



**PHSDSBC**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Case No: PSHS872-16/17

Commissioner: Lillian Goredema

Date of Award: 3 July 2017

In the matter between:

**NEHAWU OBO LUNGISA SAUNDERS**

(Applicant)

and

**DEPARTMENT OF SOCIAL DEVELOPMENT - WESTERN CAPE**

(Respondent)

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## DETAILS OF HEARING AND REPRESENTATION

1. This is an award in matter heard on 13 March, 10-11 April, 12 May and 13-15 June 2017. The Applicant Lungisa Saunders was represented by Sakhele Madlanga an official of NEHAWU and the Respondent the Department of Social Welfare- Western Cape, was represented by Leonie Mohamed an official of the Respondent.
2. The proceedings were digitally recorded.

## ISSUE TO BE DECIDED

3. I have to decide whether the Applicant's dismissal was procedurally and substantively fair.

## **BACKGROUND TO THE DISPUTE**

4. The Applicant was employed by the Department of Social Welfare from 1 June 2006 until his dismissal on 5 October 2016.
5. The Applicant was charged with the following:

### **6.CHARGE 1**

*Sexually harassing Ms Samuels an intern by pushing his genitals against her buttock whilst she was bent over, alternatively that on 7 September 2015 the Applicant conducted himself in an improper, disgraceful and unacceptable manner by pushing his genitalia against Ms Samuels' buttocks whilst she was bent over.*

### **CHARGE 2**

*Sexually harassing Ms Danielle Samuels an Extended Public Works Programme Intern in the Department of Social Development from July 2015 by rubbing her shoulders or arms with his hands whilst she was seated, rubbing his genitalia against her shoulders or arms whilst she was seated and*

*July 2015 to September 2015 the Applicant conducted himself in an improper, disgraceful and unacceptable manner by rubbing Ms Samuels' shoulders or arms with his hands whilst she was seated, rubbing his genitalia against Ms Samuels' shoulders or arms with his hands whilst she was seated and adjusting his genitalia directly in front of her.*

### **CHARGE 3**

*During the period December 2014 to March 2015 the Applicant sexually harassed Ms Megan Herbert an Extended Public Works Programme Inter in the Department of Social Development by rubbing her shoulders or arms or hands with his hands whilst she was seated and rubbing his aroused genitalia against her shoulders or arms whilst she was seated. Alternative charge being that the Applicant whilst on duty conducted himself in an improper, disgraceful and unacceptable manner by rubbing her shoulders or arms or hands with his hands whilst she was seated and rubbing his aroused genitalia against her shoulders or arms whilst she was seated.*

### **CHARGE 4**

*During August 2015 the Applicant sexually harassed Ms Megan Herbert, an Extended Public Works Intern in the Department of Social Development by rubbing her shoulders or arms or hands with his hands whilst she was seated and rubbing his aroused genitalia against her shoulders or arms whilst she was seated.*

*Alternative charge being that the Applicant whilst on duty conducted himself by rubbing her shoulders or arms or hands with his hands whilst she was seated and rubbing his aroused genitalia against her shoulders or arms whilst she was seated.*

#### **CHARGE 5**

*During the December 2015 to January 2015 the Applicant sexually harassed Ms Kim Michaels an Extended Public Works Programme Intern in the Department of Social Welfare by touching her leg whilst she was seated next to you. Alternative charge being that the Applicant whilst on duty conducted himself by in an improper, disgraceful and unacceptable manner by touching Ms Kim Michaels' leg whilst she was seated next to him.*

#### **CHARGE 6**

*During December 2014 to January 2015 the Applicant sexually harassed Ms Kim Michaels an Extended Public Works Programme Intern by rubbing her shoulders or arms with his hands whilst she was seated and rubbing his genitalia against her shoulder or arms whilst she was seated. Alternative charge being that the Applicant whilst on duty conducted himself by in an improper, disgraceful and unacceptable manner by rubbing Ms Michaels' shoulders or arms whilst she was seated next to him and rubbing his genitalia against her shoulders and or arms whilst she was seated and hugging her Ms Michaels' inappropriately.*

7. The Disciplinary hearing was held in the Applicant's absence and he was found guilty and dismissed. He now challenges the evidence presented in his absence and he would like to be reinstated.
  
