all. This had taken place in January 2010, but it was not the only time comments had been made as they often made jokes about the food and everyone laughed. He was shocked to hear that they did not want to work with him because of such comments. He apologised for the remark at the meeting on 27 January. Prior to that he was unaware he had upset anyone. When Ms AB's version of the white sauce incident was put to him, NP insisted that it was JK who had prepared the source and Ms AB who was eating it.

Opportunities to complain about NP's conduct

[41] It was put to Ms AB that QR, the district manager, who would visit the unit at Albany every two or three weeks, was very approachable and would directly engage with employees during such visits. Ms AB said she never engaged with her and QR always went directly to the office of the unit and did not greet them, but conceded that she was not aware what QR did when she went into the kitchen itself. She admitted never having approached QR, but reiterated that the staff had sent the letter to the HR unit at head office. When she was asked why they had never raised their with QR who was NP's line manager, she said that this was because NP kept telling them that he was on good terms with QR and they couldn't speak English properly anyway.

[42] CD also claimed that QR went directly to the office when she came to the Albany site, but conceded that she did greet staff. She also said they did not approach her because of what NP had said. On why they had not approached another manager who visited the site frequently, Ms ST, CD said they had done so in November or December 2009, despite Ms AB's claim to the contrary. When ST testified, she denied any knowledge of the

complaint, or that Ms AB never complained to her about NP even though she had a good relationship with Ms AB. She did concede she was only occasionally at the Albany unit.

[43] CD confirmed NP said they must raise issues with him and that QR went straight to the office but would still greet them. QR was a strict person who wanted a job properly done. They were afraid to approach her because NP said they had no right to approach her directly. When asked if they had approached ST, a manager from another unit who had been there often about their problems, she said they did in November or December 2009.

[44] JK agreed that QR went to NP's office when she visited the Albany unit, but then greeted staff, asking if they were fine, and tasted the food. According to QR's testimony, she would visit a unit like the Albany one once a week, or daily if there was a problem which needed to be solved. She never had any problems with any of the staff. If she went to the unit and if lunch was been served she would taste the food, ask if there were any problems and then go to the office unless there was a specific meeting. No problems were raised with her by any of the complainants.

[45] There was evidence led of a helpline poster which the company said was on the notice board. Amongst other things, the notice advertising the free helpline, which is administered by De Loittes, invited employees to report fraud, corruption and victimisation, but both Ms AB and CD denied ever having seen it. JK even added that NP had advised them to call the number on the notice if they had a problem, a point which was not put to any of the applicant's witnesses. LM also remembered the notice and that there was a number on their payslips. When NP testified he said, in response to a leading question, that the notice had been discussed with staff that if there was anything they wanted to report in relation to the issues listed on the hotline notice there was a toll-free number they could use.

[46] CD further said that despite working at Albany for 5 years she had not even noticed the notice board in the kitchen. Both LM and JK claimed they did remember seeing it. JK understood the helpline to be used in cases of theft, fights or corruption. CD further disputed ever having seen a

telephone in the unit which could be used by employees for work related issues and could be used to call the helpline. When confronted with a minute showing that the payment of a phone bill had been discussed in a meeting where she had been present the witness became vague and somewhat evasive. Ms AB and CD also denied ever receiving a red pen bearing the number of the helpline which the company claimed it had distributed to employees, unlike AB2 and LM who agreed they did. Ms AB also claimed never to have noticed the theft or fraud helpline number on her payslip.

[47] It was at this point in CD's testimony when she was asked about this, she broke down and proceedings had to be adjourned. It was apparent that she had become progressively subdued prior to the point and was struggling to continue. When asked after the adjournment why she had become so upset she said it was because of the harassment they had suffered and it affected her deeply still. She also claims never to have understood the paragraph in her contract of employment obliging her to familiarise herself with the company's policies and procedures even though she read it. It took the witness a few minutes to answer this straightforward question. She agreed she could read English but was evasive about what parts of her contract she understood and which parts she did not.

Events leading to the intervention of the Union

[48] According to Ms AB, NP's treatment of the staff in that kitchen unit was reported to customers who asked why they put up with it. One customer suggested they join a trade union to address the issue and one of the women who worked in the kitchen, Ms LM said she belonged to a union, the Future of South African Workers' Union ('FOSAWU'), and invited the union to come to the workplace to speak to them. This was sometime in November 2009. Mr EF confirmed that LM joined the union early, and indicated that others wanted to join the union in November. LM denied introducing the union to the workplace and claimed she only met Mr EF for the first time at the meeting on 27 January 2010. Ms AB said that they

joined the union on 3 December 2009 and a letter signed by all the kitchen staff was written and faxed to the company head office. CD confirmed this, but LM said she signed it shortly before the meeting on 27 January and that she was told the intention was to fax it to the company. She was sure this was in January but could not say if it was faxed. Later, under cross-examination, she said she came to the meeting because NP had phoned her to attend as she was not on duty at the time. The reason he phoned her was that her name was on the earlier letter. When asked how it could have been on the letter if she only signed it on the day of the meeting, she said she could have signed it on 18 or 20 January, but in any event did so without reading it because she was knocking-off at the time. Moreover, she later said that GH had read this letter which NP had given to him. She did not remember seeing the letter written by the union at the meeting.

[49] The company disputed ever receiving the letter and alleged that the first time it became aware of it was when it appeared as an attachment to the applicant's statement of claim. GH claimed he saw it after the parties had come to court on the first occasion. When Ms AB was asked how the letter was sent to Head Office, Ms AB claimed it was faxed from Albany by office staff at Albany, though she had no proof this was done. All she could recall is that it was sent sometime during December 2009 and January 2010. When CD was asked why the letter had not simply been given to QR she said that NP had told them not to communicate with QR as he was the senior person whom they should deal with first. In response to the contention that they should have gone to QR because their problem was with NP and she was his senior, she reiterated that NP stressed they must go to him first.

[50] Ms AB denied that it was herself that introduced the union to the other employees and insisted that it was LM. CD also identified LM as the person who advised them that she had joined a union and confirmed that it was Albany employees who had suggested they join a union. LM introduced them to the union. Mr EF testified that LM joined in October and paid three months' subscriptions in December. He was adamant that she had joined the union before Ms AB.

[51] CD also recalled the document being drawn up and typed sometime in November or December 2009 by an employee of Albany, whose name she could not recall. She obtained the Fedics HR department's fax number from her sister who worked in Fedics and it was faxed by the employee from Albany, but conceded she had no proof of it being faxed. According to CD it was faxed before the workers joined the union.

[52] In response to a claim that LM had said she was only given the second page of the letter to sign and was told by Ms AB that it was in preparation for a grievance hearing relating to salary, leave and related issues only, Ms AB said that LM knew about the document from the start. In relation to AB2's claim that she was given the document to sign by Ms AB at the station and that it only concerned the issues discussed at the meeting and did not concern sexual harassment, Ms AB insisted that they knew full well about the sexual harassment issue. In her testimony JK denied any knowledge of any incidents of direct sexual harassment as alleged by Ms AB. She also claimed that CD and Ms AB gave her the second page of the petition document to sign sometime in November 2009 and they had only mentioned that it concerned issues of overtime. She denied having seen the first page of the document. When she was questioned about the complaints detailed in that document she denied knowledge of any of them.

[53] The letter, which the company denies receiving, has no heading. Some of the pertinent points made in the letter, which contains a litany of more than twenty complaints about NP's treatment of staff and his own alleged abuse of his position and failure to comply with company practices and policies, are:

> *"Our manager discriminates us, he accuses us of witchcraft, curses us calling us names, such as idiots, for we cannot speak English well.*
>
> …
>
> *He makes moves on some staff members, sexual harassment*
>
> *He accuses us of stinking private parts"*

(sic)

[54] The document ends with a plea for help:

> *We pleade for help, for we no longer enjoy working with him, we are discriminated, we feel we could lose jobs due to treatment.*
>
> *Please assist!!!*

(sic)

[55] Ms AB could not produce proof of a fax transmission slip, but said that it had been sent by an Albany employee in the office and that she saw the paper going through the fax machine. She could not be certain exactly when the fax was sent but it must have been sometime in December 2009 or January 2010. Ms AB was adamant that the letter was faxed.

[56] A second letter dated 9 December 2009 headed "Grievances- Albany bakeries", was penned by the union, the 'FOSAWU'. This letter contained a list of eight grievances which set out in more general terms what was stated in more detail in the document signed by the affected staff. The pertinent grievances for the purposes of this matter, which are recorded in the letter are:

> *"1. Your manager Kenny harasses workers by swearing at them*
>
> *2. Stupid women*
>
> *3….*
>
> *4. Discriminating against women*
>
> *..*
>
> *8. Problem about transport at night, which resulted in some of them hijacked."*

[57] Ms AB could not comment on how this letter was transmitted to Fedics, which also claimed it had not received until the union organiser had asked GH if he had received it. Mr EF said he received the grievances after the members joined early in December and a letter about the grievances was sent to the company on 9 December 2009. Workers told him in January that they had heard nothing from Fedics about their grievances and he

contacted GH who said he had not received the letter. The letter was resent and a meeting was set up for 27 January 2010. GH claimed his first knowledge of the grievance was in January 2010 when he was phoned by Mr EF about the letter. Because the letter concerned a manager he set up the meeting at the unit to discuss how they would go about addressing the issues in the letter. He agreed that on face value the issues raised in the letter were serious. Ms AB conceded that GH had come to the unit sometime during the week of 18 to 22 January and advised them he had received the letter and that a meeting to deal with the grievances was set up for 27 January 2010.

