DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

08/9/2023

SIGNATURE

THE LABOUR COURT OF JOHANNESBURG

Reportable

Case no: J1952/2017

In the matter between:

DR GABRIELLA LA FOY **Applicant**

and

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **First Respondent**

THE MINISTER: DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **Second Respondent**

THE DIRECTOR GENERAL: DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **Third Respondent**

THE DEPUTY MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **Fourth Respondent**

Heard: **17, 18, 20, 21, 25, 26, 27, 28 April 2023 and 14, 15, 16, 18 August 2023.**

Delivered: **08 September 2023.**

Summary: **Referral in terms of the Employment Equity Act (EEA) – harassment as a form of unfair discrimination based on arbitrary grounds. The applicant failed to discharge her statutory *onus*. Unfair discrimination not established. Managerial functions and activities do not amount to workplace harassment. Decayed relationship with political heads incapable of amounting**

to harassment. Individual acts of harassment are not ongoing in nature. Each act or omission is subjected to the time frame provided for in the EEA. Failure to refer each act or omission to the statutory bodies for conciliation or mediation timeously impacts on the jurisdictional powers of the Labour Court. Where an act or omission amounts to an unfair labour practice as defined in the Labour Relations Act, the remedy lies in the LRA. The provisions of the LRA cannot be bypassed in order to build a case under the EEA. The inquiry into the alleged harassment conduct, although viewed from the perspective of the harassed employee, remains an objective one, regard being had to its impact on the *dignitas* of the *persona*. Held: (1) The claim for unfair discrimination is dismissed. Held: (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is a referral in terms of section 10 (6) (a) of the Employment Equity Act (EEA)[1]. The applicant, Dr Gabriella La Foy (La Foy) contends that the Department of Justice Constitutional Development and Correctional Services (Justice) had subjected her to unfair discrimination in the form of harassment within the contemplation of section 6 (3)[2] of the EEA. She contends that the said unfair discrimination is based on arbitrary grounds as listed in section 6 (1) of the EEA. After hearing the testimony of La Foy, Justice applied for absolution from the instance. In a written judgment, this Court dismissed the said application.[3]

---

[1] Act 55 of 1998, as amended.
[2] Section 6(3) reads as follow: "*Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or combination of grounds of unfair discrimination listed in subsection (1)*".
[3] *La Foy v Department of Justice and Constitutional Development and others* [2023] ZALCJHB 127; (2023) 44 ILJ 1733 (LC).

[2] Although the trial ran for a substantial number of days, the dispute fulcrums on a limited legal question, which is, are the litany of complaints sharply hoisted by La Foy constituting harassment as a form of unfair discrimination on any arbitrary grounds? This Court heard evidence from three witnesses, namely La Foy, who testified in her own case; Ambassador Madonsela (DG); and Deputy Minister Jeffreys (DM) both of whom testified on behalf of Justice.

Background facts and evidence

[3] It is not the intention of this judgment to, in any formidable details, repeat the evidence delivered by the witnesses who appeared before the Court. The essential facts pertinent to the present dispute are that La Foy was, effective from 1 July 2016, appointed as a Deputy Director General: Constitutional Development in Justice.

[4] I interpose to mention that the bulk of the events appertaining to the present dispute are documented. They are littered either in letters exchanged between the witnesses, memoranda routed amongst the relevant parties, reports and outcomes generated by investigators or chairpersons and other related documents. In the main, all the witnesses that appeared before Court delivered their testimony with reference to those documents. About five lever-arch files contained documents, which were liberally and at times *ad nauseam*, referenced. In order not to prolix this judgment, it is obsolete to give a full rendition of the evidence delivered. Where necessary, this Court shall quote the relevant evidence delivered, in the body of this judgment. Most of the incidents as they occurred and recorded in writing are common cause between the parties, however, the parties before me differed on the interpretation of those recorded incidents.

[5] Given the *onus* issue, La Foy was the first party to deliver evidence. When she joined Justice, the Department was faced with serious capacity issues. Many of the posts in the staff establishment were vacant. In that financial year of 2016/17, certain cost-cutting measures were introduced by the Treasury

Department. Those measures impacted a number of government departments' (Justice included) ability to afford compensation for staff. Shortly after La Foy joined, Justice had to devise means by which the impact could be ameliorated. A means was adopted, which saw the establishment of the Human Resources Review Committee (HRRC). In the main, the task of the HRRC was to address the capacity challenges in the Department by first identifying critical posts and recommending to the Deputy Director General: Corporate Services for the filing of those posts. Such that any branch that would require capacitation ought to go through the processes designed by the HRRC.

[6] Pertinent to the dispute before me, like many other responsible heads of branches, La Foy identified the need for capacity in her branch. Initially, she took a view that since her branch was "new", it ought to be exempted from the bespoken processes undertaken at that stage by the HRRC. This view did not meet with the DG's approval. Owing to that, she presented a motivation to fill certain of what she considered to be critical posts. The report prepared by the HRRC reflects which of the positions were approved and the manner in which they were to be filled. Because Corporate Services did not, on the version of La Foy, fill some of the positions, La Foy took a view that she was being subjected to harassment and was not supported.

[7] In the performance reviews, La Foy frontally raised those issues as having impeded her from fully performing her duties. On La Foy's version, the situation of capacitation remained a problem until she left the Department. In the interim, issues of discipline emerged which saw her being presented with what was termed *audi alteram partem* letters. The issues of discipline emerged one after the other and as a result, La Foy felt that she was bombarded with letters of discipline. This bombardment she considered to be harassment. Around the same time, investigations were conducted by two government officials (Mr Nel and Ms Clark). Both of whom produced their own findings on issues investigated or considered by them. At a point, following

grievances lodged by nine officials against La Foy, as a precautionary measure, she was transferred to another branch whilst the grievances were being investigated. La Foy considered that precautionary transfer to amount to a demotion and an act of harassment. Because she was made to report to a junior employee, she considered this act as a demotion. After the investigations, Clark suggested mediation which was not accepted by the nine officials who had grieved.

[8] Over a period of time, La Foy felt that she was marginalized, her duties were taken away from her, she was excluded from meetings and her probation was not finalised. Owing to all that, on 8 or 9 May 2017, she referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) lamenting victimization on arbitrary grounds. In the referral form, she alleged that the dispute she was referring arose on 24 April 2017. She annexed to the referral form, a document setting out what she considered to be acts of harassment. As a relief, she required (1) the employer to stop victimizing her and allocate duties to her; and (2) that she be compensated.

[9] The CCMA on 15 June 2017, attempted and failed to resolve the referred dispute through conciliation. Commissioner Naidoo certified that the unresolved dispute may be resolved by this Court through adjudication. Ultimately, La Foy referred the unresolved dispute to this Court for adjudication.

