**The National Labour court**

Labour Appeal No. 35999-10-21
November 30, 2022

| | |
|---|---|
| The Appellant | Jane Doe |
| | - |
| The Respondents | 1. So And So Company<br>2. John Doe |

In front of: President Varda Wirth Livneh, Justice Sigal Davidov Motola, Justice Roy Poliak, Public Representative (Employees) Ms. Haya Shahar, Public Representative (Employers) Mr. Atzmon Lifshitz

# [Revised[1]] Judgment

## President Varda Wirth-Livneh

## Introduction

1. The case on hand before us is an appeal against the judgment of the Beer Sheva Regional Labor Court in its session in Eilat (Judge Yaakov Azoulay and the representatives of the public, Ms. Malka Fishman and Mr. Dan Barkai; labor dispute in the framework of the subordinating authority of a judge 22307-02-18) (hereinafter: "**the judgment**"). As part of the judgement, the claim of the appellant against the John Doe respondent and the So and So Company respondent to receive compensation pursuant to the Law for the Prevention of Sexual Harassment, 5758 - 1998 (hereinafter: "**the Law**" or "**the Law for the Prevention of**

[1] A wording that is permitted for publication, according to a decision dated December 12 2022.

**Sexual Harassment**") and by virtue of the Law on Equal Opportunities at Work, 5748 - 1988 (hereinafter: "**the Law on Equal Opportunities**"). At the same time, the claim of the appellant was accepted for breaching an obligation to pay a benefit for the retention at the workplace (for discharged soldiers) and to pay compensation for causing mental anguish (distress).

2. The course of our ruling will be as follows: in Chapter A, the background to the case on hand before us will be presented, including a recitation of facts, the claims of the parties in the Regional Labor Court and the established rulings of the judgment in the Regional Labor Court. Chapter B, will detail the claims of the parties in the appeal with regard to sexual harassment, persecution, offensive employment and other claims in relation to the judgment in the regional labor Court. In Chapter C, discussion and decision on the appeal, the rules with regard to the intervention of the appeals Court in the judgement will be discussed, in particular, findings of fact and Credibility. In Chapter C.1, we will review the normative framework. In this framework, we will focus on the exception of relationship of a subordinating authority, while deliberating on a new issue that has not yet been discussed in our ruling, which we characterize as "relationships of influence." Later, we will distinguish between persecution and malevolence at work and we will review the law with regard to the responsibility of the employer. In Chapter C.2, we will apply the law in the case on hand before us by looking at the deduction from the general to the specific and in Chapter D we will make reference as to the remedies.

# A. Background

## A.1. The recitation of facts

3. The recitation of facts which is not subject to ant dispute will be detailed below, as it had been stipulated in the regional labor Court.

   (a) The appellant worked for the 1st respondent (the So and So Company respondent) during the period of the months of February to September 2017 in a position for which she was supposed to be entitled to a benefit of a discharged soldiers and a benefit for the retention at the workplace from the hotel as long as she would have been working there for a period of six months. This, being at the age of 21 (twenty-one) years (paragraph 3 of the affidavit of the appellant, attached as appendix M/5 to the notice of the appeal).

   (b) The 1st respondent (the So and So Company respondent) (hereinafter: "**the company respondent**") is a company that operates, among other things, a hotel in Eilat (hereinafter: "**the hotel**" or "**the hotel complex**").

   (c) The 2nd respondent (hereinafter: "the **2nd respondent**") was employed at the hotel in the senior managerial position of a Chef Tournant[2] during the relevant period when he was a about the age of 32 (thirty two) years (Minutes of the hearing dated January 14, 2020 on p. 93, attached as

[2] A chef tournant is a floating or relief chef who helps out wherever needed in a restaurant or other professional kitchen. This chef is supervised by the head chef and can be assigned to perform any cooking task or serve as an intermediary between chefs. Job duties of a chef tournant vary depending on the dining establishment. This individual might perform management tasks, such as training cooks, setting the production flow and managing inventory. In some operations, the chef tournant works with the other lead chefs to manage the dining operation's budget. He or she also might ensure that kitchen workers meet safety and sanitation standards.

Appendix M/11 to the notice of the appeal (hereinafter: "**Prot. M/11**").

(d) On February 21, 2017, the appellant began her work at the hotel as a lobby waitress while the 2nd respondent worked as a Chef Tournant in the kitchen departments.

(e) On March 12, 2017, a Purim party was held at the beach for the hotel employees (hereinafter: "**the party**"). The appellant returned from the party with other hotel employees who were riding in a car which was driven by the dining hall manager of the hotel (hereinafter: the "**dining hall manager**" or "**the witness**") and next to him sat the girl friend of the appellant (hereinafter: "**the girl friend**" or "**the girl friend of the appellant"** or "**the female witness**") and in the back seat sat the 2nd respondent and the appellant (hereinafter: "**the ride**"). The ride ended near the quarters of the employees, the two women got out of the car and the 2nd respondent left with them. The girl friend vomited and was later escorted by the appellant and the 2nd respondent to her room. There is no dispute that the 2nd respondent did not enter the room with the two women (hereinafter: "**the escort to the quarters**"). There is no dispute that the appellant and the 2nd respondent made their way towards the exit from the building of the quarters and at some point, the manager of the dining hall joined them and on the ground floor the appellant separated from the two men and returned to her room. After that, the 2nd respondent and the manager of the dining hall left the building. (The party, the ride and the

escort to the quarters will be referred to below as: "**the Events of the Party night**)"

(f) Shortly thereafter, the mother of the appellant contacted the Commissioner for the Prevention of Sexual Harassment and Human Resources Manager at the hotel (hereinafter: "**the Commissioner**") claiming that the 2nd respondent sexually harassed her daughter during the events of the night of the party.

(g) On March 20, 2017, the Commissioner met with the appellant and put her complaint in writing. After the conversation, the appellant was transferred to work in the telephone exchange of the hotel.

(h) During her work at the telephone exchange, the appellant worked under the manageress of the telephone exchange, who was later replaced.

(i) On September 12, 2017, the appellant finished her work with the 2nd respondent.

(j) On the basis of the above, on February 11, 2018, the appellant filed a lawsuit against the respondents for the violation of the Law for The Prevention of Sexual Harassment and the Law for Equal Opportunities at Work, as well as for violating the obligation to pay a benefit for the retention at the workplace and causing her mental anguish (distress).

(k) On August 31, 2021, the nearly all of the claim was rejected, but it was accepted against the 2nd respondent in relation to the breaching of an obligation to pay a benefit for the

retention at the workplace and for the causing of a mental anguish (distress).

(l) The appellant filed an appeal on this judgment and this is the proceeding which is on hand before us.

**A.2. The arguments of the parties in the Regional Labor Court - as they were described in the judgement.**

4. The appellant claimed that during the events of the night of the party she experienced three incidents of sexual harassment by the 2nd respondent committed towards her. According to her claim, she came to a party on the beach with her girl friend and after midnight the two sat with a group of employees when the girl friend did not feel well and the appellant helped her. At some point the 2nd respondent arrived at the group of employees, sat down next to the appellant and crossed is arm with hers and pulled her to a secluded area on the beach. When they were alone, the appellant sat down on a beach bed and the 2nd respondent began to kiss her on the cheek, close to the mouth. The appellant pushed him away and said "no" and to distract him she tried to talk to him (hereinafter: "**The first alleged harassment**"). The 2nd respondent tried to kiss the appellant once more and she pushed him away with her hands. The 2nd respondent asked why the appellant was "not rolling" (easy going) and she replied that she had to go back to help her girl friend, and walked away quickly (hereafter: "**the second alleged harassment**"). When she reached the group of employees, she pulled the girl friend away and said they should go. The two intended to take a taxi but the manager of the dining hall offered them a ride to the quarters of the employees and they accepted. The girl friend was sitting next to

the dining hall manager who was driving and the appellant sat in the back when the 2nd respondent appeared and got into the back seat next to the appellant who "froze". According to the claim of the appellant, the 2nd respondent clung to her throughout the ride, placed his hand on her shoulder and caressed her with his hand going down towards her buttock, he grabbed her hand and placed his hand on her inner thigh (in the groin) and even took her phone without her noticing (hereinafter: "**The alleged third harassment**"). The manager of the dining hall and the 2nd respondent suggested to the two women to go out to eat, but the appellant asked that they will take them to the quarters of the employees. When they got out of the car, the girl friend vomited and the appellant turned to help her. The 2nd respondent insisted on helping even though the appellant asked him to leave them and to return her phone to her. After several requests, he handed her the phone and went over to help the girl friend to enter the quarters of the employees. According to the claim of the appellant, she had no choice and she led the 2nd respondent and her girl friend into the quarters, the 2nd respondent continued to accompany them while entering the elevator and escorting them to their room. The appellant asked that he should not enter their room and went in to put her girl friend to bed. After that, the manager of the dining hall arrived and she accompanied him and the 2nd respondent to the elevator to make sure the they were leaving the complex. The manager of the dining hall again offered to go out to eat, the appellant refused, waited for them to get out of the elevator and returned to her room.

5. **On the basis of these events, the appellant argued that she experienced harassment as stated in paragraph (3a) of the Law for the Prevention of Sexual Harassment while between the parties there is a relationship of a subordinating authority within the framework of a relationship of employment**. In addition to the above, reference should be made to the claim of the appellant in the affidavit which was submitted to the Regional Labor Court that the day after the events of the night of the party, she told her girl friend about the three alleged harassments. Later, the appellant went home and told her father about the events and he told the mother of the appellant about those events. Because the appellant was afraid to complain, her mother contacted the Commissioner a few days after the events and reported them. As a result, the appellant was summoned to a conversation with the Commissioner. In order to approach of the appellant in this conversation, there was an attempt to coerce and pressure her to leave the workplace but she refused due to her financial situation. Therefore, as an alternative for a resignation, she asked to move to work in the telephone exchange, which is distant from the 2nd respondent place of work, whom she was afraid to meet. According to the version of the appellant, shortly after the conversation, the 2nd respondent returned to work without her being informed about it, and this led to her experiencing a severe anxiety attack, as a result of which her mother specifically came to stay at the hotel for fear of her safety (the affidavit is attached as Appendix M/5 to the notice of the appeal).

6. The 2nd respondent rejected the version of the appellant and her allegations with regard to sexual harassment. According to his

claim, during the party he and the appellant have secluded themselves from the others and that they had a pleasant conversation until he leaned towards her in an attempt to kiss her but she refused. The two then continued to talk and then returned to the other employees while they were holding hands without the appellant expressing any objection or disapproval. According to the argument of the 2nd respondent, they both walked hand in hand to the car of the manager of the dining hall, who suggested that the four of them would go out and eat together and the appellant agreed. The 2nd respondent added that he opened the car door for the appellant and they got into the back seat together. During the ride, the girl friend of the appellant did not feel well, so the four of them went directly to the quarters of the employees. The 2nd respondent described that the ride lasted a few minutes, during which he placed one hand on the shoulder of the appellant and one hand on her hand, and she did not resist to those actions. The 2nd respondent denied the allegation that he took the phone of the appellant without her noticing. The 2nd respondent described that when they arrived at the quarters of the employees, the appellant kissed him on the cheek when the girl friend started vomiting and the 2nd respondent went to support her and later helped her to get to her room. The 2nd respondent waited outside the room and then the appellant accompanied him in the elevator to the lobby floor, where the manager of the dining hall was waiting.