The meeting of 27 January 2010

[58] At the subsequent meeting on 27 January, all the kitchen staff were present. So too was NP, QR, GH and a union organiser, Mr EF. Mr AB said that the earlier letter written by the kitchen employees and the letter of 9 December 2009 formed the agenda for the meeting. As far as he knew this had been sent to Fedics at the end of November or early December 2009. He had given a copy of the document to GH at the meeting of 27 January 2010, a fact which was not mentioned by Ms AB and CD. He disputed that the letter written by the workers had only surfaced in the court papers. He received it at the meeting of 27 January and passed it on to GH. The issues in the two letters overlapped.

[59] JK's evidence on whether the contents of the worker's petition and, or alternatively, the union letter formed the subject of matters discussed at the meeting was confusing. Initially she seemed to say those issues were discussed but then corrected herself to say none of the issues were discussed. In any event, when it came to specifics she did recall a discussion taking place about lunch times, the remarks about 'stupid women', NP shouting at the kitchen staff in front of customers, the white sauce incident, overtime and night-shift. She conceded that on the one hand she signed the petition because it contained some of the things the kitchen staff had discussed, but on the other hand she assumed the matters that concerned her were in the document and did not read it when

she signed it. She did not say she had only been given the last page to sign as LM claimed. LM could only remember money issues and the white sauce issue being discussed and that there was some mention of sperm but she did not know what was said.

[60] Mr EF said that although he was the union spokesperson, the complainants filled in the details of the complaints which had been written in point form. He differed with CD's evidence that only GH spoke at the meeting. He agreed that the kidnapping/hijacking issue was discussed at the meeting. On his claim that both letters were used as the agenda for the meeting, it was put to him that only the union's letter was used as an agenda and the earlier letter was not handed to GH. GH confirmed he never received the letter at the meeting on 27 January 2010. Mr EF denied that NP apologised about the white sauce and said NP merely said he was only joking. NP further never denied any of the other complaints made.

[61] According to Ms AB, GH addressed the meeting. Mr EF had asked how the company intended to address the concerns raised. NP allegedly said that he was sorry for what he had said but that everything he had said was said in jest. Ms AB claims that all the problems she mentioned in her testimony, which were not mentioned in the letter, were also reported at the meeting. Under cross-examination it was put to her that only a limited number of issues were discussed in the meeting. She did concede that there was a general complaint about NP's attitude and swearing at staff, but denied that NP had said that he had told staff to put on the extractor fan to prevent oil getting into their clothes causing them to smell. CD also disputed this contention. Ms AB also disputed that NP had ever warned them about the extractor fan being on to prevent their clothes smelling of fish.

[62] Ms AB initially implied that nothing was really discussed at the meeting and that GH had simply said he would discuss matters with his seniors. However, she later conceded that the letter of 9 December 2009 had been used as an agenda for the meeting of 27 January 2010. With reference to the extract from NP's diary entries of the meeting, she denied that she led the discussion for the complainants. After many evasions she eventually

agreed that the question of NP's attitude and swearing at staff was raised in general terms, but disputed that GH had explained the process of raising grievances with reference to the firm's organogram. Mr AB also denied that there was any discussion relating to the organogram. Further, Ms AB agreed the white sauce issue came up and the issue of the staff smelling like fish, but disputed that NP had said he complained about the way they smelled when they cooked fish because he had previously warned them to use the extractor fan to prevent oil being absorbed in their clothes. Mr EF also denied that there had been any mention of the use of an extractor fan in the meeting. Ms AB did not recall leave arrangements being discussed but agreed that the 'hijacking' incident, lunchtimes and unpaid Sunday work was also discussed at the meeting, excluding the issue of a transport allowance. Mr EF confirmed this. According to Mr EF the following harassment complaints were raised at the meeting, namely, NP calling the women stupid and the derogatory remarks about supposed Zulu sexual habits, saying their private parts stank and that the fish they cooked on Fridays smelt like their private parts. As far as he recalled all the women at the meeting mentioned these as being utterances of NP in the kitchen. Further, related that they raised the incident of the 'white sauce' and AB1. He also confirmed that NP agreed having made those remarks and said that there was a scientific basis for his comments about AB1 concerning the white sauce and sperm.

[63] Mr EF also said that they raised the complaint that NP had accused the women of witchcraft and made comments about their panties crackling like chips when they were dry, which Ms AB had also testified to in her evidence in chief. According to Mr EF, NP admitted to saying these things but said he was only being jocular. Ms AB also related Mr AB's sexual advances which he did not deny at the meeting. Mr AB also mentioned that Sunday Pay and other issues were discussed. According to him GH said that because of the seriousness of the issues raised he would take it up with his seniors. LM denied ever hearing a remark of this nature.

[64] He agreed that the notes in NP's diary could be seen as a rough minute but for example, Item 1 of the notes which merely stated "Item one – Staff complaining about Kenny's attitude, swearing", also embraced discussion

about the fish smell and NP's allegation that the women were trying to bewitch him. The reference to victimisation in the notes was a reference to NP's remarks about the stupidity of the complainants, that they were going nowhere and could not speak English properly so nobody would listen to them. Mr EF disputed that there was any discussion of an organogram for processing victimisation disputes as the notes suggested. Mr EF could not recall discussions about the more mundane issues about leave and holiday pay. Those issues were not discussed because they were not part of the agenda.

[65] GH's recollection was that he asked if the items in the letter of 9 December dealing with harassing workers by swearing at them and calling them 'stupid women' be dealt with as one item. He said the employees complained about how NP spoke to them in front of customers and they related what he said, to which NP responded that sometimes one was under pressure and might raise one's voice without realising it. He apologised about shouting at them under such circumstances and LM seemed to recall such an apology being made at the meeting. This was followed by a discussion about working under pressure. This version was not put to the applicants' witnesses. He further said he explained to NP after the meeting that, respect was two-way process and asked him to respect the staff as well.

[66] Under cross-examination about what the complainant's had specifically said about NP swearing at them, GH claimed he had asked them for examples of this, but no-one provided any. This alleged unmet request for greater specifity was not part of the respondent's version put to the complainants either. When pressed on whether it would not have been better to have asked them to put it in writing or to ask NP to excuse himself from the meeting in case they might have been inhibited by his presence, GH's response was that he told the complainants what steps could be taken to avoid victimisation. Somewhat enigmatically he claims that this also partly motivated him to escalate the matter to QR, as the manager in charge of the operation. He felt that the further investigation of the matter should be done by QR, but it would have been reported to her that no specific detailed allegations had been made against NP on this

issue. A little later in his cross-examination, GH said that the issue of swearing was not mentioned at all in the sense that NP did not confirm any incident of that nature and nothing was raised by anyone under this issue.

[67] Regarding the complaint that NP had referred to female staff as 'stupid women', GH's response was that NP never confirmed that he said this and nobody substantiated the claim. Later, GH said NP denied ever saying this.

[68] GH also agreed the 'white sauce' issue came up, though his memory of the details of the complaint was very vague. After the complainants related the incident, NP said that this was how they joked in the kitchen, but if he had offended anyone he apologised. NP did not think it was offensive because they normally talked about it in the kitchen. GH did not think it was improper of a manager to say this if it was commonly spoken about in this way in the workplace. The complainants did not dispute NP's claim that it was the subject of kitchen banter. GH accepted that the complainants' failure to challenge GH's version, meant that they did not dispute it and he regarded the matter as closed. He saw no need to specifically ask them if they agreed with NP's version. According to GH, NP's apology was accepted at the meeting.

[69] JK's recollection of this discussion was somewhat different. She remembered Ms AB claiming NP had said she must eat more white sauce to obtain more sperm, but NP had said he had merely said she should eat more to make her better. Nevertheless NP apologised saying he did not know it would offend NP JK did not understand why GH had asked NP to apologise for this.

[70] Further, GH related the smelling complaint and that NP's response was that it was raised in reference to the use of the extractor fan to remove the oily smell. In addition the statutory issues were discussed. When asked to clarify what employees had said about the smelling issue, GH said they merely said NP told them they smelled of oil. NP's response in the meeting was that they would sweat and they would smell of oil unless they switched on the extractor fan which would remove the heat and the oil

smell. The issue of their private parts supposedly smelling was never raised according to GH. At no stage was the issue of any incident of specific sexual harassment raised. GH saw nothing offensive about the complainants being told they smelled of oil. He denied that any mention was made in the meeting of the women's private parts smelling, supposed Zulu sexual practices or incidents of direct sexual harassment of Ms AB. JK said that all that was said about the fish smell was that NP wanted them to turn on the extractor fan so their clothes would not smell of oil. Initially, she could only remember NP's response and not what the complainants had said about this issue, but conceded that they had complained that NP's remarks about them smelling of fish was because they were women. However, she believed that they were lying about this because they did not want to be 'ruled' by 'a Shangaan'. LM related that when NP replaced the previous manager Kim in 2006, Ms AB had said she could not be controlled by 'a Shangaan' because he would fire them one by one and replace them with Shangaans. Whenever there was a problem she said she would phone the previous manager.

