ARBITRATION AWARD

PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

Commissioner: **James Ngoako Matshekga**

Case No: **PSHS1121-16/17**

Date of award: **22 August 2017**

In the matter between:

JAMES CHARLES Mc GREGOR Applicant

and

DEPARTMENT OF HEALTH- WESTERN CAPE Respondent

Details of hearing and representation

1. The arbitration of this dispute was set down before me on several dates[1]. The arbitration took place at the offices of Department of Health- Western Cape[2] situated at York Park, York Street, George.

2. Dr Charles James MacGregor[3] appeared in person and was at all material times represented by Adv Robert Stelzner SC on brief from the law firm Cilliers Odendaal Attorneys. The respondent was at all material times represented by Adv Jerome Van der Schyff on brief from the Office of State Attorney. Ms Deserè Barnard (Cilliers Odendaal Attorneys), Mr Wilhelm van der Vyver (Cilliers Odendaal Attorneys), Mr Feizal Rodriques (Department of Health), Mr Cedrick Jacobs

[1] The matter was heard on 10-12 May and 21-22 June 2017. After the finalization of oral evidence on 22 June 2017, the parties agreed to submit written closing arguments on or before 30 June (in the case of the respondent) and 3 July 2017 (in the case of the applicant). The applicant complied with the agreement whereas the arguments from the respondent were only filed on 4 July 2017. The applicant filed a response to the respondent's heads of argument on 6 July 2017. All submissions received from the parties were duly considered in this award.
[2] Hereinafter referred to as the respondent.
[3] Hereinafter referred to as the applicant.

(Department of Health) and Ms Colleen Bailey (Office of State Attorney) were in attendance as observers. The proceedings were digitally recorded and no interpreter was required.

Issue(s) to be decided

3. I must decide whether the applicant's dismissal by the respondent for alleged misconduct was for a fair reason[4] and effected in accordance with a fair procedure[5]. I must determine the appropriate relief if I find that the applicant's dismissal was either substantively or procedurally unfair or both. The relief sought by the applicant is retrospective reinstatement in terms of section 193 of the Labour Relations Act[6]. The respondent wants the applicant's dismissal to be upheld and claim of unfair dismissal to be dismissed.

Background to the dispute

4. The applicant is an adult male who was employed at George Hospital in the position of Anaesthetist Specialist[7]. The applicant earned a gross monthly salary of R154 113.32.

5. On 29 December 2016, the applicant was dismissed by the respondent following allegations of misconduct. The specific allegations for which the applicant was dismissed read as follows:

   Charge 1

   You allegedly made yourself guilty of an act of misconduct as contained in the disciplinary Code and Procedures for the Public Service, Annexure A as read with the Sexual Harassment Policy: Provincial Government Western Cape, in that while you were on duty on an outreach program to Riversdale as Consultant to Dr J Smook during October 2016 and while stopping over at Vleesbaai beach made unwelcome suggestion of a sexual nature when you dared Dr Smook to remove her clothes and swim naked in front of you and should have known that your behaviour is unwelcome.

   Charge 2

[4] Substantively fair.
[5] Procedurally fair.
[6] Act 66 of 1995, hereinafter referred to as the LRA.
[7] The Applicant was the Head of the Anaesthetics department.

You allegedly made yourself guilty of an act of misconduct as contained in the disciplinary Code and Procedures for the Public Service, Annexure A as read with the Sexual Harassment Policy: Provincial Government Western Cape, in that while you were on duty on an outreach program to Riversdale as Consultant to Dr J Smook during October 2016 made an unwelcome suggestion with sexual undertones when you suggested to Dr Smook to have an affair with you and that no one will know what has happened on outreach.

Charge 3

You allegedly made yourself guilty of an act of misconduct as contained in the disciplinary Code and Procedures for the Public Service, Annexure A as read with the Sexual Harassment Policy: Provincial Government Western Cape, in that while you were on duty during the internship of Dr J Smook in Anaesthesiology on or about 28 October 2016 made unwelcome sexual contact with Dr Smook when you inappropriately pressed yourself against Dr Smook in the theatre at George Hospital while showing her how to insert a laryngeal mask[8].

Charge 4

You allegedly made yourself guilty of an act of misconduct as contained in the disciplinary Code and Procedures for the Public Service, Annexure A as read with the Sexual Harassment Policy: Provincial Government Western Cape, in that while you were driving in your car on an outreach program to Riversdale as Consultant to Dr J Smook during October 2016 made unwelcome sexual advances to her when you inappropriately touched her leg.

6. The applicant lodged an internal appeal against the dismissal on 3 January 2017. The respondent upheld the applicant's dismissal on 31 January 2017. On 2 February 2017, the applicant referred an alleged unfair dismissal dispute to the Council, challenging both the substantive and procedural fairness of his dismissal. The dispute remained unresolved at a conciliation that took place on 27 February 2017, hence the arbitration. The applicant still challenges both the substantive and procedural fairness of his dismissal.

Survey of evidence and argument

Inspection *in loco*

[8] Hereinafter referred to as the LMA.

7. An inspection *in loco* was held on the afternoon of 10 May 2017. The primary purpose of the inspection was to observe the operating theatre at George Hospital[9].

The respondent's evidence

Documentary evidence

8. The respondent did not submit a bundle of documents.

Oral evidence

9. The respondent relied on the testimony of eight (8) witnesses, namely Mr Michael Fredirick Vonk[10], Dr Tielman Francois Roos[11], Dr Meandra Jordaan[12], Dr Silvana Maraschin[13], Dr Zilla Maria North[14], Ms Jeanne Danielle Smook[15], Ms Christel Bothma[16] and Dr Louis Stander Jenkins[17]. The testimony led by the witnesses is fully captured on the record of proceedings. What follows is a summary of the material and relevant evidence on the issues I must determine.

10. The essence of Vonk's testimony was that he is the Chief Executive Officer[18] of George Hospital. In 2014 Jordaan lodged a complaint regarding the applicant's conduct. The complaint related to the applicant making inappropriate comments of a sexual nature to her. He called the applicant into a meeting during which they spoke in general about sexual harassment. He received no further complaints from Jordaan after his meeting with the applicant.

11. He was in Durban for a conference when he received a call from North informing him that she received a sexual harassment complaint from Smook. The complaint from Smook was that the applicant brushed against her on a regular and ongoing basis.

[9] Adv Rodriques took a video of the inspection.
[10] Hereinafter referred to as Vonk.
[11] Hereinafter referred to as Roos.
[12] Hereinafter referred to as Jordaan.
[13] Hereinafter referred to as Maraschin.
[14] Hereinafter referred to as North.
[15] Hereinafter referred to as Smook.
[16] Hereinafter referred to as Bothma.
[17] Hereinafter referred to as Jenkins.
[18] CEO

12. The essence of Roos's testimony was that he is a medical officer at George hospital. He is good friends with Smook but they are not in a sexual or romantic relationship. He made the statement that appears on pages 74-75 of the applicant's bundle. Smook came to him on several occasions and complained about the applicant inappropriately touching and rubbing against her. Smook further complained that the applicant gave her "the McGregor hug". Smook alleged that the applicant rubbed his penis against her backside. He worked with the applicant and the latter never came close to him. Smook also complained about Dr Nel's conduct. He saw Smook on her return from the outreach in Riversdale. Smook was uncomfortable and felt violated by what occurred in Riversdale. He advised Smook not to let the applicant know of her feelings of violation. He contacted Dr Smith about the allegations made by Smook. He did not testify during the applicant's disciplinary hearing. He does not know why he was not called as a witness. He did not help Smook to draft her complaint. He does not work on dental lists and does not know what happened on 28 October 2016.

13. The essence of Jordaan's testimony was that she was a registrar at George Hospital until 2015. She is currently employed at Groote Schuur Hospital. She worked under the applicant. Dr Van der Bergh and Dr Lindique warned her against the applicant's behaviour towards females. One day she was on call with the applicant and the latter approached her inappropriately while teaching her incubation. The applicant gave her "the McGregor hug". She could feel the applicant's breath in her neck. The applicant's conduct was incredibly unprofessional and embarrassing.

