



ARBITRATION AWARD

Case No: **PSHS1038-19/20**

Commissioner: **T Erasmus**

Date of award: **23 September 2020**

In the matter between:

PAKAMA THEODORAH MTSHABE

Applicant

and

DEPARTMENT OF SOCIAL DEVELOPMENT- WESTERN CAPE

Respondent

Details of hearing and representation

1. This matter was set down for Arbitration at the Public Health and Social Development Sectoral Bargaining Council in terms of section 191(5)(a) of the Labour Relations Act 66 of 1995 (“the LRA”) and was heard virtually on 12 August 2020. The matter was postponed as a part-heard matter to 14 and 15 September 2020 when the Arbitration was concluded virtually. The applicant was represented by Ms Aayesha Hoosain from Parker Attorneys, whilst the Respondent was represented by Ms Kaylene Arendse, Labour Relations Officer at Respondent. There was an application for legal representation. I heard the parties’ different submissions and a ruling was made to grant the applicant’s application for legal representation.

Issue to be decided

2. I must decide whether the applicant's dismissal was substantively fair. Procedural fairness was not placed in dispute.

The respondent's opening statement

3. The applicant was employed as a youth and child care worker. She earned R148 215.00 per annum at the time of the dismissal and she was employed for 6 years, initially at the Outeniqua child and youth care centre. Her services were suspended on 7 February 2019. She was subjected to a disciplinary hearing which initially commenced on the 28th of March 2019 and finalized on the 5th of September 2019. The allegations against her included:
 - Sexual assault
 - Sexual harassment
 - Intimidation
 - Sleeping while on duty
 - Contravening a facility circular – allowing the children to have access to her cell phone.
4. The applicant was found guilty on 17 October 2019 and the dismissal was confirmed as the finding of guilty and her dismissal was confirmed on appeal on the 2nd of December 2019.
5. The respondent will call eight (8) witnesses, including mainly minors who were sexually assaulted and harassed as well as the social worker and the child and youth care worker, to whom the matter was initially reported to and the facility manager. All the witnesses will lead evidence that the applicant is guilty of the charges against her.

Witness 1

6. **TANYA EDWINA BRIDGET JACK testified on behalf of the respondent (hereinafter referred to as “Jack”)**
7. Jack testified that she has been employed as a social worker at Vredelus place of safety since December 2018. Her role is that of therapeutic and support services and with external social workers to support the kids to reunify with their families. Vredelus is a level 3 facility where they work with children who are sent to them by the court who have a criminal history as well as teenagers with behaviour problems.
8. Jack testified that she met the applicant on 3 December 2018 briefly in the reception area as they started working at Vredelus on the same day.

“Charge 1

It is alleged that you are guilty of misconduct in that, on two separate occasions during January 2019, you sexually assaulted Deonishia Beukes, a resident at Vredelus Child and Youth Care Centre, by unlawfully and intentionally violating her, by rubbing her vagina with your hand.

Alternative to Charge 1

It is alleged that you are guilty of misconduct in that, on two separate occasions during January 2019, you sexually harassed Deonishia Beukes, a resident at Vredelus Child and Youth Care Centre, by displaying unsolicited conduct of a sexual nature, by rubbing her vagina with your hand.”

9. With regards to this, Jack testified that she knew Deonishia Beukes as a resident. She is a bit behind on the mental developmental stage, she was 15 years old, she was behind compared to normal teenagers of that age.
10. Deonishia was an outspoken child, very demanding and always wanted to see the social worker, she was not scared to voice her opinion. The impact of her mental ability means that she cannot remember specific things such as dates, but she is

capable of remembering specific incidents. She has the ability to distinguish between right and wrong. She used to have a bubbly personality. She would run up to Jack when she saw her, but since December 2018 / January 2019 Deonishia started withdrawing and she did not see Deonishia as much as in the past.

11. Jack testified that Mrs van Rensburg, a child and youth care worker in the unit, informed her of the allegation which Deonishia shared with her on 8 January 2019, namely that the applicant was touching her sexually. Jack called Deonishia and told her what Van Rensburg told her, Deonishia was very hesitant at first as she was afraid that Jack would tell the applicant what Deonishia had told her. Deonishia informed Jack of the incident when she came out of the shower and the applicant touched her private parts. Deonishia was very hesitant and teary and did not want to tell anybody about it. She told Jack that the applicant threatened her to go to a sangoma in the Eastern Cape and to get some moeti if she told anybody. Deonishia also told Jack that the applicant is very rude at times and the children are scared of her.
12. Jack testified that she had no reason to disbelieve Deonishia and it was her duty to report the incident to the manager as social worker at the facility. It was her duty to take care of the children. Jack testified that it is her experience that when children make things up they would talk loudly about it and add something to the story, but this was not the case with Deonishia. Deonishia also complained a lot about being victimized by some of the staff members and that they were rude towards her and then she was transferred to Lindelani place of safety. Jack believes that Deonishia was able to recall the exact events as it took place.

The following ensued from cross-examination:

13. Jack commenced employment with the department of social development during June 2016, but she has been a social worker for the past 14 years since June 2006. Jack confirmed that this is the first time that she had come across an incident where a staff member has been the perpetrator. Children are normally scared to talk, especially where there is a family member involved. It is normal for a child to talk

to a stranger about what happened. Although Deonishia is bold and outspoken, she may be streetwise, but she is mentally behind.

14. Jack conceded that as most of the kids they work with are from a rough background, they do have manipulative tendencies. In this instance, there was nothing that Deonishia could gain from manipulating the situation. It was put to Jack that Deonishia threatened the applicant to get her fired. Jack responded that it is highly unlikely for a child like Deonishia to make such a threat. She doubts that Deonishia has the mental capability to make up such a story and stick to her story. Deonishia did not tell her exactly when the incident took place.
15. Reference was made to page 107 of bundle A, namely the reportable incident, where it is stated that Deonishia told the social worker that Ms Pakama touched her vagina and told her she has a fat vagina while touching it. This apparently was happening since December 2018. It was put to Jack that surely Deonishia would have reported this earlier if it had been happening since December 2018. Jack responded that Deonishia was scared. The applicant worked in a different department to her and they did not do orientation together.
16. In terms of the report on page 112 of bundle A it is stated:

“Deonishia Faith Hector witnessed everything because she is always in the room lying on her bed as if she’s sleeping, when this happens. Social worker spoke to Faith Hector. She confirms what Deonishia told social worker that Ms. Pakama is always waking children up and rubbing their buttocks. Previous day (07/01/2019) she touched Deonishia’s private parts, breasts and rubbed her stomach sexually, according to her. According to the witness Deonishia told her that she did not like it but she kept on doing it. She is also alleging that Pakama was lying on Deonishia’s bed the previous day without her permission. She noticed from 27/12/2018 when she returned from holiday that Pakama is touching Deonishia strangely. She noticed Deonishia is uncomfortable in Pakama’s presence but did not say anything because Deonishia did not say anything. She did say that she is scared of Pakama. She says that Pakama is always pinching the residence on the

body close to their buttocks and always lying in residents beds and that she is hitting Deonishia a lot. “