[71] On the question of making remarks about the complainants smelling, NP said that at the meeting the only point they made was that he said they are smelly and he had corrected them by pointing out that the only time he had said that was when they did not turn on the extractor fan to neutralise the atmosphere. Later in his evidence, he was referred to a minute of a meeting that took place in June 2010 in which he had emphasised issues of cleanliness to staff.

[72] According to NP's version of what transpired at the meeting on 27 January, the discussion was led by GH but staff was asked to add anything outstanding which was not in the letter, something which no other witness had mentioned. Initially he only remembered the following issues being discussed: his shouting and threatening of the complainants; the white sauce issue; leave, lunch, transport and night shift issues and the organogram. Subsequently, he confirmed that the diary notes of the meeting were his own and confirmed the contents of those notes with limited elaboration

[73] NP's interpretation of the problems about him addressing staff concerned situations when he could not summon them properly because he was under pressure. He apologised if he had shouted and in future undertook to call them into his office. In his view, the meeting ended on the understanding that GH was going to take the matter up with QR.

[74] GH said the meeting was concluded on the basis that he said he would 'escalate' the matter to QR, because they had raised an issue that transport should be provided. Since that was an issue for the unit manager it needed to be referred to her. He undertook to revert on that and the issue of a leave roster after speaking to QR and everyone at the meeting was happy with that. When asked how he had escalated the matter after the meeting, GH said he went to QR and the HR manager and advised them what had transpired at the meeting. QR said she would not allow NP to speak to staff in that manner and they considered a harmonious way forward. Thereafter, it was for the line manager to decide what to do. It was necessary to have a feedback meeting to put the suggestion of transferring employees as a way of making a fresh start.

[75] According to Ms AB and CD, they were simply told that GH was going to discuss the matter with his seniors. The Union representative indicated that they would wait for the response and then another meeting would be held.

[76] Mr EF's expectation was that following the meeting, management would take the matter further but the next he heard was that Ms AB, CD and AB1 were being transferred, which he interpreted as a retaliatory step by management. He received no communication from the company about the reason for the transfer. He had expected they would be advised that NP would be suspended and a disciplinary enquiry would be convened at which the complainants would give evidence. He had expected this would result in counselling for the complainants and in the transfer of NP, not the complainants. When the matter was referred to the CCMA, Instead of someone from the HR department attending the CCMA conciliation on behalf of Fedics, NP attended instead. GH said he had to send NP there as a formality because he himself could not attend owing to being the only

person who handled CCMA matters and as he had an arbitration the same day.

[77] QR testified that she first became aware of friction at the Albany unit when she was phoned by GH after she returned from leave in January 2010. The document she was shown by GH was the union letter of 9 December 2009. GH had gone to hold a meeting at the unit because she could not attend. After the meeting on 27 January, the feedback she got from GH was that the unit manager was not speaking properly to staff and that issues relating to over time leave and hours were sorted out.

The written warning issued to NP

[78] For such an important issue, the confusion about when this warning was actually issued is remarkable. The warning was dated 19 January 2010 and valid for six months. It stated the offence for which NP was warned in the following terms: "Not treating the staff in a proper manner, they smell of oil, only." (*sic*)

[79] In his evidence in chief, NP said he was issued with a written warning on 28 January 2010 relating in particular to how he spoke to staff. Since then he had decided to stop joking with staff. The date on which the warning was ostensibly issued, and from which the six-month warning period was calculated, was 10 January 2010 When he was asked to explain the discrepancy between this and his evidence that the warning had been issued to him on 28 January, NP surmised that it was because the event giving rise to the warning occurred on that date. In his evidence in chief, NP had only mentioned the white sauce incident as occurring on that date, whereas the warning appeared to refer to his remarks about the staff smelling. It had never been specifically suggested to other witnesses that the white sauce incident occurred on 10 January. NP also said that he thought QR had mentioned the date of the event for which he was warned at the meeting on 29 January. Under re-examination he claimed that he had apologised about the white sauce remarks because it had happened recently.

[80] As far as QR could recall, she issued the warning to NP after he had made an admission and she told him she did not want to see it happening again. Her memory of when the warning was issued was vague, but she thought it might have been on 19 January 2010. Her explanation for the date on the warning was that it was the date on which the offence had been committed, which was an error. She claimed that she had discussed the issues in the union letter with NP. The matters she had discussed in particular concern the smell of oil, the way he spoke to staff and the operational matters relating to lunch times, *et cetera*. NP had told her he was sorry and he was issued with a written warning so that "it was on paper". Later under cross-examination QR said she issued NP with the warning after she had been phoned by GH on 19 January and *before* she had received the feedback from the meeting on 27 January.

The follow-up meeting of 29 January 2010

[81] Ms AB initially denied that there was a follow up meeting but conceded that GH and QR subsequently convened a meeting with the staff in the dining room, at which Mr GH advised them they were going to transfer her, CD and Mr K to another Fedics catering unit at Johnsson Mathey, and Ms CD to Boksburg. AB2 JK and AB3 remained at Albany. CD claimed that this meeting occurred on the day she returned from leave. It was effectively common cause this meeting took place on 29 January 2010.

[82] She agreed that QR, AB4, NP, AB5, AB3, Emilia and herself were present at such a meeting, but CD was absent. CD agreed she was on leave during that meeting, but could not recall how long she had been on leave.

[83] GH claimed that he phoned Mr AB the day before the meeting and advised him of the meeting and that QR would also be attending, but he had said he had other commitments so he would not be able to come but the meeting could continue. Ms AB, who testified prior to GH, denied that he had opened the meeting by saying that the union representative had apologised for not being able to attend but said it could proceed in his absence. On her account they were simply summonsed to the dining room by NP and AB4 said they had called the meeting to tell them they were

going to be transferred. She rejected the company version that they were advised that NP had been issued with a warning for the way he had spoken to the kitchen staff. She was not aware whether Mr GH had conveyed anything to the union organiser after the meeting.

[84] Ms AB denied that management had explained what they were doing about the complaint or told them that NP had been issued with a warning. Under cross-examination, she said that the complainants wanted to express their feelings but Mr GH said he was not asking them whether they agreed to the transfer but telling them. When they realised that Mr GH was adamant, they kept quiet. This was also the reason why nobody objected in the meeting to the transfers. However, she did concede that they did ask the reason for the transfer and the response had been that the company was trying to solve the way they were conducting themselves with NP. She also said that they were told that the company had not finished solving the problem, but in the meantime they would be transferred.

[85] Ms AB also did not recall any discussion about AB1 threatening to resign and being asked to take three days to consider the matter. Mr EF was told that when AB1 expressed unhappiness about his transfer he was told to stop his nonsense and that his performance was poor.

[86] JK claimed they were told that NP was given a warning for shouting at them in front of customers and because of his handling of their complaints about unpaid overtime, lunch and transport issues. She did not know why AB1, CD and Ms AB were transferred. Under cross-examination, while admitting that Ms AB had said the transfer would be problematic for her because of her child, she had no recollection of AB1's expressed intention of resigning. However, under re-examination she readily confirmed that AB1 had wanted to resign and that GH had told him to take three days to consider matters and put it in writing.

[87] Ms AB testified that it was not explained to them that the company was intending to transfer them to defuse the situation, and that they were simply told they would be transferred. Likewise she disputed that AB4 advised them they could escalate the grievance if not satisfied with the

outcome. She also disputed that transfers of staff was a common practice in the nature of Fedics business. However, CD did agree she had been transferred on three occasions during her employment by Fedics. When it was put to Ms AB that nobody had protested about the transfers as a way of resolving matters, she said we could not comment because they were simply told they were being transferred. She claimed they asked the reason for the transfers and were told the company was transferring them while continuing to try to resolve the problem between them and NP. On realising AB4 was adamant they kept quiet.

[88] CD testified under cross examination that she was unhappy with the outcome when she learnt of the transfer, though it is apparent that the dispute was referred to the CCMA before CD returned from leave and apparently learnt of her transfer.

[89] JK recalled that QR issued the affected employees with transfer letters and AB1 said he wanted to resign. GH explained he would have to do so in writing and QR gave him three days to consider what he wanted to do. They were told that NP had been given a warning. CD agreed to the transfer but Ms AB explained she would have problems transferring because of her child and because shifts were worked more frequently at the unit to which she was to be transferred, an issue which Ms AB did not mention in her evidence.

[90] LM also recalled that the transfers were announced rather than discussed. They were told that the purpose was that they would not all be together. She also remembered that AB1 was so upset about the transfer that he wanted to resign. She was adamant that they did not want to accept the transfers, but did not want to comment on whether she thought this was fair or not.