14. She once went on outreach to Plettenberg Bay with Dr Nel, Dr Lindique and Dr Loubser. Dr Loubser physically harassed her during the outreach. She overheard the applicant talking to Loubser on the phone. On her return, she lodged a complaint and was advised to follow the informal route. The applicant had no respect for personal space.

15. She gave the applicant the note that appears on page 26 of the applicant's bundle. She chose the mug as a form of sarcasm. She was incredibly traumatised by her experience with the applicant. She also gave the applicant a fridge magnet. She did not want the applicant at her farewell.

16. The essence of Maraschin's testimony was that she is the acting head of Anaesthetic Department. She started working for the department in 2012 and was warned to watch out for herself because the applicant considers himself to be a ladies' man. She and the applicant do not get along. She heard a lot of rumours about what happened during outreaches. She met Smook on a Monday after her return from the Riversdale outreach. Smook was visibly upset and

described how the applicant sexually harassed her. Dr Lindique advised Smook to hold off putting a complaint against the applicant as the applicant was known to be vindictive. The applicant had to sign off Smook's log book for her Health Professional Council of South Africa (HPSA) registration.

17. On 28 October 2016, she observed the applicant standing behind Smook in theatre. The applicant had no respect for personal space. She had never seen anyone teach a person in the manner the applicant did. The incident was brief and the applicant moved away when he noticed her. She walked in and told Smook to go and have her red eye checked out. She then took over the patient from Smook. She later spoke to Smook in the recovery room. She made no reference to the incident of 28 October 2016 in her statement[19]. What happened on 28 October 2016 was nothing compared to what happened in Riversdale.

18. Her husband[20] and Mey's husband are friends. She did not have any hand in the applicant's disciplinary hearing.

19. The essence of North's testimony was that Dr Smith contacted her stating that Smook wanted to lodge a sexual harassment complaint against the applicant and Dr Nel. Smook complained that she was verbally, physically and sexually harassed by the applicant and Dr Nel during the Riversdale outreach. Smook also gave her a lot of details about what happened at the outreach. Smook said the applicant told her not to be ashamed of her body and made conversations with sexual innuendos. There was also an episode where the applicant put his hands on Smook's shoulders preventing her to get into her room. Smook also mentioned that at a certain point the applicant touched her leg and she moved away.

20. Smook also told her the applicant pulled her out of dental lists which was completely inappropriate. Smook alleged the applicant pushed himself against her in a way that made her uncomfortable while pretending to be helping her to insert the LMA. She was not responsible for the outcome of the applicant's disciplinary hearing. She is not aware of the evidence given by Smook during Nel's disciplinary hearing.

21. The essence of Smook's testimony was that she started working at George Hospital in January 2015. She was warned about some older male consultants who had a history of a sexual nature. The applicant's disciplinary hearing was on a Wednesday whereas Dr Nel's disciplinary hearing was on a Friday. She did not testify during Dr Nel's disciplinary hearing because she was too

[19] Page 1 of bundle
[20] Peter Adrian.

traumatised. Dr Nel's disciplinary hearing was aborted. She did not feel that Dr Nel wanted to have a sexual relationship with her.

22. She worked with the applicant in theatre after his return from leave. The applicant did not respect her personal space. The applicant stood very close to her and rubbed the top part of his chest against her back. The applicant did not press his whole body against her at that stage. She mentioned to Roos that the applicant's conduct made her a bit uncomfortable. Roos said she should be careful as he heard that Jordaan had a problem with the applicant. Roos gave her a telephone number of his friend that she could call while on outreach to Riversdale with the applicant.

23. She drove to Riversdale with the applicant in his car. The conversation started about general things. After a while they discussed outreaches. She asked the applicant about the effect of outreaches on him. The applicant said he does what he wants during outreaches, previously had affairs and his wife does not care and know. The discussion was sexual while they were going on Riversdale in a professional capacity. The conversation escalated and the applicant said it is easy to have an affair on outreach as no one will know because "what happens in Riversdale stays in Riversdale". The discussion was theoretical. The applicant made statements and was not asking for answers. The applicant mentioned he had two affairs with two women and when the matter was reported to Vonk the latter fell of his chair laughing. She could handle what the applicant was saying at that stage. She did not use the telephone number given to her by Roos.

24. She stayed in the same Bed and Breakfast with the applicant. The applicant suggested they should drive to Stilbaai to get food. As they were driving, the applicant mentioned it is going to be a great pseudo date and touched her on the upper thigh. The touch was sexual and not accidental. At that stage, she felt uncomfortable. They were early for dinner and decided to go to the harbour. She walked on the harbour and the applicant took photographs of her. During dinner, the applicant said they were on a pseudo date and ordered a bottle of wine. She felt awkward but had to eat. On return to the Bed and Breakfast she went into her room and changed her pants. The applicant knocked on her door and asked that they should go to the bar. She went with and drank small amount of Amarula. As she was walking back into her room, the applicant stood in front of her door, gave her a hug and said "good night". It was almost an aggressive move. In the morning, she went for breakfast and tried to keep the conversation professional. The applicant said even though they did not have the grand finale, it was the best night he ever had. Her shoes could not fit in her bag. The applicant took the shoes from her and said if he is carrying the shoes he can tell people that she left them in his room. She felt disgusted.

25. They passed by Vleesbaai on the way back to George. As she was walking on the beach the applicant asked if she did not want to go for a swim. The applicant said he imagined her naked and she had nothing to worry about. She made light of what the applicant said. She was unaware of the applicant taking the picture that appears on page 23.

26. On return to George she tried to normalise the situation. She sent the applicant messages to make it look like she had a wonderful trip. The messages were not truthful and she put a positive spin to the messages. She will definitely not go on outreach with the applicant again. She narrated her experience to Roos and some of her friends. She also narrated her experience to Dr Lindique. Marischin overheard the conversation and said she will support her if she wanted to report the matter to North. She wanted to finish her rotation and have her log book signed before lodging a complaint. She tried to avoid the applicant during the week. On 27 October 2016, the applicant phoned and said Broster wanted her to work on the dental list with them on 28 October 2016. On 28 October 2016, she worked on the dental list with the applicant. It was her last day and she did not need help anymore. The applicant pressed the whole front of his pelvis against her back. It was not necessary for the applicant to stand so close to her. Maraschin came into theatre and asked her to go have her eye checked out. She went and put eye-drops and later return to theatre. It would have been unethical for her to leave.

27. North asked her to write a statement. She did not have any guidance when writing the statement. She was not told how much detail to put in the statement. The allegations set out in charges 3 and 4 are not set out in her statement. She was not aware that she had to write every single complaint in the statement.

28. During the disciplinary hearing, she forgot to mention that the applicant touched her leg.

29. The essence of Bothma's testimony was that she was the chairperson of both the applicant and Dr Nel's disciplinary hearings. She had no prior knowledge of the allegations against the applicant and Dr Nel. She has no legal training and those were the first cases of sexual harassment that she had to preside over.

30. She followed the normal procedure during the hearings. Dr Nel pleaded not guilty. Smook was called as a witness. It transpired during the hearing that Dr Nel and Smook had a father/ daughter relationship and there were no sexual connotations. Reference was made to photographs that were sent by Dr Nel and Smook to each other. Dr Nel said the photographs were shared as a joke and apologised. North also testified about her supervisory role. She found Dr Nel not guilty of all charges. The charges against Dr Nel were not withdrawn.

31. She did not allow the applicant to present the photographs that appear on pages 23-25. The document that appears on pages 72-73 and pages 74-75 were not presented during the hearing. Jordaan's evidence was presented during the hearing but was not relevant to her findings. Jordaan's evidence proved that there was a history of a similar nature.

