



REPUBLIC OF SOUTH AFRICA

Reportable

Of interest to others judges

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no. D 407/10

In the matter between:

SOUTH AFRICAN POST OFFICE LIMITED

Applicant

and

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

First Respondent

ALMEIRO DEYZEL N.O

Second Respondent

FREDDY PILLAY

Third Respondent

Heard: 23 August 2011

Delivered: 15 November 2011

Summary: Application to review and set aside an award. Commissioner improperly suggesting to employee that he was unaware that he had a touchy mannerism when not supported by the evidence. Commissioner concluding that the employee had a touchy mannerism and was unaware of his actions and therefore did not have the requisite intention to commit sexual harassment. Award set aside and substituted with an award that the employee had committed sexual harassment and employee dismissed.

JUDGMENT

REDDY AJ

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act 1995 (the LRA) to review and set aside an arbitration award dated 6 May 2010 under case number KNDB 9796/10 handed down under the auspices of the Commission for Conciliation Mediation and Arbitration (“the commission”). The applicant (“the employer”) seeks to have the award set aside and substituted with an award that the dismissal of the third respondent (“the employee”) was substantively fair.

[2] The application is opposed by the employee.

Factual background

[4] The employee was employed as a production engineer at its Durmail operation in Durban.

[5] The employee was charged with

'Gross misconduct in that during the period 2003 to 2008 you abused your position and powers assigned to you by-

1. sexually harassing Noelene Behrmann and Denise Jones,
2. misappropriation of Company resources.'

[6] The employee was dismissed on 24 August 2009 on the charge of sexual harassment after an internal hearing was held. He was given a final written warning for the misappropriation charge.

[7] He challenged the substantive fairness of the dismissal at the CCMA and an arbitration hearing was duly held on 22 and 23 April 2010.

[8] The commissioner found the dismissal to be substantively unfair and reinstated the employee with retrospective effect to 25 August 2009. The backpay portion of the award is in the sum of R 311 314.22 less lawful deductions.

[9] The two complainants, Denise Jones (Jones) and Noelene Behrmann (Behrmann) were employed at Witspos Mail Centre (in Witwatersrand) and Durmail (in Durban) respectively. Jones was, like the employee, a production engineer. Behrmann was a data controller and reported to the employee. At the time of the alleged harassment both complainants reported to the employee. Behrmann at all relevant times remained a junior employee (at the lowest rank of employee). There were several levels between Behrmann's post and the employee's post.

[10] On 4 September 2008, Behrmann was questioned by investigators in respect of *inter alia*, allegations of sexual harassment. She informed the investigators of allegations of harassment at the hands of the employee. Her version was recorded in writing. Subsequently and on 8 September 2008, the employee received a notice of suspension pending a disciplinary investigation. The suspension was effective from 4 September 2008. The suspension did not initially refer to allegations of sexual

harassment.

[11] On 19 March 2009, Jones recorded a statement alleging sexual harassment at the hands of the employee.

Jones

[12] Jones testified that she was touched by the employee on three different occasions and a total of four times.

[13] She had begun working with the employee when she was the acting production engineer. She was appointed as a production engineer in December 2003. She and the employee were on the same level but he had more experience than her and to her mind he was her senior. She, like the other engineers, consulted with him quite often and asked his direction on issues.

[14] Jones was on the hub rationalisation team with the employee - the purpose of which was to take work away from some mail centres and move them to other centres. After one such meeting of the rationalisation committee, the committee went to lunch. The employee sat next to Jones at the lunch table. He placed his hand on her leg above the knee and rubbed it in an upward direction to the mid thigh. His hand was underneath the table cloth which hung quite low over the table which prevented anyone else from seeing these movements.

[15] Jones' immediate reaction was to move away from his hand. She couldn't move far because someone was sitting on her left hand side. She was very uncomfortable with the employee's actions. After lunch, she confided in a senior manager without disclosing the employee's identity and asked his advice. He said that she could lay charges of sexual harassment but she had to be sure that it was not an accident on the part of the employee. At that time, she did not know the employee well enough to determine from that one incident whether he intended the action to be sexual in nature or whether that action was part of an expressive nature he may have (in her words 'in

line with his personality'). Due to this lack of knowledge she decided not to report it as she did not want to look like a fool.

[16] This first incident occurred just before her appointment in December 2003 – between June and December 2003, when she was still an acting production engineer.

[17] When asked if she believed the touching was accidental, she said that, whilst she was initially unsure, she later realised that it could not have been accidental as he moved his hand upward from her knee to her mid-thigh. She reasoned that if his hand was motionless then perhaps it could have been accidental. She further reasoned that the table cloth was used to conceal his actions.

[18] The second occasion was also a social function – a supper at a restaurant, although she was not entirely sure but the supper could have been in Cape Town.

[19] On this occasion, the first incident occurred during supper and the second incident after supper. The same procedure was used: the employee placed his hand on her thigh and rubbed it in an upward direction half way up her thigh.

[20] She did not react to the first incident during supper – she just sat there and pretended it did not happen. She knew then that the employee's conduct was intentional and not friendliness on his part. She said in her testimony:

'I did not like it, it made me uncomfortable, I decided then I was going to do something about it.....I have to have a good relationship, I decided that I am not going to make a big scene about it, I'll do something myself.'

[21] She then spoke to two other male engineers about the incident and asked that in future they sit on either side of her. They initially thought it was a joke, but

'after supper, we moved closer and we started chatting when Mr Pillay touched my leg again in the same manner, and then after that the guys, I explained to the guys I'm serious, this is serious now. And then it never happened again because the gentlemen always saw that they

were next to me or with me, so there was never an opportunity for that situation to arise again.'

[22] The third occasion when he touched her was during a workshop where he sat on her right facing her and he placed his left hand on her back and his right hand above her knee. He addressed the other colleagues whilst doing this to her. They were talking business whilst this happened. In response to a question from the commissioner as to whether this touching was sexual in motive she replied:

'I do not know if it was with a sexual motive but because of the previous occasions I felt uncomfortable.'

[23] At the two social meals he drank red wine but she was not sure how much.

[24] She did not encourage him in any way to touch her on any of the three occasions.

[25] The latter three incidents when he touched her occurred after she was the production engineer perhaps around March or June 2004 when the three-monthly engineering meetings would take place.