7. In the regional labor Court, the appellant claimed that the company respondent violated the obligations of the company respondent towards her according to the Law for the Prevention

of Sexual Harassment. According to the argument of the appellant, after the events of the night of the party, a complaint had been submitted by her mother to the parties in charge of the management of the hotel, including the Commissioner, was not handled as required by the law. Among other things, it is alleged that the company respondent did not conduct an orderly and efficient inquiry procedure in order to handle the complaint as required, did not maintain continuous contact to update the appellant with regard to the status of the handling of the complaint or in any way to assist her in order to return to her work routine, did not determine a way to handle complaints in general and did not take steps to prevent the recurrence of such events. It is also claimed that the company respondent took advantage of the age and background of the appellant while transferring her to a position in the telephone exchange of the hotel, thereby violating Paragraph 7 of the Law on Equal Opportunities at Work.

8. In the regional labor Court, the company respondent rejected the claim of the appellant. In the general context, it was claimed that the identity of the person in charge of sexual harassment at the hotel (the Commissioner) was known to the employees, regulations on the subject is displayed at key locations in several languages and every new employee undergoes training on the subject and receives a copy of the regulations. In the case of the appellant, it was claimed that she also underwent training on the subject and received a copy of the regulations. In addition, the complaint was duly handled while holding conversations with those involved and documenting them in the protocols (attached as Appendix M/6 to the notice of the appeal, hereinafter: "**the**

**protocols**"). In addition, the Commissioner drafted a letter summarizing the inquiry and recommendations that was forwarded to the managing director of the hotel (attached as Appendix M/6 to the notice of the appeal, hereinafter: "**Summary letter and recommendations**", "**the managing director**" respectively). According to the argument of the Commissioner, the appellant was updated throughout the procedure at every stage and emphasized that the appellant insisted on moving to the telephone exchange herself after that the alternative was raised that the 2nd respondent would be transferred from his role.

9. Finally, the appellant claimed in the Regional Labor Court that during her work at her telephone exchange she experienced behaviors that amount to offensive and malevolent employment. Thus, it was claimed that the manageress of the telephone exchange, who knew that the appellant had been transferred from her position due to a complaint of a sexual harassment, used to shout at the appellant, humiliate her, send her to the dining hall where the 2nd respondent worked, and in two instances her behavior towards the appellant escalated to a threat of violence. This work environment also continued under the management of the substitute manageress of the telephone exchange. It was further alleged that the conditions of her employment turned to be malevolent in that the appellant was forced to work many hours in a row in an exceptional manner, including on the weekend, because she was the only employee who was working in the telephone exchange. With respect of this conduct at work, the appellant claimed that she is entitled to compensation for **malevolent misconduct and offensive conduct toward her at**

**work**. In addition to this, according to her, her transfer from her role and her work in a bullying and malevolent work environment and offensive employment conditions occurred on the backdrop of a sexual harassment, and therefore, according to her approach, she is also entitled to **compensation according to paragraph (3b) and paragraph (6a) of the Law on the Prevention of Sexual Harassment**.

10. In the regional labor Court, the company respondent rejected the claim of the appellant. It was claimed that the working hours were in accordance with the collective agreement on the subject and the appellant was paid a salary for them. It was further claimed that the appellant did not present evidence supporting her claims with regard to malevolence at work, nor did she file a complaint in this regard to any party at the hotel.

## A.3. The judgment of the regional labor Court

11. As described above, the Regional Labor Court rejected the claim in its essence. Below are the main determinations of the judgement with regard to the allegations and with regard to the existence of a sexual harassment (sections 20-46 of the judgement):

12. **It was determined that the appellant did not prove that during the events of the night of the party she experienced an event or events that can be from an objective point of view tantamount to a harassment on the part of the 2nd respondent**. This determination was based on several reasons. First, the Regional Labor Court found that the testimony of the appellant was incoherent "(In the affidavit she referred to three incidents - two kisses on the cheek at the beach and the touching

in the car during the ride. At the hearing she stated that the first incident was the kiss at the party, the second was the touching in the car and the third was his arrival to the room. [...] The plaintiff stated in her affidavit that the contact included touching her buttock, while in her testimony in the Court she said for the first time that the defendant touched her groin" sections 45-44 of the judgment). Second, the Court stated that the descriptions of the appellant were contradicted by the version of the 2nd respondent and the witness brought on his behalf "both the defendant and Mr. * *** [The witness – V.W.L.] testified that all the events of the evening took place in agreement and in a good atmosphere. The defendant admitted that he tried to kiss the plaintiff, but when she expressed a lack of interest he did not try again. With regard to the contact in the car - both Mr. **** and the defendant testified that the contact was consensual and included holding hands and the hand of the defendant was on the shoulder of the plaintiff. This, after they arrived at the car while holding hands." section 44 of the judgement). Third, as the version of the 2nd respondent was accepted for a fact, it was found that the fact that the appellant and the 2nd respondent were holding hands when they arrived at the car is strengthening the version of the 2nd respondent. Fourth, it was determined that the girl friend of the appellant was drunk and did not know what was happening in the back seat of the car and therefore her testimony should not be relied upon (ibid). It was emphasized that her testimony should be treated "with the required caution, because she was informed the next day of the events, as her girl friend the plaintiff told her, considered to be hearsay testimony [...] Beyond the fact that this is hearsay

testimony, it seems that Ms. **** [the girl friend - V.W.L.] asked to come to the assistance of her girl friend, even if this involved the presentation of a depiction that matches her version." (the emphasis appears in the original, section. 36 of the judgment). Fifth, it was determined that "also the testimony of the mother of the plaintiff about the incidents of the sexual harassment is hearsay evidence. She was not present when the events occurred and heard about was has happened from the mouth of her daughter" (section 42 of the judgement).

13. The Court referred to each of the paragraphs of the law that their applicability had been claimed and determined as follows:
    (a) With regard to the applicability of paragraph **3(a)(2)**, it is determined that "if it is not proven that the contact was to the buttock or to the groin and if it was not proven that the kiss did not [so in the original - V.W.L] end in an attempted kiss only, then it is not proven that during the incident the plaintiff was subject to an "indecent act" in accordance with the paragraph" (section 44 of the judgment).
    (b) With regard to the applicability of Paragraphs **3(a)3-(4)** of the law, it was determined that the element of repetition was not met because "even according to the argument of the plaintiff in the hearing from the beginning of the incident to its end - a period of time of "about **one hour to one and a half hours**." Before the incident, the interaction between the parties was once or only just a few times and it ended with saying hello, it is certain that there were no suggestions or references that amount to sexual harassment on these occasions. [...] **After the night of March 12, 2017**, the

inquiry into the complaint had been opened and the defendant was warned not to make contact with the plaintiff. The plaintiff also did not claim at any stage after that incident that there was an interaction between them, except for one time that he had passed her by." (The emphasis is in the original, section 45 of the judgment). Also, it was determined that since there was no element of repetitiveness, there is no need to refer to the question whether the appellant showed the 2nd respondent that she was not interested. However, it was determined that the appellant did not prove that she expressed a lack of interest and it was emphasized that "on the contrary - the defendant testified all along the way that he did not feel any objection or discomfort on the part of the plaintiff, and Mr. **** [the witness - V.W.L] also testified that it nothing in her behavior was apparent with regard to it. The plaintiff even agreed to the offer to go out and eat with them, but did not do so in the end because her girl friend was not feeling well." (Section 45 of the judgement).

(c) As for the applicability of paragraph **3(a)(5),** it is stated that "we do not accept the definition of the "three harassments" that have not been proven to be humiliating or a contemptuous behavior" (section 46 of the judgment).

(d) As for the applicability of the exception which is set forth in Paragraph **3(a)(6)** of the Law, it was determined that the appellant was not a subordinate of the defendant and there was no relationship of a subordinating authority between the parties for a number of reasons. First, it was determined that

the evidence shows that the role of the 2nd respondent was not senior to the that of the appellant. The Court referred to the statement of the appellant according to which "the defendant was not in charge of her and was not responsible for her and for her working conditions". And from the testimony of the girl friend, it stood out that the 2nd respondent was not involved in hiring or dismissing waitresses, nor in managing their shifts (sections 24-23 of the judgment). The Court had also taken at face value the testimony of the 2nd respondent according to which his role as a Chef Tournant was "generalist in the hotel, where there is a hole, he fills it up" and that his hierarchical position is above the cooks and is not related to the waitresses, does not hire or dismiss employees and does not sit in management meetings (section 27 of the judgement). The Court also made a reference to the testimony of the Commissioner according to which "the position of the defendant was a Chef Tournant, he was not a senior to the plaintiff and she was not subordinate to him. He was not in a position to influence her employment." (Section 26 of the judgment). Second, it was determined that "the work interface between them [between the appellant and the 2nd respondent - V.W.L.] was extremely limited - a few times in total." (Section 23 of the judgment). This was apparent from the testimony of the appellant and other testimonies. For example, the Court described the conclusions from the testimony of the girl friend in this way: "On the face of it, the statements give the impression that the main part of her work [referring to the

appellant - V.W.L.] was neither waitressing nor taking dishes from the kitchen, so her work interface with the defendant was very limited" (Sections 25-24 of the judgment). In addition, it was mentioned that the Commissioner stated in the affidavit that "he [intended for the 2nd respondent - V.W.L.] was serving only as a substitute when the cook of the lobby did not arrive, and only on those occasions was there a working interface between him and the plaintiff." (Section 26 of the judgement).

14. **With regard to the obligations of the employer according to the law for the prevention of sexual harassment, it was determined that since it was not proven that incidents of sexual harassment took place, the employer should not be obligated in accordance with paragraph 7 (c) of the law**. Above and beyond, the Court elaborated on this matter:

    (a) With regard to the obligation to act to create a safe work environment and prevent sexual harassment, it was determined that "we came to the conclusion that the company defendant complied with this obligation. As the plaintiff also admitted, when she was hired, she was informed that Ms. **** was in charge of sexual harassment and she signed the regulations for the prevention of sexual harassment. It seems that the defendant acted in an effective, appropriate and legal manner in terms of preventing sexual harassment." (Section 56 of the judgment).