[10] As indicated earlier, she was a single witness in her own case. Briefly, her evidence before this Court was that she is an admitted advocate. She related to the Court her employment history and the qualifications she holds. She came from Ethekwini and the Human Resources of Justice refused to pay for her transfer costs. She referenced a number of formal documents like the SMS Handbook, Performance Agreement and certain sections of the Public

Services Act[4] (PSA). When she joined there was no Personal Assistant (PA) and an Office Manager in her office. She confirmed the lack of capacity issue and the steps she took in an attempt to address the issue. On her version, Mr Adams and the DG did nothing about the capacitation issue. In November 2017, she was placed on a precautionary suspension. Because there was no support on the capacitation issue, the situation deteriorated and a conflict arose between her and the DM.

[11] Following grievances lodged against her, she was transferred to a demoted position. For a very long period, she was without any duties. Since her probation, she was never assessed. Despite her motivation for the filling of posts, only one post was filled. Her leave applications were not approved and she was threatened with disciplinary letters. She testified about the international trips which she was not allowed to be part of. She considered this conduct to be unreasonable. She disagreed with the views expressed by the DM on the international trips route memoranda. Attending South African Human Rights Council (SAHRC) meetings was her function. She got to know about the letter from the DM through the investigators and ultimately got a copy thereof through a Promotion of Access to Information Act (PAIA)[5] request. She attested to the strained relationship with the DM. She disputed the contents of the letter of the DM and testified that the issues contained therein were not raised with her by the DG. She testified that she was emotionally affected and had to seek medical attention. She sought and was ultimately given counselling.

[12] During cross-examination, she testified that the challenge of not filling posts occurred in all other branches. She confirmed that it was a departmental process and was not directed at her only. She confirmed that resources were made available to her although not on a permanent basis. On the international travel issue, she agreed that the DM was not required to approve. She was

[4] Proclamation no. 103 of 1994.
[5] Act 2 of 2000 as amended.

not satisfied with the refusal to travel to the meeting of experts because of the in-principle agreement she had with the DG. On the version that the decision to transfer was a practical solution, she testified that the decision was not substantively and procedurally fair and it amounted to victimization. On the question from the bench, she was asked of the reason why she was treated in the manner she testified, to which she answered she did not know.

[13] The DG testified on behalf of Justice. Briefly, he testified that he is currently an Ambassador of South Africa to the Netherlands. He has been since January 2020. He was the DG of Justice since May 2016. He outlined his duties as a DG. He attested to the interaction between the Ministry and the officials but testified that the reporting lines do not change as a result of the interaction. He testified at length on the capacitation issue and confirmed the cost-cutting measures and steps taken by the Department to address the capacity issue. He testified around the approval and non-approval of leave for La Foy. He confirmed that leave days not taken could be taken at a later stage or be credited back. He raised his concerns with the medical certificate which sought to support a sick leave request by La Foy. Some of the leave requests that were revoked by him were as a result of pressing work matters.

[14] He gave testimony around the *audi alteram partem* letters. As and when issues of discipline are brought to his attention he acted immediately. The Nel unit was the only unit with investigative capacity. He tasked it to conduct an investigation into allegations of misconduct. With regard to international travels, he testified that La Foy had no right to travel. Work demands and the purpose of the travel dictate travelling. Further, he testified that the decision to approve the travel delegation lies with the Minister. He testified about the Universal Periodic Report (UPR) process and raised concerns as to why the UPR was late.

[15] During cross-examination, he testified that reporting is structured by way of memoranda whilst interaction happens as and when the information is

required. He disagreed with the contention that La Foy was bombarded. In re-examination he testified that the preliminary allocation of funds as reflected in one of the reports was not final, it was provisional and only indicative. From the question of the bench, he testified that on international travels his role is not only limited to financial issues but also he has a say as to which of the staff members are best placed to travel.

[16] The DM also testified on behalf of Justice. He has been a DM of Justice since 2013. During 2016-17 he was still the DM. He got to know La Foy through the interview process. He testified about the interplay between the Department and the Ministry. Such interplay does not affect reporting lines. For time immemorial, there was interaction between the Ministry and officials of the Department and there was nothing untoward with such interaction. When La Foy was appointed, he stopped interacting with chief directors. He interacted with La Foy until he realised that he was not receiving accurate reporting from her. As a result, he restarted the interaction with the chief directors as he no longer trusted La Foy. He testified about his role in the drafting of the National Action Plan (NAP) on discrimination. He however disputed that he said La Foy would not go to international travel until she completed the NAP. His main concern was the UPR. He confirmed that the decision whether a person travels or not is that of the Minister and the Minister may not follow any recommendations made. He testified about the international travels involved in this dispute and stated his reasons why some travels were not recommended. He confirmed that he did express that he would work with the four chief directors because he lost trust in La Foy. When officials join him in meetings, they come to give support. In some instances, he did not need the support of a senior officials like La Foy.

Evaluation

[17] As indicated at the dawn of this judgment, the key legal question in this dispute is whether La Foy was subjected to unfair discrimination that is prohibited on any arbitrary grounds. In order to answer that key question, this

Court must consider whether the litany of complaints hoisted by La Foy constitutes harassment within the meaning of section 6 (3) of the EEA. Justice contends that La Foy failed to show that there was harassment within the meaning of the section. La Foy contends to the contrary. Once a finding is made that any of the alleged acts constitute harassment, the next question is whether that harassment amounts to unfair discrimination that is prohibited on the ground (arbitrary) pleaded by La Foy. Owing to the above permutation of the issues, the first issue to be tackled is to define what harassment means.

What is the meaning of harassment?

[18] In section 6 (3) of the EEA, the legislature only informs us that harassment is a form of unfair discrimination. However, that form of unfair discrimination has not been afforded any particular meaning. In an instance where the legislature has not provided any technical meaning to a word, Courts often resort to the grammatical meaning of the word. The grammatical meaning of the word is aggressive pressure or intimidation. To *harass* means to trouble by repeated attacks. Given the wide grammatical meaning of the word, it became apparent that some legal definition of the term is required. Section 54 (1) (a) of the EEA empowers the Minister of Labour and Employment to issue any code of good practice intended to provide employers with information that may assist them in implementing the EEA. On or about 16 March 2022, the Minister published a Code of Good Practice on Prevention and Elimination of Harassment in the Workplace (Code)[6]. It was in this Code that an acknowledgement was made that the EEA does not define the term harassment.

[19] In clause 4 of the Code, the following is stated:

> '4. WHAT IS HARASSMENT
>
> 4.1 The term "harassment" is not defined in the EEA. Harassment is generally understood to be –

[6] GG No. R1890 dated 18 March 2022.