[26] During the disciplinary hearing, the employee submitted that he was being charged with sexual harassment because other engineers or senior engineers wanted to get rid of him. He submitted that he was a victim of a conspiracy and that there was no sexual harassment by him. This issue was not put to Jones during the disciplinary hearing. At the arbitration hearing, this issue was put to her by the employer's representative. She replied that she was not aware of any agenda or conspiracy against the employee by the other engineers or senior engineers.

[27] The commissioner asked a further question in respect of the employee's personality:

'Commissioner: "Was the employee's personality such that he was one of those people who touched people whilst talking to them? What kind of personality did the employee have?"

Jones: “Ja Fred was a very friendly person. I never expected it and that is still why, I suppose I didn’t really make a scene. Fred .speaks with gestures and he would just touch you to say “Listen to me I am talking to you.”

Commissioner: “You mean touching your hand?”

Jones: “Ja.. that’s nothing – it is acceptable.”

Commissioner: “So he is the kind of person who expresses himself with his hands and would on occasion while talking to you touch you on the hand?”

Jones: “Yes, but that’s open and short term.”

[28] Apart from greater clarity in her evidence at the arbitration hearing, Jones’ evidence during the arbitration hearing was largely consistent with the evidence she gave at the disciplinary hearing. In sum, her evidence was that she was touched by the employee several times. She initially did not know what to think of it. She was not sure if she was overreacting to a friendly gesture. She erred on the side of caution and therefore took no further step after the first incident. After the second incident she realised that the employee’s actions were not friendly and innocuous. In any event if they were, she was not comfortable with them. She was advised in passing by the human resources manager that she was being sexually harassed. She was not aware of the sexual policy and its protections available to her, however rather than attract attention to the situation by lodging a harassment grievance against the employee, she dealt with the matter intelligently and discreetly by ensuring that the opportunity for him to touch her did not occur after the third incident. In so doing, she avoided embarrassment to herself and to the employee. Whilst she may have applied for his post in Durban, her evidence was not tainted by any zeal to get rid of him so that she could obtain his post.

It was put to her in cross-examination that if she were uncomfortable with the employee touching her she should have said to the employee: ‘Please do not do that. Fred.’

She replied that it was embarrassing and uncomfortable to do so.

It was also put to Jones during cross-examination that it would be difficult for the employee to remember if he placed his hand on her thigh in 2004.

Behrmann

[29] Behrmann worked with the employee for the last eight to ten years. She reported to him as her senior.

[30] She worked in an open plan office with her colleagues and the employee worked in his office which was partitioned off the open plan office. In her office, the desks were arranged around partitioning which if she and her colleagues were seated, they would not be able to see what is happening at each other's desks.

[31] The touching started with him touching her hand and shoulder – which she thought nothing of. The touching escalated to inappropriate touching which she took offence to.

[32] The touching occurred on numerous occasions and at her desk or in his office. The exact dates of the touching were not clear but Behrmann could link certain touching incidents to events and thereby ascertain some of the dates when the touching occurred.

[33] She had discussed the touching with her shop steward, Lionel Munsami (Munsami), who being male thought it better if she discussed the matter with a woman. He referred her to Phoebe Naude (Naude), a senior administrative officer. Both Munsami and Naude confirmed in writing that she had discussed the touching with them. They did not advise her to report the matter to senior management.

[34] She could not recollect the precise dates of all the incidents but they happened quite often. It got to the stage that when she had to hand in reports, she would wait until

he left his office to place the reports on his desk rather than hand them to him and face being touched inappropriately.

[35] She did not report the matter to the employee's superiors because she was afraid that of victimisation in the event of them covering up the matter.

[36] She had not written the entire statement herself as she had difficulty describing the details of the incidents. The written statement was recorded from questions she answered when asked by the two investigators. The statement was typed by one of the investigators from the answers she gave to the questions they asked her. She did feel uncomfortable describing the touching to the two investigators who were male.

Her evidence of the various types of touching is set out hereunder.

In the employee's office

[37] She explained that if she went into his office with other colleagues, he would not call her to his side of the desk. She would remain with the colleague on the other side of the desk. If, however, she went in alone, he would call her to his side of the desk to show her something on his computer which was at right angles to him and on his left side. She would be standing to his right hand side and bending to look at his computer screen. Whilst she was on this side of the desk he would make much of swivelling on his chair between his computer screen and her and in the process touch her on her body. She would be bending down to look at his computer screen when this happened. He would touch her on her hip, her thigh and her pelvic area.

[38] On one occasion she remembered that, in early 2008, she had applied for leave at year end to go to London. He invited her into his office to show her on his computer screen sites of London and suggested various places to visit. She stood to his right with the left hand side of her body closest to him. In so doing, she said,

'He would touch me with his hand...Touch me on my hip and leg. He would swivel between his screen and you. I would keep pulling back. .. he would touch me in the top part of my pants – he would put his hand in like that.'

[39] Behrmann went on to describe the manner in which the employee placed his fingers inside her jeans and just past her underwear. She pulled back immediately.

[40] She did not accept that any of the touching was mistaken or erroneous as he never apologised and he repeatedly touched her. She never encouraged him to touch her inappropriately.

[41] If he touched her on the hip whilst she was bending to look closer at his computer screen she would pull back and straighten up.

[42] The evidence of his hand down her pants was not raised by her until the arbitration hearing. It was put to her during cross-examination that this was not recorded in her written statement or in her evidence at the disciplinary hearing. She replied that her testimony that he touched her on the seam line / waist area was broad enough to cover this issue. She referred to her first language being Afrikaans and during cross-examination was asked to translate the English statement into Afrikaans. She then referred to the '*maag*' which means stomach and proceeded during further cross-examination to use the words stomach, waist and hip interchangeably to describe the area the employee touched.

[43] On being questioned by the commissioner on this issue, she explained that the seam line area was either the left side of the top end of her pants or the zip area in front.

[44] At the disciplinary hearing, she referred to the hipster seam line area. Paragraph 3 of written statement refers to 'on my waist near my private area.' The J88 form shows two crosses on the front pelvic area – which could be near or below the panty line. The J88 form was not placed in dispute. She referred to the J88 form in both hearings.