17. It was put to Jack that the applicant was not on duty on the 2nd of January 2019, so it could not have happened. Jack responded that she only reports what the kids told her. She reported the incident about two days after the incident took place on 8 January 2019. She informed her manager immediately telephonically where after she compiled the report two days later.
18. Jack was challenged on whether it is normal for a person to continue working with the children after such serious allegations. Jack stated that this is a management decision. It was put to Jack that Deonishia did her level best to get rid of the applicant as she said that she was being victimized by staff members. Jack responded that the victimization claim was only brought up after the allegations levelled against the applicant. Jack denied that Deonishia was being manipulative by trying to get rid of staff members.
19. Reference was made to page 114 of bundle A, being the form 22. This form is used if there is any report of abuse against a child in terms of the Children’s Act. She was challenged on why “threatened” was scratched out if Deonishia alleged that she was threatened. Jack was unable to answer. She only ticked off the “sexual part”. She did not immediately notice that Deonishia was withdrawn. She only noticed this afterwards. Jack stated that she only wrote in the report what the children had told her. It was put to her that form 22 was not filled out correctly. Jack denied this and stated that she focused on the sexual allegations. After form 22, form 23 is a follow up form that was needed. She worked therapeutically with the child and she sent the form to head office and her supervisor.
20. Reference was made to page 110 of bundle A. She stated that it is the reportable incident signed by the manager. It is different to form 22, which is signed by herself. She sometimes sent the reportable form first where after the form 22 would follow. She denies that form 22 signed by herself was incomplete.

The following ensued from re-examination:

21. Jack testified that she does not believe that Deonishia was manipulative on this occasion as she was scared. She had nothing to gain. Sometimes if children want to go home earlier, they make up things, but Deonishia knew that there was no chance of her going home earlier. It is not her role to investigate complaints about staff. Deonishia said she was being victimized after they became aware of the allegations. In form 22 she focused mainly on the primary complaint which is “sexual touching”. There was no emotional abuse allegation, which is a different charge. She e-mailed the form to management on the 9th of January 2019. She was informed of the allegations on the 8th of January 2018.

Witness 2

22. **SOFISO VIYEDWA testified on behalf of the respondent (hereinafter referred to as “Sofiso”)**
23. Sofiso testified that she is 16 years old and she was at the Vredelus place of safety until May 2019. The applicant worked with her. Sofiso confirmed that cell phones are not allowed at the facility at Vredelus. Sofiso confirmed that the applicant allowed her to play on her cell phone in her room, as she did with most of the other children.
24. Sofiso was asked why the applicant would allow this. Her response was that she probably did not want the children to report the fact that she was sleeping on duty. According to Sofiso it was not her duty to report it as the applicant was aware of the rules and she is an adult. The applicant sometimes just lay on the bed, but other times she slept while the children were playing on her phone. Sofiso is not aware of any other child or youth care workers who sleep when they are on duty. This is not allowed, as she was supposed to work.
25. Sofiso testified about the “knitting needle” incident with regards to Deonishia, contained in charge 2, by threatening to stab her with a knitting needle. Sofiso

testified that she was lying on the bed, whilst the applicant and Deonishia had an argument. The applicant tried to stab Deonishia with a knitting needle. Deonishia became afraid when the applicant wanted to stab her with a knitting needle. The knitting formed part of the therapeutic sessions.

26. Sofiso testified that she realised that Deonishia was different. She became reserved and quiet. She asked Faith about the applicant's demeanour. Faith said she should ask Deonishia herself, at which point Deonishia told her and said she should take notice that the applicant touches the children. Many of the children felt uncomfortable with the applicant around them. Deonishia told her that the applicant touched her and that she felt uncomfortable. When Deonishia came out of the shower, the applicant touched her and told her it was a secret. Faith also told her about it, but she did not tell her how the applicant touched Deonishia.
27. Sofiso confirmed that when the applicant was on duty, she would always call Deonishia first and when Deonishia came out of the shower with only a towel around her, the applicant would sit on her bed. Many of the children witnessed this.
28. Deonishia told Sofiso that she was scared as the applicant threatened with bewitching her. Deonishia told her that the applicant touched her on her breasts when she was naked. Sofiso confirmed that she informed Ms Cloete about the fact that they felt uncomfortable with the applicant around. She told Cloete after Deonishia told her that it was a secret and she asked permission from Deonishia to tell Cloete. Deonishia told her that she was scared of the applicant and she constantly cried.

The following ensued from cross-examination:

29. Sofiso confirmed that the applicant gave her cell phone to her in her hands. The applicant gave her the phone and the password to her phone. This did not happen with any of the other staff. Sofiso confirmed that although some of the applicant's colleagues saw her sleeping, they pretended not to see it. Deonisha had an argument with the applicant at the time, at which point Deonisha had the knitting needle in her hand and the applicant grabbed the knitting needle out of Deonishia's

hand. Sofiso confirmed that she shared a room with Deonishia. She also confirmed that she has never seen Deonishia walk naked in the passage. She also confirmed that the applicant never touched her inappropriately. She would only touch her slightly when in a conversation. The applicant never made her feel uncomfortable.

30. Sofiso confirmed that the applicant accompanied the residents to the showers as it was part of her supervision duties. Sofiso confirmed that Ms Cloete is also a child and youth care worker and they stand at the showers whilst they are showering. They will only come in sometimes if they shower too long to close the tap. None of the other residents complained about the applicant. They only got irritated because she consistently came into their rooms.
31. Sofiso referred to the incident on 7 January 2019 when Deonishia and herself slept on the ground, the applicant came in and reprimanded them in an ugly fashion. She swore at them and she swore back at the applicant. She knew it was against the rules to sleep on the floor, but she was not happy with the manner in which the applicant addressed them. The applicant told them it is because of girls like them that girls got raped. Alexander, the applicant's colleague, was also present and Sofiso was crying at the time.

The following ensued from re-examination:

32. She does not know why the applicant grabbed the knitting needle out of Deonishia's hands. According to Sofiso, Kashiefa, Sapora and many of the other children were present when she played on the applicant's phone.

Witness 3

33. **KASHIEFA BEZUIDENHOUT testified on behalf of the respondent (hereinafter referred to as "Kashiefa")**

34. Kashiefa testified that she is 19 years old and she stayed at Huis Vredelus until she had turned the age of 18 on 29 June 2019. The applicant worked in their dorm at Huis Vredelus.
35. Kashiefa confirmed that the applicant gave them her cell phone to play with and to go on Facebook and to take pictures. This was witnessed by all the children who were in the dorm. This is not allowed. The applicant also lay on their beds while they were playing on her phone. She did not report it, as the applicant, being a youth care worker should be aware that this is not allowed. This was not the case with any of the other child and youth care workers. Kashiefa confirmed that she often felt uncomfortable in the applicant's presence. She made comments such as that she looked pretty. One day Kashiefa was scratching her "koekie" and the applicant made suggestive gestures by licking her lips and the applicant looked at Kashiefa in a manner that a man would look at a woman. She is certain that the applicant was looking at her as she was the only one standing there. She felt that the applicant was looking at her in a sexual way and she was scared.