32. The essence of Jenkins' testimony was that he is employed as a doctor at George Hospital. One Thursday in October 2016[21] before the outreach in Riversdale, he got a sense that Smook felt closed in and crowded. Smook felt threated and under pressure. He did not observe anything that happened to Smook in theatre. He did not observe the applicant's proximity to Smook in theatre. He told the applicant to give Smook some space. He said this at the door of the tea room. He never had complaints about encroaching anyone's space. He does not have any issues with the applicant. He has a good relationship with the applicant as they were colleagues for 17 years. There were lots of rumours about sexual harassment but there was nothing that was ever followed up. He heard Jordaan lodged a grievance but he does not know the details thereof.

The respondent's argument

33. Adv Van der Schyff's closing arguments on behalf of the respondent are a matter of record. I accordingly do not repeat them in this award:[22]

The applicant's evidence

Documentary evidence

17. The applicant submitted a bundle of documents that was marked bundle A and paginated from pages 1-126.[23]

Oral evidence

[21] The witness stated he could not remember the exact date.
[22] I will however refer to the heads of argument where necessary.
[23] The documents in the bundle were agreed as being what they purported to be and their contents were also not in dispute (unless specified otherwise). The individual documents are also not listed in this award for the sake of brevity and due to the number of items involved. I will however refer to relevant documents where necessary.

18. The applicant relied on his testimony and that of five (5) other witnesses, namely, Dr Browyn Sunitha Roopnarain[24], Ms Roslyn Broster[25], Dr Henrietha Mey[26], Dr Brandon Glenn Rickers[27] and Dr Jacobo Cornelia Van der Linde.[28] The testimony led by the applicant and his witnesses is also fully captured on the record of proceedings. What follows is a summary of the material and relevant evidence on the issues I must determine.

19. The essence of the applicant's testimony was that as far as charge 4 is concerned, on 20 October 2016 Smook and him decided to go to Stilbaai while they were on the way to Riversdale. The Bed and Breakfast at which they were staying gave them R150 each for dinner. He did not anticipate that Smook and him will be staying at the Bed and Breakfast alone. Smook and him decided to drive to Stilbaai. They drove there. He brushed Smook's leg while driving as he was telling her something.[29] Smook did not say anything at the time. He touched Smook near the knee and not on the thigh. The brush was accidental and there was no intention behind it. He noticed that Smook changed posture and looked away. He asked Smook if anything was wrong and she said the air conditioner was blowing in her face. The conversation continued as normal. He did not utter the words "grand finale".

20. The allegations set out in charge 2 are not true. He was not on first name terms with Smook and therefore the conversation would have been inappropriate. He used the phrase pseudo- date during dinner.

21. On 21 October 2016, he went to Vleesbaai with Smook. The trip was by agreement. He took pictures at the beach with his cell phone and Nikon camera. A topic about swimming came up. He joked that people in Europe swam naked. They continued to walk in the beach and spoke about something else. The beach was not a secluded beach although there were no people at the time. They discussed gym and photography in the vehicle. The topics were raised by Smook. If Smook did not bring up the topics, he would not have discussed them.

22. On 22 October 2016, he downloaded the pictures that he took on his camera and sent them to Smook. Smook sent herself some of the pictures that he took with his cellphone[30].

[24] Hereinafter referred to as Roopnarain.
[25] Hereinafter referred to as Broster.
[26] Hereinafter referred to as Mey.
[27] Hereinafter referred to as Rickers.
[28] Hereinafter referred to as Van der Linde.
[29] Witness was not specific about what he was telling Smook.
[30] Page 23 and 25.

23. The document that appears on page 46 of the applicant's bundle is an example of the final logbook that Smook had to complete. He is not the only signatory of the document.

24. He does not get along with Marischin. Marischin is currently acting in his position. Mey informed her Marischin has ambitions of being head of the anaesthetic department.

25. As far as charge 3 is concerned, he did not show Smook how to insert the LMA as she was proficient to do that at that stage. Marischin entered the theatre room when the lights were on and Dr Mey was getting ready to operate the fourth patient. They cannot start operating unless the LMA is in. He was standing and watching when Marischin entered. He was standing about 30cm behind Smook when Marischin entered. He did not press himself against Smook when Marischin walked in. It was very unusual for Marischin to walk into theatre. Marischin told Smook to go have her eye checked out and that is what caught his attention. Smook left and Marischin took over from her. The 5th patient came in with Marischin and Smook returned two minutes into that patient. Smook looked very upset in not being able to carry on with the dental list. Marischin left and did not return. They completed 10 cases in just over an hour and went for tea. They had a normal tea break. Smook was chatting with Mey. Smook did not suggest he was standing too close to her. He took pictures of everyone who was in theatre that day. He was going to use the pictures for a presentation he had at Groote Schuur Hospital.

26. It is correct that encroachment of personal space can be an issue.

27. He became aware of the "McGregor hug" during the arbitration. It was not mentioned during the disciplinary hearing and in any statement.

28. He did not insist on Smook being part of the dental list on 28 October 2016. He was supposed to work with Dr Gerber on that date. He checked that Smook complied with her requirements before she could do the dental list. He did not phone Smook on 27 October 2016.

29. He denies that he inappropriately touched Smook. Smook and Jordaan did not hit on him. It is also not his case that they have an axe to grind with him. He has not heard of rumours about sexual harassment. He had a discussion with Vonk about body space and not sexual harassment. He was on outreach with Jordaan twice. He does not know of any doctor besides himself and Nel who faced allegations of sexual harassment. He is aware of the employer's sexual harassment policy. He concedes that sexual harassment is serious.

30. The essence of Roopnarain's testimony was that she was employed at George Hospital as a Medical Officer Grade 1. She resigned for personal reasons. The applicant trained her as an intern in the anaesthetic department. She was originally assigned to do the dental list of 14 October 2016. She helped with the second part of the dental list. She did not take over from Smook. She was told Smook can do the next dental list. She never heard of the "McGregor hug".

31. The essence of Broster's testimony was that she is employed at George Hospital as a Scope Sister. She worked with the applicant for two and half years. She did the dental lists of 14 and 28 October 2016 with Smook. On 27 October 2016, she asked for Smook to be on the dental list of 28 October 2016. On 28 October 2016, Smook arrived with dose of pink eye. They started the dental list as normal. She saw Marischin standing at the side door when she turned around to get a needle. She does not know how long Marischin stood at the door. It is possible Marischin may have seen things she did not see. Marischin walked in and told Smook that she will take over and Smook must go sort out her eye. Smook looked upset. She assumed Smook was upset because Marischin took over from her. It is possible that Smook may have been upset by someone else. Marischin took the patient to recovery room. Smook returned with the next patient. She had no conversation with Marischin.

32. There was no small talk about what happened during tea break. The atmosphere during tea break was light hearted. They were joking as usual. They were talking about surfing etc. There was no indication that Smook was uncomfortable with the applicant.

33. The essence of Mey's testimony was that she is the resident dentist at George Hospital. She met Smook for the first time on 14 October 2016. Smook assisted her with the dental list. On 28 October 2016 Smook arrived with a very red eye. Smook confirmed she was ready to continue with the dental list. She was busy with the 4th patient when in her peripheral vision she saw Marischin walk into theatre. Smook had inserted the LMA of the patient at that time. Her 1st concern was that Marischin and the applicant did not have a good relationship and she was scared that they may start screaming at each other.[31] She was happy that Marischin was not angry and they started chatting about social issues. Marischin left with the patient to the recovery room. Smook seemed confused about why Marischin came into theatre and asked her to attend to her eye.

[31] The witness testified that there were at least two previous occasions where the applicant and Marischin screamed at each other in theatre.

34. She is friends with Marischin. They have an understanding that they cannot discuss the applicant as Marischin cannot stand the applicant. One day, Marischin came in, in a rage and stated she wanted the applicant's job.

35. The sms that appears on page 70 is the sms that her husband received from Marachin's husband on 4 November 2016.[32]

36. The essence of Rickers' testimony was that he is currently a dentist in Mosselbay Hospital. He worked with the applicant for more than 11 years. He made the statement that appears on page 37 of the bundle. They were having dinner at the Bed and Breakfast in Riversdale during one of the outreaches when Jordaan asked the applicant to warm her bed while she was taking a bath. Jordaan's statement was met with silence. He did not bother about the significance of the statement.