[45] The incident of the employee's hand in her pants was not contained in her written statement (although she testified that she did inform the two investigators about it as she marked the area the employee touched with crosses on a J88 diagrammatic form). She did not raise it during the disciplinary hearing. Although she had discussed the matter with Munsami and Naude she did not tell them explicit details of the touching and she had not described to them the incident of the employee's hand in her pants.

Breasts

[46] She also testified that when she sat at her desk he would approach her from behind on her left hand side and hold her left upper arm with his right hand and press his fingers towards her breast in such a way that the outside of his fingers would be touching the side of her breast. The greatest amount of pressure from his hand would be on her breast. She would move her chair back if she was sitting or pull back from him if she was standing. He would do this while giving her instructions – it was never done playfully. Again she did not accept that this was mistakenly done by him as he never apologised to her and he kept doing it.

[47] During cross-examination, it was put to her that the employee would not deliberately touch her in the open plan office in the presence of other workers as they would see what he was doing. It emerged that if she sat down her colleagues would not see what is happening to her as there were partitions in front and to her right and a three/four drawer filing cabinet to her left. Her colleague to her left sat approximately two to three metres away from her would not be able to see what was happening to her as the filing cabinet blocked his view. Her colleagues on the side of the partitions at her desk also would not be able to see what was happening.

[48] Questions from the commissioner were put to her regarding her evidence in the disciplinary hearing of being touched on her breasts. She explained that this type of touching would occur when she would be standing at his desk and he would move past her, for example as if to pour water to drink. The water decanter and his glass were both on his desk and he would have to pass Behrmann to get to the water. He would walk

past her in such a way that he was close enough for his elbow to brush against her breasts.

Other women

[49] She testified that she saw him touching other women on their hands and shoulders in the open plan office. She did not see them being touched in his office but assumed from the squeaking of the wheels on his chair that he was touching them as he touched her by swivelling between his screen and them. She heard the same squeaking sound of the wheels as when he touched her in his office. She conceded during cross-examination that her speculations could be incorrect as no other woman came forward from her office to allege that she had been inappropriately touched.

The swing

[50] At a year end function at Umbilo park, Behrmann had recorded in her written statement that the employee had invited female colleagues to sit on his lap whilst he sat on the swing. She conceded during the arbitration hearing that she did not see him inviting women to sit on his lap, she had assumed that he invited them. She conceded that the women sat on his lap of their own accord. She was encouraged to sit on his lap by another female worker but she did not go as it was not acceptable behaviour. It was put to her that it was a game – which she denied. To her it was still a work function and she was not brought up to sit on her manager's lap. No alcohol was consumed at the park.

[51] The employee submitted during the disciplinary hearing that she was fabricating all the allegations. This was not put to her in the disciplinary hearing. At the arbitration hearing, the issue was put to her. She denied inventing the situation. She also denied allegations by the employee that she was unco-operative at work and had difficulty in taking instructions from another superior, Mr Lembede. She clarified that she did not like him raising his voice at her. She denied complaining bitterly about not being promoted. She was not vindictive towards the employee, she just did not like him touching her.

[52] She did concede that she did not want to share her computer with other workers. And she admitted to falsely filling in a leave form, for which she was not disciplined. The employee had given her the leave she requested.

[53] She would feel uncomfortable working with the employee again as she had testified against him. She did not want to work with him again. She would rather resign than working with the employee.

[54] She regarded all the touching as a personal invasion, the most serious of which was the placing of his hand in her pants. She felt there was a sexual motive behind the touching and it did not feel right. Although he never said anything inappropriate whilst touching her or anything that could explain why he was touching her in the way that he did, the touching had the effect of making her feel worthless and cheap.

[55] It was put to her in cross-examination that she could have told him not to touch her. She replied that she pulled back every time he touched her. She did not verbally tell him not to touch her. She explained that she was shocked and scared and described the experience as similar to that of being hijacked – one can conceive of how to react in a hijacking and all the necessary things one can do, however it is only being hijacked, as she was, that one realises that you actually cannot do anything.

[56] It was further put to her that the employee did not know that he was doing anything wrong and that had she verbalised her revulsion it perhaps could have stopped. Her answer was that the employee as manager, out to know the sexual harassment policy and should have complied with it.

[57] She did not know the policy and did not have access to the detailed version. She did get herself a copy of the policy.

[58] She conceded that the employee is a touchy person but he touched her in personal places. She responded as follows to the question from the commissioner:

'Commissioner: "Would he do the same to other colleagues whether male or female?"

Behrmann: "I've never seen him to do it to males but in women, I saw him, yes, but on their hand or on their shoulder. Not too often – not every day."

[59] That above response is telling of his intention. If he's being touchy is accepted as a mannerism that he is not aware of, he would touch all people he spoke to whether male or female, and not just the females.

[60] Under cross-examination, she testified that the last time the employee harassed her was just before he was suspended in September 2008. She did not record this in her written statement as she did not want to remember it.

[61] Further questions from the commissioner revealed that she did not recall testifying at the disciplinary hearing that that whilst she was at her desk the employee would touch her on her lower abdomen. She said 'I do not think I said that not at my pc.'

The employee

[62] During the disciplinary hearing, the employee denied touching the complainants. He said Jones was motivated to get rid of him as she wanted his post in Durban. Behrmann he said was a bad person, vindictive and difficult to work with. Both complainants and the two investigators had conspired against him to get him out and he was being victimised. It would be a 'triumph' for them to get him, a manager, out. The employee explained that he did not put these allegations to the complainants during the disciplinary hearing because it was an oversight on his part.

[63] During the arbitration hearing, he testified that he had a clean disciplinary record and sought reinstatement. He said he had a good relationship with Behrmann but she did not like him or his management style. He did not recall touching Jones in the manner she described.

[64] He denied touching Behrmann on her breasts or putting his hands down her pants. He heard the allegation regarding his hands down her pants for the first time in the arbitration hearing. About touching her in his office his evidence was ' I never touched her in my office.'

[65] He also denied putting his hand under her left upper arm and pressing against her breast.

[66] He said it may have been a possibility that he placed his hands 'over on her shoulder'. He denied doing anything that he would regard as sexual to Behrmann. He did not speak dirty to her and he was 'cautious' about the way he spoke to his staff. He also did not make any sexual advances to her.

[67] On the swing issue, he considered it a game and he did not encourage anyone to sit on his lap. He made no sexual advances on the swing and had no intention of doing so.