The following ensued from cross-examination:

36. None of the staff saw the applicant lying on Kashiefa's bed when she gave Kashiefa her cell phone to play with. She felt uncomfortable in the applicant's presence on a number of occasions. The applicant also woke her up in a sexual manner, Kashiefa was only in her bra and pantie in her bed. The applicant touched Kashiefa on her back and down the sides to her legs. She also often touched Kashiefa on her bum. Nobody saw this, but Kashiefa told her friends about it. She was sometimes alone in the room with the applicant. The applicant did not always do these things in front of other residents. The other residents did not see it as the applicant would do this very quickly. She also touched her in a manner a man would touch a woman.
37. Kashiefa cannot remember that she was taken to hospital by the applicant on 20 December 2018. She is not aware as to whether the applicant touched other

children. As far as Kashiefa is concerned, the applicant only touched her. This is with regards to charge 6.

38. According to Kashiefa, the applicant told the children that she is a lesbian. It was put to Kashiefa that the applicant was pregnant at the time and in a relationship with a man. Kashiefa conceded that she was not aware of this, but the applicant told them she is bi-sexual. The applicant then told them that she was going to let them walk like snakes and she was going to bewitch them, therefore they were scared of the applicant. She was with her friend, Kisha Antoni, who did not sleep in the same room. She told Kisha about the applicant's threats and that the applicant touched her indecently. She did not inform any of the youth care workers, as she was scared that the applicant would bewitch her, as the applicant threatened to do.
39. The applicant also let them do push-ups and they had to bend forward at which stage the applicant would hit them on their bums. She punished them in a sexual manner.

The following ensued from re-examination:

40. The applicant gave them her cell phone before she went to sleep. It is possible for a person to be in a relationship with a man and a woman at the same time.

Witness 4

41. **DEONISHIA BEUKES testified on behalf of the respondent (hereinafter referred to as "Deonishia")**
42. Deonishia confirmed that she is 17 years old and currently living at Lindelani place of safety and this has been the case since January 2019. She was previously a resident at Vredelus house of safety.

43. Deonishia confirmed the rules regarding the cell phone, namely that the kids are not allowed to play on a care worker's cell phone. The care worker is not allowed to bring a cell phone into the dorms. The applicant allowed both herself and other children to play on her cell phone. She asked the applicant to search for people / boyfriends on Facebook, which she agreed to. Deonishia is not the only one who played on the applicant's cell phone, as she allowed other kids to play on her cell phone as well. She did not tell anyone as she was afraid of the applicant, because the applicant threatened to bewitch her and said she was going to walk on her head.
44. She told the applicant that she was going to tell the facility manager that she touched her in an indecent manner and allowed children to play on her phone, at which stage the applicant told her that she was going to pay lobola to Deonishia's grandmother. The applicant was lying on Deonishia's bed or that of other children when they were playing on her phone. Sometimes she would just sit or lie on the bed and other times she would be fast asleep, as her eyes were closed. She also reeked of wine.
45. Deonishia testified with regards to an incident when the applicant was in room 2 with other colleagues, they were doing their nails and Deonishia was sitting on one of the children's beds, she wanted to ask something. The applicant asked whether the nails look good and she said it did not look good. Deonishia was knitting at the time, the applicant then grabbed the knitting needle out of Deonishia's hand and when she returned it to Deonisha, it was bent.
46. Sofiso asked her how she felt about what happened. She told Sofiso that she did not feel good. The applicant tried to stab Deonishia with the knitting needle, she touched her slightly with the needle in a playful way, but it did not seem as if it was playful. Alexander and Sofiso were present in the room and saw what happened.
47. Deonishis referred to the incident in January 2019 between herself and the applicant. The applicant started working there in December 2018 as a new care

worker. She played with Deonishia in a sexual way in room 1. The children thought that they were in a relationship. She told the other children that she was not in a relationship with the applicant. The applicant came to work over a weekend one morning, they were lying on the ground, sleeping in their underwear which they were allowed to do. She was lying on the ground with Sofiso. The applicant came into the room and woke her up in a sexual way. She did not want to get up. The applicant pulled the blanket off her. Deonishia told her that it was not time to get up yet, Sofiso was lying next to her and the applicant then told them that it is time to get up.

48. The applicant played music on her phone, she then gave the phone to Deonishia, as well as the code to her phone, as she could not access the phone. Deonishia then got up and went to have a shower. She put a towel around her and went to the toilet. The applicant followed her and watched her. The gate to the toilet was open and the applicant opened the gate when Deonishia went into shower. On her return from the shower, she found the applicant sitting on her bed. Deonishia told the applicant to get off the bed as she was making the bed untidy.
49. Deonishia testified that after she put lotion on her body, whilst she was naked, she was busy putting on her bra and panty when the applicant touched her stomach. Once Deonishia was dressed, the applicant was still sitting on her bed and told her to come and lie next to her on the bed under the blanket, to which Deonishia conceded. The applicant then proceeded to touch her vagina. Nothing happened there after, as it was close to handing over time. The applicant got up, whilst Deonishia was still lying in the bed. The applicant went to play dominos in the other room with the other children. This happened on a Saturday. This was the first occasion.
50. On the second occasion at around 5pm on a Sunday, the other children were watching television. Deonishia did not watch television, the children who were in their rooms, were locked in their rooms and some of the children put their beds in the tv room. Deonishia was in her room the whole day, she was afraid to come

out, as she was afraid that the children would ask whether she was in a relationship with the applicant.

51. The children returned their beds to the room at about 5pm on the Sunday, to prepare for the night shift. Some of the children went to the shower, Deonishia also went to shower, she first made up her bed before she went to the shower. She took off her clothes and put her clothes neatly in her locker at which point the applicant came in and asked whether she was going to wash. Deonishia confirmed that she was on her way to the shower. Faith left the room before her to go and wash and she was ready for bed.
52. When Deonishia came out of the shower, the applicant was in her bed. Deonishia does not know why the applicant was lying in her bed, she told her to come and lay next to her and the applicant proceeded to touch Deonishia on her vagina and on her breasts. I did not make her feel good at all. Deonishia told the applicant that she was going to tell the facility manager. The applicant responded that she was not scared and told Deonishia that she was going to walk on her head, if she told anyone. Deonishia was afraid of the applicant. Faith was also in the room, she thought Faith was asleep. Deonishia did not report the incident to anyone immediately. On Monday and Tuesday, they worked night shift.
53. On another occasion she and Sofiso were lying on the floor as they always do. The applicant came in and told them to go and lie on their beds. Sofiso told her that they are not going to lie on the beds, as they always lie on the floor, where after the applicant and Sofiso had an argument. She did not tell anyone that the applicant touched her, as she was scared of her, as the applicant threatened to bewitch her and that she was going to walk on her head and that the applicant's son was going to go out with her and she would pay lobola to Deonishia's grandmother. Deonishia confirms that it was wrong of the applicant to touch her vagina. She told Sofiso about what happened between herself and the applicant.