37. The essence of Van der Linde's testimony was that she was the Community Service Dentist in George Hospital. On 28 October 2016, she assisted Mey with the dental list. Her duties mainly include suctioning blood inside the patient's mouth and cleaning everywhere the blood spills. She met Smook for the first time on that date. She is taller than Smook. Smook was on her right-hand side at the head of the patient, monitoring the patient. She became aware of Maraschin's presence in theatre when an operation was in progress. Maraschin talked to Smook mentioning something about her eye and the redness of her eye and advised her to get that checked out. Smook went to check her eye out and Maraschin took over the patient. The applicant was standing between the medicine cabinet and the monitoring machine when Maraschin entered the theatre. The applicant was in the general vicinity of Smook. She did not notice anything untoward. If the applicant was standing too close to Smook or if there was anything inappropriate she would have seen it through her secondary focus. Smook did not complain to her about anything about the applicant during tea time. They had a general conversation about surfing. Smook was not upset or uncomfortable at all.

Applicant's argument

38. Adv Stelzner's closing arguments on behalf of the applicant are also a matter of record. They shall also not be repeated in this award.[33]

[32] The sms states "so the news at George provincial hospital is the Drs Nel and McGregor have been suspended for sexual harassment of a young intern. A hearing is pending." this looks incomplete
[33] Similarly, they shall be referred to where necessary.

Analysis of evidence and arguments

39. I am required to decide whether the dismissal of the applicant by the respondent was substantively and procedurally fair. I am also required to determine the appropriate relief if I find that the applicant's dismissal was either substantively or procedurally unfair or both. Section 138(7)(a) of the LRA enjoins me to provide brief reasons for my findings.[34]

40. Section 192 of the LRA provides that in any proceedings concerning any dismissal, the applicant must establish the existence of the dismissal. If the existence of the dismissal is established, the respondent must prove that the dismissal is fair.

41. The dismissal of the applicant was not in dispute in this matter. Therefore, the respondent bears the onus of proving on a balance of probabilities that the dismissal was fair.

42. According to Section 188(1) of the LRA, the dismissal of the applicant by the respondent will be unfair if the respondent fails to prove that the applicant's dismissal was for a fair reason related to the applicant's conduct or capacity or based on the respondent's operational requirements and that the dismissal was effected in accordance with a fair procedure.

43. In determining whether the respondent has complied with the requirements for substantive and procedural fairness, I must consider the provisions of schedule 8 of the LRA.[35]

44. The determination of whether the dismissal of the applicant by the respondent was fair requires me to make "a moral or value judgment as to what is fair in all the circumstances".[36]

45. In considering issues of fairness, I am obliged to have regard to fairness to both parties. There is no room for any suggestion that fairness is confined to its effect on the applicant only.[37]

46. In his celebrated concurring judgement in *Woolworths (Pty) Ltd v Whitehead*[38] Willis JA held that "fairness is an elastic and organic concept. It is impossible to define with exact precision. It has

[34] The section provides that "within 14 days of the conclusion of the arbitration proceedings, the commissioner must issue an arbitration award with brief reasons, signed by that commissioner".
[35] Section 188(2) of the LRA provides that "Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act".
[36] See in this regard *Metro Cash & Carry Ltd v Tshehla* [1997] 1 BLLR 35 (LAC); and *Numsa v Vetsak Co-Operative Ltd and Others* (1996) 3 All SA 311 (A)).
[37] See in this regard *FAWU and Others v SAB Limited* [2004] ZALC 65 (LC) at para 48).
[38] (2000) 3 SA 529 (LAC).

to take account of the norms and values of our society as well as its realities. Fairness, particularly in the context of the LRA, requires an evaluation that is multi-dimensional. One must look at it not only from the perspective of prospective employees, but also employers and the interests of society as a whole. Policy considerations play a role…"[39]

Substantive fairness of the applicant's dismissal

47. Item 7 of Schedule 8 of the LRA provides that:

Any person who is determining whether a dismissal for misconduct is unfair should consider-

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(b) if the rule or standard was contravened, whether or not-

(i) the rule was a valid or reasonable rule or standard;

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard; (iii) the rule or standard has been consistently applied by the employer; and

(iv) dismissal was an appropriate sanction for the contravention of the rule or standard.

48. The applicant disputes breach of the rule, the consistent application thereof as well as appropriateness of dismissal as a sanction.

49. The dismissal of the applicant is rooted in sexual harassment. The specifics thereof relate to what happened between the applicant and Smook during the outreach to Riversdale on 19-20 October 2016[40] as well as what happened in theatre during the dental list of 28 October 2016.[41] As far as the Riversdale events are concerned, the only direct witnesses of what happened between the applicant and Smook are the two. In other words, it is Smook's version against that of the applicant and vice versa. Therefore, it is the probabilities of Smook and the applicant's versions that must be weighed against each other.

50. A finding on a balance of probabilities is not merely a mechanical balancing of evidence- or for that matter, the number of witnesses on each side. In *Selamolele v Makhado*[42] the approach to the question whether the onus has been discharged was dealt with as follows: "Ultimately the question is whether the onus on the party, who asserts a state of facts, has been discharged on a balance of probabilities and this depends not on a mechanical quantitative balancing out of the

[39] Albeit in the context of an alleged unfair discrimination dispute.
[40] Charges 1, 2 and 4.
[41] Charge 3.
[42] 1988 (2) SA 372 (V) at 374J–375B.

pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and/or inherent probabilities of the evidence of the witnesses and, secondly, an ascertainment of which of two versions is the more probable."

51. In *Assmang Ltd (Assmang Chrome Dwarsriver Mine) v CCMA and others*[43] the Labour Court held that it is possible for a Commissioner to arrive at his decision simply on the probabilities and without having to make specific findings of the credibility of the witnesses. The Court further held, with reference to the decision in *National Employers' General Insurance Co Ltd v Jagers*[44] that it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility. The Court referred to the matter of *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others*[45] where the Supreme Court of Appeal laid out the accepted test applicable to both a trial court and an arbitrator when faced with a factual dispute, in particular when faced with two irreconcilable versions. According to the Supreme Court of Appeal[46] I must conclude on the disputed issues by making findings on the credibility of the various factual witnesses[47], their reliability[48] and the probabilities.[49]

52. Before embarking on an exercise on the probabilities of the parties' respective versions, it is important for me to deal with and dispose of two interrelated issues. The first is the relevance and admissibility of Vonk, Roos, Jordaan, Maraschin, North, and Jenkins' evidence in respect of what may have happened in Riversdale. The second is what the respondent described as the similar fact evidence of Jordaan.

53. In its closing argument, the respondent submitted that Vonk, Roos, Maraschin and North's testimonies was led "to explain the general conditions under which interns worked and the fact that, that was widely known as far as Durban, Johannesburg, and Cape Town".[50] During the

[43] [2015] 6 BLLR 589 (LC) at para 49.
[44] 1984 (4) SA 437 (E).
[45] 2003 (1) SA 11 (SCA).
[46] At para 5.
[47] This will depend on my impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.
[48] This will depend, apart from bias, external contradictions and the probability or improbability of particular aspects of the version on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof.
[49] This necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues.
[50] At para 2.2.

arbitration, these so-called "general conditions" were described as rumours[51]. Put differently, the respondent wanted me to consider rumours in concluding that the applicant committed misconduct.

54. The Labour Appeal Court held in *Mbanjwa v Shoprite Checkers (Pty) Ltd and Others*[52] that "it is trite that an employer bears the onus to prove, on a balance of probabilities, that the misconduct was indeed committed by an employee concerned. Where the employer is suspicious that the employee, through the latter's movements or conduct, may have some dishonest intentions, the employer cannot justifiably rely on that suspicion as a ground to dismiss the employee for misconduct because suspicion, however, strong or reasonable it may appear to be, remains a suspicion and does not constitute misconduct. There needs to be tangible and admissible evidence to sustain a conviction for the misconduct in question."