4.1.1 unwanted conduct which impairs dignity;

4.1.2 which creates a hostile or intimidating work environment for one or more employees or is calculated to, or has the effect of, inducing submission by actual or threatened adverse consequences; and

4.1.3 is related to one or more grounds in respect of which discrimination is prohibited in terms of section 6 (1) of the EEA.' [Own emphasis]

[20] Regard being had to the totality of the evidence of La Foy, it is perceptible that her complaints are about a hostile or intimidating work environment. The Code states the following with regard to hostile work environment:

'4.6 Hostile work environment

4.6.1 A hostile work environment will be present where conduct related to a prohibited ground impacts on the dignity of one or more employees. This will be present if the conduct has a negative impact on the employee's ability to work and/or on their personal well-being. This may be the result of conduct of persons in authority such as managers and supervisors or the conduct of other employees.' [Own emphasis]

[21] This Court does acknowledge that the Code was introduced well after the happening of the incidents complained of by La Foy. However, the Code codifies the general understanding around the word. The Code sets out the types of harassment. It is unnecessary to list all the types in this judgment. However, on the fair assessment of the testimony of La Foy, it is perceptible that the workplace conducts she alleged related to the following, as outlined in clause 4.7.5 of the Code:

'(a) Conduct which humiliates or demeans an employee;

(b) Sabotaging or impeding the performance of work;

(c) Ostracizing or excluding the employee from work or work-related activities;

(d) Use of disciplinary sanctions without objective cause, explanation, or efforts to problem solving;

(e) Abuse, or selective use of disciplinary proceedings;

(f) Demotion without justification;

(g) Abuse, or selective use of disciplinary proceedings.'

[22] As indicated, the majority of the conduct alleged by La Foy arose before the promulgation of the Code. On her own version, her dispute arose on 24 April 2017. The previous Code[7] focused on sexual harassment and did not provide guidance on workplace harassment in general. The current Code was influenced by developments in case law, statutes and issues dealt with in the International Labour Organisation (ILO) Convention 190 (Convention)[8]. Article 1 of the Convention provides a definition of the phrase 'violence and harassment'. According to the article, the phrase in the world of work refers to a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and it includes gender-based violence and harassment. However, the term harassment was afforded a technical meaning in the statutes in *pari materia*, namely, the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)[9] and the Protection from Harassment Act (PHA)[10]. Section 1 of PEPUDA defines harassment to mean unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and is related to sex, gender or sexual orientation or association with specified grouping.

[7] Code of Good Practice on the Handling of Sexual Harassment cases in the Workplace GN 1357 of 2005.
[8] Convention 190 was adopted on 21 June 2019.
[9] Act 4 of 2000 as amended.
[10] Act 17 of 2011 as amended.

[23] Section 1 of PHA defines harassment to mean directly or indirectly engaging in conduct that the respondent knows or ought to know causes harm or inspires reasonable belief that harm may be caused to the complainant. The section defines harm to mean any mental, psychological, physical or economic harm.

[24] Given the grammatical meaning of the word harassment, it is relatively easy for an employee to deliberately avoid the useful and necessary distinction between the exercise of managerial powers and harassment. For example, a lethargic employee may consider certain work instructions to amount to harassment.[11] In *Maphanga v Department of Justice and Constitutional Development*[12], this Court had the following to say:

> 'The purpose of the [EEA] is to eliminate unfair discrimination... In law harassment refers to a person acting in a manner that causes the complainant to fear harm. Harm refers to any mental, psychological, physical or economic harm. Based on this definition, it cannot be said that if a superior issues a work instruction, such superior is acting in such a manner that will cause the junior to fear harm. It follows that based on his own testimony Maphanga was not harassed. All what his superior did, as he should in a work environment, was to issue an instruction. The fact that Maphanga ebulliently held a view that the instruction was unlawful does not morph the instruction into a harassment.' [Own emphasis]

[25] Thus, in my view, care must be exercised when complaints of work-related harassment are considered by a Court or forum. A Court must be alive to the idiosyncrasies and over-sensitivities of individual employees. Courts and dispute resolution *fora* with commendable distinction dealt with similar situations in cases of alleged constructive dismissals. A similar approach as adopted in cases of constructive dismissal is warranted in matters of this

---

[11] *Maphanga v Department of Justice and Constitutional Development* (*Maphanga*) [2023] ZALCJHB 69; [2023] 6 BLLR 530 (LC).
[12] *Maphanga* supra at para 6.

nature, particularly where arbitrariness is alleged as a ground. A feeling of being demeaned and or humiliated is one that is subjective in nature. A feeling that a work environment is intimidating or hostile is bound to be a subjective one. It is for that reason that the objectivity of the conduct is viewed from the subjective perspective of an employee. 64 years ago, the erudite Schreiner AJ had the following to say in *R v AMCA Services Ltd and another*[13] (*AMCA*):

> 'The first test to consider is that which is generally regarded as the most important for the purpose of deciding whether a person is a servant at common law, namely, whether the employer (using that word in a colourless sense) has the right to control, not only the end to be achieved by the other's labour and general lines to be followed, but the detailed manner in which the work is to be performed.' [Own emphasis]

[26] The sentiments expressed in *AMCA* received an imprimatur from my departed brother Webster J in *Pretorius v Minister van Handel en Nywerheid*[14] *(Pretorius).* In this matter, Mr. Pretorius, a public servant approached the High Court to seek an interdict against the Director-General of the Department of Trade and Industry. He claimed that the Director General and officials in the department were harassing and victimizing him by subjecting him to investigations and questioning in respect of a grievance he lodged against the department. Amongst the complaints raised by Pretorius were (a) leave application was turned down; (b) protest against participation in the instructions to raid; (c) failure to hold a disciplinary enquiry within one month of suspension; (d) failure to disclose the name of an investigation official; (e) annual leave of five days was refused; and (f) he was subjected to criminal investigations. Having considered each of the complaints, the learned Webster J dismissed the application with costs. Before reaching his conclusion and having placed reliance on *AMCA* and *Smit v Workmen's Compensation Commissioner*[15], Webster J stated the following:

---

[13] 1959 (4) SA 207 (A) at 212H-I
[14] [2005] JOL 14393 (T).
[15] 1979 (1) SA 51 (A).

> 'It is clear from the above that the services of the applicant are subject to supervision, direction, control and interference by the respondent. The applicant has no right to the relief he seeks.'[16]

[27] Strikingly similar to the *Pretorius* matter are some of the complaints raised by La Foy before me. I am in agreement with the sentiments expressed by Webster J. The Court of Appeal of the Kwazulu Natal Division sitting in Pietermaritzburg, in the matter of *Mnyandu v Padayachi (Mnyandu)*[17] had an occasion to consider the meaning of the word 'harassment' as employed in the PHA. In *Mnyandu*, the issue involved the sending of an email containing allegations which were not true. The Court of Appeal concluded that harassment must be repetitive, oppressive or overwhelmingly oppressive if it is a single act and must be unreasonable in nature. Moodley J, writing for the Appeal Court, reached the following findings, which felicitously resonate with this Court in the present matter:

> 'In my view the conduct of the appellant in sending the email may have been unreasonable, as she allowed her emotions to cloud her perceptions, but I am not persuaded that her conduct was objectively oppressive or had the gravity to constitute harassment.'[18]

[28] I fully agree that when considering the conduct complained of in a harassment situation, the test is one of objectiveness. The learned Raulinga J, sitting alone, had an occasion to consider the meaning of the word harassment as employed in the PHA in the matter of *Moos v Makgoba*[19] (*Moos*). In *Moos,* the conduct complained of was one of placing a bucket under the tap when the complainant was taking a bath. Raulinga J approved the view in *Mnyandu* to the effect that the test must be objective. The learned Raulinga J reached the following apt conclusion:

---

[16] *Pretorius supra* at p 26.
[17] [2016] ZAKZPHC 78; [2016] 4 All SA 110 (KZP).
[18] Ibid at para 71.
[19] [2022] JOL 54225 (GP).