The following ensued from cross-examination:

54. The staff at huis Vredelus are not allowed to use cell phones. She is not sure whether anyone saw her use the applicant's cell phone. As far as Deonishia knows, nobody saw when the applicant played with her sexually during the January 2019 incident.
55. The second incident, when the applicant was busy doing her nails, Alexander and some other teachers were also present and they witnessed the applicant trying to stab Deonishia, but they did not do anything about it. The reason why the applicant threatened to stab Deonishia, was because Deonishia told her that her nails looked ugly.
56. Deonishia confirmed that the youth care workers are there to protect the children and this is no way to protect them. The other care workers were also just sitting there looking upon the applicant threatening Deonishia.
57. It was put to Deonishia that Sofiso did not testify about any other staff members being present. Deonishia confirmed that she was telling the truth and stated that Sofiso also went to the toilet at one stage, but there were certainly other care workers in the room and the incident took place in the room. Deonishia is unaware as to how old the applicant's son is.
58. Deonishia confirmed that the applicant told her that she worked with boys before at Outeniqua, she was a lesbian. She came from Outeniqua to Vredelus.
59. Deonishia confirmed that they are supposed to be watched by the care workers when you go to shower, but not in a sexual way, whilst the applicant watched them in a sexual way. Deonishia confirmed that she kept on listening to the applicant although she felt uncomfortable because she was afraid of her.
60. The incident when they were lying on the floor and there was an argument between Sifiso and the applicant, Kabuco was also present but she did not do anything about it, she was just standing there. Deonishia confirmed that they are allowed to have knitting needles in the room, because knitting is part of their program,

although she does not normally knit in their group, she only knit in her group on the day in question. Dora gave her the knitting needles to knit with.

61. She did not report the matter to Mr Benting as Benting was on leave or at another facility at the time. She is unaware as to who stood in for Benting when he was on leave and she was too scared to confide in a social worker. The applicant said ugly things to Sofiso the previous night when they argued.
62. She is unsure whether there are any witnesses of the sexual assault in room 1, but Faith saw what happened with regards to the second incident, although she thought that Faith was asleep, but she was awake.
63. Deonishia confirmed that she has not had an opportunity to testify at the criminal case, as she was emotional at the time and could not talk. She cannot remember the date when she laid a criminal charge, as the matter was continuously postponed and she was emotional, the matter has not proceeded as yet.

The following ensued from re-examination:

64. Although it is the child and youth care workers' duty to watch children in the shower, the manner in which the applicant watched them was of a sexual nature and that is not the same manner in which the other child and youth care workers watched them in the shower.

Witness 5

65. **MAROWAAN BENTING testified on behalf of the respondent (hereinafter referred to as "Benting")**
66. Benting confirmed that he is the facility manager at Vredelus child and youth care centre and has been in this position since October 2017. He is responsible for the operations of the facility, management, human resources, good corporate

governance and has to comply to the norms and standards of child and youth care. The core responsibilities of a Child and Youth Care Worker is:

- To safeguard the children
- Ensure that they are in the life space of the children at all times
- Escort the children to doctors' appointments, etc
- See to that the children are safe and have authoritative presence at all times.

67. Benting confirmed that the applicant was a child and youth care worker at Vredelus, after she was transferred from Outeniqua. He only had brief encounters with the applicant in the past:

- He was introduced to her when she came to the facility
- He took her to induction
- He picked her up when she took a child to the hospital
- She was eager to do things and to start driving herself
- The last time he saw her, was when he took her to the police station.

68. Benting confirmed that Tanya Jack, a child and youth care worker at Vredelus informed him of the allegations against the applicant. He had to report it to his direct supervisor, the director of facilities.

69. He called the applicant's supervisor, Mr. Carelse to find out when she was working again, as he needed to put something in place. Carelse informed him that she would be working that night. He asked Carelse to instruct her team leader to shadow her during the night shift. Benting then spoke to Deonishia and a couple of other residents the following day about the allegations. Deonishia was very scared and emotional.

70. He then informed the police about the allegations. They then spoke to Deonishia and all the other witnesses, as well as the social worker. SAPS said that the applicant needs to be arrested and asked him for her address. He did not have her address at the time, as she has just been transferred. He then found out when she

would next be working at which point the SAPS would arrest her. Benting asked the police if he can first speak to the applicant and rather bring her in to the police station and SAPS agreed to this. Benting spoke to the applicant when she came in to work and asked her if she would go to the police station, instead of them coming to arrest her at the facility. Benting told her that she could go to the police station the evening. She asked to go immediately instead. Benting then took the applicant to the police station.

71. The criminal case has been taken off the roll, until such time as Deonishia obtained some psychological assistance. Benting was asked whether he believed Deonishia's version of the events. Benting responded that he did not want anyone else to know who the person was who was making the allegations about the applicant, he called other residents who also confirmed Deonishia's side of the story. Some said they thought the applicant and Deonishia were in a relationship, that is how close they were and that is why they did not say anything. They also confirmed the cell phone story. He honestly believed Deonishia's version. There are activities available at Vredelus:

- Hospitality
- Hair care
- Sport
- Arts and crafts
- Needle work, knitting
- Card making

72. It was put to him that Deonishia indicated that she was knitting on one occasion and that she had a knitting needle in her possession. Knitting for caps for premature babies is allowed at the facility, but under supervision. Benting confirmed that he does not believe that the residents were safeguarded, given the incidents with the applicant. The applicant cannot be trusted with the children at all, the children were taken advantage of. The trust relationship between him and the applicant has been diminished and he will not be able to trust her again in future.

The following ensued from cross-examination:

73. The incident was reported to him the day of the last night shift that the applicant worked. He did not do a full investigation, he just called in residents and random children. The social worker drafted the report. The social worker did the initial investigation, but he also did an investigation from his side, to make sure that they are not making allegations up. Benting confirmed normal procedure in a case like this is: If it is a reportable incident, he would be informed. He would then report it to his director. A form 22 must be completed and the OB must be completed.
74. He confirmed that it is not normal to complete the form 22 partially. It must be fully completed.
75. Reference was made to page 113 of the applicant's bundle, being the form 22. He confirmed that "emotional" should be ticked off. He confirmed that when he spoke to Deonishia, she was very emotional, therefore it should have been ticked off. He did not complete the form. The matter was investigated immediately. He allowed the applicant to work the night shift at the time as they were only allegations and that is why he instructed the team leader, Ms Maureen Philander to shadow the applicant on the shift. Philander did not report anything unusual to him.
76. He confirmed that the team have lockers, for their personal belongings. No incidents were reported to him about the applicant having a cell phone on her. The staff are supposed to put their cell phones in their lockers, which are locked. He is not aware that the applicant's locker was not locked. The cameras were fixed mid-2019 and before that only the camera in the dining room were working. It is not a requirement to have cameras at a child and youth care centre.
77. He did not make a statement at the police when he took the applicant to the police station. The other residents were not as emotional as Deonishia was when he spoke to her. He spoke to Deonishia, Faith, Cora, Siphawe and Kashiefa. Only Faith and Siphawe confirmed Deonishia's testimony. Everyone was consistent about the cell phone. Sifiso said that she had the password to the applicant's cell

phone and Kashiefa said the applicant was licking her mouth in a tempting seductive manner when Kashiefa was scratching her “koekie”.

