



Reportable

REPUBLIC OF SOUTH AFRICA

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

Case number: JS 323B/09

In the matter between:

MAKOTI, MMATSHWANA EMMA

Applicant

and

JESUIT REFUGEE SERVICE SOUTH AFRICA

Respondent

JUDGMENT

**HEAD NOTES : (TRIAL-SEXUAL HARASSMENT-AUTOMATICALLY
UNFAIR DISMISSAL-DAMAGES UNDER EEA - DELAY IN REPORTING
HARASSMENT)**

LAGRANGE J

Introduction

^{1]} The applicant has referred a claim that she was dismissed by the respondent in December 2008 on account of not acceding to the alleged sexual advances of the respondent's national director at the time, a Mr G Shivatu. She claims that her dismissal was automatically unfair, or alternatively simply procedurally and substantively unfair. She further claims to have suffered unfair discrimination in terms of section 50 (1) (d) and (e) of the Employment Equity Act as a result of being subjected to those sexual advances.

^{2]} In respect of her alternative claims of unfair dismissal she seeks compensation, and in respect of the unfair discrimination claim seeks damages in the amount of R 150,000-00. At the time of her dismissal it is common cause that her gross monthly remuneration was R 10,051-40.

^{3]} The applicant herself gave evidence and also called a former colleague, Ms F Modise, another social worker who worked with the applicant in the respondent's Pretoria office between

July 2007 and November 2008. The respondent called Mr T Maphosa, who had been a project director based in its Johannesburg office. It also called Ms J M Lesisa who had been appointed as a project director in the respondent's Pretoria office in September 2008. The alleged perpetrator of the initial acts of sexual harassment was the former national director of the respondent who was appointed to the position in August 2007, Mr G Shivatu. By the time this matter was heard he had resigned under a cloud for issues unrelated to this matter and Lesisa said it had been unable to trace him for the purposes of obtaining his testimony.

- 4] The applicant accepted the onus of commencing to lead evidence, which was necessary because the respondent denied that the applicant's termination of services in December 2008 amounted to a dismissal, but merely the non-renewal of her contract. The onus of proving her dismissal lay with the applicant in terms of section 192(1) of the LRA. Secondly, the applicant bore the evidentiary burden of establishing a *prima facie* case of automatically unfair dismissal relating to sexual harassment under the LRA, and for her claim of unfair discrimination under the EEA concerning the direct acts of sexual harassment in the form of Shivatu's alleged unwanted sexual advances.

Synopsis of Evidence

- 5] Like other employees, the applicant had always been employed on an annual fixed term contract ending in December each year, since she started working for the respondent as a social worker in April 2004. The parties agree that because the respondent is a non-profit

organisation dependent on donor funding, which is provided annually, this is a factor which impacted on the decision by the respondent to renew employees' fixed term contracts. The respondent's major funder is the United Nations High Commissioner for Refugees (the 'UNHCR'), and it met with representatives of the respondent during the second half of each year to discuss budgets for approval for the following year.

- 6] The applicant's work as a social worker involved her having to assess cases of unaccompanied minors who came across the border, placing them with families or in a shelter and assessing and distributing grants for adults. She also attended to the needs of other refugees under the auspices of the UNHCR.

The allegations of unwanted sexual advances

- 7] The applicant testified to acts of sexual harassment which she claimed to have suffered at the hands of the former director, Shvatu, in 2007 and 2008. In particular, she related four specific episodes. At the time, the applicant was still working as a social worker but since August 2007, had also been performing the duties of a project director in the respondent's Pretoria office, in an acting capacity. The applicant said that Shvatu's approaches started in October 2007.
- 8] The first occurrence took place when she had gone to discuss something with Shvatu after a finance meeting. He asked her out for dinner, but she said she had to go out and asked him what her husband would think if she went out for dinner with him. She went to fetch her bag which was lying on a table in

his office and it was then that he first tried to kiss her. She pushed him away, grabbed her bag and left the office. She described the experience as 'very horrible' and it made her very uncomfortable.

9] The next day, she had to take cheque authorisation documents to him and he addressed her by her nickname, saying, "You know Nonke what I want". She took this as a clear reference to his attempt at intimacy on the previous evening. He also made another remark alluding to his supposed attractiveness to women. She told him that she had been married for 10 years and had a daughter. She thought she could stand up for herself and whenever he made similar remarks she would answer back directly. She felt that she made it clear she was not interested in him and that she had the situation under control.