> "Harm requires a more objective analysis as opposed to the subjective nature of "hurt". The respondent's conduct of placing a bucket under the tap may have hurt the appellant. That is, it may have upset or offended her, which is different from causing harm.[20]

[29] In full agreement with Raulinga J, this Court takes a view that La Foy may have been offended; unhappy or saddened by the actions of the Department officials as testified to by her, however applying the objective test and also considering that the actions occurred in a work environment, it cannot be said that La Foy was harassed within the meaning of unfair discrimination contemplated in the EEA.

[30] In this Court, my departed brother Steenkamp J, in the matter of *Shoprite Checkers Ltd v Samka and others*[21] *(Samka),* persuaded by *Aarons v University of Stellenbosch*[22] *(Aarons),* concluded that unfair discrimination was not shown. In *Aarons*, the learned Waglay J (as he then was) stated that an employee claiming harassment must do more than just make bald allegation; he or she must clearly set out why the harassment amounts to unfair discrimination. Sadly, La Foy did not do more. When asked by the Court as to why the department was subjecting her to the conduct she complained of, she, in retort, said "*I don't know*". Clearly, such is not enough from an employee staking harassment within the meaning of section 6 (3) of the EEA. As correctly held in *Aarons*, an employee must clearly set out in evidence why the harassment amounts to unfair discrimination. A conduct is arbitrary if it is based on random choice or personal whim, rather than any reason or system. Thus, this Court expected testimony to support a random choice or personal whim. Absent that, arbitrariness is not demonstrated. To simply state "*I do not know*" is not enough. Where a conduct complained of is supported by work-related reasons or system, one cannot speak of arbitrariness.

---

[20] Ibid at para 13.
[21] [2017] ZALCCT 64; [2018] 9 BLLR 922 (LC).
[22] [2003] 7 BLLR 704 (LC) at para 18.

[31] In any event, as it shall be demonstrated later in this judgment, the acts complained of are neither oppressive nor unreasonable. The position in South Africa is not dissimilar to the position in Canada. In *Toronto Transit Commission v Amalgamated Transit Union*[23], sole arbitrator Shime, dealing with a workplace harassment dispute defined abuse and harassment to include the improper use of power and departures from reasonable conduct. In another matter of *Amodeo v Craiglee Nursing Home Limited*[24], the chairperson of the Labour Relations Board (LRB), Mr Patrick Kelly, dealing with a workplace harassment dispute remarked as follows:

> '12. ... The workplace harassment provisions do not normally apply to the conduct of a manager that falls within his or her normal work function, even if in the course of carrying out that function a worker suffers unpleasant consequences.
>
> 13. In *Simcoe Country District School Board*[25]... a teacher complained, among other things, that one of his colleagues shouted at him in a meeting. The Board characterized that behaviour as a single act of rudeness that did not constitute workplace harassment. I find that the allegation that the Director of Care shouted at the applicant in the course of a private meeting with the applicant does not constitute a course of vexatious conduct or comment.
>
> 14 As for the written warning, I fail to see how that can possibly constitute a workplace harassment...
>
> 16 ...The worst that can be said of what happened is that Ms. Heinz made a blunt, unflattering assessment of the applicant's performance and demanded in no uncertain terms that she fulfil management's work expectations or risk discipline. Arguably, Ms. Heinz might have utilized greater tact and sensitivity. But as I have stated, the reality is that sometimes the exercise of management functions – which is what Ms. Heinz was engaging in – results in unpleasant consequences for

[23] 2004 CanLII 55086 (ON LA).
[24] 2012 CanLII 53919 (ON LRB).
[25] *Parsons v Simcoe County District School Board* 2012 CanLII 395 (ON LRB).

> workers. That does not necessarily translate into workplace harassment...' [Own emphasis]

[32] This Court shares the sentiments expressed in both Canadian cases. Objectively judged, the complaints raised by La Foy amount to unpleasant consequences of the exercise of management functions. Unpleasant as they may have been to La Foy, they do not cause any demonstrable harm for them to cumulatively amount to a harassment that amounts to an unfair discrimination. Having defined what harassment means, I now turn to the issue of *onus*.

The issue of onus

[33] In law, *onus* means the burden of proof which requires the accuser to prove the case against the accused. In *casu*, La Foy bore the burden to prove that Justice unfairly discriminated against her. For prohibition, La Foy places reliance on the ground of arbitrariness. Section 11 (2) of the EEA provides that if unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities that – (a) the conduct complained of is not rational; (b) the conduct complained of amounts to discrimination; and (c) the discrimination is unfair. Absent proof of any one of the above leads to the complainant failing in his or her claim. I must state, the burden placed on La Foy is undoubtedly an onerous and heavy one. As a point of departure, a behaviour is said to be irrational if it is not based on logical reasons or clear thinking. Differently put, it is conduct that is foolish, idiotic and downright stupid. It is a *prima facie* unreasonable conduct. As it shall later be demonstrated, the conducts complained of in *casu* are far from being foolish by a proverbial mile. This being the first hurdle to cross, it must follow that La Foy failed to discharge her statutory burden of proof. She could not prove on the preponderance of probabilities that any of the conducts complained of are foolish, idiotic or stupid.

[34] Assuming for now, which assumption this Court is not necessarily making in the ultimate end, that La Foy managed to cross the first hurdle, she still has to show that the conduct amounts to discrimination. Discrimination is an act of making distinctions. It is an unjust or prejudicial treatment of different categories of people. Yet again the evidence tendered before this Court is far from demonstrating discrimination. As indicated above, La Foy simply suffered from unpleasant consequences of the exercise of management function. In my view, La Foy comes second best on this leg. She conceded during her testimony that the issue of incapacitation was not facing her or her branch only.

[35] A further putative assumption being made that the second hurdle is crossed, La Foy still has to show that the discrimination is unfair. It is accepted that the notion of fairness is elastic and incapable of a specific definition. However, as pointed out, an employer exercises control and interference at the workplace. Later in this judgment, this Court shall consider each of the complaints raised by La Foy. For now, this Court takes a firm view that no element of unfairness has been demonstrated in this trial. It suffices to mention that inasmuch as the relationship between La Foy and the DM decayed over a period of time, such does not imply unfairness. On the version of La Foy, as demonstrated by the referral documents, the dispute that this Court must adjudicate upon, arose on 24 April 2017. She referred that dispute for conciliation, as required by section 10 (2) of the EEA, on 9 May 2017. Howbeit, this Court benignantly received testimony about incidents that took place in 2016, shortly after La Foy assumed employment with Justice. These incidents would as a matter of fact have fallen outside the prescribed six months' period. Nevertheless, on her own version, the dispute that was conciliated upon arose in April 2017. As an annexure to the referral form, La Foy vaguely listed acts complained of and deliberately failed to set out the dates of each incident. This Court must assume that such a palpable deliberate failure was aimed at bypassing the six-month legislated period. Had she disclosed the dates of each incident, she may have been compelled to show *good cause* as required by section 10 (3) of the EEA.