55. Suspicion and rumours are birds of the same feather. Both do not constitute admissible evidence. Both are unreliable and unfairly prejudicial to an employee. Both cannot be tested and be subjected to the rigours of cross- examination. Both are intangible. Both belong in the realm of mudslinging and character assassination. Nothing useful turn on both. To that end, the evidence led by Vonk, Roos, Jordaan, Maraschin and North is irrelevant and inadmissible. Accordingly, I paid no regard to it as evidence in arriving at the conclusions that I arrive at in this award in so far as the misconduct levelled against the applicant is concerned.

56. As far as Jordaan's alleged similar fact evidence is concerned, I do not understand why the evidence is described as similar fact in the first place. It is common cause that Jordaan never went on outreach with the applicant.[53] To that end, I fail to understand why and how Jordaan's evidence in respect of what allegedly happened to her at the hands of Dr Nel and Dr Loubser during the outreach to Plettenberg Bay constitute admissible similar fact evidence against the applicant.

57. For what it is worth, the Constitutional Court[54] had occasion to deal with the admissibility of similar fact evidence in *Savoi and Others v National Director of Public Prosecutions and Another*[55]. The Court held that in South Africa the admission of similar fact evidence is

[51] See paragraphs 46 to 48 of the respondent's heads of argument.
[52] [2013] ZALAC 29 at para 26.
[53] The only testimony that Jordaan gave was of an outreach to Plettenberg Bay that she went to with Dr Nel and Dr Loubser. During the disciplinary hearing the respondent, correctly so in my view, found that Jordaan's testimony was irrelevant.
[54] Albeit in a criminal context,
[55] 2014 (5) BCLR 606 (CC).

surrounded by some degree of confusion[56] and that similar fact evidence is inadmissible because it is inherently prejudicial.[57] The Court further held that the real question for admissibility of similar fact evidence should be whether, when looked at in its totality, evidence of similar facts has sufficient probative value to outweigh its prejudicial effects and that is a matter of degree in each case.[58]

58. As far as labour matters are concerned, the Labour Appeal Court dealt with the admissibility of similar fact evidence in *Gaga v Anglo Platinum Ltd and Others*[59]. In that matter, the Labour Appeal Court held that "in the context of an unfair dismissal arbitration, similar fact evidence of a pattern of behaviour or serial misconduct will often be relevant to both the probabilities of the conduct having been committed and the appropriateness of dismissal as a sanction. It may be more so where the alleged misconduct is characterised by an element of impulsivity, as often the case with sexual misconduct. There ordinarily would be a sufficient link or nexus between the earlier similar misconduct (if proved) and the disputed facts pertaining to a method of commission, or a pattern possibly revealed, to make that evidence exceptionally admissible."[60]

59. In *Absa Bank Limited v Ngwane N.O. and Others*[61] the Labour Court held that "the exclusionary rule against similar fact evidence is generally observed because it avoids reliance on unfairly prejudicial information with low probative value when disputes of fact are decided. As such, the rule contributes to a fair outcome (and saves time). While the rules of evidence do not have to be strictly applied in the CCMA, a commissioner must still ensure a fair outcome."[62] More importantly, the Court further held that "I do not understand the court in *Gaga* to have instituted a different exception in labour law to the rule against similar fact evidence than the 'strikingly similar' exception in the rest of our legal system. In *Gaga* the court found that evidence of prior sexual harassment may be admitted as similar fact evidence as it demonstrated a pattern of similar conduct. However, this pattern is not created merely by the common name given to the misconduct but by an established common *modus operandi*."[63]

The law around sexual harassment

[56] The court stated that is less so in recent times.
[57] At para 50.
[58] At para 55.
[59] [2012] 3 BLLR 285 (LAC).
[60] At para 45.
[61] ZALCD 21 (11 October 2016).
[62] At para 24.
[63] At para 25.

60. Sexual harassment in the workplace is prohibited under the labour laws of South Africa[64]. The 1998 Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace[65], issued by NEDLAC under section 203(1) of the LRA, and the subsequent 2005 Amended Code on the Handling of Sexual Harassment Cases in the Workplace,[66] issued by the Minister of Labour in terms of section 54(1)(b) of the Employment Equity Act[67] recognises that harassment poses a barrier to the achievement of substantive equality in the workplace and is inimical to the constitutional dream of a society founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism.

61. At its core, sexual harassment is concerned with the exercise of power and in the main reflects the power relations that exist both in society generally and specifically within a workplace. While economic power may underlie many instances of harassment, a sexually hostile working environment is often "…less about the abuse of real economic power, and more about the perceived societal power of men over women. This type of power abuse often is exerted by a (typically male) co-worker and not necessarily a supervisor."[68]

62. The 1998 Code and the Amended Code contain a definition of sexual harassment[69]. In terms of the Codes, sexual harassment may include physical conduct, verbal conduct and non-verbal conduct.[70]

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[64] Harassment of an employee is a form of unfair discrimination in terms of section 6(3) of the Employment Equity Act 55 of 1998. Sexual harassment is also prohibited under the Protection from Harassment Act 17 of 2011.
[65] The 1998 Code.
[66] The Amended Code. In *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* [2016] 1 BLLR 1 (LAC) the Labour Appeal Court held that "In spite of it being termed the "Amended" Code, this Code does not replace or supersede the 1998 Code, which to date has not been withdrawn. The result is that in terms of s203(3), both Codes are as "relevant codes of good practice" to guide commissioners in the interpretation and application of the LRA."
[67] Act 55 of 1998.
[68] Basson A "Sexual Harassment in the Workplace: An Overview of Developments" in *Stell LR* 2007 3 425450 at 425 quoting Garbers 2002 SA Merc LJ 37 n 5.
[69] The 1998 Code defines sexual harassment as '(1) unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.
(2) Sexual attention becomes sexual harassment if:
(a) The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or
(b) The recipient has made it clear that the behaviour is considered offensive; and/or
(c) The perpetrator should have known that the behaviour is regarded as unacceptable.' The Amended Code defines sexual harassment as '…unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:
4.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
4.2 whether the sexual conduct was unwelcome;
4.3 the nature and extent of the sexual conduct; and
4.4 the impact of the sexual conduct on the employee.'
[70] Although the Codes are not legally binding, they provide a useful guidance in the manner in which an employer should deal with allegations of sexual harassment, and encourages the development and implementation of policies and procedures to prevent sexual discrimination.

63. The respondent's sexual harassment policy[71] includes a definition of sexual harassment that appears to be fusion of the definition in the 1998 and Amended Code.[72]

Re: charge 1, 2 and 4

64. The allegations in charge 1, 2 and 4 are based on what transpired between the applicant and Smook to and from the outreach in Riversdale. Charge 1 is based on what happened on the beach in Vleesbaai. It is not in dispute that the applicant and Smook went to the beach in Vleesbaai. It is also not in dispute that a discussion about swimming ensued. The essence of Smook's testimony was that the applicant dared her to swim naked. The essence of the applicant's testimony on the other hand was that he made a joke about people in Europe swimming in the nude. The material question that I have to determine is whether the applicant's admitted conduct of making a comment about swimming in the nude constitutes sexual harassment.

65. It is common cause that the Riversdale outreach was the first that the applicant and Smook went to, together. Apart from the fact that they drove to Riversdale together, the two hardly knew each other on a social level. The applicant testified he was not on a first name basis with Smook.

66. Swimming in the nude is a practice that is generally unknown in South Africa. Conversations about nudity with one's colleagues whom you are not acquaintances are wholly inappropriate. Expecting a junior colleague to be nude and/or making a joke about nudity is deplorable. The power relations between the applicant and Smook are such that the applicant should have known that he could not have a conversation with Smook, whatever the label he seeks to attach to it, about nudity. The applicant should have known that such comments were unacceptable and unwelcome.

67. The 1998 Code states that "verbal forms of sexual harassment include unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or

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[71] Page 92- 107 of the applicant's bundle.

