CSA 4790/04

State of Israel

v.

Avraham Ben-Hayim

The Supreme Court

[2 May 2005]

Before Justice D. Beinisch

Appeal of the judgment of the Civil Service Disciplinary Tribunal (Adv. Y. Telraz, Ms. E. Breiman and Ms. R. Bar-Yosef) on 22 February 2004 in DC 99/02.

Facts: The respondent, the manager of the Postmen Department at the Benei Berak branch of the Postal Authority, was charged, before the Civil Service Disciplinary Tribunal, with sexually harassing and victimizing a woman (the complainant) who was working temporarily at the branch. The tribunal found that the respondent promised to ensure the promotion of the complainant, and it found that the respondent had conducted a sexual relationship with the complainant in which full sexual intercourse had taken place. In addition the respondent tried to prevent the complainant making a complaint against him. The tribunal found that an abuse of authority had not been proved, and it acquitted the respondent of the charges concerning sexual harassment and victimization, but it convicted him of unbecoming conduct. After the verdict, the parties reached an arrangement with regard to sentencing, which the tribunal approved, although it said that the agreed sentence was a lenient one.

The state subsequently appealed the acquittal of the respondent on the disciplinary offence of sexual harassment.

Held: Conduct that amounts to an 'abuse of authority' for the purpose of sexual harassment may take on different forms. It may be express or implied, direct or indirect. An extreme form of this conduct is a direct threat, but in most cases the threat is not made clearly and expressly but in a veiled manner, even though this does not make it any less potent. In other cases, the abuse of authority takes on the form of

an express or implied promise of a benefit in employment conditions in return for a sexual favour.

Since the respondent's power to influence the professional future of the workers was considerable, he held a position of considerable power over the complainant. In addition, the complainant was 22 years of age at the time she began to work at the post office branch and the respondent was approximately twenty years older. This age gap added to the respondent's control over the complainant. It follows that the complainant's consent to the sexual acts was given because the respondent abused his authority over her, and therefore it was not a voluntary and genuine consent.

Appeal allowed.

Legislation cited:

Civil Service (Discipline) Law, 5723-1963, ss. 17(1), 17(2), 17(3), 17(4), 34(6), 34(7), 34(8).

Penal Law, 5737-1997, ss. 346(b), 348, 348(a)-(c1), 348(e), 348(f), 349.

Prevention of Sexual Harassment Law, 5758-1998, ss. 3(a), 3(a)(2), 3(a)(3), 3(a)(4), 3(a)(6)(c), 4.

Israeli Supreme Court cases cited:

CSA 11025/02 *Eisner v. State of Israel* [2003] IsrSC 57(5) 541. [1]

CSA 6737/02 *State of Israel v. Zaken* [2003] IsrSC 57(2) 312. [2]

CSA 1599/03 *Tapiro v. Civil Service Commission* [2004] IsrSC 58(2) 125. [3]

CSA 6713/96 *State of Israel v. Ben-Asher* [1998] IsrSC 52(1) 650. [4]

CrimA 2695/93 *A v. State of Israel* (unreported). [5]

CSA 2168/01 *Hamani v. Civil Service Commission* [2001] IsrSC 55(5) 949. [6]

CSA 7113/02 *State of Israel v. Levy* [2003] IsrSC 57(3) 817. [7]

HCJ 1284/99 *A v. Chief of General Staff* [1999] IsrSC 53(2) 62. [8]

American cases cited:

Meritor Savings Bank v. Vinson, 477 U.S. 57 [9] (1986).

For the appellants — R. Matar.
For the respondent — O. Hanoch.

JUDGMENT

Justice D. Beinisch

The respondent, the manager of the Postmen Department at the Benei Berak branch of the Postal Authority, was charged with sexually harassing and victimizing a woman employee who worked at the branch. Because of these acts, the respondent was charged with a disciplinary offence under ss. 17(1), (2) and (3) of the Civil Service (Discipline) Law, 5723-1963. In the statement of charges it was alleged that the respondent breached the provisions of ss. 3(a)(2), (3) and (4), together with s. 3(a)(6)(c) of the Prevention of Sexual Harassment Law, 5758-1998, as well as the provisions of ss. 43.421 and 43.431 of the Civil Service Regulations.

After hearing the evidence, the disciplinary tribunal acquitted the respondent of the charges concerning sexual harassment and victimization. Nonetheless, the tribunal saw fit to convict the respondent of unbecoming conduct under ss. 17(1), (3) and (4) of the Civil Service (Discipline) Law, because of the character of the intimate relationship that he conducted with a worker who was subservient to him and because of his attempt to prevent her from making of a complaint against him.

After the verdict was given, the parties reached an arrangement with regard to the disciplinary measures that would be imposed on the respondent and they presented their agreed arrangement to the tribunal. The tribunal approved the arrangement, and in the sentence the respondent was given the disciplinary measures that had been agreed in the arrangement, namely a severe reprimand, the loss of one month's salary and being reduced by one grade for a period of a year.

The appeal before me was filed by the state on the judgment of the tribunal. It should be emphasized from the outset that the appeal is not directed against the factual findings reached by the tribunal but against the legal conclusions that were reached on the basis of these factual findings. According to the state, the conclusion that arises from the factual findings that were reached is that the respondent sexually harassed the employee and therefore it should be held that the respondent breached the relevant provisions of the law and the Civil Service Regulations and he should be convicted of an offence under s. 17(2) of the Civil Service (Discipline) Law.