[91] Regarding GH's claim that Mr EF had agreed the meeting could proceed in his absence, Mr EF strenuously denied that there had been any communication of this sort and he had not been advised of the meeting on 29 January. If it had been a feedback meeting, he would have expected GH to have advised him of the outcome but he did not. After the meeting the company never reverted to the union, the matter was referred to the

CCMA. Interestingly, when GH was cross-examined and tested on whether or not he should have given feedback to the union, he implied that not only had he phoned Mr EF about the feedback meeting but had informed him about the outcome. When GH was asked what Mr EF's response was he supposedly advised him of the 'proposed' transfer, he eventually replied that Mr EF raised no objections to the proposal. It was never put to Mr EF when he was cross-examined that not only had he been advised telephonically of the feedback meeting but also of the 'proposal' and that he had tacitly concurred with it.

[92] GH's account of the meeting was that it was explained to them what action had been taken against NP. He recalled QR having said she had issued a warning to NP. QR had told GH before the feedback meeting that she had reprimanded NP and wanted to raise that at the meeting.

[93] Further, he said that since NP had been reprimanded, with a view to resolve the tensions in the unit, he suggested employees should be placed in other units with a new manager to start afresh and that they would not incur extra travelling costs. Nobody objected to that proposal. It was normal to move employees to different units according to the needs of the different units. He said AB1 had volunteered to resign at the feedback meeting, but GH told him that was a big step and he should think about it, but he never heard anything from him subsequently about resigning. GH claimed not to be sure why he wanted to resign. When asked if he did not think there was a connection between the transfer and AB1 wanting to resign, GH did not answer directly, but simply repeated that he had been asked to go and reflect on it. It did not occur to him to ask if it was connected with the transfer. In answering questions of clarification, GH said that it had also been indicated to those who were transferred why it was a challenge to transfer NP instead, but this was never part of the respondent's version put to the applicant's witnesses, nor had he mentioned it in his evidence in chief.

[94] LM testified that the issues discussed at the previous meeting were spoken about and they were advised that NP had been given a warning and told to apologise. She claimed that he apologised to her and JK for

saying anything which might have offended them, an incident which JK had not mentioned

[95] GH denied imposing the transfers but said that the transfers were presented in the form of a proposal and any counter-proposals would have been considered, but no objections were raised. He took this to mean the transfers were accepted as a solution. However, he would not comment on the employee's subsequent failure to sign the transfer forms as that was an 'administrative issue' beyond his remit, nor would he be drawn on whether the referral of the matter to the CCMA was not indicative of the complainants' unhappiness with the outcome of the hearing. In his understanding they should have escalated the matter to the next level of the internal grievance procedure. The fact that he did not take transfer letters with him to the meeting indicated that he was not going to the meeting with the intention of instructing them to transfer. As transfers were simply proposed as a solution, he could not see how that could have amounted to victimisation for lodging a grievance. Had that been the case they ought to have referred a grievance to the next level. In any event, it was not abnormal to transfer employees between units.

[96] NP said that, at this meeting, QR told them that he had been issued with a warning and GH proposed the transfer of staff as another way of harmonising the situation. The transfers were done in a way to be most suitable for the people transferred to minimise transport costs. Thus Ms AB and AB1 were transferred to Johnson Matthey, which was the nearest unit and CD was transferred to Atlas in Boksburg. No units were identified for LM and JK, apparently because there were no units within QR's district which were convenient for them from a transport perspective. He claimed that there was no objection from those affected by the transfers. NP also claimed to have apologised again at this meeting, but this was not put to other witnesses. On the question of AB1's intended resignation, NP said he would "like to believe" that AB1's comments were prompted by the fact that he had put the Albany contract in jeopardy and wanted to resign. Subsequently he came back and did go to Johnson Matthey.

[97] Although NP testified to complaints from Albany management about the poor quality of AB1's cooking which had put the Albany contract in jeopardy, it was not irrational to transfer AB1 to Johnson Matthey which was a bigger contract because he was assigned to work there as an assistant chef to the head chef.

[98] His impression was that the matters had been successfully addressed on the basis of the warning issued to him and the public apology he had made. He denied any knowledge of the transferees being unhappy about it or that any of them had mentioned it to him. When JK's evidence about Ms AB not wishing to be transferred in view of her child was related to him, he denied this had been said in the meeting and implied that that must have happened in a "side meeting" between them. In view of his apology he did not see why it would have been necessary to convene a disciplinary hearing. The fact that he had been issued with a warning showed that the company had dealt with the case, even though in his view raising the matter through the union was not the proper channel the complainants should have used.

[99] QR's account of the meeting of 29 January was that GH gave the complainants feedback on the written warning issued to NP and "told them what we were going to do on the transfer". He then told them that if they were not happy they must follow the organogram. Unlike NP and GH, QR did say there were 'issues' about the transfers because of the shifts they would entail, but these issues were resolved. However she still felt that the affected employees had agreed to the transfers after discussions and she did not see them as victims who had been transferred. The units identified for Ms AB and for CD were the most suitable. Nobody ever approached her to complain about the transfers.

[100] Although they did not object to the transfers in the meeting, Ms AB refused to sign the letter notifying her of the transfer which was to take effect from 1 March 2010, because she was not satisfied since they had never asked to be transferred. She also said that they were given no reason for the transfer. NP was also transferred to Johnson Matthey and she was

unhappy with that but did not raise any complaint about this. At the moment they did not speak to each other but merely greeted one another.

[101] She denied that Mr GH advised them that if they were not happy with the outcome that could escalate the matter to the next level of the company grievance procedure. Ms AB further claimed that after the meeting she did tell NP that she was not prepared to be transferred. When asked what they did after the meeting to express their unhappiness, Ms AB said she later told NP that she was not prepared to go, because he was saying the union was a 'fly by night' union. She claimed that after the meeting she raised this slur both with NP and with Mr EF, as well as their unhappiness about the transfer. However, she was unaware if he did anything to follow up on it. CD also mentioned that NP had said the union was a 'Fong Kong' union. Later under cross-examination she said that NP had told her they had no right to join a union. She confirmed that they had also told the union organiser they were not happy with the transfer, but she was not sure if he had written a letter to the company about that.

The question of compliance with the Respondent's policies

[102] Evidence was also elicited on whether or not the grievance procedures had been properly invoked and whether the respondent had complied with its own Sexual Harassment Policy.

[103] On whether it was appropriate for NP to have been transferred with a complainant, GH felt that if the employee was unhappy they ought to have raised the matter. According to the grievance procedure the applicants failed to raise the matter with QR as the manager who should have been approached in terms of Step 1 of the Grievance Procedure. As GH understood it, the meeting held on 27 January 2010 had constituted a response to the grievance at that level.

[104] However, it appears that the transfer of NP to Johnson Mathey only took place during February 2012 more than two years after the incident. Ms AB said that, apart from greeting him, she did not talk to him. She was unhappy about him being there, but did not complain about it. NP testified

that at Johnson Mathey he worked with a team of 24 staff, including Ms AB and AB1. He had experienced no negative reaction from staff when he was transferred there. When he was challenged about the fairness of relocating other staff but not himself he defended the outcome on the basis that it was difficult to find a unit to which he could be transferred and the respondent was concerned about the impact his transfer might have. When asked whether it was appropriate for him to be working together with Ms AB at Johnson Matthey, he said that he was assisted by other staff and he was not very involved with the cashiers.

[105] When GH was asked if interviews and investigations were conducted as stipulated in Step 2 of the Grievance Procedure, he deferred to QR to give the answer to that question. He denied that, he had accepted NP's version, after hearing both parties at the meeting on 27 January. He also rejected the suggestion that a decision was taken to transfer the employees and he had then washed his hands of the matter. He said he never regarded the matter as closed but there had been 'a conclusion' and he had told the complainants they would get back to them.

[106] GH avoided a direct answer to the question of whether the 'white sauce' incident fell under 'comments with sexual overtones', which Fedics' Sexual Harassment Policy and Procedure ('the Policy') describes as a form of sexual harassment. In effect, his answer was that he did not view it as harassment on the basis that it constituted 'normal talk' unless someone objected to it and the practice still continued. It was also put to him that Fedics did not comply with its first Policy Rule, which reads:

> *"a. Company personnel should create and maintain a working environment in which the dignity of employees is respected. A climate in the workplace should also be created and maintained, in which victims of sexual harassment will not feel that their grievances are ignored or trivialised, or fear reprisals."*

[107] GH's view of this was that this policy rule was also not transgressed because talk such as that about the 'white sauce' was normal in the kitchen.

[108] It was further suggested to GH that he did not address the allegations of sexual harassment 'seriously, speedily, sensitively or confidentially', as required by clause 6(b)(ii) of the Policy. GH's somewhat evasive response was that, given that the 'white sauce' incident was 'normal', it could not be said that it was harassment. In any event, when they heard of the incident he went to the unit as soon as possible and the time spent at the meeting was considerable which indicated that he had taken it seriously at the time.