    (b) As for the obligation to handle the complaint of the appellant properly, it was determined that the company respondent complied with its obligation. In relation to the transfer of the

appellant to work in its telephone exchange, it was determined that "as the evidence clearly and unequivocally shows, the plaintiff is the one who asked to be transferred to the telephone exchange and even conditioned the continuation of the inquiry on that transfer. In fact, if she had not asked to do so, the hotel would have taken an active action to keep the defendant away. Reflected From the testimony of Ms. **** [the Commissioner - V.W.L.] that she acted sensitively and did everything necessary to distance and separate the two." (Section 71 of the judgment). In relation to the inquiry of the complaint, it was ruled that "Ms. **** [the Commissioner - V.W.L.] kept a record of the clarification conversations she had carried out with the plaintiff, with the defendant and with Mr. **** [the manager of the dining hall – V.W.L.] The letter summarizing the inquiry that Ms. **** sent to the managing director [...] was in line with the spirit of the matter, but did not completely match the protocols of the inquiry, as it should have been. It should be noted that although Ms. **** updated the plaintiff after sending the letter to the managing director and at the same time, even sent the defendant a warning letter and had a conversation with him, there was no mention of this in the documents even though it should have been done so. Despite the fact that the defendant did not submit the aforementioned documents, despite her express obligation to summarize things in writing, we trust the version of Ms. **** about how things happened as described by her. Her testimony in this regard was coherent and orderly. [...] In accordance with the

above, we reject the claim of the plaintiff by virtue of the Law to the Prevention of Sexual Harassment and by virtue of the Law for the Equal Opportunities at Work Law" (ibid., section 72-7).

15. **As for the allegations with regard to the offensive employment, it was ruled that the appellant did not meet the burden of proving that she experienced offensive employment or malevolence in the workplace**. In the meantime, it was noted that the attendance reports indicate that the plaintiff worked 7-10 hours every day and was paid as required "Indeed, in the majority of the months that the plaintiff worked many days in a row, without a day of rest per week, and there may have been room to separate a claim component with respect for this" (section 88 of the judgment). However, it was determined that this was not malevolence and that the appellant did not complain to her superiors and she was usually given a rest day the following week. In relation to the testimony of the witness and the mother of the appellant, as well as in relation to the testimony of the Commissioner on behalf of the 2nd respondent, it was ruled that this was hearsay evidence. The Court found that the testimony of the deputy manager of the reception who was in charge of the manageress of the telephone exchange (hereinafter: "**the deputy manager of the reception**" or "**the witness of the company respondent**)" who testified on behalf of the 2nd respondent, was reliable. According to it, he never received a complaint about an offensive treatment, but he did see the appellant crying several times and when he approached her, she said it had to do with her family. It also stood out from his testimony that together with the

appellant there was another employee in her telephone exchange and in relation to the behavior of the manageress of the telephone exchange, he described that she used to curse "jokingly" and that this could create an unpleasant atmosphere in the workplace. In this context, it was ruled that "we did not see this as a sufficient cause to define her employment as offensive or as malevolent. [...] The plaintiff did not make a connection between the treatment that she had defined as a malevolent treatment and her complaint of sexual harassment. Even if the style of the words and the general form of discourse of the late Ms. **** [the manageress of the Telephone exchange - V.W.L.], was not necessarily respectful [...] one should not confuse the wording of a general appeal to the various employees with the fact that we were given the impression that there was no malevolent attitude towards the plaintiff in the objective sense of the term." (Ibid).

16. The Court finally ruled that the appellant is entitled to a payment in the amount of NIS 6,000 for the benefit for the retention at the workplace that was not paid to her. In this context, it was stated that "if there had been a change in salary [...] it is reasonable that Ms. **** [the Commissioner - V.W.L.] in her capacity as human resources manager would have informed the plaintiff about this, and allowed her to consider whether she would like to move to the other role. Therefore, even in the case of the entitlement to a benefit, a mutual obligation that is part of the salary conditions of the plaintiff, it would have been appropriate to inform her that upon moving to this role, about the issue of her entitled to receive the grant." (Section 97 of the judgement).

17. It was also determined that the appellant is entitled to compensation for mental anguish (distress) in the amount of NIS 5,000 since "we believe that there were certain failures in the handling of the defendant of the complaint of the plaintiff about the sexual harassment, and also that there was a failure in that Ms. **** [the Commissioner - V.W.L.] did not tell the plaintiff in advance that her right to the benefit for the retention at the workplace would be affected upon the transfer of the role, even if the plaintiff did not explicitly ask about it. [..] In addition to this, although the plaintiff was not able to prove a conduct that can be tantamount to an offensive employment, however, even according to the testimony of Mr. ** ** [Deputy Manager of the reception - V.W.L.] It is understandable that the work environment of the plaintiff was not always sensitive enough" (section 103 of the judgement).

## B. <u>The arguments of the parties in the appeal</u>

### B.1. Allegations of sexual harassment

18. <u>According to the argument of the appellant, the Regional Labor Court erred in its ruling that there was no relationship of a subordinating authority between the appellant and the 2nd respondent in light of the following indications</u>: the 2nd respondent was older than the appellant, married and the father of children, while the appellant was a discharged soldier; The 2nd respondent worked as a Chef Tournant at the hotel for several years and knew the hotel managers well, compared to the appellant who worked for a short time at the hotel in a junior position as a lobby waitress; There was a working interface

between the two when the 2nd respondent took out dishes to the appellant who served them to the guests in the lobby. In light of the above, it was claimed that the 2nd respondent had the ability to influence the work of the appellant by virtue of his experience and his connections with senior office holders at the hotel and by virtue of his position within the framework of which he could give the appellant instructions.

19. According to argument of the respondents, the Court was right when it determined that no relationship of a subordinating authority existed. It was claimed that the Chef Tournant does not have the subordinating authority to hire waitresses for work, to dismiss them, to determine their wages and to manage their work, and this is also shown by the affidavit of the Commissioner and the affidavit of the witness. The 2nd respondent emphasized that he is not a friend of the managers who are working in the hotel, and in particular with regard to the dining hall manager, he emphasized that they are acquaintances from work and do not spend time together outside of work. The company respondent added that the testimony of the 2nd respondent clarifies that he was employed in the kitchen department while the appellant was employed in the "food and beverage" department and hence the two had different managers and there was no interface between them.

20. According to the argument of the appellant, the Regional Labor Court erred in determining that objectively no event or events considered sexual harassment occurred:

    (a) **From his affidavit and the minutes of his conversation with the Commissioner it stood out that the 2nd**

**respondent admitted that he tried to kiss the appellant and was rejected**. In addition, the 2nd respondent did not explicitly deny the allegation of sexual harassment in his affidavit. Thus, the 2nd respondent did not specifically refer to the additional attempt to kiss the appellant after she refused, and to the fact that he caressed her body in the car and took her phone.

(b) **Each of the alleged harassment can be tantamount to sexual harassment in accordance with the language of the paragraphs of the Law for the Prevention of Sexual Harassment and in accordance with the established rulings**. First, it was claimed that the three harassments are indecent acts, offers of a distinctly sexual nature and even contemptuous and humiliating treatment. Second, it is argued that the Court erred when it determined that there was no element of repeatability and erred in its decision not to necessitate to the question of whether the appellant expressed a lack of interest, or not. Because, there is no dispute that the appellant showed that she was not interested from the very beginning. In light of the above, it was claimed that even if the relationship of the parties had not been defined as a relationship of a subordinating authority, sexual harassment still existed.

(c) **It was claimed that the Court erred in stating that the version of the appellant is not coherent and therefore the version of the 2nd respondent should be preferred.** First, there was no room to hold against the appellant her difficulty in dividing the three events in a clear manner. In addition,

there is no place to hold against her the statement that the attempt to kiss her constitutes an "assault" and that placing the hand on her thigh constitutes a "serious assault". Because that this is a legal matter that the appellant is not aware of. Second, it was argued that the fact that she first said that the 2nd respondent touched her inner thigh and only in her testimony in Court she said that he actually touched her in the groin, should not be held against her. Third, it was argued that the Court ruled that it was not proven that there was contact to the buttocks or groin and relied on the version of the 2nd respondent and the witness on his behalf without any reasoned explanation. Fourth, it was argued that the version of the appellant according to which she and the 2nd respondent did not return arm in arm from the secluded area on the beach to the car should be preferred. This is because the appellant was authentic, for example by admitting that her girl friend had been drinking that day, while the 2nd respondent and the witness on his behalf presented a more "embellished" version.

(d) **The appellant presented a list of external evidence that reinforces her version and which the Court did not according to her claim refer to,** including: the conversations the appellant had with her girl friend and with her family shortly after the events of the night of the party, the filing of the complaint was made by the mother and not by the appellant, the hesitation to file a complaint with the police, the conversation with the Commissioner and the fear of revealing the identity of the 2nd respondent in the process,

the request of the appellant to move to the telephone exchange, the seizure the appellant suffered and as a result her mother arrived to stay at the hotel and more.

21. In this context, both the 2nd respondent and the company respondent argued, each with their own emphases, that the court was correct in its determination.

    (a) As for the claim that the appellant was sexually harassed according to the paragraphs of the law, it is argued that the incidents she had listed constitute "on the conceptual level" one single incident and because no relationship of a subordinating authority existed, the paragraphs of the law were not proven.

    (b) As for the determination that the testimony of the appellant was unreliable and incoherent, it was claimed that the appellant presented contradictory, alternating and unreliable versions. First, in the affidavit she claimed that two incidents of harassment happened at the beach and then another incident happened in the car, while in her inquiry she described that there was an incident at the beach, an incident in the car and an incident at the quarters. Second, it was claimed that the protocol of the inquiry of the complaint signed by the appellant shows a version according to which the 2nd respondent touched her buttock, while in the affidavit she claimed that he touched her thigh and in the testimony in Court she claimed that he touched her groin. It was claimed that this did not appear in the summaries of the appellant. Third, the manager of the dining hall was the only one who did not drink alcohol, so his version must be

accepted according to which it appeared that the appellant did not feel threatened during the ride with the hand of the 2nd respondent on her shoulder. Fourth, it was claimed that according to the testimony of the manager of the dining hall, the two arrived at the car together holding hands and the four of them drove directly to the quarters of the employees. Fifth, the respondents presented additional examples of the claim that the testimony of the appellant was full of contradictions and changes, including: from the version of the appellant, it is not clear whether she arrived at the secluded place with the 2nd respondent, before the first alleged harassment, with her hands clasped with him or if she was taken there by force. It has not yet been clarified whether the attempt of the second kiss happened when she was standing or sitting, whether the attempt of the first kiss was "on the cheek close to the mouth" or "in the cheek area" and more. Sixth, it was claimed that the version of the appellant according to which, upon entering the quarters of the employees, she signaled to the guard with her eyes that she needed help, is not reliable. Seventh, it was claimed that the testimony of her girl friend from the events of the night of the party is hearsay because the appellant herself stated that her girl friend was not aware of what was happening at the time.

(c) **It is further claimed that the appellant did not believe in real time that this was sexual harassment**. First, she did not seek external assistance (other employees at the party, the girl friend and the manager of the dining hall in the car

and the guard at the quarters). Second, even in the inquiry she claimed that she did not know if it was sexual harassment. On the other hand, the 2nd respondent testified that he believed that the appellant wanted his courting in real time when she laid her hand in his on the beach and kissed him on the cheek when getting out of the car. Third, the appellant chose not to file a complaint with the police. Fourth, the appellant turned to file a lawsuit only when she realized that she would not receive the benefit for the retention at the workplace and her testimony shows that she did not think of filing a lawsuit when the 2nd respondent returned to work claiming that "the malevolence had not yet started." It was claimed that if she had experienced such threatening harassment, she would have sought legal advice close to the incident.