The state also argues that, if its appeal is allowed, there are grounds for making the disciplinary measures that were imposed on the respondent significantly stricter.

The main facts

1. The respondent, who was born in 1958, was employed, during the period relevant to the charges, as the manager of the Postmen Department at the Benei Berak branch of the post office. In May 2000, the complainant, who was born in 1978, began to work at the post office branch where the respondent worked, as a temporary worker who was referred by a manpower company. On 4 July 2002 charges were filed against the respondent, in which it was alleged that he sexually harassed the complainant when she worked at the post office branch. According to what was alleged in the statement of charges, from April 2001 the respondent habitually visited the respondent in her rented apartment and there he engaged in sexual intercourse against her will. In the charges it was alleged that the respondent committed these acts while promising the complainant that he would help her to obtain a status of a temporary worker in the civil service, a status that is one of the stages on the way to obtaining a permanent status. The complainant, who felt humiliated and exploited, decided after several months to put an end to the relationship, and in response to this, it was alleged, the respondent decided not to accept the complainant as a temporary worker of the civil service. On account of all this, it was alleged in the statement of charges that the respondent sexually harassed the complainant and victimized her.

On the basis of the evidence and testimony that was brought before it, the tribunal held that the respondent was indirectly one of the complainant's supervisors and he had the power to make recommendations and decisions with regard to her. The tribunal also found that a good inter-personal relationship developed between the respondent and the complainant and that 'that relationship of mutual inter-personal sympathy developed over time into a sexual relationship with the accused… a relationship that was wanted also by the complainant' (p. 37 of the verdict). With regard to the character of the relationship between the respondent and the complainant and its circumstances, the tribunal accepted the testimony of the complainant and rejected the respondent's version of events. The tribunal rejected the respondent's claim that the complainant was the initiator of the sexual

relationship and that she had pursued him. The tribunal also held that the sexual relationship ended at the complainant's initiative and not at the respondent's initiative, as he claimed. The tribunal further held that, contrary to the respondent's version of events, the respondent and the complainant engaged in full sexual intercourse. In this regard, the tribunal said that in the sexual acts that were committed there was a degree of cooperation on the part of the complainant, even though there were moments when the respondent and the complainant 'felt uncomfortable, while the relationship was taking place, or afterwards' (p. 38 of the verdict).

With regard to the character and nature of the relationship between the complainant and the respondent, the tribunal was persuaded that the complainant saw a connection between the respondent's promise of advancement and the relationship between them, and the sexual relationship was interwoven with the complainant's hope that the respondent would give special attention to the issue of her advancement. The tribunal held that the complainant did indeed have an open and personal channel to the respondent in so far as her requests to become a temporary worker at the post office were concerned, but when the promotion was slow in coming, the complainant decided to put an end to the relationship.

On the basis of these findings of fact, the tribunal sought to examine the main question that was in dispute between the parties, which was whether, in the circumstances of the case, the respondent committed an offence of sexual harassment. After it examined the evidence and the testimonies before it, the tribunal held that the respondent 'was interested in the continued existence of the sexual relationship, and tried to maintain it on the basis of the promotion that he wished to realize' (p. 38 of the judgment). Notwithstanding, the tribunal held that it was unable to determine that at the root of the relationship between the respondent and the complainant there was a fear and a concern on the part of the complainant that she would be harmed at her place of work if she refused to engage in the sexual relationship. Therefore, it was held that there was a doubt as to whether the respondent took advantage of his position as a supervisor. In view of these conclusions, the court held that the respondent should not be convicted of sexual harassment. Notwithstanding, because of the fact that the respondent engaged in a sexual relationship with someone who was subordinate to him, in the circumstances of the case the tribunal was of the opinion that the respondent conducted

himself in a manner that did not befit his position as a civil servant, and it therefore convicted him of disciplinary offences of unbefitting conduct under ss. 17(1) and (3) of the Civil Service (Discipline) Law.

With regard to the charge of victimization, the tribunal did not find that a sufficient basis in fact had been established to prove this charge. Notwithstanding, the tribunal held on the basis of the evidence that was presented to it that the respondent did try to prevent the complainant from making a complaint. The respondent did this by means of exerting pressure on a worker who was close to the complainant and who, in the respondent's opinion, would be able to persuade her to forego her complaint. Although the respondent was not charged with these acts in the statement of charges, the tribunal found that the respondent was given a proper opportunity of defending himself against a conviction on these charges, and therefore it was possible to convict him. Because of his attempt to prevent the filing of the complaint, the tribunal convicted the respondent of disciplinary offences under ss. 17(1) and 17(3) of the Civil Service (Discipline) Law.

2. With regard to the disciplinary measures, in this matter the parties reached an arrangement after the verdict was given, and according to this the respondent would be sentenced to the following disciplinary measures: a severe reprimand, the loss of one month's salary and being reduced by one grade for a period of a year. The tribunal considered the arrangement, and although it thought that it erred to some degree on the side of leniency, it decided to approve it. Therefore the respondent was sentenced to the aforesaid disciplinary measures.

The arguments of the parties

3. The state's main argument was that the disciplinary tribunal made an error when it acquitted the respondent of the offence under s. 17(2) of the Civil Service (Discipline) Law. According to the state, the respondent breached the provisions of s. 3(a)(2) of the Prevention of Sexual Harassment Law and thereby he did not carry out his duty as a civil servant under the law. It follows that the purpose of the appeal that was filed by the state is to define the acts of the respondent as 'sexual harassment' and to convict him, because of the acts of harassment within their meaning in the law, of a disciplinary offence as a result of a breach of a provision of law that was binding on him.