[109] When it was pointed out to GH that clause 6(e) (i) of the Policy acknowledged that the sensitive nature of sexual harassment might make it difficult for victims to approach colleagues or their more immediate managers and they could approach any senior level manager they trusted, his response was that if they were afraid, they could have used the tip-off line and he had explained that in terms of the organogram that they could go to a higher level. As far as he was concerned they were not justified in not pursuing their grievance further by referring it to the CCMA if they were not satisfied with the outcome.

[110] Under re-examination, GH gave evidence on the grievance procedure. This was to the effect that grievances had to be resolved speedily and effectively. He was also referred to Stage 1, Step 3 of the Grievance Procedure which states that it is not necessary for any documents to be signed if the employee is satisfied with the outcome of the grievance provided the regional IR Manager was aware of the outcome within two days. GH confirmed that in this instance he was aware of the outcome. Stage 1 of the Grievance Procedure was described as 'Informal Notification'. GH confirmed that the complainants had never filed a formal grievance in terms of Stage 2 of the procedure ('Formal Notification').

[111] GH would not comment on the appropriateness of the written warning issued to NP or on whether an enquiry should have been convened. Likewise, he said that a disciplinary enquiry as envisaged by clause 6(c)(ii) of the Policy would not be convened 'for the fun of it' and QR would have to had a good reason to convene it. Under re-examination he said he conveyed his 'findings' to QR after the meeting and subsequently the

warning was issued. After some equivocation about why an enquiry was not convened, GH was of the view that it could not be convened once the written warning had been issued as it would place NP in double jeopardy. As to the question of what he meant by his 'findings' he gave the example of the fish oil smell and the employment law issues. In essence he qualified his use of the term 'findings' to simply mean a report on the discussions.

[112] Though the question was more appropriate for GH and QR, NP was also asked under cross-examination whether, if a proper investigation had been done the matter would have been dealt with more seriously. NP pointed out that once the more serious allegations came to light QR had gone to the site to conduct further investigations, but this was long after the employees had been transferred. His understanding of what made QR do this was that the trade union had approached the respondent's head office, and she had been instructed by head office to conduct more investigations. Under re-examination it appears that he was referring to the time when the HR department saw the pleading bundle and the petition of the complainants. As far as he knew, it was only in that document that the issue of sexual harassment was mentioned for the first time.

[113] When QR was questioned about whether she had investigated what the complaint about swearing entailed, her attitude was that HR had 'handled it' and given her feedback. Similarly, she had seen no need to further investigate the allegation that NP had referred to the complainants as "stupid women" because HR had dealt with the matter and given her feedback. Consequently she did not conduct any investigation of her own. She further defended the respondent's failure to take further steps on the basis that no staff came back to complain after the warning had been issued and they had been told to follow the organogram. She was also critical of the applicant's use of the union to channel their grievance as irregular and non-compliant with the respondent's policy. They should have referred the matter to her and then to HR. She suggested that there is no reason to have believed that a proper investigation would have revealed anything more at that stage because nothing in the union's letter

dealt with sexual harassment. At the time, she said that, she did not know about the 'white sauce' remarks, but would have done something about it had she known about the allegations then. She was not asked why she had discussed the complaint about NP accusing the workers of smelling of oil and other issues in the union letter with NP before issuing him with the warning, if she had relied wholly on GH's feedback.

[114] QR confirmed that the first time she saw the employee's petition was in the applicant's pleading documents around September or October 2010. She was then asked to do a full investigation by the operational director, Mr AB6. She consulted with Ms AB and AB1 and asked them if they were prepared to testify but they said they were not prepared to sign anything because the trade union was handling it. This was never put to Ms AB under cross-examination. She further claimed that CD was asked to come to an appointment but never responded. This too had not been tested with CD. Because sexual harassment had not been raised as an issue at the time NP was disciplined, the Sexual Harassment Policy was not invoked. Under cross-examination, QR was asked why the union was not contacted about the sexual harassment claims and her response was that she was following their internal policies and procedures and it was for HR to deal with the union. She did not say why she had not asked HR to contact the union.

[115] Under cross-examination Ms AB said that the Albany customers of Fedics witnessed the female kitchen staff crying, but had not necessarily heard what NP had said. When asked how often this happened, she said it would happen about once a week and on other days they would restrain themselves. CD also said the staff would also cry except for AB5. JK denied that anyone physically cried, but implied they only metaphorically cried about overtime, night shift, transport and related issues.

Evaluation

[116] Before dealing with evaluation of the evidence a few points need to be made about the witnesses. As often happens most of the witnesses remembered those things which tended to favour the party who was

leading them and were less likely to recall things favouring the opposing party. Likewise, there were times when the evidence of witnesses for the same party had a rote-like quality and their evidence had a greater ring of truth when they were asked a question about something they might not have anticipated giving evidence on, or on an issue which may have seemed of lesser importance to them. It was also not uncommon for some of them to obviously try to embellish their evidence with additional details that seemed contrived.

[117] Ms AB in particular was a witness whose attempts to adapt her evidence as she saw fit were very transparent. Thus her instinct was to deny and dispute any perceived weakness identified in her evidence, or to try and repair inconsistencies rather than just acknowledging them. In some instances this was plainly absurd when, for example she denied any discussion taking place on a number of issues in the meeting of 27 January. I am also alert to the fact that there might have been a degree of antagonism along language or ethnic lines which she harboured against NP whether as a response to his interaction with her or as a result of a pre-existing prejudice on her part. Nonetheless, that does not mean I doubt every part of her evidence. In respect of the core issues regarding the allegations relating to the women in the kitchen smelling of fish and the white sauce incident, there is sufficient commonality between her testimony and what others said to attach weight to that. I adopted a similar approach to the other witnesses, attaching less weight to bland colourless testimony which appeared to be determined more by a desire to say what was expected than to be a genuine recollection of past events.

[118] Accordingly, I have avoided making black and white credibility judgments about any particular witnesses but have evaluated their testimonies in the light of its inherently plausible or implausible character, the testimony of others and circumstantial evidence. It must also be said that on some matters the evidence led by either party was less detailed than it ought to have been and the probabilities of two plausible but in some respects relatively threadbare accounts of an event had to be weighed.

[119] In summary, the particular behaviour by NP, the applicants complained about, which was identified in their amended statement of claim was that he:

119.1 degraded and humiliated female employees by saying that their private parts smelled;

119.2 in particular, he intimated that their private parts smelt of raw fish which he suggested they could confirm by putting their fingers inside their vaginas;

119.3 referred to the applicants as stupid, empty-headed and ignorant of English, and that he would replace them with Shangaan people who were better and intelligent;

119.4 made comments to Ms AB with reference to AB1 to the effect that she was serving him left over white sauce in order to improve the quality of his sperm;

119.5 made derogatory comments directed in particular at Ms AB, who were Zulu speaking, about supposed Zulu sexual practices;

119.6 made direct sexual advances towards Ms AB and suggested she reciprocate if she wanted to keep her job, and

119.7 suggested female employees were attempting to bewitch him.

[120] NP also represented to the applicants that it was pointless attempting to do anything about his abuse because they had to raise any complaint with him first, nobody would believe them in any event and he had a good relationship with his senior, QR.

Direct sexual harassment of Ms AB

[121] From the evidence, it appears to be common cause that sometime after the so-called kidnapping incident, an element of tension may have been introduced in the relationship between NP and Ms AB. Nonetheless, NP claimed to have shown an interest in improving Ms AB's skills and spent time with her amongst other things working on the computer. He

vehemently denied any sexual interest in Ms AB or making any advances towards her. Ms AB had claimed that other employees had witnessed his attempts to hug or kiss her, but this was not corroborated by any other witness.

[122] Nevertheless, it did emerge from the evidence of LM and JK, who were called as the respondent's witnesses, that Ms AB had complained to them about unwanted attention from NP. The nature of this attention was ambiguously or perhaps euphemistically expressed by Ms AB to them as a complaint about NP 'following' her or 'liking' her. However, Ms AB herself never testified to even making such statements to her colleagues so the court did not have the benefit of a better understanding of what she might have been specifically referring to if indeed she would have agreed that she had made such remarks to them. Moreover, CD did not mention Ms AB making any similar comments to her, and did not witness any of the direct sexual harassment alleged by Ms AB, even though she said she could not comment on what might have happened in the office.

[123] Interpreting her colleagues' testimony is further complicated by the suggestion that she was antagonistic towards NP as a supervisor either because he was Shangaan speaking or because she preferred the previous supervisor or both, which could have meant that she simply disliked any sort of amicable relationship with him, even in the course of ordinary workplace interaction. It is true that she accused NP of similar ethnic bigotry so any hostility she felt towards him in that respect may have been a reaction to his own utterances about Zulus.

[124] In conclusion, even though I believe it is a realistic possibility that NP might have made direct and unwanted sexual advances towards Ms AB, I am not satisfied that this has been established as more probable than not in light of the difficulties in the evidence discussed above. The fact that NP might have created a hostile environment for female employees in particular also does not directly assist in determining whether he probably made direct sexual overtures to Ms AB.