22. According to the argument of the appellant, the determination that the company respondent complied with its obligations to prevent sexual harassment and handle her complaint is wrong.

(a) **With regard to the obligation to publish regulations**, it was claimed that the company respondent did present a version of the regulations but did not prove that it was posted in the quarters of the employees and throughout the surroundings of the work place without a reasonable explanation for this. It was claimed that in fairness she testified that upon her admission to the work place she was explained to whom to turn in the event of a sexual harassment, but beyond that there was no briefing for the employees on the subject and no regulations were posted.

The girl friend confirmed this in her testimony. In this context, it is argued that the Court erred by accepting a photograph of the regulation with the signature of the appellant as evidence, even though it was submitted after the lawsuit was filed without the appellant being questioned about it, nor was it attached to the affidavit of the witnesses of the company respondent.

(b) As for the obligation to conduct a proper inquiry of the complaint, it was claimed that the company respondent did not meet its obligations. First, the Commissioner did not have a conversation with the girl friend that was present at the event and did not present a convincing explanation for this. Second, the managing director of the hotel did not issue any summary of his decision to adopt the recommendations of the Commissioner in her letter. Third, the managing director was not brought to testify on behalf of the company respondent. Fourth, the 2company respondent did not check the security cameras. Fifth, no evidence was presented with regard to the final decision of the managing director of the hotel on the issue of the complaint or on taking steps with regard to the issue. Sixth, the appellant elaborated on the claim that the protocols and documents submitted by the company respondent as evidence of a proper inquiry of the complaint are inauthentic evidence and the court erred in accepting them. Among the reasons for this, it was claimed that in some of the protocols the dates were missing (unlike other documents it had submitted) and the witnesses of the defense did not know when the conversations took place;

Some of the protocols were not attached or were not mentioned in these statements of the witnesses; As for the letter of summary and recommendations that the Commissioner sent to the managing director of the hotel at the end of the inquiry, it was claimed that it also does not bear a date and that the Commissioner did not know when it was sent. It was also claimed that there are several contradictions between the content of the protocols and the content of the letter. Additional examples have been added to this. Seventh, the evidence of the lawsuit shows that the appellant was not informed about procedure of the inquiry and was even told that it was "not of her business".

23. In this context, the company respondent believed that there was no place for it to interfere with the determinations of the judgement.

    (a) **It was claimed that the company respondent has proved that it complied with its obligation to establish regulations through the evidence and the testimonies that were heard**. On the other hand, the claim of the appellant that she does not remember whether or not regulations were posted in the area of the quarters of the employees is not sufficient. It was also claimed that there is no dispute that the upon the admission of employees for work, they undergo training on the subject and sign the regulations. In this context, it was noted that there is no flaw in the fact that the appellant was not questioned with regard to the regulations that she had signed, which was not submitted with the affidavit of the Commissioner, and that the judgment

determined that the appellant signed the regulations upon her admission and that she was informed that the Commissioner is the responsible party for sexual harassment at the hotel.

(b) **As for the obligation to conduct a proper inquiry of the complaint, it is argued that the determinations of the judgment should not be interfered with**. First, the inquiry conversation was held immediately when the appellant returned from vacation on March 20 2017, when the Commissioner became aware of the incident on March 18 2017. It was emphasized that the conversation was documented in a protocol which was signed by the appellant and it was also made clear to her that the representatives of the hotel would assist her in handling the matter and that the 2nd respondent was not present at the hotel on that week. It was emphasized that the appellant refused to give the name of the 2nd respondent and the Commissioner insisted on receiving it in order to conduct a complete inquiry. Third, the Commissioner made an inquiry with the 2nd respondent and the manager of the dining hall. With regard to the failure to conduct an inquiry with the girl friend, it was claimed that the appellant refused to give her name and when her name had been found out through the inquiry that had been conducted with the manager of the dining hall, it had been known that the girl friend had been drinking alcohol that evening and was therefore not summoned to the conversation. Fourth, the Commissioner made a summary of the inquiry and forwarded it to the managing director of the hotel on April 10, 2017, and his decision had been received

three days later. As for the claim that the company respondent did not comply with the obligation to make its decision with regard to the complaint without delay, it was claimed that this was indeed the case – that the appellant had been made known about the findings and an inquiry conversation was held with the 2nd respondent immediately after the decision had been made. Fifth, it was claimed that the failure to check the cameras was due to consideration of the privacy of the employees and when it was known that it was in fact the 2nd respondent, there was no point in examining the photographs. Sixth, the company respondent rejected the claims with regard to the protocols and the email correspondence on the grounds that it was just speculations.

## B.2. Claims with regard to offensive employment and persecution on the backdrop of a sexual harassment

24. According to the argument of the appellant, the Court erred when it rejected her claims, since the company respondent did not prove that the following malevolencies did not take place:

(a) The transfer of the appellant to the telephone exchange as an alternative to the distancing of the 2nd respondent.

(b) Failure to create a protected and safe environment for the appellant when she was not informed about the status of her complaint and walked around the hotel grounds accompanied by girl friends.

(c) Persecution of the appellant while she was working at the telephone exchange, to which she was transferred due to the complaint.

(d) The refusal of the company respondent to pay the benefit for the retention at the workplace in light of the transfer to the telephone exchange. All this, while the company respondent did not present any evidence to contradict these claims.

25. According to the claim of the company respondent, the appellant abandoned the claim in her summaries and therefore the Court did not refer to it in its judgment. The company respondent emphasized that there was no proven connection between the complaint and the allegation of an offensive employment. First, the transfer to the telephone exchange was made at the request of the appellant. Second, the failure to transfer the 2nd respondent should not be seen as persecution in itself or as a violation of the duty to ensure a safe environment. Because, after the transfer of the appellant, there was no communication between the two. Third, the appellant did not prove the existence of a connection between the conduct at work and the alleged malevolence.

26. According to the claim of the appellant, the court erred when it rejected her claims with regard to the offensive employment.

(a) **As for the work environment**, it was claimed that the treatment that the appellant received from the manageress of the telephone exchange included threats of physical harm, shouting and humiliating comments with regard to the appearance of the appellant. It was further claimed that the manageress of the telephone exchange knew about the complaint of the appellant and required her to go to the places where the 2nd respondent was present there.

(b) **As for the working conditions**, it was claimed that the appellant was required to work under difficult conditions that included work that lasted for many continuous hours.

(c) **As for the testimonies of the parties**, it was claimed that the claim of the appellant was supported by the testimony of the girl friend of the appellant and her mother of the appellant. This, while the company respondent did not bring relevant parties to testify, such as the replacement manageress of the telephone exchange, the general manager of the hotel, or other employees. On behalf of the 2company respondent, only the deputy manager of the reception testified, who confirmed that the appellant was a good employee and who did not witness the alleged behaviors. During his inquiry, it became clear that he reported to the manager of reception that he saw that the appellant was crying, but the issue was not examined (protocol of the hearing dated July 17, 2019, page 72, attached as Appendix M/10 to the notice of the appeal (hereinafter: "Prot. M/10")).

27. In this context, the company respondent claimed that there was no evidence of an offensive employment or malevolent employment.

(a) According to the argument of the company respondent, the existence of a **malevolent work environment** has not been proven. It was claimed that the appellant did not report the malevolence and did not bring witnesses who worked with her to support her claims and this should be held against her.

(b) According to the argument of the company respondent, the claim that the **working conditions** of the appellant had been tantamount to a persecution had not been proven. For

example, in relation to her working hours, the Regional Labor Court examined the attendance reports and rejected her claims.

(c) As for the testimonies of the parties, it was claimed that the only admissible testimony is that of the appellant herself and the fact that it is the testimony of a party, it should be given little weight. In relation to the testimony of the girl friend, it was claimed that it was an unclear hearsay testimony and therefore should not be given any weight at all. The company respondent emphasized that the Court was right when it accepted the version of the witness of the company respondent according to which he conducted himself properly and the appellant did not state that she was crying because of her manageress. He also emphasized that the manageress of the telephone exchange "would curse in a Moroccan language with humor" at everyone and that he is not aware of an inappropriate and unique behavior that was directed against the appellant.

**B.3. Additional claims**

28. According to the argument of the appellant, the amount of compensation for mental anguish (distress) that was awarded in her favor is very low, and there was a reason to award the expenses of the Court costs and the fees of the attorney in her favor.

29. According to the argument of the respondents, the judgment should be left intact and costs and payment of fees of the attorney should be ruled against the appellant. The company respondent

emphasized that the amount awarded for mental anguish (distress) was low and that the appellate Court is not inclined to interfere with the amount of expenses which had been determined by the lower instance.

## C. Discussion and decision

30. **Points from last to first - we found that the appeal should be accepted.**

31. In accordance with the established rule, the appellate Court will not interfere with the findings of the trial Court easily. However, "the rule of non-interference is not hermetic, and over the years a number of exceptions have been established, in which, as it was determined, the trial Court does not have an advantage over the appellate Court" (Criminal Appeal 8146/09 **Eli Avshalom v. the State of Israel**, at paras. 21-19 of the judgment (September 8, 2011) hereinafter: "**The Avshalom case**")). For the sake of order, we will refer to this in a nutshell.

32. **In relation to factual findings**, it was ruled that the trial Court has an advantage in that its impression of the witnesses is direct and unmediated. Therefore, as part of an appeal procedure, it is possible to interfere with factual determinations and findings of Credibility when the determination of the trial Court is unreasonable and even causes injustice (Labor Appeal 424/06 **Sharet Kitchens Ltd. - Yelena Grohulski** (August 2, 2007)). In the **case of Avshalom,** it was ruled that the trial Court has no advantage over the appellate Court when it comes to findings which are based on logic and common sense, on the plausibility of testimony or on evidence that can be presented to an appellate

Court (such as written evidence). **In particular, in relation to the determination of Credibility**, the intervention of an appellate Court will be allowed when a significant error has been made in assessing credibility, when a "refuted and illogical" version has been adopted" or when contradictions were found in the testimony or between testimonies (ibid). Also, with regard to conclusions, as opposed to facts, it was determined that there is no advantage to a trial Court. An appellate Court may intervene if a fundamental error is found in the judgement of the trial Court in understanding the findings of facts and their consequences or in the application of the law to the factual basis (Labor Appeal 1261/02 **Movas Dani - Walid Ahmed** (June 15, 2004); Labor Appeal 323/89 **Kohari et al. v. the State of Israel** (February 21, 1991)). **In general**, an appellate Court will be allowed to intervene in the determinations of the trial Court where due weight is not given for substantial evidence or detail (the **Avshalom case**, in para. 19).

33. **Before we discuss the appeal in its merits, we already note that the appeal must be accepted in light of several grounds for intervention in the judgment of the regional labor Court.**

    (a) The trial Court erred in its factual determination that the appellant did not prove the existence of the events which she claims is amounting to a sexual harassment.

    (b) The trial Court erred in its legal conclusion that even if the events that were claimed by the appellant occurred, they do not constitute a sexual harassment according to the law.

(c) The trial Court erred in determining that the employer met its obligations under the Law for the prevention of Sexual Harassment.

(d) The trial Court erred in rejecting the claim that the appellant experienced persecution based on her complaint of sexual harassment.