The state argued in its appeal that the various conclusions of the disciplinary tribunal are inconsistent with one another, since the finding of the tribunal that the respondent did not take advantage of his supervisory position vis-à-vis the complainant contradicts its other finding that the respondent tried to continue the sexual relationship by means of the professional advancement that he promised the complainant. According to the state, we should take into account the finding that the respondent was aware of the complainant's desire to be advanced in her status at the Postal Authority, and he used this desire and took advantage of his senior position in order to obtain her consent to engage in sexual intercourse. Counsel for the state argued that the circumstances of the case, which include the disparity of forces between the temporary worker and the manager and the age gap of approximately twenty years between them, also support the conclusion that in this case the element of an abuse of authority was satisfied and it should therefore be held that sexual harassment did take place. Counsel for the state further argued that even if the relationship did not involve an element of fear and concern on the complainant's part, this cannot rule out the occurrence of the abuse of authority and the occurrence of sexual harassment. On the basis of the aforesaid, the state argued that the respondent should be convicted of an offence under s. 17(2) of the Civil Service (Discipline) Law, on account of a breach of s. 3(a)(2) of the Prevention of Sexual Harassment Law.

With regard to the disciplinary measures, the state argued that should the appeal be allowed, then the disciplinary measures that were handed down to the respondent ought to be made stricter, notwithstanding the fact that the sentence approved the arrangement that was made between the parties. According to the state, there is no basis for taking the arrangement into account since the respondent did not rely on it during his trial. During the hearing before me, counsel for the state agreed that this position gave rise to a certain difficulty in view of the respondent's expectation that the arrangement with him would be upheld; notwithstanding, she reiterated the argument that there was a public interest in the severity of the penalty for someone who is found guilty of sexual harassment.

In reply, counsel for the respondent argued that the appeal should be denied. She argued that the conclusions of the disciplinary tribunal are well founded on the factual findings that were reached and there is no reason for intervening in them. In her opinion, the element of 'abuse of authority' did

not take place in this case since it was held that the relationship was a consensual one and the complainant participated in it without any concern or fear of the respondent.

With respect to the appeal on the sentence, on this matter counsel for the respondent argued against the imposition of any stricter disciplinary measures than the ones that were imposed on him. She argued that the respondent relied on the arrangement that was reached with the prosecution and waived his right to bring evidence with regard to the disciplinary measures that should be imposed on him. Counsel for the respondent argued that the state's attempt to go back on the arrangement that it made with regard to the sentence was unfair to the respondent and it caused him serious harm.

4. After hearing the arguments of the parties and studying the material that was brought before me, I have reached the conclusion that the appeal should be allowed, because the respondent did breach the provisions of the Prevention of Sexual Harassment Law and s. 43.421(b) of the Civil Service Regulations. The following are my reasons for this.

The appeal against the verdict

5. As I have said, the state argued in its appeal that the factual findings reached by the disciplinary tribunal — findings that are not being contested in the appeal — show that the respondent did breach the provisions of s. 3(a)(2) of the Prevention of Sexual Harassment Law. Let us therefore examine this argument.

Section 4 of the Prevention of Sexual Harassment Law states the following:

> 'Prohibition of sexual harassment and victimization
>
> 4. A person shall not sexually harass or victimize another.'

As this court has pointed out in the past, the concept of 'sexual harassment' includes various types of prohibited acts and there is a broad spectrum of cases on various levels of severity (see CSA 11025/02 *Eisner v. State of Israel* [1], at p. 553 and the judgments cited there). As stated, s. 4 of the Prevention of Sexual Harassment Law prohibits the perpetration of acts of sexual harassment (and victimization), but in order to know what these prohibited acts are, we need to refer to s. 3(a) of the law. The purpose of s.

3(a) is to cover the broad spectrum of prohibited acts that amount to sexual harassment. The purposes of the Prevention of Sexual Harassment Law and the rationale that underlies it can be seen, *inter alia*, from the explanatory notes that accompanied the draft law:

> 'The law does not purport to enforce morality or to intervene in voluntary social relations, but to prevent a person from forcing himself on someone who is uninterested in him doing so, especially when it is done by means of taking advantage of a position of power' (Draft Prevention of Sexual Harassment Law, 5757-1997, *Draft Laws* 1997, at p. 484).

Section 1 of the law provides the following:

> 'Purpose of the law
>
> 1. The purpose of this law is to prohibit sexual harassment in order to protect human dignity, liberty and privacy, and in order to promote equality between the sexes.'

The acts defined in s. 3(a) of the law are prohibited because they are concerned with circumstances in which one person forces his will upon another person. In such circumstances, there is a violation of the human dignity and autonomy of the victim, against the background of his sexuality. The dignity and autonomy of the individual are therefore the main values that the Prevention of Sexual Harassment Law seeks to protect (for a more comprehensive treatment of this issue, see: O. Kamir, 'What Kind of Harassment: Is Sexual Harassment a Violation of Equality or Human Dignity?' 29 *Hebrew Univ. L. Rev.* (*Mishpatim)* (vol. 2) 317 (1998), at pp. 375-376).

6. In our case, the state concentrated its arguments on the provision that appears in s. 3(a)(2) of the Prevention of Sexual Harassment Law, which states:

'Sexual harassment and victimization

3. (a) Sexual harassment is any one of the following acts:

…

(2) Indecent acts within the meaning thereof in sections 348 and 349 of the Penal Law.'