[68] He stood by his version as to why Behrmann would lie.

[69] He denied ever calling Behrmann to his side of the desk and denied calling her to see the London sites on his computer screen. He testified that he downloaded the information onto a flash drive and handed it to her. This version was not put to Behrmann.

[70] The commissioner enquired why would Behrmann fabricate her evidence in this regard and his response was to describe Behrmann as a troubled employee. He referred to an email from Behrmann to Munsami about learners receiving greater preference than permanent staff. The email further recorded that Behrmann found it hard to perform her best as a result of her being isolated by managers. In so referring he said:

'Noelene .is not a team player, would complain about my management style, she feels that

she's getting isolated, does not come to speak to me but writes an e-mail and chooses to speak to the CW rep, Lionel, Mr Commissioner, has been in the same position for years, for many years.'

[71] The commissioner asked the employee further questions about his conspiracy theory to which no substantive answer was forthcoming.

[72] Under cross-examination, it was put to him that the email from Behrmann does not create the necessary motivation for her to fabricate a sexual harassment allegation against him. It was put to him that he was lying about her so that he could create some motive on her part. There was no substantive response to this question.

[73] The following extract from the cross-examination covers his restrained personality. It was earlier put to him that he testified that he was a very restrained person and he was cautious when speaking to staff.

'The employee: "Ja I am very restrained person when it comes to touching people unnecessarily."

Mr Maeso: "And yet at the park year end function there was no problem when staff members sat on your lap?"

The employee: "No."

The following testimony by the employee also confirm this:

'Mr Purdon: "Did you ever intend to do anything offensive to Noelene?"

The employee: "Mr Commissioner, I have never intended to do anything of that sort to Noelene Behrmann."

Mr Purdon: "Did you, assuming that you are a type of person who does touch people in the course of communication, did you treat Noelene and Denise in any, did you touch them in any way different to you may have touched other female colleagues?"

The employee: “Mr Commissioner, I wouldn’t, I have never touched them in any way that I would touch the other females differently, and kind of a, over touch them or keep my hands on them as to say that I am coming on to them. I do not do that, Mr Commissioner.”

Grounds of review

[74] Various grounds were submitted in support of the application to review the award, including that the commissioner ignored relevant evidence; failed to properly apply his mind and that the award is not an award that a reasonable decision maker would have arrived at.

[75] The commissioner was faced with several material disputes of fact. He was obliged to resolve the factual dispute before him in accordance with the principles set out in *SFW Group Ltd and another v Martell et Cie and Others*,¹, where the proper approach to the resolution of factual disputes was explained by the Supreme Court of Appeal (per Nienaber JA) in the following terms:

‘On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’ candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’ reliability will depend, apart from the other factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities she had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall

¹ 2003 (1) SA 11 SCA.

thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of the assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.' ²

[76] The commissioner's function was to ascertain the truth as to the conflicting versions before him. He was required, in terms of the approach set out in the *SFW* judgment, to make some attempts to assess the credibility of the witnesses by reference to any internal and external inconsistencies that might exist, to assess their reliability and to consider the probability or improbability of each party's version. (See *Isaacs v Cape Department of Education* C460/08 not reportable)

[77] The employer's disciplinary code defines sexual harassment as:

"Behaviour of a sexual nature, affecting the dignity of women or men at work. Such behaviour is unacceptable if it is unwanted, unsolicited, unreasonable and/or offensive. The conduct creates an intimidating, hostile and humiliating situation.'

[78] The employer's sexual harassment policy records the objective of the policy as

'...to establish a productive and pleasant working environment that is free from sexual harassment and where mutual respect among employees, ... is maintained'.

[79] Under the heading 'What is sexual harassment?', the following relevant description is provided in the sexual harassment policy:

'Sexual harassment is regarded as any unwanted conduct of a sexual nature.

Note

- The fact that it is unwanted conduct distinguishes sexual harassment from behaviour that is welcome and mutual.

² *SFW Group Ltd and another v Martell et Cie and Others* at para 5...

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- Sexual harassment in short refers to purposeful and sexually-oriented behaviour that is bound to elicit negative response from the recipient party, makes them feel uncomfortable and inhibits good working relations.'

[80] The code of good practice on sexual harassment provides further that:

'4 Test for Sexual Harassment

Sexual harassment is unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:

- 4.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
- 4.2 whether the sexual conduct was unwelcome;
- 4.3 the nature and extent of the sexual conduct; and
- 4.4 the impact of the sexual conduct on the employee.'

[81] The employer's disciplinary code provides further that the offence of sexual harassment may attract the sanction of dismissal or a final written warning for a first offence.

[82] The commissioner interprets the employer's sexual harassment policy to mean that the perpetrator must have an intention to carry out sexually motivated behaviour towards the complainant and such behaviour must be unwelcome or unwanted by the complainant. The actions by the perpetrator must be objectively assessed as sexual in nature and the complainant must subjectively regard the action as unwanted or unwelcome. In carrying out the sexually motivated conduct, the perpetrator must be

able to foresee or know that the unwanted conduct is bound to elicit a negative response from the complainant.

[83] The commissioner found at paragraph 72 of the award that it was common cause or not seriously in dispute that the employee did indeed touch the two complainants and other employees on numerous occasions. He recorded that the extent to which he touched them was in dispute. He also recorded that it was in dispute whether the touching was purposeful and sexually orientated or whether it was part of a mannerism. The commissioner also stated that

‘It was specifically in dispute whether the touching was done with a sexual intent and whether the applicant knew or foresaw that Ms Jones and Ms Behrmann would regard such touching as unwelcome or unwanted and whether the touching occurred without the applicant realizing that it would be perceived as sexual harassment.’

[84] At paragraph 73, the commissioner stated the following:

‘Ms Jones and Ms Behrmann both testified that the applicant has a mannerism to touch people on their hands or shoulders whilst talking to them and the applicant testified that it was part of his personality to demonstrate with his hands whilst talking. The applicant denied that he is the type of person that would touch others while talking to them and specifically denied he was the type of person that would touch a female on her upper leg. On the overall probabilities it was far more probable than not that the applicant had such a mannerism even though he probably did not realize it.’