Demeaning remarks about alleged sexual practices of Zulu persons

[125] Both Ms AB and CD testified to NP making one or more references to supposedly conservative Zulu sexual practices. JK and NP simply denied this ever happened. There was a contradiction between Ms AB's evidence that this occurred in 2009 and the statement of claim which said it occurred in 2008. In this regard, it is worth noting that JK only started working for the respondent in 2009, so she would not have been aware of such remarks if they were made the previous year.

[126] It was palpably obvious that when CD related her own recollection of NP's remarks on this issue it caused her considerable genuine discomfort. I also think it is unlikely that she and Ms AB would have dreamt up the explicit detail of the demeaning comments which CD clearly found difficult to talk about. It is true that the remark she remembered was not identical to what Ms AB related but the tenor and thrust of the comments was similar, namely to suggest that their sexual practices were conservative and unenlightened. These factors incline me to believe such graphic demeaning remarks probably were made by NP and on more than one occasion, but it is uncertain they were made in 2008 or 2009 or in both years. It is not sufficiently clear from the evidence that they were made in 2009. If anything, all the factors suggest it is more likely to have been in 2008.

Insulting comments about their lack education and inability

[127] CD and Ms AB both gave evidence that NP made demeaning comments about their lack of education and ability to speak English. This was echoed in the remarks he allegedly made that they would struggle to pursue any complaint against him given their limitations especially because they could not speak English. JK and LM merely said they heard no remarks of this nature.

[128] This complaint was echoed in the first item mentioned in the complainant's petition, viz: "*Our manager discriminates us, he accuses us of witch craft, curses us calling us names, such as idiots, for we cannot speak English well.*" Similarly, the first two items of the union's letter of 9 December 2009 refer to them being sworn at and referred to as 'stupid women'. Although there was a dispute about whether the respondent received this document

before it obtained the pleadings in the matter even JK and LM, who later distanced themselves from the case, but said nothing at when the issues were raised in the meeting in January 2010, both claimed to have signed at least the second page of the document either late in 2009 or by the meeting in January 2010. The point about this is that the petition and the items it contained was not something created after the January meetings but recorded issues of great concern at the time.

[129] Apart from these insulting comments being referred to in these documents, JK and Mr EF confirmed that the issue of NP calling the complainants 'stupid women' was discussed. Mr EF had said the complainants had provided details of the items discussed, but did not relate anything specific. GH admitted it came up as an item agenda but nobody came forward to substantiate it. He changed his version about how NP dealt with it, firstly saying NP did not 'confirm' he had said it and then that he had denied saying it. He left it at that without further enquiry.

[130] The nature of the comments allegedly made are consistent with other allegations against NP in that they also were plainly intended to demean the complainants and undermine any confidence they might have had in being able to do things for themselves. It appears also that the shortcomings attributed to them were shortcomings attributed to them as women. Again it is certainly plausible that NP made such remarks, but the evidence on this particular type of slur is insufficient to say on a balance of probabilities that the applicants proved it was said. This is particularly so given the lack of any but the most vague indication of how this was presented at the meeting of 27 January.

Remarks that the complainants smelled of fish and relating this to their private parts

[131] In effect, the evidence of Ms AB and CD was that NP said they smelled of fish when they cooked it on Fridays and that they would find their vaginas also smelled of fish if they inserted their fingers there. According to CD there were other comments made by NP about how they smelled of sweat on spring cleaning days. There was some discrepancy about whether the

particularly gross remarks of this nature were made by NP in August or September 2009 but nothing much turns on this. There were also discrepancies as to whether fish was cooked weekly, monthly or fortnightly, but it is fair to say that all witnesses agreed it was cooked at least once a month on Friday unless the customer made a special request for it.

[132] NP's version was that he had merely said they smelled of oil and that they should switch on the extractor fan to stop their clothes smelling of oil. Interestingly, both NP and JK claimed that NP found them cooking chips and had warned them that their clothes would smell of oil if he did not put the extractor fan on. This version was not put to the applicants' witnesses and had found them cooking chips and NP did not specifically mention it either.

[133] According to him there had been no mention at the meeting of 27 January that he had said they smelled of fish or any of the more odious remarks he supposedly made in this regard. All that had been mentioned was that they had complained he said they smelled of oil. JK and LM also remembered him giving this explanation. JK originally said she could not remember what the complainants had said about the matter at the meeting of 27 January, but eventually also just said it was complaint that NP had said they smelled of oil. GH's evidence about what was said about the incident was similarly innocuous. Mr EF, CD and Ms AB all claimed that the more offensive version of the complaint which concerned a comparison being made between the smell of fish and female private parts was raised.

[134] There was no suggestion by any of the witnesses that NP made any apology for the smelling remark. Incomprehensibly, this is the very issue for which he was issued with a written warning, which suggests that the respondent did adopt the view that he had actually said they smelled of oil. Yet GH testified that he saw nothing wrong with such a comment. Regrettably, these anomalies were not tested in cross-examination.

[135] In evaluating the evidence, it is difficult to understand why this complaint was expressed in the complainants' petition not as a complaint about

being accused of smelling of oil or even fish but of 'stinking private parts'. This suggests that the sting of the abusive comment lay in its sexually demeaning character, and that it is more probable that NP's utterance took this particular form.

[136] A critical issue is if this particularly obnoxious aspect of the complaint was ventilated at the meeting of 27 January. No detailed evidence was provided by any of the applicant's witnesses of the manner in which this complaint was conveyed in the meeting. Reference was simply made to them raising the 'smelling of fish' issue. On the other hand, the main thrust of GH, NP and LM's testimony was to the effect that this grievance was expressed as complaint that NP said the women smelled of oil, and that NP responded with his apparently inoffensive explanation that he was simply pointing out that their clothes would smell of oil if they did not put the fan on.

[137] However, in her evidence in chief, JK did say that CD had spoken about the fish matter in the meeting. Later, under cross-examination, she was asked what the complainants had actually said in the meeting about the issue and she then could not remember, but tellingly remembered that NP responded in the meeting to the 'fish issue'. When she was asked what the 'fish issue' was she somewhat cryptically said she had heard that, in the 'other letter' NP had been accused of saying they smelled of fish 'because they are women'. She was also asked if according to her friends, they had said NP said they were smelling of fish because they were women and she confirmed this. When asked if they had any reason to lie, she said they did because they were antagonistic to NP because he was Shangaan. From her evidence it is clear that she understood NP to have been responding in the meeting to a complaint about saying they smelled of fish and not simply oil. Further, it seems likely that at the meeting on 27 January the complainants had verbalised the insulting association NP had made about the smell being connected with them being women, but probably without mentioning the more explicit and obscene reference to them being encouraged to examine themselves intimately. It is quite possible, in the context of that meeting that, the explicit details might have been toned down by the complainants given the awkwardness of dealing

with it in that informal forum. As with NP's response to the white sauce remark, GH preferred to accept NP's more innocuous explanation.

[138] In weighing up all the evidence, I believe that it is more likely that the complaint which was articulated in the meeting was that NP had said they smelled of fish, or fish oil, because they were women rather than simply a complaint that he said they smelled of oil.

[139] In passing, it is interesting to note that QR claimed to have discussed this issue with NP as well and the written warning issued to NP , made specific mention of him saying they smelled of oil, whereas GH had accepted that NP had simply warned them they would smell of oil.

The white sauce incident

[140] This is one of the few matters on which there was some degree of commonality on the facts. While there are discrepancies about precisely whom NP identified as requiring the white sauce as an aid to fertility, there was really no dispute that he made the remark in relation to either AB1 or Ms AB or both of them. The imputation of the remark, whoever it was directed at was that they suffered from a shortage of ova or sperm and the white sauce would rectify that.

[141] The real area of dispute concerns whether or not this was an uncalled for and insulting remark or whether it was a normal part of kitchen banter and that NP was simply unlucky that someone took exception on that occasion. It is noteworthy from the evidence that the only person who claimed it was commonplace talk in the kitchen was NP himself. He also cited no example when such remarks had been made by anyone else. Both JK and LM denied hearing any remarks of this nature at all. Ms AB and CD's evidence on the other hand tended to support a version that it was a once-off incident. It was a remark made by a supervisor making fun of one or more subordinates about a personal attribute that would not normally be the subject matter of ordinary workplace conversation.

[142] In the circumstances, the evidence supports a version that it is more probable that it was a comment made at the instance of NP alone and as

part of a general exchange of workplace banter, contrary to the view adopted by GH who seemed to have uncritically accepted NP's version. The thrust of the comment was to belittle either Ms AB or AB1's reproductive capacity, or both, which is plainly not his concern as a catering manager. The comment had obvious sexual overtones falling within the definition of what constitutes sexual harassment according to the respondent's own Policy.

[143] NP was not disciplined for this remark and it seems that this was because GH accepted that it was part of a pattern of kitchen banter and that, in any event, he had apologised if it had caused any offence. QR seemed to accept GH's assessment of the merits of this complaint against NP.