It can be seen that s. 3(a)(2) of the Prevention of Sexual Harassment Law provides that the offences set out in ss. 348 and 349 of the Penal Law, 5737-1997 constitute sexual harassment. In other words, in order to convict someone of an offence under s. 3(a)(2) of the Prevention of Sexual Harassment Law, one must act as if we were speaking of a conviction for one of the offences set out in ss. 348 and 349, since, from the perspective of criminal law, we are speaking of the same offence (see, in this regard, CSA 6737/02 *State of Israel v. Zaken* [2], at p. 325). It should be noted that when a civil servant is charged with an offence under s. 3(a)(2) of the Prevention of Sexual Harassment Law in disciplinary proceedings, as opposed to criminal proceedings, the offence with which he is charged, while relying on the Penal Law, is an offence under s. 43.421 of the Civil Service Regulations together with s. 17(2) of the Civil Service (Discipline) Law.

The state argued that the respondent breached s. 3(a)(2) of the Prevention of Sexual Harassment Law but failed to mention in the statement of appeal which was the relevant subsection of s. 348 of the Penal Law that the respondent breached, notwithstanding the fact that the aforesaid s. 348 lists several prohibited forms of conduct that are defined as an 'indecent act.' In its closing arguments before the disciplinary tribunal, as well as in the hearing before me, the state referred to s. 348(e) of the Penal Law. This wording of this subsection is as follows:

'Indecent act

348. …

(e) Someone who commits an indecent act against a person who is over eighteen years of age by means of an abuse of authority in employment relations or in a service is liable to two years imprisonment.

> (f) In this article, "indecent act" — an act for the purpose of sexual stimulation, satisfaction or humiliation.'

An offence under s. 348(e) of the Penal Law has five elements of fact: 'someone who commits,' 'an indecent act,' 'against a person,' 'who is over eighteen years of age' and 'by means of an abuse of authority in employment relations or in a service.' In view of the facts of the case described above, it would appear that of these five elements we need to examine only whether two of them exist; there are 'an indecent act' and 'by means of an abuse of authority in employment relations or in a service.' We also need to examine whether the respondent had the *mens rea* required for the offence. Let us therefore begin by examining the factual elements.

7. Did 'an indecent act' take place in the case before us? 'An indecent act' is defined in s. 348(f) of the Penal Law as an act that was done 'for the purpose of sexual stimulation, satisfaction or humiliation.' As this court has said in the past, the definition of the concept of 'an indecent act' provides an element of conduct that is very broad in its scope, and the question whether 'an indecent act' was indeed committed depends mainly on the purpose or subjective intention that accompanied the perpetration of the act (see *State of Israel v. Zaken* [2], at pp. 326-327).

In order to examine the question whether respondent committed the *actus reus* of the offence attributed to him, we should recall that the disciplinary tribunal accepted the complainant's version and held that full sexual intercourse took place between her and the respondent. It is clear that the broad definition of 'an indecent act' includes sexual acts that do not amount to intercourse, and the severity of these is less. It should be noted that with regard to full sexual intercourse between a supervisor and a subordinate at work, there is a separate offence in s. 346(b) of the Penal Law, which is entitled 'prohibited consensual intercourse.' This states:

'Prohibited consensual intercourse

346. …

(b) Someone who has intercourse with a woman who is over eighteen years of age, by means of an abuse of authority in employment relations or in a service… is liable to three years imprisonment.'

However, the offence under the aforesaid s. 346(2) is not mentioned among the various forms of sexual harassment listed in s. 3(a)(2) of the Prevention of Sexual Harassment Law. It would appear that the reason for this lies in the legislature's desire to maintain the unique nature of criminal acts whose severity justifies the criminal enforcement of the provisions of the Penal Law. A clear example of this can be found in the fact that the Prevention of Sexual Harassment Law does not mention the offence of rape. A question therefore arises in our case as to whether it is possible to convict the respondent of an indecent act under s. 348(e) of the Penal Law — a provision that is mentioned in the Prevention of Sexual Harassment Law — on account of 'prohibited consensual intercourse,' which is an offence under the Penal Law but is not mentioned in s. 3(a)(2) of the Prevention of Sexual Harassment Law. Our answer to this question is yes. There is no doubt that an act of prohibited intercourse under the Penal Law includes all the elements of the indecent act. Therefore, the offence under s. 346(b) of the Penal Law is included in an offence of an indecent act under s. 348(e) of the Penal Law, and it follows that it is also included in the offence of sexual harassment, even though it is not expressly mentioned in the statutory definition. Any other interpretation would lead to the conclusion that engaging in full sexual intercourse, as opposed to other indecent acts, does not constitute sexual harassment, and clearly this result is inconceivable.

8. The second and main question that arises in our case is whether the fifth element of the offence under s. 348(e) of the Penal Law — the element of an 'abuse of authority' — is satisfied. According to its character and background, it is possible to say that the origins of the offence of sexual harassment, as opposed to sexual offences in general, lie in the abuse of a position of authority. This element contains two factual components. The first factual component of an 'abuse of authority' in the context of work relations

is the existence of authority. Authority, in its simple sense, is the control of a supervisor over someone who is subordinate to him. It would be well to emphasize, as this court has done many times in the past, that the component of authority also includes influence and indirect authority, and this expression is not limited merely to persons in the position of an employer or a direct supervisor (see CSA 1599/03 *Tapiro v. Civil Service Commission* [3], at pp. 135-136). It has also been held in our case law that a determination as to the existence of a relationship of authority requires, first and foremost, an examination of the work relationship according to objective criteria; for this purpose the injured party's subjective impression is not enough (see *Tapiro v. Civil Service Commission* [3], at p. 134).