10] The next distinct recollection the applicant related concerned events at the staff Christmas party at the end of 2007, which took place at Hartebeespoort. When they were leaving the venue Shivatu said he was drunk and therefore could not drive the respondent's vehicle. She replied that as long as he could walk he could drive. She then told him she was going home and went to her car. He left in his car but when she exited the venue he tried to stop her. He approached her and asked her to give him a hug. She wanted to escape the situation and drove off going through a red traffic light in the course of her flight from her harasser.

11] The third instance of direct harassment the applicant mentioned took place early in 2008. She had to go to Kalafong hospital to see a Somali refugee who had been

stabbed at the time of xenophobic attacks which were taking place in the country. Shivatu went with her and on the way told her about an alleged former girlfriend of his, who was now married and who came back to him “for more” because he was like a “tiger in bed”. He also told her about a new project that was to be opened in Limpopo and asked her if she would be interested in running it. The post would have been a promotion for her, but she told him that she couldn't leave her family to work in Limpopo province. She believed this was an attempt on his part to win her affection.

12]The last incident she recounted also occurred when she had occasion to go to his office to ask him to sign various financial documents. He told her that she “had an effect on him” and that she “turned him on”. While he made these utterances he emphasised his remarks by tugging the elastic of his underpants and releasing it with a snapping sound. She responded sharply and firmly saying that was “too bad” and that he must not think that she was a “toilet for him to dump his filth in”. She also told him that her husband knew about his advances.

13]This last remark obviously surprised him. From then on, Shivatu became distinctly offhand towards the applicant and would not greet her. He no longer held meetings with her either. In one act of pettiness he instructed her, through another staff member, to remove her car from her usual parking place and to park it underground. The applicant attributed his change in attitude to the fact that previously he never thought she would tell her husband about his behaviour.

14] His spiteful attitude towards her persisted. Even though she was acting as a project director in Pretoria he did not advise her when the permanent post was advertised. She only heard about it indirectly when she was sent a copy of the advertisement by someone working at UNHRC. She sent an application for the post to head office and Shivatu queried why she had sent it there. He told her that he would “show her” because he would draw up the shortlist of suitable candidates. She was not shortlisted for the post despite being interviewed. When she asked for reasons for being turned down for the post, she never got any response. All she got was a letter in July 2008 advising her that her application was unsuccessful.

15] Although other persons including Sister V Hasson and Maphosa had formed part of the interviewing panel, the applicant believed that Shivatu had a decisive influence on the final choice. The person appointed to the position was Ms J Lesisa, an outside candidate.

16] The applicant never reported these incidents to the respondent when they occurred, though she testified that she did recount the experiences to her colleague Modise. They laughed about it because Shivatu’s ludicrous offensive behaviour was at odds with the image of himself he liked to present. She also said she had mentioned Shivatu’s sexual harassment to Maphosa at a meeting in the Pretoria offices. After Shivatu’s advances ceased following the last incident, the applicant just focused on her work and believed she had dealt with and resolved the problem in her own way, hence she never reported it at the time. This changed when she was told that her contract would not be renewed.

The non-renewal of the applicant's contract

17] The gist of the applicant's evidence was that the normal procedure for the renewal of contracts was that the respondent would ask employees to re-apply for their posts for the following year some time around October the preceding year. She was also told at the time she was employed that the renewal of contracts was dependent on the availability of donor funding. Apart from this, the applicant herself participated in drawing up budget proposals which were discussed with the UNHCR, but this did not happen in 2008 because Lesisa attended the meeting with Shivatu.

18] The first time the applicant heard that her contract would not be renewed for 2009 was when she was summonsed to a meeting with Shivatu and Lesisa on 11 December 2007. She was told by them that her contract would not be renewed the following year. When she asked for reasons she was told that she was incompetent, insubordinate and not compassionate. She asked for this to be put in writing so that she could study it further.

19] After the meeting she was given a letter confirming that she had been advised that her contract would not be renewed at the end of the month and that the reason was as a result of her 'continued poor performance'. Attached to the letter was a termination agreement in terms of which she was offered the opportunity to resign by the following day. The letter was headed "without prejudice", as was the applicant's reply, in which she characterised the non-renewal of the contract as an unfair labour practice and an act of constructive dismissal.