8. The Respondent disputes that the hearing was procedurally and substantively unfair.

### **SURVEY OF THE EVIDENCE AND ARGUMENTS**

#### **DOCUMENTARY EVIDENCE**

9. Both parties submitted bundles of documents as evidence and the Applicant's bundle was marked bundle "A" and it was marked page 1 to 82 and I marked the Respondents bundle "B" marked from p 1-141. The documents for which evidence would be given would be admitted as evidence.

## **RESPONDENT'S EVIDENCE**

### **DANIELLE SAMUELS**

10. She testified under oath stating that she is an Intern in the Extended Public Works Programme (EPWP) from December 2014.
11. She assisted with administration and worked with the Applicant, a manager in the Sustainable Livelihood Programme in July 2015.
12. She stated that on 7 September 2015 the Applicant had asked her to look for a file in his office. The files were on the floor behind his door so she bent down to get the file he wanted and he felt the Applicant's private parts on her buttocks. She was shocked and could not make out the Applicant's intention when she looked at him his face showed no emotion and he had moved past her.
13. She expected him to apologise and she felt violated. After placing the file on his desk she went to her desk and she was upset and started crying quietly.
14. Shortly thereafter Mr. Lawrence inquired why she was crying and she told him what had happened and he asked what I wanted to do but he said he would tell Mr. Arnolds the Director which he did.
15. Mr. Arnolds sent her a WhatsApp message about the report made to him by Mr. Lawrence and he arranged to have a meeting with her.
16. At the meeting she told him what had happened and gave her the contact details of the officer who deals with sexual harassment cases.
17. On previous occasions the Applicant had rubbed her shoulders and put his hands on them. He would also lean on her in such a manner that she felt his private parts on her shoulders as he would be standing whilst she was seated.

18. He would adjust his private parts in front of her and as she sits around a round table he would scratch his private parts whilst talking to her and she made a sound and he stopped. She felt uncomfortable and violated.
19. She met with Marion Johnson and made a statement in which she stated what took place on 7 September 2015 and also that she had told Mr. Arnolds that she is uncomfortable working with the Applicant as there have been previous incidents and she felt disgusted and disappointed with the Applicant. She requested to be moved to another programme.
20. She was moved from the Department and one day she almost bumped into the Applicant after she moved and she went to bathroom and vomited and she once saw him getting out of the lift on the sixth floor and she greeted him.
21. She testified that every time the Applicant touched her she would move away from him and this happened many times as she made it clear that his conduct was not welcome.
22. On 7 September 2015 she said the Applicant should have told her that he would move behind her to allow her to stand up if his intention was not to place his private parts against her.
23. She had chosen to have her complaint dealt with in the formal way and advised Ms Johnson accordingly by e mail on 20 October 2015.
24. In answer to questions during cross-examination she said that she had not made her statement together with Kim Michaels.
25. She said she could not specify the dates on which the Applicant had touched her inappropriately and other incidents as she was more concerned about the incident of 7 September 2015. Initially she did not know how to report the incident that took place

on 15 July 2015 and she was still new at work and she had not worked closely with the Applicant.

26. She said she reported the incident of 7 September to Mr. Lawrence as he had seen her crying and upset. She did not feel comfortable reporting incident to Sonia Kingsley as she is the Applicant's friend. She also did not report the incident to Yvette, Mr. Arnold's PA as well as to Andiswa as she was not sure about what to do.
27. She said Yvette sits outside Mr. Arnold's office facing Ms Rali and Mr. Lawrence sits directly opposite Ms Rali.
28. She denied that the Applicant ever talked to her about reporting for work late on 7 September 2015.
29. She said she was married but divorced and she has five children.
30. She denied discussing her statement with Ms Michaels.
31. She said prior to the incident of 7 September she and the other Interns had discussed the Applicant's conduct informally in the presence of Mr. Lawrence as he had asked why Ms Michaels always sat alone far away from the others at meetings but they did not know how to report the matter.
32. She admitted sending a WhatsApp message to Mr. Arnolds asking to be moved prior 7 September as she felt uncomfortable working with the Applicant and she knew that both Ms Michaels and Liziwe would be away leaving her to work with the Applicant alone. He did not respond to the message.
33. The complainants' statements were written on the same day at the request of Ms Johnson but written in separate rooms.