9. The second factual component of the element of an 'abuse of authority' is the element of abuse. The Hebrew word for 'abuse' (ניצול) is a synonym for the word 'use' (שימוש), but in the context that concerns us we are really speaking of '*ab*use' (שימוש לרעה). The component of 'abuse' in the situation of an indecent act is expressed in the fact that the supervisor uses his authority or his power to influence the status or the prospects of a person who is subordinate to him, in order to obtain his consent to engage in the sexual acts with him and in order to force his will upon him.

Conduct that amounts to an 'abuse of authority' may take on many different guises. Such conduct may be express or implied and it may be done directly or indirectly. One of the extreme forms of this conduct is the making of an open and direct threat — 'do what I want or I will show you the power of my authority'; in most cases the threat is not made clearly and expressly, but is deliberately couched in a more veiled manner, even though this does not, of course, make it any less potent. In other cases, the abuse of authority takes on the form of an express or implied promise of a benefit in employment conditions in return for a sexual favour. This type of sexual favour has become known in the United States as *quid pro quo* sexual harassment (see: CSA 6713/96 *State of Israel v. Ben-Asher* [4], at p. 664). In any case, whatever the guise that the element of an 'abuse of authority' takes, the significance is always the same: obtaining the consent of the subordinate to do acts which he does not really want to do but which he is induced to do as a result of the abuse of the position of authority.

Indeed, the circumstances of the offence under s. 348(e) of the Penal Law are not such that the victim of the offence is completely deprived of his free will and choice. By way of comparison, it is possible to refer to ss. 348(a) to (c1) of the law, which concern indecent acts that were committed in circumstances of rape, while using force and other forms of pressure or without consent. The assumption in the context of these subsections is that the indecent act was committed notwithstanding the absence of consent on the part of the victim to the commission of the sexual acts against him. In these circumstances, the violation of the autonomy and human dignity of the victim of the offence is very great, and therefore the penalties provided in the law for the aforesaid acts are severe. By contrast, the provisions of s. 348(e) of the Penal Law concern a situation in which consent was apparently given by the worker to the sexual acts that were committed against him or her. Notwithstanding, the aforesaid consent was obtained in circumstances in which the supervisor abused his position of authority. These circumstances give rise to a suspicion, which is based on life experience and common sense, that notwithstanding the fact that the sexual acts were apparently committed with consent, this was not a freely given and genuine consent. The existence of the position of authority and its abuse by the perpetrator of the indecent act are the main reason why the employee gave his or her consent to the acts committed against them. In such circumstances, there is a statutory presumption that the consent that was given is defective, since it is not freely and genuinely given. Therefore, even though s. 348(e) of the law does not involve a situation in which a person is totally deprived of his free will, it involves conduct that, because of its nature and the circumstances in which it is committed, is capable of seriously violating the free will and human dignity of the victim of the offence, which are the protected values underlying the prohibition of sexual harassment. In this respect, it should be noted that although the prohibition of sexual harassment developed in the United States from a perspective that is different to the one that was determined in Israeli law, the American legal system also recognizes that the existence of a 'formal' consent to the sexual relationship is insufficient where the consent is obtained against a background of a position of authority, and in these circumstances it is not regarded as a genuine and full consent (see, in this regard, M.J. Shaney, 'Note: Perceptions of Harm: The Consent Defense in Sexual Harassment Cases,' 71 *Iowa L. Rev*. (1986) 1109, at pp. 1115-1116;

in that article, the author explains that in *Meritor Savings Bank v. Vinson* [9], the Supreme Court of the United States recognized the coercive nature of 'requests' to engage in sexual intercourse made by a supervisor at a place of work. In that case, it was in fact held that a consent that was given in such circumstances is not a consent at all).

Thus we see that a supervisor who abuses his authority in order to procure from someone who is subordinate to him an apparent consent to engage in sexual acts with him is abusing his power while seriously violating the human dignity and the autonomous will of the victim of the harassment. In these acts the supervisor is relating to the worker merely as a sex object, a means for gratifying sexual impulses, and he tramples on the dignity and free will of the victim of the harassment. There is no doubt that subordinates, who yield to the authority of a supervisor who abuses his power over them in order obtain sexual favours from them, find themselves in a difficult situation and it is absolutely essential to protect them when they are placed in this impossible situation (see, in this regard, the remarks of Justice D. Levin in CrimA 2695/93 *A v. State of Israel* [5]).

10. Against the background of the foregoing, it is clear that the fact that the subordinate did not express any opposition to the sexual acts that the supervisor committed against him cannot strengthen the accused's defence. Life experience shows that the disparity of forces between the supervisor and the subordinate at the work place frequently deprives the victim of the harassment of the ability to express the fact that he does not consent to the aforesaid sexual acts. In this respect the remarks made in *Tapiro v. Civil Service Commission* [3] with regard to the element of an 'abuse of authority' in the context of s. 3(a)(6)(c) of the Prevention of Sexual Harassment Law are correct:

> '… the existence of a relationship of authority between the harasser and the victim of the harassment and its abuse by the harasser give rise to a presumption that the victim of the harassment did not give a full and voluntary consent to the conduct of the harasser, even if he did not "indicate" that he did not consent to this conduct (see CSA 2168/01 *Hamani v. Civil Service Commission* [6], at p. 958). The provisions of s. 3(a)(6) of the Prevention of Sexual Harassment Law list the situations in

> which the legislature determined as a presumption that there is an unequal relationship between the harasser and the victim of the harassment, such that there is an inherent concern that the victim of the harassment will be afraid to express opposition to the conduct of the harasser' (*ibid.* [3], at p. 134).