20] Although the respondent raised an objection in its pleadings that its letter was privileged, it did not persist with the objection when the letters were referred to in evidence at trial. In any event, it is very doubtful at that early stage of events, that the mere invocation of the phrase was sufficient to cloak the correspondence with the privileged status of communications without prejudice.¹ It would be difficult to seriously contend that the parties were in the process of settling a dispute at that time.

21] The applicant also disputed the allegation of poor performance. It must also be mentioned that the applicant said that she had merely been told about her 'poor performance' in the meeting and the word 'continued' had not been used to describe it. She pointed out that Lesisa had barely been three months in the organisation and had never come to her office. She questioned how Lesisa could have reached conclusions about her performance record, noting also that Lesisa was not qualified as a social worker. She suggested that, as such, Lesisa was not able to assess her performance anyway, which Lesisa disputed.

22] On 12 December 2008, the respondent advised the applicant

¹ In this regard see **Jili v South African Eagle Insurance Co Ltd 1995 (3) SA 269 (N)**, per Combrinck J at 275B, also cited with approval in **Lynn & Main Inc V Naidoo and Another 2006 (1) SA 59 (N)** at 65,[22], viz:

"No conclusive legal significance attaches to the phrase 'without prejudice'. The mere fact that a communication carries that phrase does not per se confer upon it the privilege against disclosure, for example where there exists no dispute between the parties or it does not form part of a genuine attempt at settlement (Merry v Machin 1926 NPD 236; Schmidt Bewysreg 2nd ed at 552-3); nor is a communication unadorned by that phrase always admissible in evidence, for it will be protected from disclosure if it forms part of settlement negotiations (Gcabashe v Nene 1975 (3) SA 912 (D) at 914E-G, and see Cross on Evidence 5th ed at 300)."

in writing to attend a meeting with the respondent with her lawyer at a hotel in Pretoria at 10h00 on 15 December 2008. On the morning the meeting was due to take place, the applicant sent an e-mail to the respondent's attorneys asking for the agenda of the meeting and advised that her attorney would not be able to attend owing to his other commitments that day. She requested the respondent to contact him for further arrangements. On the face of the correspondence, it appears that the respondent's attorneys did try to do so but were unable to make contact with the applicant's erstwhile attorney because the contact details they were given were incorrect.

23] Be that as it may, at approximately 17h00 on 15 December the respondent's attorney sent another letter re-scheduling the meeting for 08h30 on 17 December 2007. In that letter, the respondent's attorneys stated:

"Kindly further note that the purpose of the meeting is to formally discuss the renewal of your fixed term employment contract. Our instructions are that your performance has been of such a poor standard that our client does not wish to renew the contract. To this end, you will be given an opportunity to discuss the matter and to advance reasons as to why our client should consider giving you a further fixed term contract."

24] On 15 December, the applicant also decided to raise with senior management of the respondent what she believed lay behind the non-renewal of her contract allegedly for continued poor performance. She wrote to Sister V Hasson, advising her that she had been informed her contract would not be

renewed for the reason given and that she had been asked to resign. She then went on to say:

"I wish to inform you that the country director, Shivatu made sexual advances towards me which I reject it, this happened when I was the acting project director. My refusal to heed for the sexual favours resulted in me being victimised. This strained the working relationship between Shivatu and Me. I believe this caused me not to get the project director's post and subsequently my job. Thabile (Johannesburg project director) and other social workers know about this issue."

This is sexual harassment and cannot be tolerated in the workplace. This is the reason I do not believe that the nonrenewal of my contract is based on poor performance but the lack of sexual favours."

(sic)

25] In conclusion, the applicant appealed to Hasson to intervene in the matter. She received a reply from Hasson the following day. Hasson advised the applicant that she was on leave in the USA and would only be returning to Johannesburg on 19 January 2009. She promised however to refer her request to Sister J Whitaker. She suggested that the applicant should not return to the office after the holidays but rather meet with Whitaker as soon as possible.

26] When questioned under cross-examination as to why she only raised the allegations of sexual harassment at this stage, the applicant responded that until then her very employment

had not been threatened. However, she conceded that the respondent's code of conduct made it clear that sexual harassment towards fellow staff members was regarded as dismissible misconduct and that acts of sexual abuse by a fellow employee had to be reported in terms of the code. It was put to the applicant that her claim of sexual harassment was improbable given the fact that she failed to report any of the incidents, despite a clear policy prohibiting such conduct and an obligation on her to do so. In answer she confirmed her earlier testimony that she thought that if Shivatu no longer bothered her she could continue working. She said she never anticipated what happened subsequently.