78. He does not believe that the complainants were manipulating the situation. The one resident, with regards to the cell phone, said that she told the applicant if you do not do this, “I am going to tell Mr Benting you allow us to play on your cell phone”.
79. Benting confirmed that he is not always at the facility. They have a buddy system with another facility manager. Benting confirmed that the opening of a file for the applicant when she came over from Outeniqua is an HR function and not something that he gets involved with. It was put to Benting that the criminal case was withdrawn against the applicant, as per page 3 of bundle A. Benting replied that he knows that it has been removed from the roll, but he is not aware that it has been withdrawn. He referred to the notification “SOR” – struck off roll. Deonishia has been transferred to another facility and the child and youth care worker would accompany her to court.
80. The applicant’s main core is to protect the children, but he has to protect his staff as well.

The following ensued from re-examination:

81. As facility manager, he is tasked to investigate any forms of misconduct, if it is informal. The Human Resources department must investigate more serious matters.

Witness 6

82. **MARGARET VAN RENSBURG testified on behalf of the respondent (hereinafter referred to as “Van Rensburg”)**
83. Van Rensburg testified that she has been a child and youth care worker for the past 6 years and 10 months at Huis Vredelus. Her duties are that of taking care of

residents and protecting them at all times. She met the applicant at classes at Huguenote College when she started working here, during orientation and during hand overs between night and day shift.

84. Deonishia informed her of the allegations against the applicant. She then went to her supervisor, Carelse and told him about the allegations, he referred her to the social worker, Ms Jack. She has known Deonishia since 2018 when she came to Vredelus. She spoke to Deonishia after she was made aware of the allegations. Deonishia was very scared and emotional when she informed her about the allegations against the applicant. Their duty is to protect the child, there were a lot of changes with Deonishia herself. She was talkative and active before the allegations. She then became quiet withdrawn and no longer watched movies with the other children.
85. The life skills, arts and crafts and knitting are projects to provide a skill and there are projects to donate to hospitals and old age homes. The residents were not safe guarded at all in this instance. They have to protect the children at all times and the allegations would not have been made if this had not been the case.

The following ensued from cross-examination:

86. She noticed changes in Deonishia's behaviour prior to the incidences reported to her, in December 2018. She conceded that these type of children are manipulative, but Deonishia is not such a child, she is not a trouble-maker.
87. The "knitting needle" incident: she is not familiar with the incident. Sifiso briefly mentioned the incident about the alleged stabbing to her. She confirmed that the children are not allowed to keep the knitting needles with them if the group activity is over. It could be that Deonishia was busy with a project that day and they are only allowed to have the knitting needles in their room with them under supervision.
88. She only heard from Deonishia and other residents who said that the applicant looked at them inappropriately and touched them.

89. The procedure if such incidents are reported to her (page 79 of the bundle):
- She has to write an incident report
 - Inform her supervisor
 - Write it in the occurrence book
90. She did not write it in the occurrence book as she thought it was best for the social worker, Ms Jack to complete the occurrence book. After speaking to her supervisor, Carelse, he said the situation is too sensitive and it is best if the social worker writes the report. The applicant escorted one of their residents to the clinic, she was alone. She is supposed to report any movement in the occurrence book, but accompanying a child is not written in the OB book.
91. Most of the staff members have their own lockers, some share lockers. She is unaware if the applicant shares a locker. She only saw her with her cell phone when she was taking the resident to the clinic. One can leave your cell phone at the main gate or at Human Resources. They do not work the same shift, therefore she never saw her lying on any child's bed. She has never left her cell phone at the main gate, only in her locker in her bag. She has never taken her phone to the unit to take pictures.

The following ensued from re-examination:

92. Knitting needles are allowed in the unit under supervision. The TANGO, the child and youth care worker and two other childcare workers were in the room, therefore it is regarded as supervision.

Witness 7

93. **CHANTELLE STEPHANS testified on behalf of the respondent (hereinafter referred to as "Stephans")**

94. Stephans testified that she is employed as a child and youth care worker for the past 2 years with the respondent. Her responsibilities are to always ensure the safety and needs of the children. The Applicant worked with her in the same unit. They were only colleagues and not friends. In 2018, every time a child would ask the applicant something, she would refer them to Stephans. She saw her sleeping on duty in the tv room and the children's rooms a few times. Her team leader saw this, that is why she did not report it. Her team leader said the applicant was on medication, that is why she was so sleepy.
95. She witnessed the applicant taking her cell phone into the unit and allowing the children to take her phone into the unit. Her TANGO also saw this. She worked with Deonishia since October 2018 and she was very outspoken and play full. The applicant was very playful with Deonishia and always called Deonishia when she arrives and Deonishia would respond that she is still sleeping, she was not like this with other residents. Deonishia became agitated and withdrawn. She was no longer playful in the way she was before. Stephans heard about the allegations and noticed that Deonishia's behaviour changed, she did not talk or anything. She does not believe that the residents were indeed safeguarded.

The following ensued from cross-examination:

96. Stephans confirmed that other care workers also recorded matters in the occurrence book. She kept her cell phone in her pocket, as the new workers did not have lockers. She is unaware as to whether the applicant had a locker. She is aware of one occasion when the applicant took a child to hospital.
97. When the children shower, they have to stand in the passage whilst the children are in the shower. They only need to go in and speak to the children if they have to be reprimanded. Children are allowed to walk in the passage with only a towel around them. They are not allowed to have knitting needles in their rooms. Children with knitting needles will be supervised by a care worker. There were no incidents reported about Deonishia prior to the allegations against the applicant.

Van Rensburg reported the incident to Benting. The applicant was suspended after the incident. She has never experienced any manipulative behaviour by Deonishia. She confirms that Deonishia has been rude to her in the past, she is very outspoken and sometimes she does not know how to say things properly. The TANGO and Ms Phillander, saw that the applicant had her phone with her.

The following ensued from re-examination:

98. The fact that Deonishia was previously rude towards Stephans does not mean that she is manipulative or dishonest.

The applicant's case

99. **PAKAMA THEODORAH M TSAHBE testified in support of her own case (hereinafter referred to as "the applicant")**

100. The applicant confirmed that she worked at House Vredelus from 3 December 2018 until 8th of January 2019. She started working for the department on 4 November 2013 at house Quteniqua place of safety. She was transferred to Cape Town because her brother was ill and he was looking after her child. The applicant was supposed to start working on the 1st of December 2018, but Benting said that she should start on Monday, 3 December 2018.

101. She started working in the units immediately, she was asked to take residents to clinics or the hospital. She also worked in the unit during her orientation period. She only started working with Deonishia when she started working shifts on 20 December 2018.

The following ensued from cross-examination:

102. It was confirmed that the applicant worked during the period from January as a child and youth care worker. The respondent's representative stated that she has no further questions under cross-examination as the applicant's witnesses were

not put to the respondent's witnesses, therefore her full testimony could not be considered as it would make it reviewable.