The respondent's handling of the complaints

[144] Although it seems to be common cause that the complainants' petition was drawn up sometime in the period from November 2009 until the meeting on 27 January 2010, I do not believe that the applicants were able to establish that the respondent did in fact have knowledge of it before it was served as part of the pleadings even if it had been faxed from Albany Bakeries, which is in some doubt. I am sceptical about Mr EF's evidence that a copy was given to GH at that meeting. There was little to corroborate this, and it does seem that the sketchy notes taken by NP in his diary correspond more closely with the items set out in the union letter than the petition so it seems it is unlikely its contents were used together with the letter as an agenda for the meeting.

[145] The evidence also does not show clearly that the respondent probably received the union's letter of 9 December 2009 before it was refaxed to GH by the union, after Mr EF queried the lack of response to it. In the circumstances, it cannot be said that GH's initial response in convening an informal meeting about the grievances was tardy.

[146] Did the respondent address the complaints 'seriously, speedily, sensitively and confidentially' as the Sexual Harassment Policy exhorted it to? Firstly, it must be said that there was no evidence that Ms AB's allegations of direct sexual harassment in the sense of NP making sexual overtures to her were canvassed in the meeting of 27 January. The issues that did

come to light in the meeting were the demeaning comments concerning the white sauce and the fish smell. It is apparent from GH's testimony that he considered the first issue resolved because he adopted NP's account that it was part of kitchen banter and that NP apologised if it had caused any offence, without admitting any wrongdoing. In relation to the fish smell, it is equally obvious that GH accepted NP's account that it was simply an issue of keeping clothes from being contaminated with oil and nothing offensive was said by NP.

[147] GH's evidence about what his feedback to QR entailed was ambiguous. On the one hand he spoke of his 'findings' and then tried to remove any evaluative component from what he relayed to QR by referring to it as a 'report'. He also spoke of 'escalating' the matter to QR and that further investigation of the matter should have been done by her. He understood that some of the operational matters raised at the meeting required her to address or follow up on. He also claims to have told the complainants how they should deal with complaints of victimisation, which seems to accord with his view that they had not handled their problem in the correct manner and that in the absence of them doing so after 29 January the respondent was not required to do anything further.

[148] GH did confirm reporting to QR and the senior HR Manager on what transpired at the meeting and remembered QR saying she would not allow NP to speak to staff the way he had. GH implied that the three of them had jointly considered the way forward but did not go into specifics. Once again he mentioned that it was up to QR to decide what to do. Neither he nor QR was questioned in any depth about the details of this meeting.

[149] Just as GH suggested QR was to finalise the matter, QR claimed she decided not to pursue further investigations into some matters because HR had 'handled it'. What she discussed in particular with NP before she issued him with a warning seemed to only concern the smelling remarks, his way of talking to staff in general and the operational issues. She also took the view that no further intervention was required by the respondent in the absence of the applicants pursuing the matter further through the grievance procedures once she had advised of the warning issued to NP

and the transfers had been finalised. Like GH she claimed the grievances in the letter did not relate to sexual harassment and therefore no further investigation was warranted.

[150] How much QR actually understood about what transpired at the meeting on 27 January was never probed. In this regard, I note her comment that if she had known about the white sauce comments she would have done something about that, which does suggest this grievance might not have been reported to her by GH. But in any event, Step 2 of the Grievance Procedure at the Informal Notification stage required the direct supervisor - in this case QR because NP could not investigate a grievance against himself – to conduct interviews and investigations as considered appropriate and HR was to play an advisory role. Even though QR was not specifically questioned about her compliance with the Grievance Procedure whereas GH was, she was tested on why she did not conduct her own investigation and effectively her attitude was that having issued the warning to NP and the transfers having been implemented as a step to harmonise things going forward, nothing more was required of her.

[151] It seems QR was never made aware of the CCMA referral which followed shortly after the transfers and which GH handled without reference to her.

[152] Quite insensitively, GH deputised NP to attend the conciliation. GH's attitude towards the conciliation was clearly that it was a formal step and even NP could represent the company at that forum. Obviously there was no serious intention by the respondent to engage with the dispute in that forum considering that the CCMA form specifically referred to the complaint about the complainants' private parts smelling and alleges no action was taken against NP .

[153] It was said that when the petition came to light months later QR did attempt a further investigation but was met with an uncooperative attitude by the complainants. This was never put to the applicants' witnesses so its evidentiary value as demonstrating that the respondent was genuinely showing a belated interest in their grievance is minimal.

[154] What the evidence reveals is that the combined actions of GH and QR resulted in a failure by the respondent to deal adequately with the issues.

QR decided to issue a written warning to NP without having done any investigation herself except to speak to him. GH appears to have too readily accepted NP's version of the validity of the complaints against him, without justifying why he preferred his version. His narrow classification of the grievances as not concerning sexual harassment was not in accordance with the respondent's own Sexual Harassment Policy which describes various forms of verbal harassment as sexual harassment.

[155] The overall sense one gets of the way the more serious complaints were dealt with is that the approach of both GH and QR was that as long as some action was taken after one informal meeting was held and a step was taken to separate the complainants from NP to defuse the situation that was enough. Their evaluation of the merits of the complaints also appears to have been based on accepting NP's version too readily, without any more serious investigation or testing of the different versions. The fact that the union's letter did not use the term 'sexual harassment' was not good enough reason for QR or GH to take the grievances less seriously when the items listed spoke of harassment, discrimination against women and abusive language directed at women. While I do not suggest they necessarily knowingly co-operated with each other to minimise the grievances, the nett effect of them each deferring to the other's judgment on was that the respondent avoided seriously getting to grips with the issues.

[156] Moreover, it should have been obvious when the matter was referred to the CCMA barely a fortnight after the transfers were announced that the grievances were not resolved. It may be true that the complainants decided to place their faith in external mechanisms rather than following the next stage of the grievance procedure, but there was no evidence that the respondent itself even attempted to steer the dispute in that direction before the CCMA hearing took place and sending NP to the hearing, even if GH himself could not attend, hardly inspires any confidence in the respondent's *bona fides* in treating the complainants seriously.

[157] GH was satisfied that the grievances were resolved when it was reported in vague terms that NP had been issued with a warning and when the

complainants uncomplainingly concurred with the 'proposal' to transfer them. However, the preponderance of the evidence does not suggest that the transfers were tabled as a proposal. It is more probable that they were tabled as a decision, which management had taken as part and parcel of its 'solution' to the grievances. The evidence of LM and QR herself was that the transfers were not simply accepted. The most plausible reason for AB1 announcing his intention to resign was that he was unhappy with the transfer. Even though Ms AB did not testify herself to raising her problems with the transfer, perhaps because she realised it would be at odds with her claim that there was no discussion about the transfers at all, she did not sign the form. Neither did CD.

[158] It may be that it would have been more difficult to have transferred NP immediately, but there was no evidence this was explained as the reason why the complainants had been identified as the persons to be relocated rather than him. I accept also that it is in the nature of the work at the respondent that employees may be transferred to different catering units from time to time as operational needs dictate, but it is hard to escape the fact that it was not the person who was in the wrong who was transferred but those who had brought his wrongful actions to light. Having said that, neither CD nor Ms AB gave evidence about the prejudice they might have suffered as a result of their particular re-assignations.

Legal Considerations

[159] I concluded above that NP probably did utter the abusive comments discussed above. Moreover NP's 'white sauce' comments and his remarks about the applicant's smelling of fish together with the associated obscene suggestion he made were clearly a form of verbal abuse amounting to sexual harassment both in terms of the respondent's own Sexual Harassment Policy and the Code of Good Practice on Handling Sexual Harassment Cases in the Workplace.[1] The question which then

[1] ***GenN 1357 in GG 27865 of 4 August 2005*** in which unwelcome verbal conduct constituting sexual harassment is described in item 5.3.1.2, viz:

arises is whether the respondent is liable for that harassment and if so what remedy is appropriate.

[160] S 60 of the EEA states:

> *"**Liability of employers***
>
> *(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.*
>
> *(2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.*
>
> *(3) If the employer fails to take the necessary steps referred to in subsection 2, and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.*
>
> *(4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act."*

(emphasis added)

[161] It must be said that when the verbal abuse took place was a matter of much dispute. On QR's version the white sauce remarks took place in January 2010, whereas the applicants' gave differing versions of when it

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> *"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."*

occurred but all of them in the last quarter of 2009. Oddly, the respondent took the date of this incident as the date from which the warning ought to be effective even though the warning referred to the complainants smelling of oil, which was an event of occurring on an indeterminate date but most probably in 2009. It cannot be said that the complaint about NP's conduct was made immediately, but in my view the only impact this has on the question of liability is that it might affect the feasible remedial alternatives available to an employer, against which the employer's response will be evaluated. Thus, if the harassment is only reported at a time when the alleged perpetrator is no longer working for the employer, the remedial action available to the employer to prevent a recurrence or to deal with the perpetrator might be confined to putting in place appropriate procedures to deal with future recurrences if such procedures did not previously exist.