27] On 17 December 2008, the applicant's erstwhile attorney re-entered the picture and responded to the employer's correspondence, proposing *inter alia* that the meeting scheduled by the respondent's attorney should take place on the 12th and 13th or 14th of January 2009 instead. The letter also demanded the renewal of the applicant's contract and disputed the alleged reason for its nonrenewal. In a patronisingly sarcastic reply on the same day, the respondent's attorney made it clear that he could only meet the applicant's attorney in March and that the question of the renewal of the applicant's contract would not be a topic of discussion then. The letter also called upon the applicant to provide reasons by 18 December 2008 why her contract should be renewed.

28] On 19 December 2008, the applicant was given a letter issued by the respondent itself, the introductory paragraph of which read reads:

"Further to our meeting dated 11 December 2008, including correspondence between us and you on between our attorney and your attorney regarding renewal of your fixed term contract. We regretfully confirm that your employment with us is terminated with effect from 19 December 2008."

(sic)

29] The letter noted that the applicant did not avail himself of opportunity to meet to discuss the renewal of the contract nor had she provided any reasons why it should be renewed. The letter then provided some details of her alleged poor performance, a failure to maintain professional standards of behaviour and insubordination. In short, the complaint was that: the applicant had been verbally warned on three occasions about her poor performance in relation to her service delivery; she asked police to remove clients from the premises in April 2008 instead of assisting them; she failed to report for work on time on 4, 10, 13 and 17 March 2008, which was part of a trend until August; she declined to sign the attendance register from September to December 2008; she failed to report for work on 16 December without a valid reason and her timekeeping was poor despite discussions and complaints from management. Her failure to maintain professional standards of behaviour was based on a claim that she had not "bought into" the "core values" of the respondent nor had she displayed a professional standard of behaviour. No factual details of this complaint were provided. The allegation of insubordination appeared to be based on a statement that she told Lesisa she would not come to work whether or not Lesisa authorised her leave of absence or not.

The letter was signed by Shivatu and co-signed by Lesisa.

30] The applicant denied that any of these details were discussed in the meeting on 11 December 2008. No further evidence in support of any of these claims was put to the applicant under cross examination, apart from the issue of whether or not she was supposed to be at work on 16 December 2008. The applicant pointed out that none of the alleged misconduct before September 2008 could have been within Lesisa's knowledge as she did not work for the respondent until September 2008. She specifically denied that any of these issues have been raised with at the time the alleged under-performance occurred, and was emphatic that her performance had not been an issue until it was first raised with her at the meeting of 11 December 2008. When Lesisa gave evidence she agreed that she was unable to comment on any of the allegations prior to 1 September 2008. Her own recollection of alleged instances of poor performance after that date was vague at best. Lesisa could not recall when the applicant had allegedly taken leave contrary to her refusal to grant her leave, but said that she thought it had been for one day. She also testified that the applicant's alleged poor attendance had been discussed with her on several occasions and when the applicant left work early she never made arrangements with herself beforehand. Apart from the vagueness of Lesisa's account, little effort was made to put this version of her alleged poor performance and insubordination to the applicant during her cross-examination.

31] Regarding the timing of the decision not to renew the contract, Lesisa conceded more than once under cross-examination that the decision not to renew the applicant's

contract had been taken by 11 December 2008. She also agreed that the respondent had not followed a proper procedure "in the true sense of the word" in the way it had dealt with the applicant's alleged poor performance. Although the respondent had spoken of the applicant advancing reasons why her contract should be renewed, Lesisa agreed that the subject matter of any meeting would have dealt with the issue of poor performance and not the renewal of the contract as such.

32] Even though Lesisa stated in her evidence in chief that the applicant's poor performance had been discussed in the meeting on 11 December 2008, she agreed that the information on which the allegation of poor performance was based had still not been conveyed before the meeting which the respondent had tried to schedule on 15 December 2008. Further, Lesisa eventually conceded that the opportunity afforded to the applicant to be heard was only offered after the decision not to renew her contract had already been taken by 11 December 2008.

33] While acknowledging the importance of Shivatu's input on the claims of poor performance prior to her appointment, Lesisa claimed that she made her own assessment of the applicant's performance and was not reliant on his views in concluding that the applicant's contract should not be renewed.