[72] Paragraph 7 of the policy contains the following definition:
7.2.1. Sexual harassment is unwelcome conduct of a sexual nature that violates the rights of a person. The unwelcome nature of sexual harassment distinguishes it from behaviour that is welcome and mutually acceptable. Such conduct may substantially interfere with an employee's work performance and may create a hostile, offensive and intimidating environment. In determining whether conduct constitutes sexual harassment the following factors are to be taken into account:
7.2.1.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
7.2.1.2 whether the sexual conduct was unwelcome;
7.2.1.3 the nature and extent of the sexual conduct; and
7.2.1.4 the impact of the sexual conduct on the complainant.
7.2.2. Sexual attention becomes sexual harassment if:
7.2.2.1 the recipient has made it clear that the behaviour is considered offensive; and/or
7.2.2.2 the perpetrator should have known that the behaviour is regarded as unacceptable, and/or
7.2.2.3 the unwanted behaviour persists, although a single incident of harassment can constitute sexual harassment.

insults or unwelcome graphic comments about a person's body made in their presence or directed toward them, unwelcome and inappropriate enquiries about a person's sex life, and unwelcome whistling directed at a person or group of persons."[73]

68. From the evidence led by the applicant and Smook in respect of what tanspired on the beach in Vleesbaai, I am satisfied that the applicant's conduct constituted sexual harassment as defined. Therefore, the respondent proved on a balance of probabilities that the applicant breached the rule in respect of charge 1.

69. As far as charge 2 is concerned, the essence thereof is that the applicant made an unwelcome suggestion with sexual undertones when he suggested to Smook to have an affair with him and that no one will know what has happened on outreach. Smook's testimony about the applicant having referred to their dinner as a "pseudo date" remained unchallenged. In fact, the applicant admitted that he used the words "pseudo date". The applicant vehemently denied that he told Smook that "what happens in Riversdale stays in Riversdale". The denial was nothing more than a bare denial. Smook gave a detailed account of the events in Riversdale. Smook's version, when balanced against the applicant's bare denial, points to the probability of the applicant having made an unwelcome suggestion that they should have an affair. That conduct constitutes verbal sexual harassment as defined[74]. Therefore, the respondent proved on a balance of probabilities that the applicant breached the rule in respect of charge 2.

70. The essence of charge 4 is that the applicant inappropriately touched Smook's leg. There is no dispute that the applicant touched Smook's leg. It is immaterial whether the touching happened to and from Stilbaai. What is material is whether the touch happened. Smook described the touch as sexual and not accidental. The applicant described the touch as an accidental brush.

71. Smook could vividly remember the subject matter that was being discussed at the point of the touch. Her testimony was that the applicant mentioned that it is going to be a great pseudo date and then touched her on the upper thigh. The applicant, on the other hand, testified that he accidentally touched or brushed Smook's leg while gesticulating. Importantly, he testified he could not remember what he was talking about at the time.

[73] Para 4(1)(b). Para 5.3.1.2 of the Amended Code sates that "verbal conduct includes unwelcome innuendos, suggestions, hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person's body made in their presence or to them, inappropriate enquiries about a person's sex life, whistling of a sexual nature and the sending by electronic means or otherwise of sexually explicit text".
[74] Para 4(1)(b) of the 1998 Code and Para 5.3.1.2 of the Amended Code above.

72. Critical in this matter is to always be aware of the power relations[75], age difference[76] and familiarity between the applicant and Smook. I find it highly improbable that a 58-year-old man driving for the first time with a 26-year-old female can accidentally touch or brush her on the leg while talking about their dinner being a pseudo date. The probabilities favours Smook's version and therefore I am satisfied that the applicant's touch was deliberate, sexual and not accidental. A pseudo date is sexual. It is also not in dispute that Smook turned away from the applicant after the touch[77] and that the applicant enquired from her what was the problem. It was not necessary for the applicant to enquire from Smook what her problem was. The applicant should have known that his conduct of touching Smook's leg was unwelcome.

73. The 1998 and Amended Code states that physical conduct of a sexual nature includes all unwanted physical contact, ranging from touching[78]. I am satisfied that the applicant's conduct constituted sexual harassment as defined. Therefore, the respondent proved on a balance of probabilities that the applicant breached the rule in respect of charge 4.

Re: Charge 3

74. The essence of charge 3 relates to what happened between the applicant and Smook in theatre on 28 October 2016. Most of the facts about what transpired on that date are not in dispute. It is common cause that Smook and the applicant worked on the dental list for that day together with Roopnarain, Broster, Mey and Van der Linde. It is also common cause that Smook arrived at work with a red eye. It is also not in dispute Marischin walked into theatre during the operation of a 4th patient and asked Smook to have her eye checked out. It is also not in dispute that Smook returned and continued with the dental list. It is also not in dispute that Smook did not mention or report any sexual harassment by the applicant to Roopnarain, Broster, Mey and Van der Linde. The essence of Smook's testimony was that the applicant did not respect her personal space. At no stage did she allege the applicant sexually harassed her in theatre[79]. The respondent's other witnesses on the person of Vonk, Roos, Jordaan, Maraschin and North also jumped on the "lack of respect of personal space" bandwagon. Roos went as far as testifying that Smook told her the applicant rubbed his penis against her back, an allegation that was completely at odds

[75] Smook was an intern and the applicant the HOD.
[76] Smook was 26 years old at the time and the applicant was 58 years old.
[77] Para 5.2.1 of the Amended Code states that "there are different ways in which an employee may indicate that sexual conduct is unwelcome, including non-verbal conduct such as walking away or not responding to the perpetrator." Smook's actions of turning away were reasonable as she could not walk away from the applicant because the touch happened when the applicant's vehicle was in motion.
[78] Para 4(1)(a) of the 1998 Code and Para 5.3.1.1 of the Amended Code.
[79] The alleged sexual harassment was not mentioned or referred to in the written statement made by Smook.

with what Smook herself testified. Roos testified that the allegations of lack of respect of personal space by Smook started even before the Riversdale outreach.

75. The undisputed affidavit evidence of Prof Justiaan Swanevelder was that "it goes without saying that both the anaesthetist and the intern must both be prepared and satisfied to work in such close proximity, whilst at the same time respecting each other's personal space."[80] Nowhere in that expert evidence is it stated that a failure to respect personal space constitutes sexual harassment. Both the 1998 Code and the Amended Code do not define sexual harassment in those extremes. Neither does the employer's sexual harassment policy.

76. From the evidence that has been placed before me, I am satisfied that the applicant did not sexually harass Smook on 28 October 2016. There was nothing sexual about the Applicant's proximity to Smook. In other words, the conduct was not of a sexual nature within the meaning of the 1998 Code, the Amended Code and the employer's sexual harassment policy. Therefore, the respondent failed to prove on a balance of probabilities that the applicant breached the rule in respect of charge 3.

The inconsistency challenge

77. The root of the applicant's inconsistency challenge lies in the respondent's failure to discipline and dismiss Dr Nel in circumstances where Smook made the similar allegations of sexual harassment against him.

78. The relevant legal principles applicable to consistency were re-emphasised and clarified by the Labour Court in *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others*[81]. The court stated that:

The legal principles applicable to consistency in the exercise of discipline are set out in item 7(b)(iii) of the Code of Good Practice: Dismissal establishes as a guideline for testing the fairness of a dismissal for misconduct whether "the rule or standard has been consistently applied by the employer." This is often referred to as the "parity principle", a basic tenet of fairness that requires like cases to be treated alike. The courts have distinguished two forms of inconsistency - historical and contemporaneous inconsistency. The former requires that an employer apply the penalty of dismissal consistently with the way in which the penalty has been applied to other employees in the past; the latter requires that the penalty be applied consistently as between

[80] Page 34 of the applicant's bundle.
[81] [2009] 11 BLLR 1128 (LC).

two or more employees who commit the same misconduct. A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a subjective element - an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed by the employee used as a comparator (see, for example, Gcwensha v CCMA & others [2006] 3 BLLR 234 (LAC) at paragraphs [37]-[38]). The objective element of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to different treatment, usually in the form of a disciplinary penalty less severe than that imposed on the claimant (see Shoprite Checkers (Pty) Ltd v CCMA & others [2001] 7 BLLR 840(LC) at paragraph [3]). Similarity of circumstance is the inevitably most controversial component of this test. An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of, inter alia, differences in personal circumstances, the severity of the misconduct or on the basis of other material factors.