34. She said she did not go for counselling as she was no longer working with the Applicant.

### **PETER LAWRENCE**

35. He testified under oath and stated that he was in the office on 7 September 2015 when he noticed Ms Samuels who sits opposite him sniffing and when she looked up her eyes were red and when she sniffed the second time and he noticed she was crying she asked her what was wrong and she initially said nothing was wrong.

36. When he asked her again because she continued crying she then told him that the Applicant had rubbed his private parts against him whilst she was bending to get a file. He thought that the Applicant had again made improper contact with an intern.

37. She looked visibly shaken and he told her to report the matter to Mr. Arnolds and she asked him to report the matter for her. Ms Samuels told him that she felt vulnerable and unsafe.

38. He reported the incident to Mr. Arnolds.

39. On a previous occasion he had witnessed the Applicant asking for a frontal hug from Ms Michaels and he thought this was very strange. One day in Ms Scholtz' office, Kim Michaels, another Intern sat next to the Applicant and he saw the Applicant putting his hand on her shoulders and she shrugged pulling away from him. He had asked her what this was about and she told him that she did not want the Applicant to touch her.

40. In answer to questions under cross-examination he said he had worked with the Applicant for two years and eight months in Gugulethu and he had worked at the Head office with him from 2012 but he was no longer employed by the Department. No charges of sexual harassment had been brought against him during the period.

41. He said he had talked to Ms Samuels downstairs and he could not say whether she went home early and he could not remember testifying that she went home early at the Disciplinary hearing.

42. Although Ms Samuels, Ms Michaels and Ms Herbert had told him about the Applicant's conduct of touching them he did not know how to tell him because it was an unpleasant issue but he had advised them to report the matter.
43. He said he reported the incident of 7 September 2015 because the Applicant looked traumatized.
44. He also said he has two daughters and he thought not reporting the incident would mean he was party to it.
45. He said Liziwe Rali was not excluded from the meeting with the other complainants and there was no conspiracy against the Applicant.
46. He denied that he was under performing and therefore conspired to lie against the Applicant.
47. He did not know that Ms Samuels was favored by Mr. Arnolds.

**KIM MICHAELS**

48. She testified under oath and stated that she is an Administration Clerk in the Funding Department and is also a Data Capturer. She has been employed as an intern from 1 December 2014 by Sonia Kingsley and Ms Liziwe Rali to work under the Applicant.
49. She said she generally does not like being touched. In January 2015 the Applicant placed his hand on top of her left leg and she moved away as she did not like it and the Applicant continued as if nothing had happened this was in the presence of Ms Samuels.
50. When she had to work on the Applicant's PC, the Applicant pushed her chair away and when she turned his genitals were in her face.
51. The Applicant had a tendency of leaving an empty chair next to him and he would come behind her and put his hand on her shoulder and he would lean over and his genitals would be on her shoulders and she felt that this was not necessary. She felt

uncomfortable and disgusted but the Applicant went about his business as if nothing had happened.

52. She never went into the Applicant's office.

53. The Applicant, Liziwe Rali and other interns had a meeting on sustainable development and the Applicant and Ms Rali stepped out of the meeting and Mr. Lawrence asked her why she was sitting far away from the others and she told him that she did not want to sit next to the Applicant as he always touched her and she did not like it and Ms Samuels also stated that the Applicant had also had improper physical contact with her.

54. After the incident of 7 September 2015 she was asked to write a statement of all her experiences with the Applicant by Ms. Johnson.

55. She decided that the matter should be dealt with formally.

56. In answer to questions during cross-examination she said Sonia Riddles is her cousin and she told her about the internship programme.

57. After joining the Department she got pregnant in February 2015. There were four interns herself, Ms Samuels, Andiswa and Gerrano.

58. She did report the incidents to Sonia as she was not so close to her and they do not speak about issues like that. She did not feel comfortable about reporting the case to Liziwe Rali as she did not have issues with her but after she lodged a complaint against the Applicant Liziwe started asking her questions about her work and attendance which she had not done prior to the report.

59. She said she was not comfortable with reporting the matter to Kulukhazi and Sonia because she felt that this was personal and she knew Mr. Lawrence more than Sonia.

60. She made the statement on 15 September 2016 and she never discussed the case with Mr. Lawrence on the day and did not discuss it with the other interns.