34] The respondent claimed the applicant never provided any reasons for the renewal of her contract, but this claim is not accurate. In her correspondence in December 2008, the applicant contended that there was no basis for making allegations of poor performance. She emphasised that she

had worked under two project co-ordinators previously without any criticism of her performance being levelled against her. There was also no standard to which she had previously been referred as the basis for measuring her performance.

35] In the letter from her attorney on 17 December 2008, it was also mentioned that: the applicant's contract had been renewed on four previous occasions without any complaints about her performance; the issue of her performance was only raised with her at the time that the contract was about to be renewed; there was never any assessment of her performance before previous renewals, and no support had been offered to allow her to improve on the areas of alleged poor performance.

36] The applicant's colleague, Modise could not claim any direct knowledge of the alleged incidents of sexual harassment related to her by the applicant. The gist of her evidence was that the applicant had told her that Shivatu wanted to sleep with her and they had laughed about the way he was performing in the office when he was supposed to be a leader. Under cross-examination it was suggested to her that her recollection of what Shivatu allegedly said to the applicant was at odds with the applicant's own version. However, from her reply it was clear that Modise was drawing an inference about Shivatu's intentions from what the applicant had told her. She also recounted the episode of Shivatu tugging at his pants to demonstrate his supposed potency. Although she said that she was told of many instances of sexual harassment by the applicant, when pressed under cross-examination she recalled hearing of at least two instances of the director's behaviour towards the end of 2007 and at least

two occasions in 2008. Her recollection broadly accords with the four specific incidents highlighted by the applicant in her testimony.

37] Maphosa was reluctant to confirm that he had been advised by the applicant of Shivatu's sexual advances, but did not deny that she might have mentioned it. Nevertheless, he insisted that if she had raised the issue in the form of a formal complaint he would definitely have taken it up and would have remembered it.

38] Maphosa agreed that he was part of the panel which had interviewed the applicant for the project director's post, but said that he had not taken part in the decision to appoint Lesisa. What he did say was that there were conflicts in the Pretoria office and the regional office wanted to appoint a new person, though none of this had been put to the applicant.

Analysis

Was the applicant dismissed?

39] In the cross-examination of the applicant and Lesisa, much was made of the significance to be attached to the wording of the respondent's letters of 11 and 19 December 2008 in deciding whether the applicant was effectively dismissed prior to the expiry of her contract or not. There was sufficient evidence to have concluded that the respondent's letter of 19 December 2008 could only have meant that the applicant's services were being terminated immediately, but the applicant did not persist in claiming that her services had been terminated before the expiry of her contract at the end of

December 2008. Instead, Mr Voyi, who represented the applicant, argued that there was sufficient evidence to conclude that she had a reasonable expectation that her contract would be renewed in 2009, and that the failure to do so in those circumstances amounted to a dismissal in terms of section 186 (1) (b) of the LRA.

4.0] I am inclined to agree. On four previous occasions her contract had been renewed without any evidence of any performance assessment being conducted as a pre-requisite for a renewal. Provided there was a proper motivation for the continuation of the post, and if funding was available, then incumbents could reasonably expect they would be employed for another year. It is true that the practice of the existing employees applying for the renewal of their contracts at the end of each year was not followed without exception before 2008, but there was nothing that would have alerted a reasonable person in the position of the applicant that there was even a possibility that her contract would not be renewed for any reason, let alone her alleged poor performance.

4.1] Although Lesisa testified that the respondent had not replaced anyone in the applicant's position after she left, the possibility that her post was not required would not have been obvious to anyone in the applicant's position towards the end of 2008. She had testified that she had already motivated a budget for her project for the following year. No feedback was provided by the respondent suggesting it was based on an incorrect premise about staffing requirements for 2009. The applicant could also not have anticipated that her contract might not be renewed by reason of her alleged poor performance. If there had been poor performance of the kind

described in the respondent's letter of 19 December 2011, there is every reason to suppose that it would have been raised with the applicant soon after the supposed incidents occurred. Lesisa could not offer reasonable explanation for the delay in raising the issues, though she made vague claims that there had been previous discussions with the applicant about her performance. Moreover, no evidence was tendered to suggest that the work performed by the applicant was no longer required. The two social work posts in the Pretoria office advertised by the respondent in January 2009 are also difficult to dissociate from the fact that both the applicant and Ms Modise's positions at that office were vacant at the end of 2008, and the broad job description in the advertisement would not have been at odds with the applicant's job functions. I do not believe it is coincidental that the advertisement called for applicants who could start immediately. The inference to be drawn from this is that both the need for the job the applicant performed still existed and the funding was available.