Our way of proceeding in this judgment will be in accordance with these points.

## C.1. The normative framework

> "The fight against sexual harassment is not the private fight of the woman who chose to file a complaint or lawsuit against the person who harmed her. The fight must be a public fight, which will complete the process that began with the enactment of the law and lead to a change in the public and legal discourse." (The State Comptroller, the implementation of the Law for the Prevention of Sexual Harassment - Annual Report 70B (2020) (hereinafter: "**The Report of the State Comptroller**")

34. At the opening of a normative discussion with regard to the prohibition of sexual harassment, it will be emphasized, as a preliminary basis, that the phenomenon of sexual harassment is a phenomenon whose main victims are women. Women of different ages and in different places. An example of this can be found in a personal security survey which was conducted by the Central Bureau of Statistics in 2020, from which it appears that among the women who answered the survey and reported being sexually assaulted, 34 percent of the cases occurred in the

workplace (about 60,000 women) (Central Bureau of Statistics "Women are victims of crime - data from a personal security survey 2020", notice to the media, the **website of the Central Bureau of Statistics** (https://www.cbs.gov.il (November 24, 2021)).

35. From these words it is clear that when we come to discuss the serious phenomenon of sexual harassment in the workplace, we must also take into account basic insights from feminist writing on the subject. Note well and learn that sexual harassment in the workplace is a widespread wrongful practice that perpetuates the inferiority of women in society. Sexual harassment preserves the economic, professional and personal dependence of women on men and thus perpetuates their weakened position in the labor market, and in society as a whole. This, regardless of the type of harassment. The perpetrator may have acted out of a will to take advantage of the victim for his personal pleasure, while forcing a sexual image on her as an object which is intended to serve him; it is possible that the abuser acted out of insecurity and to make it difficult for the victim to advance professionally took steps in order to diminish her and to dissolve her sense of security in the workplace; there may be other reasons. **But it should be clarified that there is nothing in the motive behind the act, nor in the act itself, to cancel the meaning of sexual harassment in relation to the status of women in the workplace. And Nota Bene, for every single sexual harassment of one woman in a certain workplace, there is a serious practical issue for the place of all women in the Israeli society**. [For more on feminist writing on the subject, please see for example: Noya Rimalt "On

Sex, Sexuality and Human Dignity: The Law for the Prevention of Sexual Harassment in Light of Feminist Theory and Legal Reality", 35 **MISHPATIM** 601,606-11 (2005) (Isr.); (hereinafter: **Rimalt, On Sex, Sexuality and Human Dignity**"); Orit Kamir "What "Kind" of Harassment: Is Sexual Harassment a Violation of Equality or of Human Dignity?" 29 **MISHPATIM,** 317, (1998); (hereinafter: "**Kamir, What "Kind" of Harassment**"); Civil Appeal 8954/11 John Doe v. Jane Doe (April 24, 2014) Administrative lawsuit (marriage case) 8707-07-15; **The Local Committee for Planning and Building Ramat Gan v. Eran Yerushalmi**, paragraph 13 of the judgment (August 28, 2017) (where Justice Agmon-Gonen elaborated on the objectification of women and the feminist literature on the subject); Labor Appeal 9834-05-16 **Dr. Doron Zamir – Jane Doe**, paragraph 24 of the judgment (August 22, 2018) (hereinafter: "**the Zamir case**");Civil appeal 3347/16 **Jane Doe v. John Doe,** paragraph 7 of the judgment (February 20, 2018)].

36. **On the basis of the above description, we will refer below to victims of assault or sexual harassment under the collective name "women victims". The name refers to both sexes alike and takes the feminine form in light of the data in the field as mentioned.**

### C.1.a The Law for the Prevention of Sexual Harassment

37. The Law for the Prevention of Sexual Harassment was enacted with the aim of enshrining the prohibition of sexual harassment as well as "to protect the dignity of a person, liberty and privacy, and to promote equality between the sexes" (Paragraph 1 of the law). These protected rights are first and foremost rights which

are anchored in the fundamental legislation of our system (Basic Law: Human Dignity and Human Liberty). In this regard, the description of Prof. McKinnon of the expression for the violation of the rights of a victim of sexual assault is accurate:

> "The feelings of women about their experiences of sexual harassment are a significant part of its social impact. Like women who are raped, sexually harassed women feel humiliated, degraded, ashamed, embarrassed, and cheap, as well as angry." (Catharine A. MacKinnon, SEXUAL HARASSMENT OF WORKING WOMEN 1, 47 (Yale University Press, 1979))

38. The prohibition of sexual harassment and persecution is determined in paragraph **4** of the law and is intended to prevent various behaviors that may harm the fundamental rights which are detailed above. These behaviors are detailed in paragraph **3** of the law:

> "(a) Sexual harassment is any of these acts:
>
> (1) Extortion by threats, as defined in paragraph 428 of the Penal Code, when the act that the person is required to do is of a sexual nature;
>
> (2) Indecent acts as defined in paragraphs 348 and 349 of the Penal Code;
>
> (3) Repeated offers of a sexual nature, addressed to the person who has shown the harasser that he or she is not interested in the said offers;
>
> (4) Repeated references directed at a person, focusing on his or her sexuality, when that person has shown the

harasser that he or she is not interested in the said references;

(5) Derogatory or humiliating treatment directed at a person in relation to his or her gender or sexuality, including his or her sexual orientation;

(5a) Publication of a photograph, a film or a recording of a person, which focuses on his or her sexuality, in circumstances where the publication may humiliate or degrade the person, and his or her consent to the publication was not given, however in a criminal or civil trial according to this paragraph it will be a good defense for the advertiser if one of following exists:

(a) The publication is made in good faith, taking into account the circumstances of the publication, its content, form, scope and purpose;

(b) the publication is made for a lawful purpose;

(c) There is a public interest in the publication that justifies it under the circumstances of the case, provided that it is not false, or it is an expression of opinion or criticism of a public office holder in connection with his or her position or role, and the publication did not exceed the reasonable scope for achieving its purpose;

In this paragraph, "photograph, film or recording" - including editing or combining any of them, provided that under the circumstances the person can be identified;

(6) Proposals or references as stated in paragraphs (3) or (4), addressed to any of the subjects named in the sub-paragraphs below, under the circumstances specified in these sub-paragraphs, even if the harassed person has not shown the harasser that he or she is not interested in the said proposals or references:

[...]

(c) To an employee within the framework of a relationship of employment, and to a person in service within the framework of service while exploiting a subordinating authority in a relationship of employment or in service. (b) Persecution is an injury of any kind that originates from sexual harassment, or from a complaint or a lawsuit which was filed for the reason of a sexual harassment."

39. Paragraphs 5-6 state that persecution and sexual harassment are a crime or wrongdoing under the circumstances which are specified in the law. We will first review what is a "sexual harassment" and then proceed to discuss the phenomenon of the "persecution".

### C.1.b "Sexual harassment" – the normative hierarchy

40. With regard to paragraph **3 (a)** of the law, it seems, therefore, that the legislators presented this detail in accordance with a normative hierarchy according to the seriousness of the act. In this regard, the description of the Honorable Justice A. Proccia in the State Civil Service Appeal 2192/06 **Moshe Rahmani v. State Service Commission** (Nevo, May 4, 2007), (hereinafter: "**the Rahmani case**") is appropriate:

"Sexual harassment is multifaceted, having many aspects or sides, and different degrees of severity. Sexual harassment does not necessarily involve acts of sexual blackmail or extortion or really obscene acts; it may also take the form of expressions, suggestions, and repeated statements directed at a person and focused on his or her sexuality, when he or she is expressing that he or she is not interested in them, or where it is a reference of a sexual nature addressed at a person, which humiliates and degrades him or her in a sexual context" (ibid, at para. 8)

41. The prohibited behaviors according to paragraphs **3(a)(1) - (2)** are behaviors that constitute an offense in accordance with the Penal Code, 5737 -1977, (hereinafter: "**the Penal Code**") (blackmail or extortion by threats and obscene acts). Meaning, that these are wrong behaviors that justify punishment on their part General, in any context and not only within the limits of the law. This, while the behaviors detailed in the following paragraphs **3(a)(3)-(6)** constitute an offense only according to the law, hence in a context other than sexual harassment they do not amount to a criminal offense.

42. Paragraphs **3(a)(3)-(4)** prohibit "repeated offers of a sexual nature" as well as "repeated references directed at the person, focusing on his or her sexuality" where <u>disagreement</u> was expressed on the part of the harassed person. In accordance with the legal established rulings, while "suggestions" are found on the verbal level, "references" may also include physical actions, including hugging, holding hands, wrapping a hand around the

neck, attempting to kiss, etc., Criminal appeal 3372/11 **Moshe Katsav v. The State of Israel** Para 259 - 260 to the judgment (November 10, 2011) (hereinafter: "**the Katsav case**"); Authorization for Criminal Appeal 5388/04 **Asher ben Shlomo Dahan v. the State of Israel**, paragraph 8 to the judgment (August 17, 2004); Civil Service Appeal 6920/03 **Dr. Avraham Cohen v. The State of Israel** (February 16, 2004). As an aside, there may naturally be cases in which offers of a sexual nature (Paragraph 3(a)(3)) will be expressed on the physical level (see also for example: Orit Kamir **It harasses me: living with the Law for the prevention of Sexual Harassment** 9, 44 - 46, (Giora Rosen, editor, 2009) (hereafter: "**Kamir, it harasses me**")).

43. A repetitiveness component is added to the objection, disapproval or non-consensual component in paragraphs **3(a)(3)-(4),** so that in fact the harasser is given an "exit card" and he or she can avoid committing the offense of a sexual harassment. This, in contrast to the case where it is a derogatory or humiliating suggestion or reference (more on that later). It should be mentioned that according to the established rulings, there is no requirement that several different events occur for the purpose of proving a "repetitiveness" and several references or suggestions that appeared in one event are sufficient. This interpretation is in line with the language of the law and its purpose is to preserve the dignity of the person as a human being and as an employee as well. The repetitiveness may indicate the degree of moral wrongdoing of the offender and even the degree of danger posed by a person who continues the harassment despite the resistance of the victim. (For more information, please see: The **Rahmani**

**case**, paragraphs 8 - 10 of the judgment; Justice Shmuel Tzur reiterated these words in the Labor Appeal 432/07 **John Doe – Jane Doe**, paragraph 29 of the judgment (August 22, 2010) (hereinafter: "**Labor Appeal 432/07 John Doe**)" And the National Labor Court returned to this in the judgment in the Labor Appeal 39841-11-20 **Jane Doe – John Doe**, paragraph 23 of the judgment (July 11, 2021) (hereinafter: "**the Mikes-Place case**")).

44. Paragraphs **3(a)(5)-(6)** specify separate distinctive behaviors, even one-off or lone behavior, which are offensive enough to justify punishment for them and to define them as a civil tort. In this context, it seems that these paragraphs constitute a concretization of the previous paragraphs. For example, paragraph **3(a)(5**) concerns a "derogatory or humiliating" reference, including one that refers to the "sexual orientation" of the harassed person. Whereas, paragraph **3(a)(6)** expands sub-paragraphs (3) and (4) in relation to the context in which they were said and constitutes an exception within which a repeated suggestion or reference may amount to sexual harassment even when no objection was expressed. This, when they were said in special circumstances, such as "taking advantage of a subordinating authority in working relationships".