[85] In respect of Jones the commissioner concluded as follows:

‘74. Ms Jones was a good witness who appeared to give her evidence in an objective manner. She admitted that she was at the time of the first incident not sure whether the touching was deliberate and that she was initially unsure what to think about the applicant’s behaviour. Her evidence was to the effect that the applicant should have realised on that first occasion that the touching was unwelcome because she moved away from him. However, so she testified further, she did not move far away on that occasion. Because of this her evidence did not prove

on a balance of probabilities that the applicant became aware that the touching was unwelcome. At the time of the second occurrence Ms Jones inferred that the touching was deliberate but did not indicate to the applicant that the touching was unwelcome and made as if she did not see it or feel it. Ms Jones description of the third incident rendered it highly probable that the touching was not “*purposeful and sexually orientated*”. According to her the applicant was on that occasion facing her and other colleagues and put his left hand behind her right shoulder and the other hand on her knee whilst talking to them. On this evidence it is highly probable that the touching was part of a mannerism and that it was not ‘*purposeful and sexually orientated*’.

Ms Jones’ evidence that she was uncomfortable on all three occasions was highly probable. In the absence of a romantic relationship it is understandable that a woman would be uncomfortable with a male colleague touching her in a manner described by Ms Jones. It does not follow that the inference should be drawn that the touching was done with a sexual intent or that it was foreseen that it would make Ms Jones feel uncomfortable. The evidence did not prove on a balance of probabilities that the touching did not occur as part of a mannerism and did not prove on a balance of probabilities that it was ‘*purposeful and sexually orientated*’.

75. The respondent accordingly failed to prove that the applicant’s conduct on the three occasions that Ms Jones referred to constituted sexual harassment.’

[86] In respect of the third occasion when the employee placed his left hand on her back and his right hand above her knee, the commissioner arrived at a reasonable decision when he found that the touching was not sexually motivated.

[87] The commissioner’s reasoning insofar as the first two occasions are concerned is flawed for the reasons hereunder.

[88] The conclusion that ‘On the overall probabilities it was far more probable than not that the applicant had such a mannerism even though he probably did not realize it.’ is not supported by the evidence that was before the commissioner.

[89] The commissioner specifically asked the employee whether he could have touched Jones without knowing it. The relevant portion of the transcript is:

'Commissioner: "Isn't there another possibility, not that that could be the only possibility, but at least one of a number of possibilities, that you did touch her without even thinking or knowing about it and that unknown to you she was, in fact, unhappy about it?"

The employee: "No, (inaudible)."

[90] Given the employee's clear and emphatic 'No' to the suggestion by the commissioner, it is clear that the commissioner did not consider relevant evidence and arrived at a conclusion that was not supported by the evidence before him.

[91] The cross examination proceeded further:

'Maeso: "... I put it to you that that would be highly improbable because you just describe yourself as not overly touchy, particularly concerned when speaking to fellow employees and surely, if your hand was on a woman's leg, that is something you would remember, it's not something you're going to do subconsciously, on more than one occasion.... Do you agree?"

The employee: "...my hand has never, I reiterate, has never been on a woman's leg."

Mr Maeso: "You're absolutely certain about that?"

The employee: "I'm a hundred percent absolutely certain, I would not and I have never gone there to a woman's leg."

Mr Maeso: "So the only version that can really be is either you're telling the truth or Jones is lying, effectively. That can be the only way we can deal with this, is that correct?"

The employee: What I am saying is that it has never happened, so as to who is saying the truth, Mr Commissioner what I am saying is what I have done. I have never done that. I'm saying that this is what Denise is saying, which is an absolute exaggeration of the truth, Mr Commissioner. "

Commissioner: "The impression I got from what they were saying is that you ... have that type of personality where you would be demonstrative with your hands while talking... is that

correct?”

The employee: “To a certain degree, yes. I would want to express myself, but I am not overly touchy to – I cannot recall touching continuously people to express or to ensure that I feel them or to touch them. I am fairly restraint.”

The above evidence does not sustain the conclusion reached by the commissioner in respect of the employee’s touchy mannerism.

[92] The employee denied being able to recall the first two occasions which Jones had referred to. This evidence is verification of his lack of credibility:

‘Mr Purdon: “Denise Jones, let’s talk about that. Do you have any recollection of what she alleges? You heard her evidence yesterday.”

The employee: “I have no such recollection whatsoever of an incident that she talked about.”

[93] He did however remember that there were no table cloths on the tables when they had lunch in Pretoria after the hub rationalisation meeting. This was not put to Jones.

[94] He also denied having any specific recollection of touching her on the second occasion when they were at supper. His further evidence is contained hereunder:

‘Mr Purdon: “Look, I think the bottom line is this, Mr Pillay, and in all fairness to you is did you ever touch her in a way that is sexual?”

The employee: “Absolutely, Mr Commissioner, I deny that touching sexual of Denise (inaudible).

Mr Purdon: “If it’s put to you that you put your hand on her at some stage would you deny that?”

The employee: “I cannot remember specifically that I put my hand, I could have, I could have put my hand on her, but Mr Commissioner, what I am saying is that I never touched her, as she claims, that I touched her legs and I would pull my hands up up to her, being surrounded, being there with the rest of my colleagues.....”

[95] Given that the employee denied that he could possibly touch people without knowing it, it was more probable that he was aware when he was touching people. This is further emphasised by his evidence that he is a fairly restrained person and that whilst he is to a certain degree expressive, he is ‘not overly touchy’. On his own version, what was loosely accepted as his ‘touchy mannerism’ was limited to the employee touching people on their hands and shoulders.

[96] It was not the employee’s case that Jones was dishonest in her evidence. The commissioner concluded that she was a good witness and accepted that the employee had touched her in the way she had described but he was unaware that she did not welcome the touching.

[97] Given that he remembered that there were no table cloths at the Pretoria lunch, the probabilities are that he recalled the incident that Jones had referred to. In denying recalling that evidence, he was dishonest. A reason to deny such recollection would be because he did place his hand above her knee and rubbed her leg as she had described with the intention of a sexual overture. The description of the touching cannot leave any doubt in any objective decision maker’s mind that the touching was not platonic or fraternal. Jones did not mind the fraternal or platonic touching on the hand or the shoulder. She accepted those actions as signs of friendliness. The further reason for the employee denying the recollection was that he was aware of her revulsion thereof by her instantaneous movement away from him.