4.2] In the circumstances, I am satisfied that there is sufficient evidence to conclude, on a balance of probabilities, that the applicant had more than a reasonable basis for believing that her contract would be renewed as it was in previous years. As such I am satisfied that the failure to do so amounted to a dismissal within the meaning of section 186 (1)(b) of the LRA.

Was the applicant's dismissal automatically unfair?

4.3] Essentially what must be determined here is firstly whether the respondent's account of the alleged sexual advances of the national director should be believed or not. If it should be

believed, the next question is whether the applicant's failure to respond favourably to those advances was the proximate cause of her dismissal.

4.4] The applicant's testimony of the specific acts of sexually aggressive behaviour of the director aimed at her was relatively detailed, plausible and could not be directly contradicted by the respondent. Understandably, the respondent sought to suggest that her account ought not to be believed because she never raised any grievance about it at the time. It is true, that the applicant's failure to make an issue of a deeply felt grievance at the time when it was suffered calls for a plausible explanation, which must be carefully assessed.

4.5] On the evidence I am satisfied that she has provided one. Firstly, it is clear from the evidence that on all of the occasions when the director made his advances on her she successfully resisted him. Her attitude was that if she remained firm and unyielding he would eventually give up. It is true that he was not easily deterred, despite her obvious hostility and his failure to overcome it. But eventually, apparently because he was put off by the knowledge that the applicant had informed her husband about his behaviour, he did stop harassing her. His behaviour then changed from attempting to win her over to shunning her.

4.6] Moreover, even though Modise had no direct knowledge of what transpired between applicant and the director, I am satisfied that the applicant had told her of his behaviour around the time when the applicant had said it took place. Whatever other corroboratory value Modise's testimony might

have, it does tend to support the applicant's version that the events she related were not something she concocted in desperation to save her livelihood when it was threatened at a later stage. Further, even though Maphosa equivocated about whether or not he would have remembered a formal complaint made to him by the applicant as opposed to merely being told informally about the director's antics, he would not go so far as to say that the applicant could not have related the issue to him.

4.7] Another woman in the applicant's position who was less self assured than the applicant might have sought the intervention of a third party sooner, but the applicant not unreasonably believed that she was strong enough to deal with the situation herself. However, she miscalculated in believing that, once the acts of direct harassment had ceased, the matter would end there.

Was the reason for the applicant's dismissal her failure to succumb to the director's sexual advances?

4.8] What is clear from the evidence is that there was a sea change in the director's demeanour towards the applicant once he accepted his campaign of sexual conquest had come to naught. From being an object of desire she became an object of contempt in his eyes. There was the direct evidence that he stopped communicating with the applicant. Modise also felt that her association with the applicant led to a deterioration in her working relationship with the director.

4.9] The applicant was occupying the post of a project director in an acting role, yet when the post was advertised she only

learnt of this fact from an external source. The failure of Shivatu to notify her of this is difficult to construe in any other way than an attempt to minimise the prospect of her applying for the post. His comments to her about his role in short listing candidates also indicated his hostility towards her advancement in the organisation. The director was also the principal signatory on the letter confirming the non-renewal of her contract mainly on grounds of poor performance much of which only he could have verified. It was suggested to the applicant in cross-examination that if he had wished to get rid of her because she had rebuffed him, her contract would not have been renewed for 2008. However, this is easily explained when one takes into account the fact that he had not yet given up his sexual ambitions by the end of 2007: it was only in 2008 that he accepted defeat.

50] It seems quite plausible, given the director's conduct described above, that he was capable of vindictive action against the applicant. Lastly, the fact that the issue of the applicant's alleged poor performance was only raised at the eleventh hour before the contract fell due for renewal, at a point when there was little the applicant could have done to rectify any genuine performance shortfalls, suggests that an element of bad faith underlay the ostensible reason for her dismissal. This inference is strengthened when one considers how long it took for the respondent to articulate in writing its alleged complaints about the applicant's performance.