45. In these contexts, it was ruled that the examination of the existence of a "derogatory or humiliating" reference is done in light of the circumstances of each individual case. Meaning, not every tasteless joke or compliment will be interpreted as sexual harassment, but a sexual expression whose nature or content objectively harms the dignity of women will fall within the scope of the prohibition (for more, please see: Civil service Appeal

11025/02 **Eisner v. the State of Israel** (June 25, 2003); Civil service Appeal 5771/01 **Podlovsky v. the Commissioner of the State Service** (October 24, 2001). Thus, for example, when it comes to a reference "of a distinctly sexual nature that refers to an intimate part of the body of the complainant, and as such was intended to humiliate and degrade the complainant, the existence of the offense is not dependent on the subjective feeling of the victim" (Civil Service Appeal 1599/03 **Abraham Tapiro v. the Civil Service Commission**, paragraph 8 of the judgment (December 16, 2003) (hereinafter: "**the Tapiro case**")). In addition, it was ruled that the harassment may be an "improper reference which is directed at a group of people, and aimed at the "sechs" [so in the original, should be the "sex" - V.W.L.] or to the sexuality of a person or people who are belonging to the group." (Civil Service Appeal 11976/05 **Ruhi Khalil v. the State Service Commission**, para. 13 of the judgment (April 11, 2011)). Also, with regard to the exception that includes the **exploitation of the relationship of a subordinating authority** in the relationship of employment, much has been written about it in the established rulings. We will elaborate about this now.

### C.1.c The exception to paragraph 3 (a) (6) (c) – the exploitation of the relationship of a subordinating authority in a relationship of employment

46. This exception consists of two components - a "subordinating authority" component and an "exploitation" component.

47. As for the "subordinating authority" component, even before the law was enacted, it was stated in the established rulings that:

"12. We must not tolerate the phenomenon, which unfortunately is common, that employers and people in control will exercise their subordinating authority over their subjects to that subordinating authority in order to obtain sexual pleasure for themselves. The subjection of the subjects to such persons puts them in real distress and anguish, and more than once they will bow their heads and to their annoyance, they will put up with such behavior, not only that it is wrong and is a flawed and blemished behavior, but that it has the purpose of humiliating the person on whom the act is committed and inflicting a serious injury on his or her dignity and individual sense of innate privacy. The feeling and the certainty that there is law and there is justice must be implanted in the hearts of these people and subjects, and there are those who are entrusted with the responsibility for the protection of their rights as citizens." (Criminal Appeal 2695/93 Yossi Shiri v. the State of Israel) (July 28, 1993))

in the case of **Tapiro**, after that the law was enacted, it was determined that even though the law does not define the term "subordinating authority", its widely accepted interpretation must be preserved:

"The accepted interpretation of the term "subordinating authority" with regard to a relationship of exploitation while being employed at work also includes influence, command, and indirect subordinating authority, and the term is not limited to the relationship of an employer or

a direct superior only. [...] And in the current version of the law, as stated, there is no definition of a "subordinating authority." However, it appears that the broad meaning of the term "subordinating authority" with regard to sexual harassment has not been changed. [...]

Generally, in the framework of a relationship of employment, when the basis of a subordinating authority of a person who has direct or indirect subordinating authority towards an employee is proven, the subjective impression of that victim is not required to be proven separately. When the relations of a subordinating authority within the framework of an employment at work are proven, arising from the ability of the aforementioned "superior" to directly or indirectly influence the fate of the victim, the conclusion that is arising and learned from this is that the victim is aware of the position of the person in a subordinating authority at his or her place of work, and therefore the element of exploitation is being met." (ibid., para. 9)

48. In accordance with the established rule, the term "subordinating authority" is interpreted broadly so that even when there is indirect and even influence or a subordinating authority only, the existence of a subordinating authority can be recognized. The established rule in the case of **Tapiro** has not changed up to the present day and has even expanded over the years. Thus, the exception of paragraph **3 (a) (6)** is seen as detailing situations in

which there is an unequal relationship between the harasser and the harassed and there is a fear that the harassed will refrain from resisting the harassing behavior (Civil Service Appeal 4790/04 **the State of Israel v. Avraham Ben-Haim**, para. 10 of the judgement (May 2, 2005) (Hereafter: "**the Ben-Haim case**")). These power differences give rise to economic and professional dependence between the parties which may lead to obedience to the subordinating authority even when this is contrary to the belief, the world view and the personal will of the weaker party (Sharon Rabin Margaliot "Who is harassed by sexual harassment at work? **The Berenson book**, volume two - Bnei Sabra (711,697, Aharon Barak and Chaim Berenson, editors, 2000) Liz Montillio, "On the pondering about the crime of the exploitation of the relationships of authorities" **MISHPATIN on the website H** 69, 79 – 80 (2015)).

49. The waiver of the legislator of the element "to show the harasser that he or she is not interested" in this context reflects a view that the "exploitation of the relationships of authorities" is an aggravating circumstance for committing a sexual harassment. This severity stems from the fact that "subordinating authority is the one that gives the perpetrator the easy opportunity to carry out his or her machination compared to his or her subordinates, who naturally find themselves in a weakened position." (The case of **Moshe Katsav**, at paragraph 409 of the judgement). The reason for this is, among other things, the moral wrongfulness and the dangers arising from using the position of power for the personal benefit of the offender. In the case of **Ben-Haim**, the honorable Justice (as she was then called) Ms. D. Beinish referred to the

unique element of "exploitation of a subordinating authority" that exists in sexual harassment offenses and outlined considerations for examining the existence of a "subordinating authority" [the emphasis is not in the original - V.W.L.]

> "8. According to its nature and background, it can be said that the origin and birth of the offense of sexual harassment, as opposed to sexual offenses in general, is in the exploitation of a relationship of a subordinating authority. This element includes two factual components. The first factual component of "the exploitation of a relationship of a subordinating authority" in the context of a relationship of employment at work is the existence of a subordinating authority. Although in its simple meaning it is the control of the superior over those who are subordinate to him or her. It is not superfluous to emphasize, as this Court has pointed out many times in the past, that the element of a subordinating authority also includes indirect influence and subordinating authority and this term is not limited to the relationship of an employer or a direct superior only (please see Civil Service Appeal 1599/03 **Tapiro v. the Civil Service Commission** (hereinafter – the Tapiro judgment [3]) p. 136-135) It is also established in our ruling that the determination of the existence of a relationship of a subordinating authority requires first and foremost an examination of the relationship of the employment at work with objective standards and for this matter the subjective

impression of the victim is not enough (please see **ibid, p. 134).**

[...]

[...] 10. The greater the power differences and age differences between the superior and his subordinate; The greater the ability of the superior to influence the position or future of the employee; To the extent that the initiative to commit the sexual acts is in the hands of the superior, thus, the conclusion may be inevitable arise that the sexual acts were within the scope of the exploitation of the relationship of a subordinating authority. All this without exhausting the various considerations which are relevant to the matter which will be examined according to the circumstances of each and every case."

50. Following this, the interpretation of the term "subordinating authority" was expanded when it was determined that a subordinating authority exists even when there is no "formal" subordination between the parties within the framework of the relationship of employment at work. For example, in the case 2203/05 **Beni Madar v. the State Service Commission** (July 21, 2005), (hereinafter: "**the Madar case**)" it was ruled that there was a relationship of a subordinating authority between a male secretary in a court and a female typist, it is proven that she saw him as having an influence on her destiny as well as from an objective point of view. Considering the status of the appellant in relation to the complainant at her place of work" (ibid., at para. 8) Another example is the Labor Appeal No. 274/06 **Jane Doe –**

**John Doe** (March 26, 2008) (hereinafter: "**the Jane Doe case 2008**)" where it was ruled that there was a relationship of a subordinating authority when the victim was a software quality control engineer in one of several teams in a software department, while the attacker was the manager of the entire department. As part of the established rulings, it was determined that there was a relationship of a subordinating authority, among other things, in light of the fact that the respondent was part of the process of the hiring of the appellant, in light of his ability to influence her position and role and in light of his senior position in the company.

51. As for the manner of examining the considerations outlined in the established rulings, it was determined that "subordinating authority" is examined according to an objective standard, and the subjective impression of the complainant is not sufficient (**the Ben-Haim case**, in paragraph 8 of the judgment; **the Tapiro case**, in paragraphs 8 - 9 of the judgment; please see and compare: Criminal Appeal 9256/04 **Yosef Noy v. The State of Israel** (August 10, 2005) which on that the Supreme Court repeated this in the Criminal Appeal 10733/08 **Hanan Goldblatt v. The State of Israel** (February 17, 2011) (hereinafter: "**The Goldblatt case**)).

52. Another expression for the expansion of the term "subordinating authority", is evident in the reference to the time period on which it is applied. Recently, as part of the ruling in the Mike’s - Place case, the applicability of the term "subordinating authority" was extended also to cases where the sexual harassment took place close to the end of the relationship of the employment:

"The examination of whether a relationship of a subordinating authority exists cannot be reduced to the question of whether the complainant fears the possibility of a dismissal. Acknowledging the existence of power differences also includes the fear that the employer will avoid paying benefits after the end of the relationship of employment, avoid providing benefits, letters of recommendations, etc., and may cause to exclusion and damage to the good name of the subordinate, this is also in the case where the relationship of employment is about to be terminated for reasons unrelated to the matter of the sexual harassment. Allowing the possibility of a categorical negation of any relationship of subordinative authority from the moment when the parties know that the relationship of employment is going to end in the near future, may lead to a blatant exploitation of a relationship of a subordinative authority and contrast completely with the intention of the legislators in this matter in the context of sexual harassment. Therefore, this matter should not be given much weight, even if it is the fact that the date of termination of the employment of the appellant would have been close to the time when the "Buddy Shot" incident occurred. In light of the above, the presumption of exploitation should not be ruled out in a relationship of a subordinating authority even if the appellant has had the firm intention to resign from her job, at the time of

the occurrence of the incident. As long as an employee is in a relationship of an employment, they must be given the full protection required so that they are able to work in a safe and protected environment, and there is no place to lower the strict standard which is required in cases where there is a relationship of a subordinating authority, even if it is happening during the final period for the existence of the relationship of the employment." (ibid., at para. 22)

In the **Goldblatt case**, it was determined that a relationship of a subordinating authority can exist even after their formal termination when the power differences between the parties continue even outside the framework in which the relationship of a subordinating authority were created. In that case, there was a women theater student who, at the end of the course, the teacher offered her to take private lessons with him, the student agreed and even signed a representation and profit sharing contract with him. During those private lessons the teacher sexually harassed his student. In this regard, it was determined that although the harassment took place at the stage when the parties entered into a contract after the end of the course, the relationship of a subordinating authority still continued:

> "There is no necessity for the relationship of a subordinating authority to be expressed in fear or dread on the part of the one who is in an inferior position. This can also result from a relationship of a subordinating authority that ended formally, but the manners of behavior and the "distance" that had characterized

them, are still existing. The influence of the owner of the subordinating authority in such situations causes the individual on the other side to act according to his wishes out of appreciation, an influence and reverence, and perhaps even out of habit, which create trust in the professional validity of what is said, and significantly weaken the free will of the "subordinate." The result is similar to a situation where formal relationships exist - the consent given is "technical", and no weight should be attributed to it, for it is the result of an abuse and exploitation of a relationship of power dynamics." (ibid., at p. 140).