61. She went on maternity leave in October 2015.

62. She denied that any attendance issues were discussed with her on 8 September 2015.

**MELANIE THORN**

63. She testified that she was the chairperson of the Disciplinary Hearing held on 21 June 2016 against the Applicant.

64. On 21 June the Applicant and his representative Mr. Madlanga failed to attend the hearing. Ms Mohamed representing the Department said she had checked for Mr. Madlanga's leave application for the day and there was none and she said she had asked him to make an application to her (Ms Thorne) for postponement via e mail dated 17 June 2016 in which she gave him Ms Thorne's name and e mail address.

65. There was leave approved for 22 and 23 June 2016 but not 21 June. After satisfying herself that the Applicant and Mr. Madlanga were aware of the hearing date she proceeded to hear evidence in the case.

66. She found the evidence of the witnesses to be probable and found that dismissal was appropriate in the circumstances.

67. In answer to questions under cross-examination she said that she had adjourned the matter for closing arguments and aggravation and she had no obligation to ask for closing arguments and mitigation from the Applicant as he had not attended the hearing.

68. She said she took more than five days to make a decision as the case was sensitive.

69. She said no leave of absence form had been presented to her on 21 June to confirm authorized absence of Mr. Madlanga.

## **LIONEL ARNOLDS**

70. He testified under oath stating that he is the Director of Community Development and he was appointed to this position on 1 April 2016 and he had been the Acting Director since 2 January 2015.
71. He has worked with the Applicant who was a Community Development Manager since 2 January 2015 and the Applicant reported to him.
72. His duties included managing two full time employees as well as four interns.
73. On 7 September 2015 Mr. Lawrence reported the allegations made by Ms Samuels against the Applicant.
74. Other interns Ms Herbert and Ms Kim Michaels also complained about the Applicant's unacceptable conduct to them when he spoke to them on 9 September 2017 after he had informed Mr. Hewu about the allegations and he asked him to speak to the interns. He also asked them to put their complaints in writing.
75. Ms Herbert has since left the Department for overseas.
76. The statements specified how they felt violated by the Applicant by the way he touched them but they had not reported this as they were afraid to lose their jobs.
77. He referred them to Marion Johnson the Sexual Harassment Officer.
78. There was a concern that Mr. Madlanga who works in the Community Development Directorate was not on leave on 21 June 2016 when this case was heard.
79. He had submitted a leave form for 22 and 23 June 2017 and the attendance register showed that he and the Applicant were at work on 21 June 2016.
80. The interns requested to work with the Uniform Funding Department after their complaints were reported to Ms Johnson.

81. He viewed the complaints in a very serious light but only talked to the Applicant on 23 September 2015 after handing over statements to Ms Johnson.
82. The Applicant did not appear shocked when he told him about the complaints but he requested to see the statements and he told him he had referred them to the Sexual Harassment Officer.
83. He testified that it was not the Applicant who requested for the transfer of the interns but he had waited for confirmation of the transfers.
84. The case affected the EPWP as it became short staffed.
85. He said he continued to work with the Applicant in a non-judgmental manner but he would not support the Applicant's reinstatement.
86. In answer to questions during cross-examination he stated that there was a WhatsApp message between him and Ms Samuels regarding her reluctance to work with the Applicant prior to 7 September 2015 but he failed to retrieve it as he has a new tablet.
87. He had spoken to Ms Samuels in the afternoon after the incident and he said he could not remember saying he talked to her on the phone on her way home on the same day.
88. He did not speak to the Applicant immediately as he reported the matter to his Supervisor first.
89. He said he remembered Ms Samuels reporting to him that Ms Rali and the Applicant had not responded to her request to go home early as her child would be going on a school trip and she reported to him by WhatsApp and he sent them an e mail asking them to respond and when this was not done he called them to his office. He does not view this as favoritism or over protection as a child's interests were involved.

90. Ms Rali did not cry in his office but he had heard that she cried after the meeting by an Administrative Officer who asked him why Ms. Rali had been crying.
91. He said he referred the complaints to the Sexual harassment officer as per policy and he did not refer the interns for counselling.
92. He said when the Applicant sent an e mail to the Applicant asking for the interns to be transferred he was surprised as he had discussed the transfer of the complainants with him and he had already approached Ms Khatieb for this when the Applicant was on leave and he had asked that the matter be dealt with confidentially. He was therefore shocked that the Applicant followed the discussion with an e mail copied to many staff members ignoring the confidentiality for his protection.
93. After he referred the case to the Sexual harassment officer the Applicant continued working. Prior to the incident on 7 September 2015 Ms Samuels had asked to be moved from working with the Applicant but because she did not give a reason he did not respond to the request.