79. Item 3(6) of Schedule 8 of the LRA further provides that "the employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration".

80. The hallmark of the parity principle is that all things being equal it is generally or *prima facie* unfair to dismiss an employee for an offence that the employer has habitually or frequently condoned in the past[82] or to dismiss some of a number of employees guilty of the same misconduct[83]. In other words, historical consistency requires employees to be treated the same as employees who committed the same offence in the past whereas contemporaneous consistency requires all employees who have committed the same misconduct at the same time to be treated equally.

81. In *NUMSA & Others v Henred Fruehauf Trailers (Pty) Ltd*[84] the Appellate Division[85] explained that "equity requires that the courts should have regard to the so-called 'parity principle'. This has been described as a basic tenet of fairness which requires that like cases should be treated alike".

[82] That is historical inconsistency.
[83] That is contemporaneous inconsistency.
[84] [1995] BLLR 1 (AD).
[85] As it then was, currently the Supreme Court of Appeal.

82. In *Gcwensha v CCMA & others*[86], the Labour Appeal Court, per Nicholson JA, held that "disciplinary consistency is the hallmark of progressive labour relations and the "parity principle" merely requires that every employee must be measured by the same standards. Discipline must also not be capricious nor should there be any perception of bias when comparing employees care should be taken to ensure that the gravity of the misconduct is evaluated and the discipline record of the two employees compared. No extraneous matters should be regarded and a comparison has to be made between all the relevant features that are normally considered when one employee is disciplined."

83. In *SRV Mill Services (Pty) Ltd v CCMA & Others*[87] the Labour Court held that inconsistent treatment is "likely to produce in the minds of interested and impartial observers alike a perception of unfairness and, possibly, one of bias or ulterior purpose. It is for this reason that the explanation of the differentiation is essential, if the different outcomes are both to survive". The court further stated that "it is not part of the law on consistency that bias or ulterior purpose must be established before a disciplinary outcome can be said to be inconsistent to the point that it impacts on the requirement of fairness. One of the reasons underlying the need for consistency is that the perception of bias should be avoided."

84. It is not in dispute that Smook alleged that Dr Nel sexually harassed her.[88] It is also not in dispute that Dr Nel, amongst others, sent graphic images to Smook. It is also not in dispute that Nel was acquitted of the allegation of sexual harassment without Smook's testimony and on Bothma's finding that there was no sexual harassment because the images were shared as a joke[89].

85. When the applicant raises an inconsistency challenge, the onus rests on the respondent to explain the inconsistency in discipline. In *Rustenburg Platinum Mines Ltd (Bafokeng Rasimone Platinum Mine) v CCMA & others*[90] the Labour Court stated that "an employer bears the onus to prove that it acted consistently. I accept that an employer may be justified in differentiating between employees guilty of the same offence. The employer must lead evidence since it bears the onus to justify the differentiation of treatment meted out between the employees. In other words, it must justify why there was a differentiation"[91] .

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[86] [2006] 3 BLLR 234 (LAC).
[87] [2004] 2 BLLR 184 (LC).
[88] It was because of those allegations that Dr Nel was also disciplined.
[89] Bothma's understanding of sexual harassment in so far as Dr Nel's outcome is concerned clearly show her lack of appreciation of the seriousness of his misconduct and is at odds with the definition of sexual harassment in the 1998 Code, the Amended Code and the respondent's sexual harassment policy.
[90] [2006] 11 BLLR 1104 (LC).
[91] See also in this regard *Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC).

86. If the applicant leads evidence that another employee similarly placed was not dismissed for a contravention of the same rule, the respondent must justify the difference of treatment. Unless the respondent can provide a legitimate basis for differentiating between two similarly placed employees, a disparity in treatment is unfair[92].

87. The respondent did not favour me with any reliable evidence and/or reasonable explanation why Dr Nel was not disciplined and/or dismissed despite being similarly placed as the applicant and committing the same, if not, more serious misconduct.[93] In the absence of that evidence the conclusion is evitable that the reason for the distinction is motivated by bias and/or ulterior motives. Accordingly, the dismissal of the applicant while no disciplinary action and/or Dr Nel was acquitted of the same misconduct is unfair. Thus, the dismissal of the applicant was substantively unfair.

Procedural fairness

88. When deciding whether a disciplinary procedure conducted in terms of a collectively agreed procedure[94] involves any procedural unfairness, I am required to examine the actual procedure followed. Unless the actual procedure followed results in unfairness, I should not make a finding of procedural unfairness in a dismissal case.[95]

89. The essence of the applicant's procedural challenge is that he was denied a fair opportunity to defend himself as relevant evidence was excluded during his disciplinary hearing. The applicant's evidence remained largely unchallenged.[96]

90. At the heart of procedural fairness lies the applicant's right to be given a fair opportunity to defend himself against the allegations. When relevant evidence is excluded, the procedure cannot be said to be fair and the right becomes hollow and illusionary.

91. I accordingly find that the dismissal of the applicant was procedurally unfair to the extent that he was not given a fair opportunity to defend himself against the allegations brought against him by the respondent.

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[92] Paragraph 101 of the CCMA Guidelines on Misconduct Arbitration. See also *Cape Town City Council v Masitho & others* [2000] ZALAC 15 (LAC) at para 14 and 18.
[93] Th respondent did not even address the inconsistent application of the rule in its closing arguments.
[94] The procedure in the public service is regulated by PSCBC Resolution 1 of 2003.
[95] *Highveld District Council v CCMA & Others* (LAC) [2002] 12 BLLR 1158 (LAC) at para 15.
[96] No argument was also advanced to show that the dismissal was procedurally fair.

RELIEF

92. I have found that the dismissal of the applicant was substantively unfair to the extent that the respondent acted inconsistently. I have also found that the dismissal was procedurally unfair to the extent that the applicant was not given a fair opportunity to defend himself against the allegations brought against him by the respondent.

93. In *Sidumo and Another v Rustenburg Platinum Mines and Others*[97] the Constitutional Court held that I have to consider the full extent of the relevant personal and surrounding circumstances which includes the nature, the importance and purpose of the rule breached, the nature and extent of the breach, the reasons for the imposition of the sanction of dismissal, the basis of the challenge thereto, the harm or potential harm caused or likely to be caused by the breach of the rule, further conduct, including disingenuousness surrounding the commission of the breach and the disciplinary and arbitration processes, a complete lack of remorse and re-commitment to the values of the respondent, the effect of the breach on the trust relationship and the capacity for the resuscitation of a workable employment relationship, the effect of the dismissal on the applicant and her service and disciplinary record.[98]

94. The Applicant has requested relief of retrospective reinstatement. Section 193(2) of the LRA directs that if a dismissal is unfair, I must require the respondent to reinstate or re-employ the applicant unless (a) the applicant does not wish to be reinstated or re-employed; (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or (d) the dismissal is unfair only because the respondent did not follow a fair procedure.

95. In *South African Revenue Service v CCMA and Others*[99] the Constitutional Court held that "the correct approach to adopt when the dismissal has been found to be unfair, is first to consider the provisions of section 193(1) and then section 193(2) to determine which of the three remedies reinstatement, re-employment or compensation may be granted.[100]

[97] [2007] 12 BLLR 1097.
[98] *Sidumo* at para 78.
[99] [2017] 1 BLLR 8.
[100] At para 38.

96. I have considered the particular circumstances of this matter and there are many factors that militate against ordering reinstatement or re-employment of the applicant. The applicant is not blameless in this matter. In fact, I have found that he breached the rule[101]. Despite his misconduct, the applicant has not shown any remorse or acknowledged any wrongdoing whatsoever.