Following on from these remarks, it should be noted that for the purpose of the offence of sexual harassment that involves an indecent act under s. 348(e) of the law, it is not necessary to prove that the worker was afraid of his supervisor at the work place. Proof that the subordinate was afraid of the person who was his supervisor and therefore agreed to the commission of the sexual acts against him is of course likely to constitute a significant indication of the fact that the acts were committed by means of an abuse of a position of authority; notwithstanding, this is not an essential requirement. As we have already said, the legislature presumed that in a situation where the supervisor carries out sexual acts against a worker who is subordinate to him by abusing his authority with respect to him, there is no free and genuine consent to the acts. This statutory presumption is likely to exist even if it is not proved that the worker was afraid of his supervisor. Thus, for example, it is possible that the victim of the harassment apparently agreed to the commission of the sexual acts against him because of a feeling that he was unable to oppose the acts of his supervisor who enjoyed a position of power and influence at the work place, even if this feeling did not amount to actual fear. Even in these circumstances the legislature says that the consent that was given is defective, since it was the product of an abuse of the position of authority.

Indeed, it cannot be denied that in certain circumstances the element of an 'abuse of authority' may give rise to questions that admit of no simple answer. This is the case, for example, in situations where a worker approaches his or her supervisor on his own initiative and offers him a sexual favour in return for advancement or an improvement in his or her situation at the place of work. If the supervisor agrees, it is questionable whether in these circumstances his conduct amounts to sexual harassment involving an indecent act while abusing a position of authority. These questions do not arise in the case before me and they can be left for another occasion. In any case, the question whether or not the supervisor abused his power in order to obtain the consent to the sexual acts will always be examined against the

background of the circumstances of the case and the context in which the acts were committed in each case. The greater the disparity of forces and the age gap between the supervisor and his subordinate, the greater the power of the supervisor to influence the status or prospects of the worker, and the more that the sexual acts were initiated by the supervisor, the more likely it is that the court will reach the conclusion that the sexual acts constituted an abuse of a position of authority, although I have not mentioned all of the different considerations that are relevant to the issue, which should be considered in accordance with the circumstances of the individual case (see, for example, *Hamani v. Civil Service Commission* [6], at pp. 958-959; CSA 7113/02 *State of Israel v. Levy* [7], at p. 827; also see and cf. HCJ 1284/99 *A v. Chief of General Staff* [8], at p. 71).

11. With regard to the *mens rea* required in an offence of an indecent act under s. 348(e) of the Penal Law, no one doubts that, within the framework of the criminal law, it is necessary to prove that the accused was actually aware of the element of an 'abuse of authority' or at least shut his eyes to such a possibility. With regard to disciplinary proceedings, we have already said in the past that there is a question whether a civil servant may be found guilty of a disciplinary offence for improper conduct of a sexual character, even if he is unaware of the absence of true and willing consent *de facto*, but he is aware of this possibility in theory (see *State of Israel v. Zaken* [2], at p. 329). This question does not arise in the case before me and therefore it does not require a decision. With regard to sexual harassment that takes the form of an indecent act while abusing a position of authority under s. 348(e) of the Penal Law, even in the disciplinary sphere it must be proved that the accused was aware *de facto* of the element of an 'abuse of authority,' or at least shut his eyes to it. In other words, it must be proved that the supervisor was actually aware, or at least had a real suspicion, that his subordinate agreed to his committing the sexual acts against him because of his authority over him. This question, which concerns the subjective emotional state of the harasser at the time when he committed the acts, should be examined against a background of all the circumstances of the case.

From general principles to the specific case

12. As I said above, in the case before me the complainant was employed as a temporary worker at the post office branch after she was referred by a

manpower company. The respondent was the manager of the Postmen Department at that branch. The tribunal held — and this is disputed by no one — that the complainant was subordinate to the respondent at their place of work and that a relationship of authority existed between the two of them. It was also held that on several occasions the two engaged in full sexual intercourse, until the complainant decided to put an end to the sexual relationship with the respondent. The question that requires our decision is whether in the sexual relationship that the respondent conducted with the complainant there was an element of an abuse of authority.

It was proved before the disciplinary tribunal that a very short time after the complainant began to work at the post office branch, the respondent began to take steps in order to promote her in a way that was out of the ordinary. In this regard, it was held that '… the complainant had an open and personal channel to the accused in so far as her requests to become a temporary worker of the post office were concerned' (p. 39 of the verdict). The respondent's version of events, that he saw the complainant as a suitable candidate for promotion to the status of a temporary worker, was accepted by the tribunal. Notwithstanding, the tribunal went on to hold that the respondent took steps in order to promote the complainant notwithstanding the fact that there were other workers who were of greater seniority than her, because of his desire to continue the sexual relationship with her. In the words of the disciplinary tribunal, '… the accused [the respondent] was interested in continuing the sexual relationship, and he tried to maintain it on the basis of the promotion that he wished to realize' (p. 38 of the verdict). After the position that the respondent had intended for the complainant was taken by another worker who was promoted, the respondent continued to nurture hope in the complainant that when positions would become available in the future, he would recommend her for promotion. This emerges from the statement that the respondent made in his interrogation at the Civil Service Commission (prosecution exhibit 3, at p. 6). These findings lead to the conclusion that the respondent took advantage of his power to influence the position of the complainant and the fact that she was one of his subordinates at their place of work, for the purpose of obtaining her consent to engage in a sexual relationship with him.