103. **NTOMBIZANDILE NDUNA testified in support of the applicant's case (hereinafter referred to as "Nduna")**
104. Nduna testified that she has been employed a child and youth care worker at Huis Vredelus for the past 7 years. She was required to be in the live space of the children and to support children with behaviour problems and attend to their developmental and social needs. She became aware of the charges against the applicant during January 2019. According to Nduna, only one camera was not working in unit 3. There was an objection as this was not put to Benting under cross-examination.
105. Nduna confirmed that she does not have a locker at Huis Vredelus. She would normally put her cell phone in her bag in the boiler room. She never saw the applicant with a cell phone on her person. She worked on the applicant's shift, they were a team of nine where Philander was the team leader. She never saw the applicant sleeping on duty and she never saw her using her cell phone, whilst on duty in the dorms, only during her lunchtime.
106. Deonishia, Sifiso and Siphora were in that unit. Normal care worker duties entail that she had to attend to normal behaviour problems, she had to reprimand them and accompany them to the showers twice a day (morning and evenings). It is required of a health care worker to be in the live spaces of the children at all times. She had to look through a window when the children are in the showers. Children are not allowed to walk naked in the passage, only in their rooms when getting dressed. The behaviour problems in the children is a big part of the challenging and it needed more attention. She never saw the applicant give her cell phone to one of the children.

The following ensued from cross-examination:

107. She never saw the applicant with her cell phone in her hand in the dorms, only outside the dorms, between lunch hours. She was on leave from the 18th of December 2018 until mid-January 2019. The applicant started in December 2018, therefore she cannot attest to the charges against applicant in respect of the period 12 to 18 December 2018. She can only attest to the period from 3 until 11 December 2018. Therefore it is possible that the applicant could have used her cell phone, during the period when Nduna was on leave. The fact that Deonishia reported the charges does not mean that she is manipulative at all.

The following ensued from re-examination:

108. Nduna concedes that she could have been on from the 12th to the 18th of December 2018. Health care workers are allowed to use their cell phones during lunch time. It may be in your bag, just not in your hand.

The respondent's closing arguments

109. The applicant had been appointed from 4th of November 2013 in the Public Service. She worked as a Child and Youth Care worker. On 11 December 2019 the applicant referred an unfair dismissal dispute to the sectoral Bargaining Council. The applicant was employed by the respondent as a Child and Youth Care worker from the 3rd of December 2018 until the 8th of January 2019 at Vredelus. The applicant was formally suspended on the 7th of February 2019. The applicant was subjected to a disciplinary hearing, as a result of which she was found guilty, which was confirmed on appeal on the 2nd of December 2019, which was the date of the applicant's dismissal. The question is whether the applicant's dismissal was substantially fair, procedural fairness is not disputed. There were eight (8) charges levelled against the applicant:

Sexual assault

Sexual harassment

Intimidation

Assault

Breaching unauthorised articles circular

Sleeping on duty

110. The respondent's witnesses were all residents at Vredelus at the time of the allegations. There are also other witnesses employed by the respondent and stationed at Vredelus.
111. With regards to Charge 1: Sexual assault of Deonishia Beukes: Two (2) incidents took place (Saturday and Sunday). Deonishia Beukes initially indicated she was uncertain of the exact days when the incidents took place.
112. The applicant's defence was that a child and youth care worker was always present with her, this was not put to Deonishia Beukes or that no-one had witnessed the first incident of sexual assault. It was also not disputed that Deonisha Beukes was emotional during the time of consulting with the internal officials. During cross-examination of witnesses and Deonishia Beukes, emphasis was put on Deonishia as to why she did not testify at the criminal hearing. Deonishia's version of the incidents and how it happened was not disputed. The applicant's testimony was not put to the respondent's witnesses and should be disregarded.
113. Reference was made to case law:

DALMAR COAL (PTY) LTD & CCMA & 2 OTHERS (J440/17) LC (unreported) 2017

The Court indicated that there is a duty to cross-examine a witness on facts disputed. 2015 what. The oral evidence by Deonishia was straight forward and reliable. It was undisputed. Benting and Jack testified that they are inclined to believe Deonishia. Jack's completion of the form 22 is a primary indicator of sexual abuse, emotional abuse is secondary. Deonishia's emotional demeanor was not disputed during cross-examination and she can distinguish between right and wrong.

114. Miss Nduna is always there if she works in the units, she also attends to transportation duties and she is not always present with the applicant. Reference was made to when Ms Xhaxa and Stephens had an argument on the 7th of January 2019. This was one isolated incident where child and youth care workers were present. The applicant testified Deonishia would accompany her to the kitchen to fetch food for lunchtime. There was no evidence of anyone else present. Therefore, she could have been alone with Deonishia.
115. In terms of section 5(2) of the Sexual Offences and Amendment Act, 32 it is stated that a person who intentionally violates a person “any act which causes direct or indirect contact”. The applicant’s actions comply with the definition of sexual assault, her hand touched Deonishia’s genitals. On the balance of probabilities, the respondent proved sexual assault in relation to Deonishia Beukes.
116. Charge 2: Assault of Deonishia with a knitting needle: the applicant’s version was not put to the witness that she was not attempting to stab Deonishia with a knitting needle. The focus was placed on how Deonishia obtained the knitting needle and who was present. The incident was not disputed. Van Rensburg and Stephens confirmed that residents are allowed to knit as long as supervision is present.
117. The case law in ***DALMAR COAL (PTY) LTD & CCMA & 2 OTHERS (J440/17) LC (unreported) 2017*** is also applicable in this case. Sifiso had not indicated who was present in the room when the applicant attempted to stab Deonishia. Sifiso was not cross-examined about who was present when the applicant attempted to stab the applicant with a knitting needle. It was intentional and unlawful and in spite of belief, that force is to be applied to him or her. The two witnesses attested to the fact that the applicant attempted to stab Deonishia with a knitting needle. Deonishia believed that the applicant would carry out her threat to stab her. The respondent proved on the balance of probabilities that the applicant is guilty of this charge.
118. Intimidation of Deonishia: The applicant threatened to bewitch her if she reported the conduct. She would “doekom” her and she would walk on her head. Deonishia

indicated that she conceded to the applicant's request to come and lay in the bed next to her, mainly because she was scared of the applicant. This form of intimidation was not denied or disputed by the applicant or her witnesses. Deonishia's version was uncontested. Deonishia's testimony was straightforward, clear and uncontested.