53. lo and behold, it is easy to notice a trend in the established rulings that tends to expand the term "subordinating authority". This expansion is expressed on two levels, where the nature of the relationship is influenced by characteristics that make it a relationship of a subordinating authority, below: <u>On the formal level</u>, the nature of the professional relationship between the parties will be examined, when non-classical hierarchical relationships (indirect subordinating authority, influence and power that are not direct) will also be recognized as a subordinating authority. Thus, the ability to influence the status and the future of the employee (which may be derived from the status, role or the position of the supervisor, including the authority to hire or dismiss employees, etc.) is also an indication of the existence of subordinating authority. <u>On the informal level</u>, we will examine the nature of the relationship on a personal level, that is, on considerations external to the employment itself,

including indicators such as: age differences between the parties, how the relationship began and which of the parties initiated it. **All of these are of course not an exhaustive list, but only examples, and of course this does not mean to change the decisions of the established rulings with regard to the existence of a relationship of a subordinating authority.**

54. As for the "exploitation" component, the words of the Honorable Justice Ms. D. Beinish in the case of **Ben-Haim** are appropriate [the emphasis is not in the original – V.W.L]:

> 9. The second factual component of the element of the "exploitation of a subordinating authority" is the element of exploitation. The word "exploitation" is a synonym for the word "use"; in the context in which we are dealing with, it is actually "misuse". The "exploitation" or "misuse" component in a situation of an indecent act is manifested in the fact that the superior uses his or her subordinating authority or power to influence the position or the future prospects of the person who is subordinated to his or her authority, in order to obtain his or her consent to perform the sexual acts on him or her and to impose his or her will on him or her. [...]
>
> A superior who takes advantage of his or her subordinating authority in order to obtain from those who are hierarchically subordinated to him or her the alleged consent to perform sexual acts on him or her, is abusing his or her power while severely harming the human dignity of the harassed person and the autonomy

of his or her will. In these actions, the superior relates to the employee purely as a sexual object, as a device for the satisfaction of lusts, and tramples on the dignity and free will of the harassed subordinate employee. **There is no doubt that subordinates who are disobedient to a superior who abuses his or her subordinating authority towards them in order to extract sexual favors from them, find themselves in a very difficult situation and there is a vital need to protect them from being subjected to this impossible and desperate situation[...]."**

55. In relation to this element, it was determined in the established rulings in the field of criminal law that when the element of a subordinating authority is objectively proven, **a presumption arises that exploitation has taken place** (Criminal Appeal 10489/06 **Yitzhak Ofer v. the State of Israel** (January 14, 2010); for more, please see Dr. Galia Schneebaum "The criminal Prohibition of Sex in Workplace Supervisory Relations: Between the Protection of Autonomy and the Regulation of Authority" **Law, Society and Culture** 813, 835–839 (Alon Harel, 2013). Subsequently, a similar rule was ruled in civil law when it was determined that the differences in power inherent between a superior and a subordinate give rise to a doubt with regard to the ability of the subordinate to oppose the authoritative behavior of a superior. Therefore, it was ruled that when the elements of paragraph **3 (a) (6) (c)** of the law are proven, **a presumption of exploitation arises** and the burden of refuting the claim that sexual harassment took place falls on the shoulders of the holder

of the subordinating authority (**the Jane Doe case**, 2008, at paras. 80-77, 47-44 of the judgment; please see also the **Zamir case**, in paras. 35-31 of the judgment and this rule was reiterated by the Court in Labor Appeal 42257-07-19 **John Doe -Jane Doe** (July 23, 2020) (hereinafter: "the **John Doe case** 2019") and also in the **Mike's-Place case**)).

56. **In the case on hand before us, the Regional Labor Court was right in determining that there is no relationship of a subordinating authority between the harasser and the harassed.**

### C.1.d Relationships of influence in the work place

57. The work place is a very significant arena in the life of a person. In the physical sense, it is a place where the employee spends many hours every day, and in the emotional sense, it is a space where an employee can express and develop him or herself, setting goals for him or herself and aspiring to accomplish achievements. The employee is financially dependent on the work place, therefore the relationships at the work place are also very important to her or his livelihood. These relationships may grow significant relationships outside of work, but they mainly affect the daily routine of a person and hence are complex and sensitive in light of the importance of the work place in the life of a working person. The laws of labor are based on these foundations, and in particular the Law for the prevention of Sexual Harassment. This, through the definition of clear boundaries for those complex relationships and the careful and sensitive behavior which is required within them. Without clear boundaries, an employee may make the mistake of thinking that his or her strength as an

employee makes him or her superior to another employee, as a person. Against the backdrop of the aforementioned, an exception with regard to the relationship of a subordinating authority was formulated, that recognizes the power that a professional rank, role or position possesses in order to influence the ability of a low-ranking employee to resist disturbing and offensive behavior that is directed towards him or her within the framework of a relationship of employment. as described above, according to this exception, in the case of a relationship of a subordinating authority, the harassed employee is not required to prove disagreement or the lack of consent in relation to sexual harassment when proving that a harassment actually took place according to paragraphs **3(a)(3)-(4)** of the law.

58. As mentioned, in the established rulings, various signs indicating the existence of relationship of a subordinating authority were outlined, which we have divided into the formal level and the informal level. In contrast to these, there are cases of sexual harassment according to Paragraphs **3(a)(3)-(4)** that occurred between employees who have power gaps between them that do not stem from any kind of a subordinating authority or relationship of a subordinating authority as defined in the established rulings. These gaps may lead to cases in the "grey" area where it is clear that one party has the ability to influence the other party, an ability that will prevent the weaker party from showing the harasser that he or she is not interested, and may even lead to cooperation or obedience to the harasser even when this involves the harming of the harassed. For example, in the **John Doe case 2019**, please see the words of the Court in this context:

"This is an intermediate case, on the wide spectrum that on the one side is a relationship between a superior and a subordinate, and on the other side is a relationship between co-employees whose have a similar status. In order to apply the paragraphs of the law, it is necessary to determine whether or not there are "relationships of subordinate authority", but even if we come to the conclusion that those relationships do not exist - in our opinion, the differences between the parties must be taken into account when analyzing the evidence and applying the legal tests for the purpose of examining the question of whether we are dealing with a case of a sexual harassment. Accordingly, in the case on hand before us, the existence of a certain hierarchical gap between the appellant and the 2nd respondent cannot be ignored, even if it does not amount to a "relationship of subordinating authority", which stems from the gaps in age and seniority as well as from the familiarity of the appellant with the system and its officials. This intermediate situation justifies, in our opinion, a more careful and rigorous examination of the consent of the female respondent to enter into a relationship with the appellant and to go along with it, and a higher evidentiary standard in order to be convinced that on hand before us is indeed a mutual relationship out of free and full will." (ibid., at para. 34)

**Beyond these things, gaps of power in intermediate cases of this kind have not yet been discussed in our ruling, and our**

**proposal is that they will henceforth be called relationships of influence in the work place.**

59. **Relationships of influence** in the workplace are found in the middle between relationships of subordinating authority (superior to subordinate) and the absence of a relationships of subordinating authority (co-employees in a similar or same rank). This power of influence can be created in different situations, which do not involve the subordinating authority which is attributed to the holder of the subordinating authority. **relationship of influence** can be expressed mainly in two ways – a professional way and a status way.

60. From a professional point of view, **relationships of influence** are expressed in the experience or seniority of an employee in the relevant field and in the degree of his or her professional importance in the work place. This influence is manifested when the personal and professional credentials of the harasser render him or her confidence and security in the work place and directly affects his or her reputation and name. In this situation, even between two employees who started working at the same time, power gaps may exist due to the professional power of the more experienced employee even without there being any relationship of a subordinating authority between them as defined in the definition of a relationship of a subordinating authority. In the event that the more experienced employee sexually harassed the less experienced employee, the power gaps between them may affect the continued employment of the harassed employee in the future if he or she does not cooperate with the actions of the harassing employee. For example, it is possible that the resistance

of the harassed employee will lead to the harasser making it difficult for him or her on the professional level by refraining from lending him or her a possible assistance, or taking advantage of his or her professional weakness to belittle him or her in front of the employer and to create a negative opinion of him or her in the work environment. Gaps in power from a professional point of view can also be expressed in the nature of the role of the employee itself, when the role of the harasser in the work place is valued, is prominent or is considered to be of greater value, compared to the role of the harassed employee. In this context, it will be noted that the existence of these power gaps may also come to light from the subjective perception of the parties, but this consideration is only one of many different considerations (please see the **Madar case**).

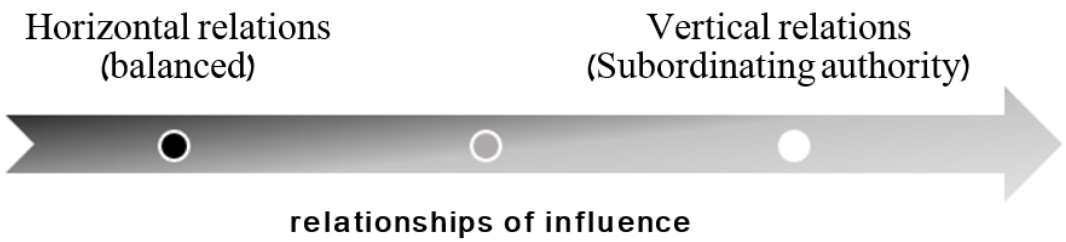
61. **Relationships of influence** can also come into play from a status point of view in the personal position of the employee in the work place as well as be derived from the seniority of the employee in the workplace, the quality of his or her relationships with other employees, his or her name and reputation. Also, in a case when a reality of a sexual harassment existed between two employees in the same or in a similar professional position or role, it is possible that the differences in the status power between the two employees would make one of them to acquire a degree of influence over the other. For example, when one of them is well established in the work place due to his or her longer employment and the other employee has been just admitted to the work place. Seniority in terms of longer employment may confer power on an employee in the work place, both in terms of the weight given to

seniors and managers, for example, and in his or her social power and the effect that his or her behavior has on other employees. In this way, the employee who enjoys seniority can apply influence, in practice, on the work environment of the harassed person, both in his or her daily routine and also in a way that can lead to the termination of his or her employment. Therefore, it is not inconceivable that a recently admitted employee who experiences sexual harassment from an established employee, may refrain from expressing his or her disapproval to the actions of a sexual harassment out of fear that this will affect the continuation of his or her employment.