### **THE APPLICANT'S EVIDENCE**

94. The Applicant testified under oath stating that he commenced working for the Government in 1987 as an Educator and joined the Social Welfare Department on 1 June 2006 working in Gugulethu until 2011.
95. He moved to Head office. The interns were employed in the EPWP and Sonia was responsible for their employment. He managed Ms Samuels and Ms Michaels.
96. On 7 September Ms Liziwe Rali and Ms Michaels were off duty. He only saw Ms Samuels at around 12 noon and he denies ever asking him to work in his office on that day.
97. He denied touching any of the interns in the manner the described and they conspired to lie as they wanted to please Mr. Arnolds and Mr. Lawrence and to continue employment with the Department.

98. Mr. Lawrence reported to Mr. Majela and when he left he reported to him.
99. Mr. Lawrence's performance was below par and he drafted a performance improvement plan for him and he had reported the issue to Mr. Arnolds who asked the Applicant to relook at Mr. Lawrence's performance and he did not agree. The relationship between him and Mr. Lawrence became strained.
100. Mr. Arnolds advised him of the complaints against him on 23 September 2015 but he did not give him particulars as he said he had referred the case to the sexual harassment officer.
101. He said when he was told about the charges he was shocked and was admitted to a clinic for stress until 29 September 2015.
102. The officer never gave him an opportunity to present his case and he believes that if this had been done the matter could have been resolved.
103. Ms Samuels should have referred the matter to Ms Zimba and Ms Kingsley who dealt with interns.
104. He denies that there were incidents as reported by the interns between December 2014 and July 2015 as there was no reason why the complaints had not been reported.
105. On 11 September 2015 he noticed Ms Samuels downloading photographs from her phone and then she asked to leave early and he told her to ask for permission from Liziwe Rali and he asked Liziwe to ask Ms Samuels what she had done for the day.
106. He was thereafter called to Mr. Arnolds' office to explain why he and Liziwe were not responding to Ms Samuels' request and Liziwe started to cry. He felt that Mr. Arnolds treated Ms Samuels with favour.

107. He had requested that he be transferred or for the transfer of the interns when he resumed duty on 29 September 2015.
108. He said the interns had discussed the case and this gave him the impression that they had fabricated the allegations. They had made their statements on the same day and believed that the allegations had been discussed at that meeting and were therefore not true.
109. He was only suspended on 26 November 2015 and had continued to work well with Mr. Arnolds.
110. He feels that he was not protected by the employer in terms of the sexual harassment policy.
111. In answer to questions during cross-examination he said Mr. Lawrence worked with him in Gugulethu in 2011 or 2012 and he reported to him.
112. He worked with Ms Michaels from December 2014 and Ms Herbert and Ms Samuels in July 2015 and Ms Smith in June 2015.
113. He said Ms Zimba was the Acting Director until she moved and Mr. Arnolds joined the Department in January 2015.
114. He said he was served with the notice of Disciplinary hearing on 7 December 2015 and the original hearing date was 15 December 2015 and he believed the case took more than three months to be dealt with.
115. He did not know that Ms Michaels was pregnant and went on maternity leave.
116. He agreed that the evidence against Ms Samuels was that she never came to his office that day and this was not put to her when she testified because he thought that the questions were based on what the complainant said.

117. He said he could not recall the details of the incident when Mr. Arnolds called him and Liziwe to ask about Ms Samuels' request.
118. He agreed that Mr. Madlanga had been asked to ask for postponement from Melanie Thorne and the contact details were in the e mail.
119. He confirmed that both he and Mr. Madlanga were at work on 21 and 22 June as per attendance register.
120. He denied the charges and said they were engineered by Mr. Lawrence.
121. He said he understood the meaning of sexual harassment and one incident of unwanted sexual conduct was sufficient for a person to be charged with misconduct.
122. He agreed that Ms Michaels was not asked about him putting his hand on his leg and that questions mainly related to her not reporting the matter to her cousin.
123. He said the issue of the interns conspiring against him was not put to them.
124. He agreed that the complainants had chosen to proceed with the matter in a formal way but disagreed that this meant that the sexual harassment officer would not engage with him further.
125. He could not explain the clause in his paragraph in the Appeal where he seemed to be accepting responsibility.
126. He said the interns were lying because they were vulnerable regarding their employment so they wanted to please Mr. Arnolds and Mr. Lawrence as the two were close.