51] The respondent did not make any concerted effort in these proceedings to substantiate the allegations of poor performance to demonstrate it had a legitimate reason for dismissing her. Moreover, it cannot be seriously disputed by

the respondent that it had already decided not to renew the applicant's contract even before she had been given an opportunity to respond to any detailed account of her supposed shortcomings.

52]The respondent tried to demonstrate through Lesisa's evidence that the decision not to renew the applicant's contract was one that Lesisa had a major role in. However, it was apparent even from Lesisa's own evidence that she would have been heavily reliant on what Shivatu related to her about the applicant's alleged poor performance prior to September 2008. Consequently, there is good reason to believe that his views on the matter would have played a dominant role. Moreover, he remained the national director and was the primary signatory of the letter of 19 December 2008.

53]Not only was the applicant's repulse of the director's sexual advances one of the reasons for her dismissal, but it is also the most probable explanation for the dismissal. It is trite law that so-called quid pro quo acts of sexual harassment amount to unfair discrimination. The Code of Good Practice on the Handling of Sexual Harassment Cases² defines the forms taken by sexual harassment as follows:

"4. Forms of Sexual Harassment

(1) Sexual harassment may include unwelcome physical, verbal or non-verbal conduct, but is not limited to the following examples:

(a) Physical conduct of a sexual nature includes all unwanted physical contact, ranging from touching to

² Published under GenN 1367 in GG 19049 of 17 July 1998

sexual assault and rape, and includes a strip search by or in the presence of the opposite sex.

(b) Verbal forms of sexual harassment include unwelcome innuendoes suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person's body made in their presence or to them, unwelcome and inappropriate enquiries about a person's sex life, and unwelcome whistling at a person or group of persons.

(c) Non-verbal forms of sexual harassment include unwelcome gestures, indecent exposure, and the unwelcome display of sexually explicit pictures and objects.

(d) Quid pro quo harassment occurs where an owner, employer, supervisor, member of management or co-employee undertakes or attempts to influence or influences the process of employment, promotion, training, discipline, dismissal, salary increments or other benefits of an employee or job applicant in exchange for sexual favours.”

54] The obverse of granting employment benefits in exchange for sexual favours, is when an employee is disadvantaged for not granting them. Clearly this is an impermissible criterion for differentiating in the treatment of employees and will constitute unfair discrimination. An employee dismissed on such basis is clearly dismissed for an impermissible reason and one that is unfairly discriminatory within the meaning of section 187(1)(f) of the LRA read with section 6(3) of the EEA. The former provision forbids dismissal on any unfairly discriminatory ground and the latter provision identifies harassment as a form of unfair discrimination if it is based on

one or more of the impermissible grounds of discrimination. In this instance, the applicant was clearly targeted by Shivatu because she was a woman.

The claim of unfair discrimination in terms of section 50(2) of the EEA.

55] This claim, as I understand it, relates essentially to the improper sexual advances of the director as such, which he made late in 2007 and early in 2008. Although there was a suggestion that there may have been an element of *quid pro quo* harassment relating to the director's suggestion that the applicant apply for a post in Limpopo province, the gravamen of the applicant's complaint in relation to those incidents she was subjected to unpleasant, aggressive and clearly unwanted sexual harassment by him. Although the director's actions in dismissing the applicant are connected to these earlier incidents, even if nothing further had happened after his antics had ceased, those actions still amounted to acts of sexual harassment.

56] As such, his conduct on those occasions could render the respondent liable for a separate claim for damages and compensation in terms of section 50(2) of the EEA. For the reasons stated below I do not think it would be appropriate on the facts of this case.

Relief

57] It was common cause that the applicant was able to obtain employment within two months of her dismissal, so the direct financial loss she suffered is limited to her salary for those months. However, that is not necessarily the limit of an award

of compensation for an automatically unfair dismissal as the reasoning of the court in *Colliers* case illustrates.

58] In ***Christian v Colliers Properties (2005) 26 ILJ 234 (LC)*** an employee who was dismissed after a couple of days in her new job as a secretary after refusing to succumb to her superior's sexual advances was awarded 24 months compensation in view of the calculating and callous manner in which she was treated.³ In this matter, the applicant made it clear during her testimony that she had not embarked on the litigation with the object of obtaining a large amount of compensation, but mainly with a view to clearing the slur on her professional reputation by removing the stigma attached to being dismissed for alleged poor performance. However, she was also angry that her director had been able to prejudice her so severely because she had not responded favourably to his aggressive sexual behaviour.