119. The allegation that the applicant had always had someone who worked with her, was not put to Deonishia and must therefore be disregarded.
120. The applicant implicated that Ms Xavuca was always there, but this was not confirmed by Xavuca. Ndaba was not at work from 11 December 2018 until 4 January 2019 as she was on leave. Therefore she was not always present when the applicant was working as alleged.
121. In terms of 72/1982, the Intimidation Act, section 1(1)(b), intimidation is defines as follows: an act or conduct installing fear. Deonishia indicted she was afraid to report the applicant's conduct. This is sufficient evidence that the applicant intimidated Deonishia. The respondent has proven the applicant's guilt on balance of probabilities.
122. Sexual harassment of Kashiefa Bezuidenhout: Charge 6: Kashiefa testified that she never disputed that the applicant licked her lips or the manner in which she licked her lips. The manner in which the applicant looked at her was the same as a man looks at a woman, therefore it is of sexual nature. In terms of section 7(1)(1), the Provincial sexual harassment policy (Respondent's bundle), the complainant's perception is indicative if it was of a sexual nature. The applicant's conduct was unwarranted which is Kashiefa's perception. Therefore the applicant's conduct was unwarranted. It violated Kashiefa's rights. The respondent proved on a balance of probabilities that the applicant is guilty as charged.
123. Sleeping whilst on duty: Charge 7: all the witnesses confirmed they saw the applicant sleeping on duty. The witnesses were merely asked if someone saw the applicant sleeping whilst on duty, which was never denied in cross-examination.

The applicant denied that she slept on duty, this was not put to witnesses, the applicant testified that there was always another care worker present. The respondent's witnesses' testimony remains uncontested. An employee is guilty of misconduct if he or she sleeps on duty. Four (4) witnesses confirmed they saw the applicant sleeping on duty. The respondent believes they proved on a balance of probabilities that the applicant is guilty of misconduct.

124. Cell phone used in the life space of residents: charge 8: Witnesses on behalf of the respondent confirmed the applicant brought her phone into the life space of the residents and allowed them to use her phone / facebook. It was not disputed under cross-examination; emphasis was placed on who saw the applicant bringing her cell phone in to the residents' space. The cell phone was stored in her bag and locked in the office. The defence raised by the applicant was not adequate to dispute the respondent's witnesses' version. Stephens and Xavuca were not always present when the applicant are with the children. During the applicant's testimony, she only denied letting Deonishia use her cell phone, and also having let the other residents use her cell phone.
125. Regarding the unauthorised articles circular: the applicant did not deny that she transgressed this policy (DSD Facilities Circular 2013 updated on 15 January 2014). A cell phone is one of the listed articles. It is viewed as insubordination if found in possession of such article. Four (4) witnesses attested to the applicant's possession of the unauthorized article. On 30 August 2018 the applicant received a written warning for unauthorised possession of a cell phone. The respondent proved on balance of probabilities that the applicant is guilty of this charge.
126. The applicant's witness, Nduna confirmed that the mere fact that Deonishia reported the allegations, do not amount to her being manipulative. Benting indicated he can no longer trust the applicant to work with the children, her core function is the trust relationship, which has been broken. The respondent proved that the applicant was guilty of all the charges. The applicant's dismissal is deemed substantively and procedurally fair.

The applicant's closing arguments

127. The applicant worked for the department of social development from 4 November 2013 until the 5th of September 2019, which was the last date of the disciplinary hearing. The applicant's appeal was dismissed and she was paid up until December 2019. The applicant earned approximately R14 000.00 per month.
128. It is not disputed that the applicant had a warning against her for having a cell phone on her person at Outeniqua residence. The applicant disputed having a cell phone on her person during her time at Huis Vredelus. Jack conceded that the form 22 was not complete, but the applicant did not have to complete all items. Benting confirmed that the form should. Sifiso did not confirm that she was in the room when the incident of the knitting needle took place. The applicant testified that she bears no knowledge of the knitting needle.
129. Regarding the sexual assault of Deonishia Beukes: Charge 1: This was denied by the applicant that it took place. It was important for Deonishia to remember the date and time when the incident took place. Due to the length of time, it was possible for dates to get mixed up. Deonishia's mental capabilities, Sifiso testified that it was possible not to remember dates, etc. Xhaxa testified that the applicant would not have been left alone at any given time with the children, therefore it is impossible that she would not be seen harassing the children. This was confirmed by Xhaxa.
130. Xhaxa and Nduna confirmed they never saw the applicant with a cell phone on her person, during the times they were working with her. Chantal Alexander testified that she also kept her cell phone on her person in her pocket. It is normal for the applicant to have her cell phone in her pocket, but she denies giving her cell phone to the children. Nduna confirmed that Deonishia can be manipulative and that she was part of a troublesome group. Xhaxa testified that she said she is going to show the applicant that she will report her to Mr Benting to ensure the applicant loses her job.

131. The respondent did not prove their case that the applicant's dismissal was substantively fair. Procedural fairness is not disputed. The respondent did not dispute that the cameras were not working, this goes to prove that Benting was lying in his testimony. It was stated that the version was not put to witnesses. I asked the questions about the camera to Xhaxa and Nduna. The respondent did not prove on the balance of probabilities that the applicant's dismissal was fair. There was no sexual harassment or sexual assault at the applicant's previous place of employment. The only previous transgression was a cell phone at the applicant's previous place of employment. Deonishia and the other residents are manipulative and should not be taken seriously.

Replication

132. It was never put to Benting that he was being dishonest and that the cameras were in fact working at the time. Ms Jack confirmed the reason why Deonishia would not be able to remember specific dates, as it was due to her developmental capabilities. Alexander did not testify regarding the knitting needles, it was not put to her that she did not corroborate the evidence. The applicant denied having committed the sexual assault, at no point was it denied in cross-examination or in her own testimony.

133. A correction: Sifiso indicated that because of her mental capabilities she was unable to remember dates, this does not relate to Sifiso, but to Deonishia. Regarding the cell phone, this specifically relates to the applicant permitting the residents to utilize her cell phone (it was not merely in her pocket, such as the other care workers). Xhaxa or Nduna were not always present when the applicant was working. It is irrelevant whether the cameras were working.

Analysis of evidence and argument

134. The applicant was appointed as a Child and Youth Care Worker, stationed at Vredelus House of Safety on 3 December 2018 until 8 January 2019. The applicant started working at Outeniqua Place of Safety on 4 November 2013. She was

transferred to Vredelus as of the 3rd of December 2018. The applicant received a salary of R14 000.00 per month at the time of her dismissal. The applicant was found guilty of the charges as a result of a disciplinary hearing and a sanction of dismissal was confirmed on appeal. The applicant had a warning against her for having her cell phone on her person at Outeniqua Place of Safety. The applicant however disputed that the cell phone on her person during the time she was at work at Vredelus. The applicant denies that the sexual harassment of Deonishia Beukes took place. Deonishia Beukes could not remember the date and time when the alleged transgression took place, due to the lengthy time, possible dates got mixed up. Deonishia's mental capabilities made it difficult to remember dates.

135. The applicant did not start working with Deonishia Beukes immediately. She only started working with her when she started working shifts on 20 December 2018. The applicant seeks retrospective reinstatement. The respondent presented evidence in respect of all charges on which the applicant was found guilty.

136. The applicant was charged with:

“Charge 1

It is alleged that you are guilty of misconduct in that, on two separate occasions during January 2019, you sexually assaulted Deonishia Beukes, a resident at Vredelus Child and Youth Care Centre, by unlawfully and intentionally violating her, by rubbing her vagina with your hand.

Alternative to Charge 1

It is alleged that you are guilty of misconduct in that, on two separate occasions during January 2019, you sexually harassed Deonishia Beukes, a resident at Vredelus Child and Youth Care Centre, by displaying unsolicited conduct of a sexual nature, by rubbing her vagina with your hand.