**KULUKAZI ZIMBA**

127. She testified under oath and said she has been working in the Department since 1977 and she is a Social worker by profession.

128. She stated that if the complaints by the interns had been referred to her she would have listened to them and refer the complainant to the Sexual Harassment office as during her time the office had no officer.

129. During her time as the Acting Director there was no report made to her office.

**SONIA ELLEN KINGSLEY**

130. She testified under oath that she was employed by the Department as the Poverty programme manager since August 2014.

131. It was her responsibility to employ interns and place them into various Departments and Ms Michaels is her cousin and she is the one who told her about employment as an intern.

132. The Applicant was her colleague.

**TEBOHO MAJELA**

133. He testified under oath and stated that he was employed as an Assistant Director by the Department of Social Welfare and worked with the Applicant for about three years and he managed monitoring and evaluation of the team.

134. He appraised the performance of Mr. Lawrence and rated his performance in the non-financial section as below the acceptable standard of a score of 3 he got 2. He said this could lead to a Developmental plan being worked out for him and if standards are not met then a discipline hearing would be held in terms of performance standards.

135. In answer to a question during cross-examination he said Mr. Lawrence performed poorly during his term of office and there documents to prove this.

**LIZIWE RALI**

136. She testified under oath and stated that she is a Community Development Practitioner in the Sustainable Livelihood programme and the Applicant was his manager.
137. On 8 September 2015 he held a meeting with Ms Michaels and Ms Samuels at which Ms Michaels said she understood the purpose of their employment but Ms Samuels said she did not know. She had explained the purpose and asked Ms Michaels to share her duties and knowledge with Ms Samuels.
138. She asked them to tell her what duties they had done for the day and they failed to do so.
139. On 11 September she was asked by the Applicant if Ms Samuels had spoken to her about a sick child and immediately thereafter Ms Samuels had asked her to go home early as her child was sick she told her to first tell her what she had done for the day.
140. Mr. Arnolds asked her about an e mail he had sent to her and she found an e mail from him addressed to the Applicant. She and the Applicant were called to his office to explain why they were being insensitive to Ms Samuels' request she was upset and started crying in his office and went out crying as Ms Samuels was getting special treatment unlike all the other interns.
141. During cross-examination she said the interns were managed by both the Applicant and herself.
142. She said Ms Samuels was at work on 8 September 2015.
143. She said she could not remember Ms Samuels telling her about her child's school trip.

### **ANDISWA NGOJOBA**

144. She testified under oath that she is an intern in the EPWP and on 7 September she was at work and submitted an attendance register to confirm this.
145. She sits in an open plan office next to Liziwe Rali opposite Mr. Lawrence and on 7 September 2015 she did not see Ms Samuels crying.
146. She agreed under cross-examination that because she did not see her crying it does not mean she did not cry on the day.

### **YVETTE RIDDLES**

147. Testified under oath that she works as a Personal Assistant to Mr. Arnolds.
148. On 7 September 2015 she was at work. Her office is outside Mr. Arnolds' office and she can see part of the open plan office and partly see Mr. Lawrence's desk. She did not see Ms Samuels crying although she was sitting on Liziwe's desk next to her office.
149. Both Ms Samuels and Ms Michaels were at work on 11 September 2015.
150. In answer to questions under cross-examination she said Liziwe sits with her back to the door she would not have been able to see Ms Samuels crying as she was sitting at Liziwe's desk and she did not see Mr. Lawrence talking to Ms Samuels but this would not be unusual.

### **ANALYSIS OF THE EVIDENCE AND ARGUMENT**

151. In coming to a decision in this matter I have considered the documentary evidence, the oral evidence as well as the written closing arguments presented by Mr. Madlanga and Ms Mohamed representing the respective parties.
152. I have also taken into account the Code of Good of Good Practice on the handling of sexual harassment cases. Section 3 of the Code of Good Practice on the handling of sexual harassment Cases states that;

*(1) Sexual harassment is unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.*

Section 4 states that:

*(1) Sexual harassment may include unwelcome physical, verbal or non-verbal conduct, but is limited to the following examples:*

*(a) Physical conduct of a sexual nature includes all unwanted physical contact, ranging from touching to sexual assault and rape -----“*

153. The complainants Ms Samuels and Ms Michaels testified about their experiences leading to the Applicant being charged with sexual harassment. The Applicant denied ever sexually harassing them and testified that the reason for their false evidence is because they wanted to please Mr. Arnolds and Mr. Lawrence so they could keep their jobs as interns.