It should be noted that the complainant's testimony before the disciplinary tribunal was that although she did not oppose the sexual intercourse with the

respondent, she did not want this relationship and she was pushed into it both by the respondent's promises to take care of her promotion at the place of work and because of her fear of the respondent. In her testimony before the tribunal, the respondent said that at that time she felt that she could not say no to the respondent's acts. In her words:

> 'In a situation where he is your manager and he has the power, and he promises you things all that time, you feel that you are in a tight spot' (p. 6 of the disciplinary tribunal record).

Later she said:

> 'I agreed because the whole time he convinced me that he would take care of me. He prepared the ground; even before that he promised me things' (*ibid*.).

When the complainant was asked if she agreed to the acts only because of the promises to promote her, she answered:

> 'Not only because of the promises. I was afraid. He was my boss' (*ibid*.).

The complainant adhered to this version even when she was cross-examined. This version was not accepted by the disciplinary tribunal. In its judgment, the tribunal held that the complainant wanted the sexual relationship with the respondent and it was interrelated to her hope that the respondent would take care of her promotion at the place of work (pp. 37, 39 of the verdict). With regard to the complainant's claim that she was afraid of the respondent, the tribunal held that:

> 'An examination and assessment of the complainant's testimony before us, together with her statements at the Civil Service Commission (Commission's exhibits 1 and 2), and together with the version of events presented by the accused in his interrogation (prosecution exhibit 3) and before us do *not* allow us to determine that this relationship was based on a fear or concern in the heart of the complainant that the accused would harm her status or her chances of promotion if she refused to agree to the sexual relationship' (p. 37 of the verdict; emphasis supplied).

In view of the complainant's consent to engage in a sexual relationship and taking into account the finding that the complainant was not afraid of the respondent, the tribunal deduced that there was no element of an 'abuse of authority' on the part of the respondent. This conclusion is totally unfounded.

Indeed, the complainant did not say refuse the sexual relationship with the respondent, and she appeared to agree to his acts, in the hope that the respondent would stand by his promises and ensure that she was promoted at the place of work. For the reasons that we discussed above, the aforementioned consent of the complainant cannot decide the matter. From the facts that were proved before the tribunal, it emerges that the consent of the complainant was given as a result of the respondent's abuse of his authority over her. As stated, the respondent was the manager of the Postmen Department, the department in which the complainant worked after being referred by the manpower company. From the testimony heard by the tribunal it can be seen that the respondent's power of influence over the professional future of the workers was considerable. The complainant's professional future, livelihood and chances of promotion at the Postal Authority therefore depended on what the respondent said, and he held a position of considerable power over her. To this it should be added that the complainant was 22 years of age at the time that she began to work at the post office branch, and there was a significant age gap of approximately 20 years between her and the respondent. This age gap added to the control that the respondent had over the complainant. It is not superfluous to note the personal circumstances of the complainant when she began to work at the post office branch. The complainant had lost her father and at that time she was undergoing a personal crisis. The complainant testified that at that time she was 'in not a very good emotional situation' and when the respondent asked her about her private life, she told him of her personal circumstances. It would appear that the sensitive position of the complainant, of which the respondent was aware, weakened even further her power to withstand his authority. In view of all of the aforesaid circumstances, we are drawn to the conclusion that the complainant's consent to the sexual acts was given as a result of an abuse of the respondent's authority over her, and therefore we are not speaking of a voluntary and genuine consent. The finding of the disciplinary tribunal that it was not proved that the complainant was afraid of the respondent cannot change this conclusion. The complainant testified before the tribunal that at

the time relevant to the charges she felt that she was unable to refuse the acts of the respondent in view of his power and status at the place of work; as I have clarified above, even if this feeling did not amount to a fear of the respondent, the element of abuse of authority does not depend on the existence of fear. In the circumstances of the case, the lack of any real fear cannot make the complainant's consent voluntary and genuine.

With regard to the *mens rea* required for the offence, as I said above, the disciplinary tribunal held in its judgment that the respondent wished to continue his sexual relationship with the complainant on the basis of his promises and efforts to procure her promotion at their place of work (p. 38 of the verdict). This determination leads to the conclusion that the respondent deliberately abused his authority over the complainant, and he knew, or at least suspected, that her consent to the sexual relationship was the result of an abuse of his authority and power of influence over her at their place of work. This conclusion is strengthened by the respondent's lies with regard to the character and circumstances of the sexual relationship that he conducted with the complainant.

Therefore, in view of all of the reasons that I have stated, I have come to the conclusion that it has been proved beyond all reasonable doubt that the respondent sexually harassed the complainant contrary to the provisions of s. 3(a)(2) of the Prevention of Sexual Harassment Law, together with s. 348(e) of the Penal Law, and s. 43.421 of the Civil Service Regulations. Therefore, I think it right to allow the state's appeal and to convict the respondent of an offence under s. 17(2) of the Civil Service (Discipline) Law.