59] I am also mindful of the fact that in this case the respondent organisation is dependent on donor funding and performs an important service to a vulnerable section of the community for whom limited support services exist. Nevertheless, the respondent did have an opportunity to rectify matters before the litigation started to run its course in earnest.

60] From the evidence it appears that once it became known that the applicant had referred her dispute to the CCMA, the respondent's senior management was not willing to intervene in the matter. There is nothing to suggest that the opportunity of conciliation afforded by the CCMA process was utilised to try and address the serious allegations levelled against the

director by the applicant before the matter escalated. It is also regrettable that respondent's senior management had not seen the need to act with greater urgency in dealing with the applicant's complaint, instead of simply advising her to act in compliance with the non-renewal of her contract and postponing any intervention until the following year.

61] Further, no evidence was presented that any internal investigation into the director's alleged conduct was undertaken by the respondent. It might have been so that by the time this matter came to trial the former director was unobtainable as a witness, but it is also striking that there was no evidence of any action being taken to probe such a serious allegation of impropriety committed by a senior management figure, even if the respondent's senior management had believed at the time that the applicant's performance did not warrant the renewal of her contract.

62] Given all these considerations, I think that an award of eight months' remuneration for the applicant's automatically unfair dismissal would be appropriate.

The applicant's claim of unfair discrimination under the EEA

63] In *Colliers'* case the applicant also claimed compensation for sexual harassment in terms of section 50 of the EEA. In that instance she was awarded an amount equivalent to approximately five month's remuneration. In the same judgement, a number of other decisions are cited in which varying amounts of compensation were awarded in terms of this provision. The learned judge in the matter, Oosthuizen AJ, observed, correctly in my view that amount awarded in

other judgements could only serve as a guideline.⁴

64] In *Colliers'* case there was no meaningful opportunity for the applicant to raise a grievance even if a channel had existed, because matters happened so fast. In this instance, the applicant was aware that she could take the matter further even though she had doubts about the ability of the more senior management to attend to such matters because of their regular absences from the country. She had therefore decided to deal by herself with the incidents of harassment which she related in her evidence. At least for a time it seemed that she had effectively brought unpleasant episode to an end.

65] That does not mean that the director's conduct can be condoned: it was completely unacceptable and crude behaviour which no employee ought to be subject to. Nevertheless, because the applicant took matters completely into her own hands the respondent was never afforded an opportunity to address the director's improper behaviour itself when it took place. Moreover, the applicant was a professional person and had occupied positions of responsibility within the organisation and was aware of the respondent's code of conduct in such matters.

66] While I can understand the applicant's motivation for dealing with the matter herself thereby avoiding the complication and unpleasantness of involving third parties, once she had done so and consciously decided not to pursue a grievance at the time, it would be unduly onerous to now saddle the respondent with the burden of a compensatory award, when it

could not reasonably have anticipated the director's actions, nor could it be said that it had any opportunity to address his conduct at the time. On the facts of this matter therefore I do not believe a separate award of compensation for the original acts of sexual harassment would be justified. In arriving at this conclusion I have also taken into account Section 60 of the employment Equity Act, which states:

“60 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.”

67] For the purposes of this judgement it is not necessary to analyse the nuances of this provision because it is clear that senior management would not have been aware of the alleged misconduct, which was clearly contrary to its stated policy, until the applicant raised the matter in her letter to Hasson in December 2008,.

Costs

68] There is no ongoing relationship between the parties. Even if I consider that the respondent is a completely donor funded institution, the applicant was only able to obtain any redress by incurring unnecessary legal costs and in the circumstances it would be inequitable that she should not obtain some recompense for these. Consequently this is a case in which the respondent should pay the applicant's costs in my view.

Order

69] The respondent is ordered to pay the applicant an amount of R 80, 411-20 (eighty thousand, four hundred and eleven rands and twenty cents) being the equivalent of eight months' remuneration of the applicant at the time of her automatically unfair dismissal at the end of 2008.

70] No order of compensation is made in respect of the sexual harassment of the applicant in late 2007 and early 2008.

71] The respondent is ordered to pay the applicant's costs.



ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing: 2 -4 August 2010

Date of judgment: 13 January 2011

Appearances:

For the Applicant: N P Voyi of Voyi attorneys

For the Respondent: ESJ Von Graan, SC instructed by Rudolph Kuhn Attorneys