154. I accept the complainants' evidence that they were sexually harassed as defined above as the Applicant had unwelcome physical contact of a sexual nature with them as being credible and probable, because save for the bare denial by the Applicant that Ms Samuels never went into his office on 7 September 2015 her evidence was not challenged and no plausible reason was given for this.

155. The Applicant stated that because the complainants' statements were made on the same day I should find that this is sufficient evidence to support his conspiracy theory, but I reject this inference. The complainants testified that they were asked to make statements on the same day but in different rooms and no plausible evidence was presented to prove that there was conspiracy. I find that the statements were made on the same day but in different rooms and my finding is fortified by the fact that the statements are not similar as they give particulars of different incidences with Ms Samuels giving particulars of her experience on 7 September 2015.

156. I find that although the other incidences were not reported immediately after they occurred the explanation tendered by the complainants were reasonable given the nature of the relationship between the Applicants and the interns.

157. Although the circumstances surrounding the report of the incident by Ms Samuels on 7 September 2015 to Mr. Lawrence, I find Mr. Lawrence's evidence on this issue credible and probable. I accept that a report of the incident was made and that Ms Samuels was reluctant to tell him what had happened and that his initial response, that the Applicant had done it again corroborative of the fact that that the interns had told him how unhappy they were with the Applicant's conduct of having physical contact of a sexual nature with them unwelcome and unacceptable. This evidence is further corroborated by his evidence that he had witnessed the Applicant touching Ms Michaels' leg and asking for a frontal hug, incidents which he felt were inappropriate. He was not cross-examined on this evidence.

158. There was evidence that Mr. Lawrence got a poor performance grade and the Applicant drafted a performance development plan which Mr. Lawrence he was unhappy with leading to a strained relationship with the Applicant leading to Mr. Lawrence conspiring with the interns against him. I find it difficult to accept this evidence as probable because Mr. Lawrence was not cross-examined on this evidence to allow me to assess his responses and the credibility of the evidence on the issue. Further, Mr. Majela's evidence was also not specific as to the effect of the poor performance on the relationship between Mr. Lawrence and the Applicant as he left employment. Viewed wholly against all the other evidence presented before me by Mr. Lawrence, I find his evidence and the evidence of the interns credible and probable. Mr. Lawrence gave his evidence well and despite vicious cross-examination at times stood his ground.

159. I also find that Mr. Arnolds' evidence was credible and was corroborative of the circumstances after the incident was reported to him by Mr. Lawrence. It was not specifically put to him that he was fabricating evidence because he was close to Mr. Lawrence and wanted to keep the interns in their job. This is so because

the interns did not report to him directly and he had not employed them. Although he continued working with Applicant after the report by the complainants he testified that he did not want to judge the Applicant. I did not find any contradictions in his evidence.

160. A lot was also made about him not moving the interns from working with the Applicant after the incident but there was no evidence presented that there was any contact between the interns and the Applicant except twice once when Ms Samuels saw the Applicant and went to vomit evidence of her revulsion and when she saw him at the lifts. I accept Mr. Arnolds' evidence that he had initiated the transfer of the interns and had discussed this with the Applicant stressing the need for confidentiality and was surprised by the content of the Applicant's e mail on subject. Whilst I find that it would have been ideal to move the interns I also have no evidence that the Applicant was prejudiced by their presence in the general office. Consequently, I find that both versions of his request to move and Mr. Arnolds version that he had already requested the interns to be moved to be mutually inclusive and in any case this evidence does not have any material bearing on the issues that I had to decide in this matter.

161. The Applicant also failed to present evidence whether he had been prejudiced by the conduct of this case prior to him charged and in answer to a specific question whether he had been prejudiced he said no and I agree with him. He was even allowed to continue worked until his suspension on 26 November 2015 and he said he worked well with everyone.

162. I find that Ms Rali's did not add value to the Applicant's case because she did not testify that the complainants were not sexually harassed. She also was not at work on 7 September 2015. Further the interns reported to both her and the Applicant.