[98] The commissioner’s rejection of the probabilities that the employee was unaware of Jones’ negative response to the touching on the first occasion is also flawed. He reasoned that because she did not move far away from the employee (someone sat to her left) he was not aware that his actions were unwelcome.

[99] Not only did the commissioner conclude that the employee was not aware of his own mannerisms when speaking to people (which was rejected by the employee) but he also was unaware of the immediate reactions of other people including the complainants to his actions (which was also rejected by the employee). The evidence required for a commissioner to arrive at this conclusion would be that the employee was completely inept at a social level, had absolutely no idea how to conduct himself in relation to staff and had no clue in reading people's reactions to him. In other words, the employee had to be a social buffoon with a very low intellect. The evidence was quite the contrary. The employee was a manager with several years experience, who whilst friendly is respectful of others, is sensitive to physical gratuity in the workplace and who has a sense that he had led by example as other engineers look to him for guidance.

[100] Further, if the employee's own description of himself is accepted, that is that he was very aware of other people's spaces and is himself not overly touchy, he would have seen and felt Jones moving away. He would also have been acutely aware of her being embarrassed and her feeling of unease as a result of his actions. He certainly had the intellectual, social and emotional intelligence to understand the implications of her moving away. Despite her doubt as to his intentions on that day, her instinctive and immediate response was a physical rejection of his advances. If he did not understand the implications of her movement away from him and if he, as the commissioner persistently and incorrectly assumed, was not aware that he had a propensity to be overly touchy, he would have continued touching Jones that same day despite her moving away. He did not do so. The only reasonable conclusion is that he understood her physical and non-verbal communication to him when she moved away and accepted it that day.

[101] The only decision a reasonable commissioner could have made in respect of the first incident is that the employee did touch Jones with sexual intent and he was aware that his actions were unwelcome.

[102] Insofar as the second occasion is concerned, the commissioner found that because she did not indicate that the touching was unwelcome the employee was

unaware of her response thereto. In so concluding, the commissioner failed to consider the evidence of the second incident later that same night after supper, when the employee performed the same action and Jones successfully placed physical barriers in the form of colleagues between her and the employee.

[103] Not only did the commissioner omit relevant evidence he also failed to consider the events as described by Jones insofar as the requirements for sexual harassment are concerned. The employee ought to have foreseen from Jones' initial reaction to his advances on the first occasion that any further advance would not be welcomed. However, he persisted with that conduct. When Jones did not physically react to the first incident during supper, and given her initial rejection of his advances on the very first occasion during the lunch, the employee probably assumed that his advances were now welcomed. After supper, he repeated the action assuming that his advances were to be accepted. On Jones barricading herself between two other colleagues, the employee had to accept that his advances were rejected and he did not pursue further sexual overtures with Jones that night.

[104] The commissioner failed to apply the requirements of the sexual harassment policy in the above context. It is clear that the employee had sexual intent on the second occasion as well and that he became aware, when he tried the second time that evening to make his intention known, that Jones would have none of it.

[105] Throughout his analysis of Jones' evidence, the commissioner did not take cognisance of the purpose of the sexual harassment policy. The commissioner also disregarded the fact that Jones' dignity was negatively affected and that the employee's conduct did not make for harmonious relations at work. There is no need for an employee to be safeguarding herself from a colleague by surrounding herself with people all the time. He paid no heed to the fact that at a rational level, Jones gave the employee the benefit of the doubt the first time he made an advance on her and that only after she found the benefit to be misplaced did she take control of the situation in a discreet and effective way. She was objectively not the girl who cried wolf.

[106] Insofar as the first two occasions are concerned, the commissioner did not arrive at a decision that a reasonable commissioner would have made. The only conclusion that a reasonable commissioner could arrive at on the evidence before the commissioner is that the employee's touching of Jones was not a mannerism but a sexually purposeful touching in circumstances where he knew or ought to have known that such touching was unwelcome or unwanted.

[107] Insofar as Behrmann is concerned, the commissioner concluded that she was not as good a witness as Jones and that many portions of her evidence were improbable. On an objective conspectus of all the evidence in respect of the sexual harassment of Behrmann, the most probable version is that the employee did touch her on various occasions but not to the extent that she described. It is more probable that Behrmann exaggerated some of her evidence to paint the employee in a worse light. The commissioner, however, rejected her version in totality and found that the employer had failed to prove on a balance of probabilities that 'such instances of touching as might have occurred in relation to Behrmann was accompanied by the requisite blameworthy state of mind and it constituted sexual harassment.'

[108] The probabilities went against Behrmann's evidence that the employee placed his hand in her pants; that he invited female staff to sit on his lap whilst he was on the swing and her seeing him touching other female staff in his office. The commissioner in rejecting this evidence arrived at a decision that a reasonable commissioner would have made. However, on the issues of the employee touching Behrmann on the hip, waist and pelvic area; brushing past her so that he touched her breasts and in respect of holding her upper left arm and touching her breasts, the decision is not supported by the evidence. Further the employee's own evidence of the swing incident contradicts his evidence of his personality.

[109] The commissioner had before him two witnesses who were less than satisfactory: Behrmann who, at times, exaggerated the truth and the employee who was less than forthcoming with the truth.

[110] As stated above, the employee portrayed himself as very aware of people's spaces and gratuitous physical contact. However, his overall summation of himself bore two improbabilities.

[111] The first was that despite his alleged reserved demeanour, he did not ward off the female staff who sat on his lap whilst he was on the swing. Whilst he did not invite them to sit on his lap he did not discourage them from sitting on his lap. This is hardly the behaviour of a reticent employee who prefers not to touch people. This can be seen from his evidence under cross-examination:

'Commissioner: "But sometimes people who are in the habit of touching other people don't even know that they are doing it."

The employee: "Yes, well, Mr Commissioner, it's not my general habit to touch people always. Sometimes I do."

Mr Maeso: "That's correct, I think you actually said in your evidence-in-chief that you're not a touchy person."

The employee: "I do not, I do not overpower people. I never touch their hands, touch their ears, hug or put my arms around them, I just do not do that. If I'm, I'm a little of an expressive person, as you can see, Mr Commissioner, (inaudible) I would just touch the shoulder, or not in a way just to, it's to say that "Hi" that type of thing. I could have touched Noelene by her shoulder, Mr Commissioner, I am not saying that I have not touched her, but I cannot recall what the situation is or was, Mr Commissioner."