Disciplinary measures

13. As I said above, after the verdict was given by the disciplinary tribunal, the parties reached an arrangement with regard to the disciplinary measures that would be imposed on the respondent and the tribunal adopted that arrangement in its sentence, even though it thought that the arrangement was too lenient. In these circumstances, the state's requests that the disciplinary measures that were imposed on the respondent should be made stricter gives rise to a certain difficulty, and even counsel for the appellant was aware of this. On the other hand, there is no doubt that the disciplinary measures that were imposed on the respondent in accordance with the arrangement are not commensurate with the acts of which he was convicted,

and therefore leaving the disciplinary measures that were imposed as they are will not serve the purpose of the disciplinary trial. Let us examine these conflicting interests below.

Indeed, as counsel for the respondent argued, we cannot ignore the existence of the arrangement concerning the disciplinary measures. When the appellant agreed to reach an arrangement with the respondent, it 'hinted' to him, at the very least, that his case was about to end. We should not treat lightly the respondent's expectation of the lenient sentence that he was promised and this should be given the proper weight in the circumstances of the case. The opposing interest is the duty to impose the proper disciplinary measures for the offence that was committed. Incidentally, it should be said that it appears that in our case the disciplinary measures that were handed down to the respondent were considerably more lenient than they should have been, even in view of the less serious offences of which he was convicted by the disciplinary tribunal. I doubt whether the arrangement that was made satisfied the proper balance between the various considerations relevant to the case. The disciplinary tribunal expressed itself in a similar vein in the sentence. Notwithstanding, the tribunal thought it right to approve the arrangement.

In so far as the aforesaid arrangement is concerned, it should be noted that in the case before us we are not speaking of an 'ordinary' arrangement or plea bargain. The arrangement in this case was reached after the verdict had already been given and after the respondent was convicted of the offence of which he was convicted. The respondent did not plead guilty to the charge as a part of a plea bargain but was convicted in his trial after the evidence was heard, and therefore the respondent did not adversely change his position in reliance on the arrangement, or, at least, if he did change his position it was only to a small degree. Therefore, from the outset the weight of the respondent's reliance on the plea bargain was less than usual and it derives mainly from the approval of the arrangement by the disciplinary tribunal.

In addition to the aforesaid, we should take into account the objectives of disciplinary proceedings, which are supposed to operate mainly for the purpose of prevention and as a deterrent; its main goal is to ensure the proper and correct functioning of the civil service. There is no doubt that the disciplinary measures that were handed down to the respondent are not the

proper and appropriate disciplinary measures for a worker who has been convicted of sexual harassment in the circumstances of committing an indecent act through an abuse of authority. As I said above, these disciplinary measures were lenient and disproportionate even in relation to the acts of which the respondent was convicted by the disciplinary tribunal. Therefore, in view of the circumstances of the case and the conviction at the appeal stage of the offence of sexual harassment, there is a basis for examining once again the disciplinary measures that ought to be imposed on the respondent.

14. As a rule, the most appropriate disciplinary measure for an employee who has abused his authority is to deprive him of that authority. This achieves the preventative goal of disciplinary measures in the best possible way and it is thereby possible to prevent the worker who acted wrongly from again using the authority that was given to him in order to obtain favours from his subordinates. Taking away the authority can be done in various ways and on various levels, and the Civil Service (Discipline) Law contains, for this purpose, several disciplinary measures that the disciplinary tribunal can impose. The most extreme measure for taking away authority is, of course, the measure of dismissal under s. 34(8) of the Civil Service (Discipline) Law, and it is obvious that dismissal results in taking away the authority absolutely. Depriving someone of authority can also be done by means of more moderate measures — disqualifying someone from certain positions under s. 34(7) of the Civil Service (Discipline) Law or removing him from his position under s. 34(6) of the Civil Service (Discipline) Law. The degree, character and scope of the removal of authority depend upon the circumstances of each case, and, *inter alia*, on the seriousness of the acts and the danger that the worker who acted wrongly will do so again. A worker who blatantly and frequently abused his authority cannot be compared to a worker who abused his authority in a minor manner on one exceptional occasion. Each case needs to be considered on its merits, in accordance with its circumstances and accepted sentencing principles. In each case it is therefore necessary to make the disciplinary measures properly fit the offence, and it is the duty of the disciplinary tribunal to impose a sentence in such a way that it balances the disciplinary offences that were committed against the disciplinary measures that will be imposed.

15. After studying the material before me, I have reached the conclusion that in view of the acts of the respondent, there is no alternative to imposing a

stricter disciplinary measure that will affect his power of authority. The manner in which the respondent abused his authority – both in the sexual harassment and in his attempt to prevent the making of a complaint against him — makes it necessary for us to impose an appropriate disciplinary measure. Therefore, in addition to the disciplinary measures that were imposed on the respondent, the respondent shall be removed from the managerial position to another position that does not involve the management of workers or the supervision of workers, as shall be determined in coordination with the appropriate persons at the Postal Authority, as of 1 June 2005, for a period of one year. It should be noted that even after this disciplinary measure is added to the disciplinary measures that were imposed on the respondent, his sentence still can be considered lenient when one considers the acts of which he has been convicted. However, in view of the circumstances that were described above, I do not think it right to make the respondent's sentence any stricter than this.

Therefore, the measure of removing the respondent from every managerial position for a year from 1 June 2005 will be added to his sentence.

Appeal allowed.

23 Nissan 5765.

2 May 2005.