[162] As I have mentioned above, the respondent cannot be accused of not acting once the complaint was brought to its attention. It also did consult with the complainants and the alleged perpetrator by convening the informal meeting on 27 January 2010. Within a few days it had issued NP with a written warning and had taken steps to separate him from the complainants *albeit* that he was not the one affected by this measure by having to relocate to another workplace. The heart of the criticism of the respondent's actions is whether these steps were sufficient or, in the language of s 60(3), that it took the necessary steps to eliminate the conduct and comply with the EEA.

[163] It was never suggested that the respondent's own Sexual Harassment Policy was inadequate. It is arguable that it might have been better publicised amongst the workforce, but it was not part of the applicants case that if they had known about it they would have invoked it and that their failure to do so was attributable to the employer not making them aware of it. I accept that the respondent did advertise its helpline both on the notice board and on employee's payslips. Even though LM and JK claimed to have been aware of the number it was not apparent from their evidence that they realised the number could also be used to complain about sexual harassment. It seems that a big obstacle to the individual applicants taking up their complaints was that they felt doomed to fail until

they realised that joining a union might provide a solution. Again, it must be emphasised that the thrust of the applicant's case was not to attack the adequacy of remedial measures in place, but to attack the steps taken by QR and GH as insufficient once the complaints were brought to light.

[164] In effect the alleged shortcomings in the respondent's actions which the applicants identified were:

164.1 the inadequacy of the warning letter issued to NP in failing to properly reflect the misconduct he was guilty of;

164.2 the failure of the respondent to convene a full disciplinary hearing before adjudging the misconduct worthy only of a written warning.

164.3 transferring the complainants without dealing effectively with NP's misconduct, and

164.4 transferring NP in 202 to the same unit that Ms AB and AB1 had been assigned to.

[165] In respect of the last complaint, the respondent countered that there had been no evidence led of further complaints about NP since then. On the question of the appropriateness of the warning, the respondent argued that this court is not in a position to substitute the sanction imposed by the employer on the basis of the decision in ***Potgieter v National Commissioner of the SA Police Service & another***.[2] In that matter the applicant had complained amongst other things that the sanction and fine imposed on the perpetrator of sexual harassment in that case was too lenient and this was a factor rendering the employer liable under s 60 of the EEA. The learned judge found that the applicant was still entitled to hold the employer liable even if the perpetrator had left its employment and the leniency of the sanction was irrelevant to her claim.[3] I do not read this judgement as saying that the court might not in appropriate circumstances consider the inadequacy of the sanction imposed as a factor in determining liability, but simply that it will not always be a *sine qua non* in order to hold the employer liable as there may be other

[2] (2009) 30 *ILJ* 1322 (LC)

[3] At 1333, para [51].

respects in which the employer falls short of doing what is necessary in the circumstances.

[166] In this instance, the warning was obviously inadequate in the sense that it did not *describe* the essence of the discriminatory misconduct complained of, namely sexual harassment in the form of abusive language: it referred in vague terms to treating the staff properly which could have referred to any number of things including shouting at them or not ensuring they were properly compensated. The reference to smelling of oil could easily be interpreted merely as a reference to an insult devoid of any sexual harassment connotation.

[167] This is certainly one sense in which the respondent did not take the necessary step of issuing a warning corresponding to the nature of the misconduct, quite irrespective of whether it should have been a more serious level of warning. But the fact that the warning did not correspond meaningfully to what most probably happened is not necessarily because QR decided, after considering the same evidence that was placed before the court not to issue such a warning. It is more likely in my view that the inadequate warning that was issued was simply a consequence of the inadequate procedure adopted by GH and QR as a result of which QR took action with a very limited appreciation of the full extent of the complaints against NP, which had been canvassed at the meeting of 27 January. If she had a better appreciation of them, she ought to have realised that calling a formal enquiry was in fact justified.

[168] Even if it cannot be denied that the warning issued to NP cannot be said to have been a meaningful corrective measure necessary to address the verbal sexual harassment, separating NP from the complainants was a reasonably necessary step to take to minimise the prospect of any form of further interpersonal conflict arising between them which would have included sexual harassment.

[169] It is clear from the applicants' complaint about NP being relocated two years later to the same unit as two of the complainants that they also regarded such a separation as a reasonably necessary part of the solution. Their complaint was that the way of implementing it was unfair to

them as NP was the wrongdoer. From the evidence which emerged in the trial I am not satisfied that there was an easy way of of relocating NP quickly and there may well have been an operational rationale for relocating the complainants to address the issue promptly. I also accept on the evidence that it is likely that this was not properly explained, if at all, at the meeting on 29 January and this was insensitive of the respondent. However it cannot be said the transfers were not reasonably necessary measures at the time.

[170] As regards NP's relocation to the same unit as AB1 and Ms AB two years later, I am not satisfied that the applicants demonstrated that a permanent separation of the parties in different work units after such an interval was still necessary, unless it had evidently resulted in a recurrence of the conduct complained of.

[171] In conclusion, the respondent did not take the necessary step of issuing NP with a warning which was appropriate to the nature of the misconduct and that given the nature of the verbal sexual harassment complaints articulated at the meeting of 27 January 2010, it was necessary to have convened a full enquiry before deciding on appropriate disciplinary action.

Relief

[172] The applicants sought damages but led no evidence of the effects they suffered as a result of the NP's abuse. In any event the employer cannot be held liable for the ill consequences they suffered *before* the matter had been reported and there was no evidence they continued to suffer any after the employer intervened, even if Fedics did not do all it ought to have done to minimise the prospect of it recurring. In the absence of any injury attributable to inaction on the part of the respondent no liability for damages arises.

[173] On the alternative claim of compensation, I believe this must be related to the nature and extent to which the respondent fell short of taking necessary steps. It is not disputed that the respondent had adopted a Sexual Harassment Policy and did make an anonymous helpline available even though it is was not obvious that it could be used for complaints of

this nature. It fell short in the adequacy of its investigation as a result of a process failure arising from the interaction of QR and GH. The inadequacy of the investigation was most probably the cause of a warning being issued that did not serve to fulfil a corrective function in relation to verbal sexual harassment.

[174] I believe the appropriate approach in this case is similar to that adopted by the learned judge in ***SATAWU obo Finca v Old Mutual Life Assurance Company (SA) Ltd & another*** [4] in which there was a failure by the responsible officials in properly giving effect to the respondent's own policy. The court felt no purpose would be served in requiring the employer to revisit the appropriateness of the sanction imposed by re-opening the disciplinary process as it would not redress the wrong done to the applicant.[5] In that case the court ordered that the applicant be awarded compensation to be determined by the court. The reason for deferring the issue of quantum was because the parties in that matter had agreed to such an arrangement.

[175] In this instance, no evidence has been led to assist the court in determining an amount of compensation and I am of the view that the nature of the inadequacies of the steps taken by the respondent and given that it did take some meaningful action the award of compensation should be in the form of a *solatium* and should be confined to an award of six weeks' wages for each of the remaining individual complainants.

Costs

[176] The respondent effectively chose to ignore the referral of the applicants' complaint to the CCMA in February 2010 and made no effort at that stage to try and resolve a matter that was clearly still an unsettled grievance in the mind of the applicants whatever the respondent itself may have thought at the end of January. I am also not persuaded that Mr AB advised he would not attend the meeting on 29 January and that it could proceed without him. Still less do I believe he was advised of

[4] [2006] 8 BLLR 737 (LC)

[5] At 746, paras [43]-[44].

management's intended resolution of the dispute. Having been the formal representative of the applicants at the previous meeting it would have been appropriate for GH to have advised him of the outcome and not just dealt with the individual complainants directly.

[177] A renewed attempt to address the issue at the conciliation stage might well have avoided this litigation but it is understandable that the presence of NP at the conciliation could not have given the applicants any hope of a positive engagement with the company. I do not believe that it was unreasonable for the applicants to seek an external resolution of the dispute at that point after the way the meeting of 29 January was conducted and given GH's failure to communicate with Mr EF as a representative of the complainants. Although the applicants and the respondent have an ongoing employment relationship, I do not believe the applicants should bear the costs of this litigation.

Order

[178] In conclusion, I find that that the individual applicants were subjected to verbal sexual harassment by the second respondent amounting to unfair discrimination in terms of section 6(1) of the EEA on the grounds of sex and that the employer failed to take some necessary steps to eliminate the misconduct in the form of conducting a full investigation and issuing an appropriate sanction to serve as a corrective measure against future verbal sexual abuse by the second respondent. In consequence the employer is in contravention of s 6(1) in terms of the deeming provision of s 60(3) of the EEA and is liable to the applicants.

[179] Further the respondent is ordered to pay each of the following individual applicants an amount of compensation equivalent to six weeks' remuneration calculated at their respective rates of remuneration in January 2010 within 15 days of the date of this judgment, provided that if the parties cannot agree on any of those rates of remuneration, either party may refer the matter to this court to determine.

[180] The respondent must pay the applicants' costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

For The Applicant: C Levin of Clifford Levin Attorneys

For the First and Second Respondents: Du Randt of Du Randt Du Toit Pelser Attorneys

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[*] Names of natural persons in this judgment have been replaced with arbitrary letters to preserve the identity of all involved.