Mr Maeso: "In your evidence-in-chief, in fact, you went so far as to say you were very cautious when speaking to staff."

The employee: "Absolutely correct, Mr Commissioner."

[112] Secondly, he denied walking so closely past Behrmann that he would brush her breasts. The commissioner concluded in paragraph 78 that the manner in which his

brushing past Behrmann was described by her

“... did not give any indication that it was deliberately done and was entirely consistent with something that happened by accident. Ms Behrmann’s explanation as to why she believed that these actions were deliberate was unsatisfactory. Her explanation was that she believed it was deliberately done because it happened repeatedly and because the applicant failed to apologise.’

[113] If the employee’s version, that he is a restrained person is to be accepted, it would logically follow that he would foresee when a member of staff is too close to him for him to pass her without touching her. He could either take a step to the side so that he avoided physical contact with her body or asked for more space to pass her to avoid making physical contact with her body. On the very improbable assumption that he did not have such foresight, and he proceeded to brush against her body when passing her, he would apologise after doing so. These are reasonable actions done every day by everybody. There is nothing challenging in their execution. If nothing else manners would have dictated that he, at the very least, apologised. The employee did none of these things.

[114] For the employee not to foresee that he would brush past her implies that he would have to be a bumbling, awkward person with no idea of his own body space and that of others. His evidence was quite the contrary and the probabilities are against him on this score.

[115] It is therefore more probable that he did intentionally walk so close to Behrmann so that he would brush her breast with his arm or elbow. He ought to have known or foreseen that his conduct would be inappropriate and unwelcome.

[116] The commissioner found that the employee’s touching of Behrmann’s hip, thigh and abdominal area was ‘entirely consistent with touching that occurred as part of the mannerism that the applicant had.’

[117] I have already set out earlier in this judgment why the employee's alleged ignorance of his mannerisms are not probable. For those reasons, the alleged ignorance of what he was doing is also rejected. There is certainly no doubt that a manager's touching of a junior employee's thigh, hip and abdominal area cannot be construed as friendly. Further, the commissioner's conclusion implies that the employee had no control over his arms when speaking – this is so highly improbable so as to border on the ridiculous. The most probable version therefore is that the employee intended these actions to be sexual and not platonic or fraternal in respect of Behrmann.

[118] The commissioner further concluded that the

'touching was not accompanied by any verbal indication of a sexual motive and on the contrary occurred whilst they were talking about work related documents or sites that one could visit in London and this further rendered it likely that the touching was part of a mannerism.'

[119] The above conclusion is erroneous for the following reason: the employer's disciplinary code and the sexual harassment policy do not define sexual harassment as requiring any verbal indication of a sexual motive. Sexual harassment is 'behaviour of a sexual nature' – and although verbal insinuations by themselves may constitute sexual harassment, they need not be present when physical sexually motivated conduct occurs.

[120] At paragraph 81, the commissioner concluded that:

'Ms Behrmann's evidence relating to the applicant holding her from behind by her left upper arm and then bending his fingers backwards so that it touched the side of her left breast was highly improbable. According to her this occurred while she was sitting or standing at her work area. This was an open plan office and in close proximity to other staff members whose work areas were close by. It is highly improbable that the applicant would touch Ms Behrmann's breast so close to other staff members. The bending backwards of the fingers was not mentioned at any stage prior to the arbitration and it is probable that this was added because Ms Behrmann realized that questions would be asked as to how it was possible that the applicant could have

“*rubbed the back of his hands against my breasts*” which was how she described in her statement. It is much more probable than not that the applicant on occasion held her arm from behind while requesting Ms Behrmann to do something work-related and that such touching was not sexual orientated.’

[121] The above conclusions are also not supported by the evidence. In her written statement, Behrmann records at paragraph 4:

‘At time when I was sitting at my work station he would come to me and rub the back of his hand against my breast.’

[123] The detail of the touching is not recorded in the written statement, however the uncontested evidence of Behrmann was that the written statement was typed by one of the investigators from her answers to their questions. It is conceivable that some of the detail could have been lost during the taking down of the statement and some weight must be placed on the fact that Behrmann was uncomfortable in describing the touching to the two investigators. It is probable that the detail which she had given to the investigators was not recorded *verbatim*.

[124] During the disciplinary hearing however, Behrmann testified that the employee touched ‘my breast with the back of his hand’ and demonstrated on a person by the name of ‘Carin’ how this touching occurred. Whilst so demonstrating her words were:

‘ He would touch me like this on my inner arm and breast.’

[125] Unfortunately, the detail of the demonstration is not recorded in the transcript of the disciplinary hearing. The detail of the touching is clear in the transcript of the arbitration hearing because that hearing had the benefit of two experienced attorneys representing the parties and who made a point of placing on record the various actions by the witnesses. The lack of detail in the disciplinary hearing has very little to do with Behrmann’s credibility and it is probable that she did indeed demonstrate at the disciplinary hearing what she demonstrated at the arbitration hearing. It is therefore

probable that she had testified as to how the employee had rubbed the back of his hand against her breast at the disciplinary hearing.

[126] The cross-examination of Behrmann in the disciplinary hearing neither elicited any further clarification of the touching in this regard nor did it dispute Behrmann's description. It was pinned to the improbability of the employee touching her in such close proximity to her colleagues.

[127] The cross-examination on this point during the arbitration hearing went further to the point of suggesting that her breasts are not in the region of her armpits, however it was not put to her that she had belatedly construed this evidence to tie in with her written statement.

[128] The finding that Behrmann had added this detail to her evidence is not supported by the evidence that was placed before the commissioner.

[129] The finding that it would be highly improbable that the employee would touch Behrmann's breast whilst in so close proximity to other employees is also flawed.

[130] The employee's hand was blocked from view when it was placed between Behrmann's upper arm and body. Not only was it blocked by its discreet positioning, it was also blocked by the partitioning, the three/four drawer cabinet and the employee's body. It was not possible for her colleagues to see that his fingers were pressing against the side of her breast. It was also not necessary for his fingers to protrude beyond the front of her breast for them to feel the side of her breast. The close proximity of colleagues in these circumstances is irrelevant and of no value to the credibility of Behrmann's evidence.

[131] The finding that the employee held Behrmann in the upper arm and such touching was not sexually orientated, is not a decision that a reasonable decision maker would have reached.