163. Her evidence on favoritism of Ms Samuels by Mr. Arnolds is not supported by the e mail sent by Mr. Arnolds as he called both her and the Applicant to ask them to treat Ms Samuel's request with sensitivity as a child was involved. Further Ms Rali said the reason for her request to leave early was because her child was

sick which evidence had been contradicted by both Ms Samuels and Mr. Arnolds as the reason was that the child was going to a school trip.

164. No evidence was further presented to show how Mr. Arnolds favored Ms Samuels and how this is connected to the charges faced by the Applicant.

165. The evidence of Ms Riddles and Ms Zimba did not take the Applicant's case anywhere. Andiswa's evidence about not seeing the Applicant crying on 7 September does not add value to the Applicant's case as she did not testify as to what time she was supposed to see Ms Samuels crying and whether she had been at her desk all day and she admitted that because she did not see her crying it does not mean she did not cry on the day. There was a contradiction in that Ms Samuels testified that Andiswa was not at work on 7 September 2015 and Andiswa produced an attendance register showing that she was at work. However, this evidence was not material to the case as a whole.

166. There was an issue raised by Mr. Madlanga about a WhatsApp message sent to Mr. Arnolds by Ms Samuels requesting to be moved from working with the Applicant as being evidence of a conspiracy. I reject the inference because this message was sent prior to 7 September 2015 and accept Mr. Arnolds' evidence that he could not produce it as he has a new tablet (phone) and that he did not respond to the request as Ms Samuels had not stated why she wanted to be moved and this was not challenged.

167. I further find that the submission made on behalf of the Applicant in his appeal clause 7.2 where it is stated a sanction short of dismissal in the form of a final written warning and perhaps employee assistance programme would have been appropriate because it is accepted that this may have given rise due to the fact that Mr. Saunders did not keep a distance between himself and the subordinates and for that he is prepared to take responsibility means that the Applicant takes responsibility of his unwelcome conduct which had sexual

connotations. There was no adequate explanation of the meaning of this clause because it was true.

168. Consequently, I find that the Applicant's guilt was established.

169. There was reference to the fact that the Applicant was not afforded an alternative to a disciplinary hearing and therefore the procedure was unfair. I disagree because the complainants chose to have the matter dealt with in a formal manner.

170. In the case of *Motsamai v Everite Building Products (Pty) Ltd (2011) 2 BLLR 144 (LAC)* it was stated that "sexual harassment is the most heinous misconduct that plagues a workplace, not only is it demeaning to the victim, it undermines the dignity, integrity and self-worth of the harassed employee. The harshness of the wrong is compounded when the victim suffers at the hands of a supervisor. To force conciliation or mediation between the perpetrator and the victim further compounds the wrong. Therefore, unless the victim agrees to any other form of resolution of a complaint of a sexual harassment the employer should hold a disciplinary hearing against the perpetrator.' In this case the complainants wanted the matter dealt with in a formal way.

171. At the disciplinary hearing there was evidence around why the Applicant and Mr. Madlanga did not appear for the Disciplinary hearing I find that the Ms Thorne was justified in finding that they were in willful default as there was evidence presented to her that both were at work on 21 June 2015 and there had been correspondence regarding asking for postponement from her. The outcome of appeal by Advocate Fritz referred to by Mr. Madlanga as evidence that he was on leave actually states that Ms Thorne was not unreasonable in continuing with the Applicant's disciplinary hearing in his absence as it was his obligation to ensure that a request for postponement was correctly applied for and subsequently approved before not attending.

172. I therefore find that the procedure adopted was fair.

173. My duty in arbitration is not to consider afresh what I would impose as a sanction in the case but to simply decide whether what the employer's sanction of dismissal was fair. I am not required to defer to the employer's decision I am required to consider all the relevant circumstances and decide on the fairness of the sanction.

174. I find that the sanction of dismissal in this matter is appropriate and fair. I have taken into account that the Applicant was a manager who was meant to protect the complainants and took advantage of them. There was testimony that they were afraid to report him as he was their manager. The misconduct is serious and to allow the Applicant to continue with employment would have resulted in an injustice sending the wrong message to other employees.

### **AWARD**

175. The Applicant's dismissal was procedurally and substantively fair.



**Lillian Goredema**  
PHSDSBC Panelist