[36] Axiomatically, this Court should decline to exercise jurisdiction over incidents that were not properly conciliated upon as it appears to be the case in relation to incidents that arose 6 months before 9 May 2017. Howbeit, this Court takes a firm view that those incidents as testified to do not in any event amount to discrimination, let alone irrational or unfair conduct. Mr Woudstra SC, appearing for La Foy, despite an earlier ruling of this Court, attempted an argument that the conduct was ongoing and as such, there must be no cutoff date. Reliance was placed on the decision of the Labour Appeal Court (LAC) in *SA Broadcasting Corporation Ltd v Commission for Conciliation, Mediation and Arbitration and others*[26]. To my mind, this decision is not of assistance to La Foy's case. There, the LAC was dealing with the need to seek condonation. The LAC held that where the alleged discrimination is ongoing, condonation is not necessary as the alleged unfair labour practice, as it was then, had no end date. The learned Waglay ADJP, as he then was, concluded thus:[27]

> 'While an unfair labour practice/unfair discrimination may consist of a single act it may also be continuous, continuing or repetitive. For example, where an employer selects an employee on the basis of race to be awarded a once-off bonus this could possibly constitute a single act of unfair labour practice or unfair discrimination because like a dismissal the unfair labour practice commences and ends at a given time. But, where an employer decides to pay its employees who are similarly qualified with similar experience performing similar duties different wages based on race or any other arbitrary grounds then notwithstanding the fact that the employer implemented the differential on a particular date, the discrimination is continual and repetitive. The discrimination in the latter case has no **end date** and is therefore *ongoing* and will only terminate when the employer stops implementing the different wages. Each time the employer pays one of its employees more than the other he is evincing continued discrimination.' [Own emphasis]

[26] [2009] ZALAC 13; (2010) 31 ILJ 592 (LAC).
[27] Ibid at para 27.

[37] With considerable regret, I disagree with the submission that the alleged harassment in this case was a continuum. On La Foy's version, the harassment is constituted by various once-off acts on the part of Justice. Take for example the alleged demotion which happened when she was placed on a precautionary transfer. This Court fails to see how a demotion, once it has happened, it has no endpoint. This is more like saying a dismissal has no end date. Section 10 (2) of the EEA is perspicuous it refers to *six months after the act or omission.* Additionally, the refusal to be part of an international trip, revocation of leave, denial of resettlement benefits, being subjected to a 'forensic investigation', not being assessed for probation purposes and other acts are once-off incidents incapable of ongoing character. When one speaks of them one cannot say *they are happening* but one must say *they happened.* Accordingly, La Foy bore the overall *onus* to prove that the alleged acts, which fall within the legislated time period with regard to their happenings. As it shall be demonstrated, La Foy failed to discharge her onus to prove that the conducts were irrational, discriminatory in an unfair or pejorative manner and based on whimsical reasons.

The alleged acts or incidents of harassment considered,

[38] Before each of the acts or incidents are considered, it may be important to define what a cause of action means. The acts or incidents listed in the LRA Form 7.11 (Form), were repeatedly dubbed as acts of discrimination. The concept of cause of action was defined by Lord Esher, MR in *Read v Brown*[28] to be:

> 'Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is material to be proved to entitle a plaintiff to succeed in his claim.'

[28] (1888) 22 QBD 128 at 131.

[39] A cause of action can mean that particular act on the part of the defendant which gives the plaintiff his or her cause of complaint. Elsewhere the concept was seen as ordinarily used to describe the factual basis, the set of material facts that begets the plaintiff's legal right of action.[29]

[40] La Foy begot a legal right of action from the provisions of the EEA. The EEA, flowing from the Constitution of the Republic of South Africa, 1996, prohibits unfair discrimination. The right that La Foy has is that of not being unfairly discriminated against. Her complaint is and can only be that she should not be unfairly discriminated upon. In other words, a fact that La Foy must prove to obtain relief under the EEA is that she has been unfairly discriminated upon.

[41] Reverting to the definition of a cause of action, the prohibited grounds, in this instance, any arbitrary grounds, constitute a piece of evidence necessary to prove the cause of action – unfair discrimination. Put differently, in the absence of any of the grounds listed or unlisted differentiation lacks legal basis to constitute an actionable claim.[30] There can never be a legal claim of unfair discrimination if the grounds are not alleged to be any form of differentiation. Therefore, a ground on its own is not a separate and distinct cause of action. In this regard, the *facta probanda* is the unfair discrimination and the *facta probantia* is the alleged ground.

[42] In the Form, before listing the offending incidents, La Foy stated the following:

> 'The Department of Justice and Constitutional Development has made itself guilty of harassment on arbitrary grounds; victimization; abuse of power; and abuse of process by its continued conduct towards me.' [Own emphasis]

---

[29] See: *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) and *Duet and Magnum Financial Services CC (in liquidation) v Koster* [2010] ZASCA 34; [2010] 4 All SA 154 (SCA).
[30] See *Sethole and others v Dr Kenneth Kaunda District Municipality* [2017] ZALCJHB 484; [2018] 1 BLLR 74 (LC).

[43] Thus, the only actionable claim is that of harassment on arbitrary grounds. I shall now consider each of the listed acts complained of. In the penultimate paragraph of the Form, La Foy stated the following about the listed acts:

> 'The combined result of the department's actions and the manner and timing of the many notices and communications that I have been served, both formally and informally, the relative power and status of the parties who are behind the services of the various notices- have had the combined result of placing me under an enormous amount of pressure. The withholding of resources, withholding of benefits and the threats of disciplinary action, multiplication of charges and the unlawful threat of suspension amount to intimidation, victimization, harassment, abuse of process and gross abuse of power.'

(a) Items 1-6 of the Form cumulatively amounts to what may be termed lack of administrative support and resources allegation (Capacity issue).

[44] It became common cause before me that when La Foy joined the branch of constitutional development, the branch was, like many other branches in Justice, understaffed. It had a number of vacant positions. It also became common cause that in the financial year of 2016/17, the National Treasury had put in place some austerity measures. Such measures had an impact on the issue of human resources reward across the entire Department as well as other government departments. The DG testified at length that a committee tasked to review positions across the Department was put in place. La Foy herself wrote a motivation for resources in her branch. Given the financial constraints, the HRRC was tasked to only consider filing what was considered to be critical positions.