[132] Behrmann testified that she pulled back every time he touched her. This evidence was not denied or disputed by the employee.

[133] Behrmann's physical response was a sufficiently explicit communication to him that he must not touch her. He therefore knew or foresaw that his actions would not be welcomed but he persisted nonetheless.

[134] When viewing the evidence as a whole, it is clear that the employee used physical overtures to communicate his sexual intention. He did not use verbal innuendo or statements. He was nonetheless communicating to the complainants his sexual intent. To my mind, he was objectively intelligent and perceptive enough to know and understand that their physical responses communicated to him that his advances were inappropriate and unwelcome. There was no need for them to verbally state 'Fred please do not do that.' for him to realise that what he was doing was inappropriate and unwelcome. To do so, would place an unnecessary burden on complainants to verbalise to the perpetrator their embarrassment and lack of ease when being sexually harassed. The code of good practice does not stipulate this as a requirement and complainants may be afforded confidentiality should they so require. This is not to say that it should not be verbalised. There are people who are more forthright than others and who are confident enough to verbalise their disquiet to the perpetrator in the workplace and still get on with the job. There are also other people, like the complainants, who cannot do so. Feigned ignorance on the part of the perpetrator in such instances does not remove the element of *dolus*.

[135] The consequences of sexual harassment is correctly and well put by Waglay DJP in *Themba Prince Motsamai v Ever Right Building Products (Pty)Ltd*³ where it is held that:

'Sexual harassment is the most heinous conduct that plagues the workplace, not only is it degrading to the victim it undermines the dignity, integrity and self worth of the employee harassed. The harshness of the wrong is compounded when the victim suffers it at the hands of

3 unreported case number JA 21/08 para 20.

his/her supervisor. Sexual harassment goes to the root of one's being and must therefore be viewed from the point of view of a victim; how does he/she perceive it, and whether or not the perception is reasonable.'

[136] The commissioner also acted improperly in suggesting to the employee that he was unaware that he had a touchy mannerism and was unaware of his touching the complainants. This was not the evidence before him and it certainly was not the employee's case in the disciplinary hearing.

[137] This impropriety by the commissioner went further when he found, despite the employee's clear and unambiguous denial of such a possibility, that the employee was indeed touchy by nature, he was not aware of it and he lacked the necessary state of mind to be found guilty.

[138] The decision of Murphy AJA at paragraph 44 of *Mzi Gaga / Anglo Platinum Limited and Others* case number JA 44/10 handed down on 20 October 2011 is apposite:

'44. Where a commissioner fails properly to apply his mind to material facts and unduly narrows the inquiry by incorrectly construing the scope of an applicable rule, he will not fully and fairly determine the case before him. The ensuing decision inevitably will be tainted by dialectical unreasonableness (process-related unreasonableness), characteristically resulting in a lack of rational connection between the decision and the evidence and most likely an unreasonable outcome (substantive unreasonableness). There will often be an overlap between the ground of review based on a failure to take into consideration a relevant factor and one based on the unreasonableness of a decision. If a commissioner does not take into account a factor that he is bound to take into account, his or her decision invariably will be unreasonable. The flaw in process alone will usually be sufficient to set aside the award on the grounds of it being a latent gross irregularity, permitting a review in terms of section 145(1) read with section 145(2)(a)(ii) of the LRA. In his minority judgment in *Sidumo*. Ngcobo J (as he then was) in effect distinguished review on grounds of dialectical unreasonableness from substantive unreasonableness, when he observed:

“It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing the commissioner’s action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration, as contemplated in section 145(2)(a)(ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.”⁴

[139] In the circumstances, the commissioner committed reviewable irregularities in not considering relevant evidence and in concluding that the employee did not have the requisite state of mind when he acted as he did, that his conduct was rooted in mannerisms of his personality and he therefore did not commit sexual harassment. The decision reached by the commissioner is not a decision that a reasonable commissioner would have made.

[140] The employer’s disciplinary code only allows for two alternatives: a final written warning or a dismissal for a first offence, if an employee is found guilty of sexual harassment.

[141] At paragraph 48 of the *Gaga* judgment Murphy AJA held:

‘48. By and large employers are entitled (indeed obliged) to regard sexual harassment by an older superior on a younger subordinate as serious misconduct, normally justifying dismissal. In *SA Broadcasting Corporation Ltd v Grogan NO and Another*,⁵ Steenkamp AJ (as he then was) observed that sexual harassment by older men in positions of power has become a scourge in the workplace. Its insidious presence is corrosive of a congenial work environment and productive work relations. Harassment by its nature will steadily undermine the supervisory authority vested in the superior, upon which the employer perforce must rely, and hence will diminish or even destroy the trust requisite in the employment relationship; ultimately justifying the imposition of the sanction of dismissal. It is appropriate then for this court and employers to send out an unequivocal message: senior managers who perpetrate sexual harassment do so at their peril and should more often than not expect to face the harshest penalty. Much will

⁴ At para 268.

⁵ (2006) 27 ILJ 1519 (LC) at 1532A, para 51.

depend on the circumstances, with the court or commissioner being obliged to have regard to the nature and gravity of the infringement; the impact on the victim; the relationship between the perpetrator and victim; the position and responsibilities of the perpetrator; and whether or not there is a pattern of behaviour evidenced by prior misconduct.’

[142] Despite his clean disciplinary record the employee persisted in a denial of misconduct in both the internal hearing and the arbitration proceedings. He was afforded an opportunity by the commissioner to acknowledge that he had a touchy personality – which he refused to take. He has not shown that despite his denial of the misconduct, that at a principled level such conduct is abhorrent and that he would ensure that the complainants never have to be concerned about his future behaviour. He is unreformed and to my mind has the propensity to continue with this conduct should he be reinstated. In the circumstances, it is appropriate that he be dismissed.

[143] In the circumstances, the following Order is made:

1. The application for review is granted;
2. The award is set aside and substituted by an award that reads as follows:

‘1. The dismissal of the employee is substantively fair.’
3. There is no order as to costs.

Reddy AJ

APPEARANCES:

1. FOR THE APPLICANT: Mr M Maeso of Shepstone and Wylie Attorneys
2. FOR THE THIRD RESPONDENT: Mr B Purdon of Brett Purdon Attorneys