97. The effect of the applicant's conduct is such that by and of itself renders continuation of a normal employment relationship intolerable. In *Gaga v Anglo Platinum Ltd and Others*[102] the Court held that "by and large employers are entitled (indeed obliged) to regard sexual harassment by an older superior on a younger subordinate as serious misconduct, normally justifying dismissal. In *SA Broadcasting Corporation Ltd v Grogan NO and Another*[103] Steenkamp AJ (as he then was) observed that sexual harassment by older men in positions of power has become a scourge in the workplace. Its insidious presence is corrosive of a congenial work environment and productive work relations. Harassment by its nature will steadily undermine the supervisory authority vested in the superior, upon which the employer perforce must rely, and hence will diminish or even destroy the trust requisite in the employment relationship; ultimately justifying the imposition of the sanction of dismissal. It is appropriate then for this court and employers to send out an unequivocal message: senior managers who perpetrate sexual harassment do so at their peril and should more often than not expect to face the harshest penalty. Much will depend on the circumstances, with the court or commissioner being obliged to have regard to the nature and gravity of the infringement; the impact on the victim; the relationship between the perpetrator and victim; the position and responsibilities of the perpetrator; and whether or not there is a pattern of behaviour evidenced by prior misconduct."[104]

98. The dismissal of the applicant is substantively unfair only because the respondent acted inconsistently. Had it not been for that fact, the applicant's dismissal would have been substantively fair. The consequences of sexual harassment were correctly and well put by Waglay DJP in *Themba Prince Motsamai v Ever Right Building Products (Pty)Ltd*[105] where it is held that:

'Sexual harassment is the most heinous conduct that plagues the workplace, not only is it deeming to the victim it undermines the dignity, integrity and self-worth of the employee harassed. The harshness of the wrong is compounded when the victim suffers it at the hands of his/her supervisor. Sexual harassment goes to the root of one's being and must therefore be

[101] In respect of charges 1, 2 and 4.
[102] *Supra*.
[103] (2006) 27 *ILJ* 1519 (LC) at 1532A, para 51.
[104] At para 48.
[105] unreported case number JA 21/08 para 20.

viewed from the point of view of a victim; how does he/she perceive it, and whether or not the perception is reasonable.

99. In so far as procedural fairness is concerned, the respondent departed from the requirements of procedural fairness by not giving the applicant a fair opportunity to defend himself against the allegations. Other than that, the respondent complied with the procedural fairness requirements.[106]

100. In *South African Revenue Service v CCMA and Others*[107] the Constitutional Court held that "to compensate or not to compensate and if compensation is to be awarded for what period, is a function of the judicious exercise of the discretionary power that an arbitrator or the court has in terms of section 194(1) of the LRA." The Court further held[108] that "in terms of our law compensation is not automatic. It is a discretionary matter. A whole range of factors must be taken into account to determine whether compensation has to be paid and if so, for how many months. In this regard one of the key factors is the need to ensure that employers are not inadvertently encouraged by the non-payment of compensation to adopt a shotgun approach of dismissing employees without affording them the opportunity to be heard. Employees are ordinarily vulnerable because, unlike employers, they do not often have the resources necessary to vindicate their rights by prosecuting cases all the way up to this Court. Condoning the flouting of laws that govern the fate of people's livelihood is a matter so serious that it always requires greater sensitivity and care. Relevant factors are, of course, the marked deviation from procedure…. The impact of the gross misconduct … on the employer and its workplace environment is an important factor to help decide on compensation."

101. Section 194(1) of the LRA states that the compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just

[106] Item 137 of the CCMA Misconduct Arbitration Guidelines provides that "In order to determine the appropriate amount of compensation for a procedurally unfair dismissal, the arbitrator must take into account the extent or severity of the procedural irregularity together with the anxiety or hurt experienced by the employee as a result of the unfairness. Item 138 states that "An arbitrator may find that a dismissal is procedurally unfair but award no compensation because the procedural irregularity was minor and did not prejudice or inconvenience the employee. When assessing the extent of the procedural irregularity, arbitrators may consider the employer's conduct prior to, and in the course of, dismissing the employee.

[107] [2017] 1 BLLR 8 (CC) at para 50.

[108] At para 52.

and equitable in all the circumstances[109], but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.[110]

102. Generally speaking, an unfair dismissal ought to earn an employee compensation where reinstatement is not feasible by reason of the intolerability of the continued working relationship.[111] I have considered the facts and circumstances of this matter. I have paid attention to the nature of the misconduct committed by the applicant and the extent of the respondent's departure from substantive and procedural fairness. I have also paid attention to the individual circumstances of the applicant and the need to prevent and deter employers such as the respondent from adopting what the Constitutional Court termed a shotgun approach in dismissing employees. All factors considered I am of the view that a compensation order equivalent to six (6) months' remuneration calculated at the applicant's rate of remuneration on the date of dismissal is just and equitable in all the circumstances. The applicant was left without an income when Dr Nel could quietly go on retirement in circumstances where he should also have been dismissed.

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[109] In *Northern Province Local Government Association v CCMA* [2001] 5 BLLR 539 (LC) at para 57 the Labour Court held that "the provisions in Section 194 (2) requiring an award to be "just and equitable in all the circumstances" underscores the need for the arbitrator to be properly informed about all circumstances which would bear on justice and equity."

[110] In *Kemp t/a Centralmed v Rawlins* (2009) 30 ILJ 2677 (LAC) at para 20 Zondo JP outlined the applicable factors in these terms:

There are many factors that are relevant to the question whether the court should or should not order the employer to pay compensation. It would be both impractical as well as undesirable to attempt an exhaustive list of such factors. However, some of the relevant factors may be given. They are:

. . .

(b) Whether the unfairness of the dismissal is on substantive or procedural grounds or both substantive and procedural grounds; obviously it counts more in favour of awarding compensation as against not awarding compensation at all that the dismissal is both substantively and procedurally unfair than is the case if it is only substantively unfair, or, even lesser, if it is only procedurally unfair.

(c) In so far as the dismissal is procedurally unfair, the nature and extent of the deviation from the procedural requirements; the minor the employer's deviation from what was procedurally required, the greater the chances are that the court or arbitrator may justifiably refuse to award compensation; obviously, the more serious the employer's deviation from what was procedurally required, the stronger the case is for the awarding of compensation.

(d) In so far as the reason for dismissal is misconduct, whether or not the employee was guilty or innocent of the misconduct; if he was guilty, whether such misconduct was in the circumstances of the case not sufficient to constitute a fair reason for the dismissal.

(e) The consequences to the parties if compensation is awarded and the consequences to the parties if compensation is not awarded.

(f) The need for the courts, generally speaking, to provide a remedy where a wrong has been committed against a party to litigation but also the need to acknowledge that there are cases where no remedy should be provided despite a wrong having been committed even though these should not be frequent.

(g) In so far as the employee may have done something wrong which gave rise to his dismissal but which has been found not to have been sufficient to warrant dismissal, the impact of such conduct of the employee upon the employer or its operations or business.

(h) Any conduct by either party that promotes or undermines any of the objects of the Act, for example, effective resolution of disputes

[111] *South African Revenue Service v CCMA and Others* above, at para 51.

AWARD

103. I make the following award:

104. The dismissal of the applicant by the respondent was both substantively and procedurally unfair.

105. I order the respondent to pay the applicant compensation in an amount of Nine Hundred and Twenty-Four Thousand Six Hundred and Seventy-Nine Rand and Ninety-Two Cents (R924 679.92)[112] being the equivalent of six (6) months remuneration calculated at the applicant's rate of remuneration at the date of dismissal.

106. The compensation amount must be paid to the applicant on or before 30 September 2017.

107. I make no order of costs[113].

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Adv Matshekga JN

[112] The amount is calculated as follows: R154113.32 per month x 6= R924 679.92. The amount must be paid less applicable statutory deductions in terms of the Income Tax Act 58 of 1962.
[113] I have accepted the respondent's reasons for its failure to contact Smook on 11 May 2017.