[45] La Foy complained that she did not have an office manager and a PA in her office. The uncontested evidence is that a resource was transferred to her office through the HRRC processes. It is also uncontested that La Foy herself assisted that resource to be transferred elsewhere. Accordingly, the Department cannot be said to have acted irrationally or in an oppressive

manner. The situation that occurred in the branch of La Foy was not dissimilar to the situation of other departments. The DG testified that his office was in need of the head of office but due to the HRRC processes, that position was not considered to be critical. That being the case, this Court fails to understand how the lack of resources and capacity could constitute harassment in the circumstances where a number of other branches suffered the same fate. There were genuine operational reasons why branches were denuded of a full staff complement as per the adopted staff establishment. That being so, it can never be said that the actions of the Department in response to austerity measures amounted to a whimsical act.

[46] The conclusion this Court reaches is that the conduct of Justice when objectively viewed does not amount to harassment within the meaning of section 6 (3) of the EEA. The cardinal question is what harm did La Foy suffer as a result? In the Court's view, none was shown to have been suffered. Properly considered, placing austerity measures is tantamount to a self-inflicted harm. A department functions optimally if it has resources sufficient to cater for its staff establishment. If there was any harm by not filling critical or non-critical posts, Justice, as opposed to La Foy and her branch, was inflicting harm onto itself. Granted, as a new employee of Justice, La Foy was eager and, understandably so, anxious to prove her worth to Justice. The lack of resources is arguably a source of irritation to any employee with such an anxiety and eagerness. However, such an irritation does not transmute into harassment in legal terms. Additionally, the act of being incapacitated, even if it could be viewed as harassment, which it is not, in the Court's view, it is not one that is arbitrary. It does not prejudice La Foy in a pejorative sense, nor does it impact on her dignity as a person. In *Ndudula and others v Metrorail – Prasa (Western Cape)*[31] it was held thus:

> 'The crux of the test for unfair discrimination is the impairment of human dignity or an adverse effect in a comparably similar manner, not the classification of the ground as listed or unlisted as is evident from the

[31] [2017] ZALCCT 12; [2017] 7 BLLR 706 (LC) at para 73.

quotation from *Harsken*. The constitutional distinction between listed and unlisted grounds affects only the burden of proof and nothing else...' [Own emphasis]

[47] With regard to the lack of capacity or resources conduct, there is no impairment of human dignity which adversely affected La Foy as a person in any comparable manner. For an act to be arbitrary and actionable, it must share commonalities with one or more of the grounds listed in section 6 (1) of the EEA. The Constitutional Court in *Hoffman v SA Airways*[32] concluded that the determining factor regarding the unfairness of discrimination is its impact on the person discriminated against. La Foy admitted that the limitations placed on the provision of resources were not aimed and directed at her as a person. Therefore, it is difficult for this Court to accept that the capacity issue impacted on her as a person or impaired her dignity. In a work environment, an employee who is deprived of resources to perform optimally, has a perfect defence should an employer question her performance. The worst that could have happened to La Foy is for her to face dismissal due to poor work performance. On her own version, when a performance assessment was conducted on her, she highlighted the issue of lack of resources. At no stage did she face allegations of poor performance.

[48] Mr Woudstra referred the Court to two LAC cases; namely; *Naidoo and others v Parliament of the Republic of SA*[33] and *Minister of Justice and Correctional Services and others v Ramaila and others*[34]. Both these cases confirmed that arbitrariness must be related to the impairment of fundamental human dignity in a comparably serious manner. As the Labour Court, on application of the *stare decisis* principle, I am bound by these two decisions. An attempt was made by Mr Woudstra to persuade this Court to depart from the principle established by these two cases. He sought to do so by placing reliance on two

[32] [2000] ZACC 17; 2001 (1) SA 1 (CC).
[33] [2020] ZALAC 38; (2020) 41 ILJ 1931 (LAC).
[34] [2020] ZALAC 41; (2021) 42 ILJ 339 (LAC).

scholarly articles.[35] This Court remains unpersuaded. The apogee of La Foy's submission is that since Justice has failed to provide her with support and assistance, which was necessary for her to discharge her functions, she has been harassed in a manner that constitutes unfair discrimination. With considerable regret, regard being had to the evidence delivered on the capacity issue, this Court crosses paths with such a submission.

(b) Failure to pay resettlement costs in terms of the applicable prescripts

[49] La Foy had included in her case before me a civil claim for resettlement costs. This civil claim was wisely jettisoned, at the commencement of the trial. Accordingly, this conduct shall not be considered in any detail whatsoever in this judgment. Suffice it to mention that it came short of harassment within the meaning of section 6 (3) of the EEA nevertheless. La Foy contends that failure to pay what she refers to as a benefit amounts to a hostile working environment within the meaning of clause 4.6.3 of the Code even if she did not receive the benefit. There is no merit in this contention. In the Court's view, La Foy is faced with two insurmountable quandaries in this part of her case. The first of which is that the failure to pay the said benefit occurred around November 2016. On her own version, the dispute subjected to conciliation arose on 24 April 2017. The second of which is that in terms of section 186 (2) (a) of the LRA, a dispute relating to provisions of benefits amounts to an unfair labour practice. In terms of section 191 (1) (b) (ii) of the LRA, such a dispute must be referred to conciliation within 90 days of the act or omission. Failure to pay a benefit is an unfair labour practice as opposed to an act of harassment. It cannot be said that failure to pay a benefit impacts on the dignity of an employee and has a negative impact on an employee's ability to work or personal well-being. If La Foy was aggrieved as she now claims to be, she had 90 days from November 2016 to refer a dispute and allege unfair labour practice. It does not accord to her to sit idle or adopt a supine approach

---

[35] Prof D du Toit, '*Discrimination on an Arbitrary Ground and the Right of Access to Justice*', (2021) 42 ILJ 1 and Kamalesh Newaj, '*Defining Discrimination on an Arbitrary Ground: A Discussion of Minister of Justice & Correctional Services & others v Ramaila & others (2021) 42 ILJ 339 (LAC)*', (2021) 42 ILJ 1405.

and hope to attempt a discrimination case at her leisure. Inasmuch as grammatically, harassment is wide to encapsulate what fits the definition of an unfair labour practice, it cannot be allowed for an employee to bypass the available legal remedies provided for in the LRA. This Court begrudgingly accepts that an employee may have two or more causes of action. An employee may choose to raise an unfair labour practice route and still remain with an unfair discrimination claim. In *casu*, La Foy did not engage in a choice exercise as it has happened in other instances[36]. She simply laid supine and surreptitiously, as it were, raised the complaint and alleged that it arose on 24 April 2017. Accordingly, this Court is not satisfied that La Foy was harassed in a manner contemplated in section 6 (3) of the EEA. Her claim on this front is bound to fail.

(c) Failure to pay the benefits of transferring employee as advised by the Public Services Commission (PSC).