Charge 2

It is alleged that you are guilty of misconduct in that, during January 2019, you assaulted Deonishia Beukes, a resident at Vredelus Child and Youth Care Centre,

by unlawfully and intentionally inspiring the belief that you would stab her with a knitting needle.

Alternative to Charge 2

It is alleged that you are guilty of misconduct in that, during January 2019, you displayed improper conduct by attempting to stab Deonishia Beukes, a resident at Vredelus Child and Youth Care Centre, with a knitting needle.

Charge 3

It is alleged that you are guilty of misconduct in that, between December 2018 and January 2019, you wrongfully and intentionally intimidated Deonishia Beukes and Sefora Nsene, both residents at Vredelus Child and Youth Care Centre, by threatening to bewitch them should they report your wrongful conduct.

Alternative to Charge 3

It is alleged that you are guilty of misconduct in that, between December 2018 and January 2019, you displayed improper conduct by threatening to bewitch Deonishia Beukes and Sefora Nsene, both residents at Vredelus Child and Youth Care Centre, should they report your wrongful conduct.

Charge 4

It is alleged that you are guilty of misconduct in that, between December 2018 and January 2019, you sexually assaulted Sefora Nsene, a resident at Vredelus Child and Youth Care Centre, by unlawfully and intentionally sexually violating her, by touching her breasts with your hand.

Alternative to Charge 4

It is alleged that you are guilty of misconduct in that, between December 2018 and January 2019, you sexually harassed Sefora Nsene, a resident at Vredelus Child and Youth Care Centre, by displaying unsolicited conduct of a sexual nature, by touching her breasts with your hand.

Charge 5

It is alleged that you are guilty of misconduct in that, you sexually harassed Sefora Nsene, a resident at Vredelus Child and Youth Care Centre, by displaying unsolicited conduct of a sexual nature, by slapping her bum while she was naked.

Alternative to Charge 5

It is alleged that you are guilty of misconduct in that, you displayed improper conduct towards Sefora Nsene, a resident at Vredelus Child and Youth Care Centre, by displaying unsolicited conduct of a sexual nature, by slapping her bum while she was naked.

Charge 6

It is alleged that you are guilty of misconduct in that, you sexually harassed Kashiefa Bezuidenhout, a resident at Vredelus Child and Youth Care Centre, by displaying unsolicited conduct of a sexual nature, by licking your lips whilst she was rubbing/scratching her vagina.

Alternative to Charge 6

It is alleged that you are guilty of misconduct in that, you displayed improper conduct towards Kashiefa Bezuidenhout, a resident at Vredelus Child and Youth Care Centre, by licking your lips, whilst she was rubbing/scratching her vagina.

Charge 7

It is alleged that you are guilty of misconduct in that, during December 2018 and January 2019, you slept on duty, without permission.

Charge 8

It is alleged that you are guilty of misconduct in that, during December 2018 and January 2019, you contravened the Unauthorised Articles in Child and Youth Care Centres policy (DSD Facilities Circular No: DFM 1/01/07/2013 updated 15/01/2014), by wilfully or negligently bringing your cell phone in the life space of the residents, and allowing the residents to access your cell phone.”

137. It is the Department's responsibility to ensure the safety and protection of vulnerable children in their care at the facilities.
138. Deonishia Beukes, Sofiso Viyedwa and Kashiefa Bezuidenhout testified with regards to the incidents as set out in the charges. Evidence was also given by Tanya Edwina Bridget Jack, a social worker, as well as by Marowaan Benting, the facility manager at Vredelus, Margaret van Rensburg, a Child and Youth Care worker, as well as Chantelle Stephans, another Child and Youth Care worker on behalf of the respondent. The applicant mainly gave bare denials of the incidents.
139. The applicant's representative made much of the fact that the applicant was not seen by other Youth and Child Care workers with her cell phone, although these workers were not always with her at the workplace, during her shifts.
140. The applicant's representative also did not dispute that Deonishia reported the complaint as soon as she could. There was also no evidence before me justifying the allegation that the witnesses on behalf of the respondent, namely Deonishia Beukes, Sofiso Viyedwa or Kashiefa's Bezuidenhout made up their versions. There were also no evidence before me that there could have been collusion about the allegations or that they even spoke to each other at any stage.
141. The allegation that the victims cannot be trusted has not been substantiated by the applicant. There was no evidence before me confirming that Deonishia and Kashiefa cannot be trusted or that they lied, other than a bare denial by the applicant.
142. **"Sexual harassment"** is defined as conduct of a sexual nature, which affects a person's dignity where such conduct is unwanted, unreasonable or offensive to the recipient.
143. It is the respondent's responsibility to ensure the safety and protection of vulnerable children in their care at the facilities.

144. Both Deonishia Beukes and Kashiefa Bezuidenhout testified with regards to the incidents as set out in charges 1 to 6. The applicant only gave a bare denial of the incidents.
145. The complainants had no discernible reason to be dishonest about the pattern of the applicant's behaviour and their discomfort with her behaviour.
146. In order to believe that the applicant's bare denials are truthful, I would have to find that the complainants conspired to falsely accuse the applicant of serious misconduct. I do not find any inconsistencies or contradictions in either of the complainants' version, on the contrary Deonishia conceded that she could not remember everything that happened, due to the fact that she was traumatized and that it happened a long time ago. Both Jack and Benting found Deonishia's version of the events to be truthful and consistent.
147. I also take cognisance of the fact that these young complainants were minors, who were subjected to the applicant's unwelcome conduct of a sexual nature. They had to testify about the incidents on two different occasions, first at the disciplinary hearing, then at the Arbitration hearing. Not only is this traumatic in itself, but they were consistent in their testimony. The applicant on the other side gave no explanation about the incidents as such but tried to place focus on whether anyone had seen her and whether the cameras were working or not. The latter did not form part of the respondent's evidence at all and is therefore deemed to be irrelevant.
148. The applicant's version was not put to the respondent's witnesses, an omission which the applicant was unable to explain. There was no evidence before me that either Deonishia, Kashiefa or Sifiso had anything to gain, by making up the allegations against the applicant.
149. The applicant did not deny the knitting needle (charge 2) incident, instead she tried to place emphasis on whether anyone had seen her.

150. The applicant also did not deny the cell phone incident under cross-examination, instead she placed much emphasis on whether anyone had seen her.
151. I take cognisance of the following: In ***SA Broadcasting Corporation Ltd v Grogan NO & Another, where Steenkamp, AJ(as he was then) observed: “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. Sexual harassment by older men in a position of power has become a scourge in the workplace.”***
152. I am satisfied that the applicant is guilty of the transgressions against her in charges 1 to 8 and that the misconduct is sufficiently serious to justify dismissal. I therefore find that the applicant’s dismissal was substantively fair. There was no evidence before me of procedural unfairness. I therefore find that the applicant’s dismissal was procedurally fair.

Award

153. I find that the applicant’s dismissal was both procedurally and substantively fair, therefore the applicant is not entitled to any relief.



T ERASMUS