[50] This conduct is linked to the one dealt with above. Similar sentiments are expressed in this regard. Additionally, it must be stated categorically that the role of the PSC is to, amongst others, investigate grievances of employees in the public service concerning official acts or omissions and recommend appropriate remedies. In an instance where a government department fails to accept and action the recommendation of the PSC, an employee, La Foy in this instance has, as an effective legal protection, the right not to be subjected to unfair labour practices (section 185 (b) of the LRA). Accordingly, a government department is not bound to accept the advice of the PSC to the point that the failure to accept a recommendation constitutes any form of actionable harassment. On this front too, La Foy must fail.

(d) Refusal to allow international travel.

---

[36] See *Ditsamai v Gauteng Shared Services Centre* (2009) 30 ILJ 2072 (LC).

[51] La Foy's case is predicated on four international trips (Gambia, Togo, Addis Ababa and Geneva). As an opening gambit, it is common cause that participation in international trips is not a guaranteed right of any employee and whether an official travels or not, it is the sole prerogative of the Minister. The process of initiating travel takes the form of the submission of memoranda. The processes related to the four international trips are well documented in so far as the reasons and purposes thereof. Accordingly, it is unnecessary to repeat all of that in this judgment.

[52] The apogee of La Foy's case is that the reasons advanced by the DG and or the DM in any instance of travel related to the four trips are unreasonable and irrational when they did not support her travel. Before any consideration may be given to rationality, the first hurdle to cross is whether unfair discrimination is involved or not. This Court firmly takes the view that failure to support a trip in the course of executing work-related functions cannot amount to a form of unfair discrimination. If the DG decides not to release a resource within a Department, he is exercising his functions as the head of the administration of Justice. Unfair discrimination is the prejudicial treatment of people. That being the case, it cannot be so that when a DG and or a DM does not recommend a travel, an employee is subjected to prejudicial treatment. Nevertheless, the decision maker, the Minister, is entitled to overrule any recommendation. La Foy herself had recommended that an official must not be part of the delegation because a department of women was represented. Surely she was not subjecting that employee to any form of harassment. The reasons she advanced for the recommendation to exclude that employee was operational and non-whimsical.

[53] In any event, this Court takes a view that the reasons advanced by the DG and the DM in not recommending the travel are all not whimsical. Whether La Foy agrees or disagrees with the reasons, it is neither here nor there. With regard to rationality, the Constitutional Court in *Law Society of South Africa and others v*

President of the Republic of South Africa and others[37] (*Law Society*). In a much more perspicuous and pronounced terms, said:

> 'The proposition in *Masetlha* might be seen as being at variance with the principle of procedural irrationality laid down in both *Albutt* and *Democratic Alliance*. But it is not so. Procedural fairness has to do with affording a party likely to be disadvantaged by the outcome the opportunity to be properly represented and fairly heard before an adverse decision is rendered... The latter [procedural irrationality] is about testing whether, or ensuring that there is a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power.'[38] [Own emphasis]

[54] The learned Justice O'Connor in *Baltimore Gas & Electric Co. v Natural Resources Defence Council Inc*[39], relying on *Vermont Yankee Nuclear Power Corp v Natural Resources Council Inc*[40] stated the following, which aptly explains the concept of rationality:

> 'Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute ... not simply because the court is unhappy with the results achieved...
>
> ...
>
> A reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most differential." [Own emphasis].

[55] The fact that La Foy is unhappy with the reasons advanced by the DM and the DG and that she bickers with them is palpable. When it comes to

---

[37] [2018] ZACC 51; 2019 (2) SA 30 (CC).
[38] Ibid at para 64.
[39] 462 U.S. 87 (1983) at 97 and 103.
[40] 435 U.S 518 (1978) at 558.

rationality, the question is not whether there is agreement or not but whether there is a rational connection with the purpose and power. Clearly, the DG as the head of administration is entitled to oppose any reduction of resources albeit for a limited purpose, where such deduction would jeopardize the optimal functioning of the administration under his control. Similarly, a political head of a department is entitled to raise concerns of service delivery to the people who put him in office. Such concerns are not whimsical at all.

[56] It is an incorrect submission to state that the DG and the DM refused La Foy travel to work-related trips. If anyone did, it was the Minister. No allegation was made and proven by La Foy that the refusal by the Minister constitutes actionable harassment. Accordingly, La Foy must fail on this front too.

(e) Cancellation and withholding of leave

[57] On this part of the case, La Foy laments on the issue of sick leave in April 2017 and revocation of leave before 3 April 2017. With regard to sick leave, the DG as head of administration was legally entitled to question and also not accept a sick certificate that does not fully justify the absence of an employee. One of the statutory financial duties of the DG, in his capacity as an accounting officer, is to avoid wasteful and irregular expenditure. In terms of section 22 (5) of the Basic Conditions of Employment Act (BCEA)[41] an employer is obligated to pay an employee on sick leave, however in terms of section 23 of the BCEA, that obligation is avoidable if an employee fails to produce a medical certificate stating that an employee was unable to work for the duration of absence on account of sickness or injury.

[58] Given the fact that it is an employee who would benefit from being paid even if he or she did not perform work due to alleged illness, this Court disagrees with a submission that the DG was duty bound to make follow ups over the authenticity of the *prima facie* questionable medical certificate. Therefore, in questioning and not accepting the medical certificate, the DG was performing

[41] Act 75 of 1997 as amended.

a managerial function and his actions do not amount to harassment within the meaning of the section.

[59] With regard to revocation of leave, section 20 (10) of the BCEA does provide that annual leave must be taken in accordance with an agreement or at the time determined by an employer. Where there are pressing operational matters, an employer may revoke, as it were, the taking of leave, as long as an employee does not forfeit those revoked days, which was the case with La Foy. In *Member of the Executive Council for Health, North West Province v SA Medical Association and another*[42], the Court confirmed that, in order to take leave, the permission and approval of an employer is required. Accordingly, where approval is not granted, it cannot be said that an employer is harassing an employee within the meaning of the implicated section. This Court disagrees with a submission that revocation of leave should be regarded as a form of discrimination. Accordingly, La Foy must fail on this front.

(f) Taking away work functions, excluding her from meetings and taking away her reportees for them to report to the DM.

[60] In the world of work, reporting is a formal and structured process. Interaction between co-workers or other officials cannot amount to reporting and it practically crisscrosses between the reporting lines. La Foy herself had interacted with the DM but she did not consider herself to be reporting to the DM. Both the DM and the DG disputed any assertion that certain employees reported to the DM. It became common cause that the hierarchy in Justice is, from the top down to the level of a chief director, as follows: Ministry to DG to DDGs and to chief directors. The practice in Justice has been and continues to be that the DM interacts with officials when he needs any information arising from the portfolio under his political leadership. One of the structured ingredients of reporting in the world of work is an agreement on key performance indicators (KPI) and assessment of those over a period. No

[42] [2021] ZALAC 38; (2022) 43 ILJ 134 (LAC).

evidence was led to indicate that DM had KPIs with the chief directors. DM testified that because he was no longer receiving accurate information from La Foy, he preferred to obtain information from the chief directors as he did before the appointment of La Foy. Such cannot constitute harassment. With regard to support from officials, DM testified that he shall not take away a senior resource to provide support at meetings. The reasoning of the DM is unassailable on any legal basis. On this front too, La Foy must fail.

(g) Bombarding her with processes.

[61] One of the elements of control over an employee is the right of an employer to discipline an employee. All the steps that were taken by the DG to deal with discipline are justified. As and when an act of misconduct arises, an employer is obligated to take prompt and appropriate steps. In order to create a storm out of a teacup, La Foy over-sensationalized the fact that incidents following each other were dealt with by the DG as and when they arose. There is nothing to ride home about that disciplinary incidents followed each other for a six-week period. In terms of section 186 (2) (b) of the LRA, it is unfair labour practice to be subjected to any unfair disciplinary action short of dismissal. As indicated earlier, La Foy had a right not to be subjected to unfair labour practice. If this 'bombardment' constituted any form of an unfair labour practice, La Foy was well protected by the LRA.

[62] It does not accord for La Foy to simply ignore the protection and the remedies provided for in the LRA and conveniently choose to allege harassment. That which she regards as bombardment was aimed at protecting her interests as an employee. Rules of natural justice – *audi alteram partem* – require hearing the other side before an adverse finding is made. This Court disagrees with a submission that dealing with discipline, which La Foy termed bombardment, created a hostile and intimidating working environment. The DG was exercising managerial functions, as such no harassment within the meaning of the section occurred in this regard. Similarly, La Foy must fail on this one.

(h) Witch hunt investigations

[63] Investigation of any form of allegations is the order of the day in the world of work. Whether an investigation is dubbed "forensic" or misconduct investigation, it is of no moment. A forensic investigation is a practice of legally establishing evidence and facts for presentation at any forum. The term is applied to nearly all investigations. Most people associate forensics with crime scene investigations. La Foy again creates a storm in a teacup and refers to the Nel investigation into allegations of misconduct as a "massive" forensic investigation. Regard being had to what the DG requested the unit of Nel to do, it cannot be said that Nel conducted a massive forensic investigation. His report is labelled to be one that investigated allegations of misconduct. The fact that Nel interviewed La Foy in the presence of a number of people is of no moment. The fact that La Foy was ultimately cleared of some of the allegations by Advocate Moroka SC is also of no moment with regard to the alleged harassment. Similarly, the fact that Justice attempted a costly review cannot cause any humiliation or harassment. The conclusion this Court reaches is that this bombardment allegation is nothing but an over-sensationalized exercise by La Foy in order to create smoke and mirrors on the harassment issue. Equally, La Foy must fail on this front.

(i) Transfer, demotion and probation

[64] Issues relating to probation and demotion amount to an unfair labour practice in terms of section 186 (2) of the LRA. Issues around these allegations arose in the exercise of managerial powers. The DG was at some point faced with a challenge where nine officials lodged grievances against La Foy. In order to exercise managerial control over the challenge the DG applying his managerial skills opted to invoke the provisions of the SMS Handbook in order to afford La Foy an opportunity to state her position. The fact that he called into aid the provisions of the SMS Handbook into a situation that is dissimilar is of no moment. What remains is that La Foy was afforded an opportunity to deal with what had surfaced. Indisputably, the DG adopted a

practical approach to the challenge he faced as a manager. He had the option to transfer all nine employees out of the already limping branch or transfer La Foy to another branch. La Foy herself at some point suggested a transfer when faced with challenges.

[65] La Foy considered reporting to an LP10 level employee as a demotion. Even if this Court were to consider a transfer as a demotion, it is not one without operational justification. The justification is that the DG considered and rejected, as it were, an option of removing nine officials out of an already incapacitated branch. That option would not have yielded acceptable administrative advantages. Nevertheless, if La Foy was aggrieved by the alleged demotion, she was armoured by the LRA. As to why she did not protect her rights in that regard, it remains enigmatic.

(j) The Clark report and requests for documentation.

[66] This is the most startling form of harassment alleged by La Foy. Clark was tasked to investigate allegations against La Foy. Nine of her juniors were aggrieved by her alleged conduct. Clark was tasked to establish the veracity of the allegations by the nine juniors. The fact that La Foy was not provided with copies of the grievances does not mean harassment in any shape or form. It is, with respect to La Foy, preposterous to the extreme to suggest that this refusal impaired her dignity as a person.

[67] It is of course concerning to this Court that this complaint was not listed as one of the acts of harassment referred to the CCMA for conciliation. It must be so that this act constitutes an alleged act of harassment which was not subjected to the conciliation and or mediatory process. This Court lacks jurisdiction over a dispute that has not been subjected to conciliation. Inasmuch as harassment is a form of unfair discrimination, where acts that constitutes the alleged harassment are not subjected to a compulsory conciliatory process, this Court lacks jurisdiction over such acts. Harassment pegged on this act must fail.

(k) Failure to consider grievances

[68] La Foy lodged about four grievances. On her version, all these grievances were ignored by Justice. La Foy considers this inattention to amount to harassment. This is perplexing, in the circumstances where the Grievance Rules in the Public Service allow for a further escalation of a grievance. Yet again, this act of harassment was not subjected to the compulsory conciliatory process. It has not been listed by La Foy in the referral documents.

Conclusions

[69] Key ingredients for legislation aimed at eliminating workplace harassment are the right to dignity, equality and fair labour practices. Thus, harassment must be an act that threatens all or one of these key ingredients. Managerial functions generally do not threaten dignity, equality and fair labour practices. Having considered the complaints of La Foy cumulatively and objectively as fully discussed earlier in this judgment, this Court fails to observe any harassment as legally defined. It is indeed so that the alleged conduct ought to be assessed objectively from the perspective of an employee who alleges harassment. The primary focus of the inquiry as to whether there has been harassment, is on the impact of the conduct on the employee. The employee in this instance should be a *bonis pater familias* (reasonable person). Where a hostile work environment is alleged, key is the impact on the dignity of an employee as a person. This Court has already acknowledged that allegations and counter-allegations between the DM and La Foy led to the perspicuous decay of the relationship between them. However, this indisputable decay does not, in my view, transmute into harassment. The DM gave his reasons why he no longer wished to work with La Foy. In the present proceedings, it is not the function of this Court to inquire into the reasons provided by the DM. There was no contractual relationship between the DM and La Foy at the relevant period. Put differently, La Foy could perform her contractual functions

optimally without any relationship with the DM or his involvement. By all accounts, La Foy has failed to establish the existence of unfair discrimination and her claim falls to be dismissed.

[70] In the results, the following order is made:

Order

1. The claim for unfair discrimination is dismissed.
2. There is no order as to costs.

GN Moshoana
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr HvR Woudstra SC
Instructed by:	Maphalla Mokate Inc, Garsfontein.
For the Respondent:	Mr M Gwala SC with him Ms M Lekoane.
Instructed by:	State Attorney, Pretoria.