62. Having established the quality and nature of the **relationship of influence**, we turn to the issue of things on the evidentiary level. When it comes to sexual harassment perpetrated by someone with influence, it must be established that the standard of proof imposed on the harassed person in relation to the proving of the "to show the harasser that he or she is not interested" component is lower than the standard imposed on someone who was harassed by an employee in the same position or status as her or him. The stronger the **relationship of influence**, the lower the threshold for proving this element. These are, therefore, cases in which it is appropriate to apply a special standard of care to the person who is in a position to disseminate influence (a person of influence), which is lower than that of an holder of a subordinating authority, but higher than that of an ordinary employee (for example, a person of influence is not bound by a stricter standard as established in the case of Jane Doe 2008 with regard to the duty to report about a relationship, and the reversal of the burden of

proof as determined with regard to the holder of a subordinating authority in the Jane Doe 2008 case), will also not be applied to him in this case.

63. And Nota Bene, the distinction between the types of relationships - relationships of subordinating authority, **relationships of influence** and balanced relationships between equals - is not unambiguous. As mentioned, there is a recitation of circumstances and indicators that must be taken into account when examining the question of whether to apply in a particular case the protection provided in paragraph **3(a)(6)** of the law. Which is to say, the types of relationships are spread across a spectrum where on the one side are vertical (Subordinating authority) relationships and on the other side are horizontal (balanced) relationships. **relationships of influence** are in the middle of this spectrum. Below is a diagram in order to illustrate those terms:




The darkness of the colors in the diagram refers to the standard of proof required for the purpose of proving the element of "to show the harasser that he or she is not interested." While in the case of horizontal (balanced) relations the proof of this component is required in full, in the case of a relationship of a subordinating authority this component is canceled in accordance with the language of paragraph **3(a)(6)** of the law. **Relationships of**

influence are found in the middle while the component of expressing disapproval and resistance is not completely eliminated, but its standard of proof is slightly softened, in view of the standard of caution which is expected of those who are capable of disseminating influence over others in the work place. It should be emphasized that the aforementioned does not change the customary law according to which one must behave with a degree of flexibility and sensitivity in relation to the evidentiary level when examining allegations of sexual harassment, we will elaborate on this briefly below.

**C.1.e The evidentiary level in examining allegations of sexual harassment**

64. The examination of claims with regard to sexual harassment is done as stated in accordance with the circumstances of the case and requires proof that those wrongful behaviors were indeed committed. Similar to the discussion of sexual offenses, these are behaviors that may occur in secret, in the presence of the offender and the victim only; or may occur in public in a disguised manner, so that they may be hidden or perceived as innocent and harmless acts. Therefore, there is an inherent difficulty in proving a claim of sexual harassment. First, since it is a "word against word" examination and second, because it is added "an attribute in the form of powerful negative emotions including fear, guilt and shame. The event itself is traumatic and this has consequences for the behavior and functioning of the victim of the crime "in real time" and his or her ability to describe the event in retrospect" (Labor Appeal 7426/14 **Jane Doe v. Adv. Uri Daniel**, paragraphs 9-8 of the judgment of the Honorable Justice Yitzhak Amit

(March 14, 2016) (hereinafter: "**the Uri Daniel case**)". Third, suppression of memories of the sexual assault incident, i.e., "deleting" them in an uncontrollable manner as a suppression mechanism, is a well-known phenomenon that may prevent the victims from complaining close to the incident as well as it may make it difficult for them to describe the events later. (**The Daniel case**, para. 14 of the judgment; for more information, please see the discussion of the issue in the **Jane Doe case, 2008**, paras. 61-59 of the judgment). Against the backdrop of this inherent difficulty, it is established in the established rulings that the version of victims of sexual offenses must be examined by different standards when their credibility is determined, and not according to the plausibility of the version or its rationality (Criminal Appeal 5582/09 **John Doe v. the State of Israel**, paragraphs 89-87 of the judgment (October 20, 2010);Criminal Appeal 6643/05 the State of Israel v. John Doe (July 3, 2007); Criminal Appeal 993/00 **Nur v. the State of Israel** (September 4, 2002; **the Katsav** case, at para. 345). Hence, it is possible to be satisfied with the hard core of the version of the victim despite contradictions or inaccuracies, as long as this core is indeed reliable enough (Criminal Appeal 10102/07 **John Doe v. the State of Israel**, Paragraph 70 of the judgment (September 7, 2010); Criminal Appeal 9497/08 **John Doe v. the State of Israel**, paragraph 22 of the judgment (July 27, 2009) - where it was determined that even certain lies of the victim do not necessarily harm the core of her version, this depends on the content and nature of the lies).

65. It should be mentioned; this flexible standard was applied in the criminal law also in contexts of sexual harassment. For example, in the case of **Goldblatt**, a flexible standard was applied in relation to the charge of an indecent act according to paragraph **348** of the Penal Code (defined as sexual harassment according to paragraph **3 (a) (2)** of the Law for the Prevention of Sexual Harassment). In the same case, the complainant first claimed that she did not remember whether the defendant laid his hand in her pants, and later claimed that he did. The Court ruled that "there is nothing in the gradual disclosure of the things in itself to damage the credibility and trustworthiness of the victim of the crime" (ibid., in paragraphs 106-104 of the judgment). The Court based this on a testimony which was written by Prof. Shulamit Almog according to which, in a nutshell, **when victims of a crime first talk about the trauma, they may minimize and soften the events and present a subdued and dim version in an effort to return to a normal life and that the trauma is not yet been processed. Later, after rehabilitation and treatment, the victim may recall the details and find the courage to reveal additional details as time passes from the date of the event and the initial report on it** (Shulamit Almog "Trauma, Narrative and Law" the **Dorner book**) 152-154, 143 (2009)).

66. The same flexible standard was also applied in the legal established rulings concerning sexual harassment within the framework of the civil law. For example, in the **Madar case**, it was determined that "the established rule is that suppressing a complaint, in itself, does not negate the credibility of the testimony. This is especially the case in complaints which are

related to sexual offenses, including offenses of sexual harassment, which are sometimes accompanied by feelings of shame, insult and disgrace, or a deterrence from the disclosure and the social and personal cost of such a disclosure" (the Madar case, in para. 6 of the judgment, and please see also the Katsav case, in para. 341 of the judgment). It will be mentioned that in the **Jane Doe 2008** case, the court referred to the difficulties of proof inherent in claims with regard to sexual harassment, including the mere disclosure of the incident to the outside world and in particular to family and acquaintances. It was emphasized that disclosure is difficult in itself given the risk that the relationships of the victim will be damaged as a result. The court ruled that the standard of proof required in sexual harassment proceedings is a balance of probabilities, as is customary in civil proceedings (ibid., at paras. 64-61,67).

**C.1.f** Persecution at the work place based on sexual harassment versus malevolence at work

67. In light of the claims that arose as part of the appeal, we found it appropriate to clarify this issue in a nutshell.

68. In accordance with paragraph **3 (b)** of the law, the term "persecution" refers to the phenomenon of "harm of any kind that originates from sexual harassment, or a complaint or lawsuit, filed for sexual harassment..." In accordance with the established rulings, this is a phenomenon with different expressions:

> "Persecution has many faces, and sometimes it is hidden from view and it is difficult to present conclusive evidence for it. Thus, it may be manifested in a change of attitude, alienation, social exclusion,

offensive comments, pestering, and even a deliberate tendency to the exercise of administrative powers - including the selective enforcement of procedures, or the disproportionate imposition of a sanction for an employee who errs or fails in a certain aspect which is related to his or her work.

[...]

There is also no need to prove intent to persecute (just as there is no need to prove intent to discriminate [...)], but the court must come to the impression that the "source of harm" (in the words of Paragraph 7 of the Law for Equal Opportunities at Work) is the complaint about sexual harassment or assistance to it (and this even in a case where it is not the only source to that harm).” (Labor Appeal 17796-07-13 **Jane Doe v. So and So office**, para. 25 (June 22, 2016))

69. In her extensive writing in this field, Dr. Kamir described the phenomenon in the following language:

"Persecution may deter victims of sexual harassment from asserting their rights according to the law, prevent complaints and lawsuits, and silence the harassed men and women as well as men and women witnesses. In any case, it may thwart the purpose of the law, and undermine its attempt to protect the harassed men and women. [...] The prohibition of persecution applies to harm that originates from any type of procedure concerning sexual harassment [...] it may occur between strangers, between colleagues, between

friends, between students, between family members, between neighbors; it may be done by the sexual harasser him or herself, by another person acting on his or her behalf or any other person. Chronologically, the persecution is prohibited before, during or after the alleged sexual harassment; before, during or after the complaint or lawsuit about a sexual harassment." (Kamir, **this bothers (harasses) me**, p. 64 - 66)

70. Various expressions of persecution based on sexual harassment have long been recognized in the case law and the established rulings, including: threats to harm the friends of the complainant, reduction of professional powers, defamation in front of colleagues, prevention of going to further training, transfer of projects to other employees, compartmentalization of the complainant by not being invited to discussions and meetings, prevention of professional progress in various ways and more (Various Appeals 882/03 **Raphael Ben David v. the State Service Commission** (July 8, 2003); Labor Appeal 64261-10-18 Jane Doe – So and So company (January, 7, 2020) (hereinafter: "the case of So and So company ")); Labor Appeal 432/07 John Doe; in the **Katsav case**, in paragraphs 313-410) in all those cases the persecutive behavior began on the basis of the sexual harassment or the complaint about it. It will be mentioned that in accordance with paragraph **6a** of the law in these cases, in accordance with paragraph **7** of the Law for Equal Opportunities at Work, the burden of proof that the employer did not harm the employee on the basis of Sexual harassment is the obligation of the employer.

71. Separately from persecution which is based on sexual harassment, there is extensive writing and increasing use of the claim of "malevolence at the work place." This is, therefore, a ground that has not yet been established by statute, but has been discussed for a long time in the regional labor Court as well as in this Court, and it refers to persecutive behavior that is not based on sexual harassment. Prof. Shulamit Almog described this phenomenon in the following language (Shulamit Almog "Occupational Persecution" **Work, Society and Law** 11 (226, 223 2016)) [the emphasis is not in the original - V.W.L.]

> "Occupational persecution is repeated behavior towards employees whose effect is a non-physical injury, which is often experienced by the employees as a humiliation. [...] Indeed, in many cases, when the negative attitude of an employer towards a particular employee is prominent and emphasized, the dynamics in the workplace are such that most of the other employees "get" in which direction the wind is blowing and join the direction which is dictated by the employer. As a result, the employee in question in some cases finds him or herself secluded in front of an entire group that treats him or her in a hurtful and humiliating manner. The persecution is driven initially by co-employees, and not by the employers."

Prof. Almog emphasized that the term that she had chosen "occupational persecution" was chosen because it represents "a kind of combination between two of the terms prevalent today for the purpose of describing it - mobbing and bullying, which also

includes the element of emotional harassment." (ibid). On the other hand, Dr. Kamir insisted on the distinction between persecution based on sexual harassment and another kind of persecution - which she called "malevolence" - while sexual harassment is an individual case of it (Kamir, **this bothers (harasses) me**, p. 156):

> "Malevolence in the work place is a serious phenomenon that may begin with the abuse of one person against another, and may deteriorate into a collective pestering of one of the members of the organization, isolating him or her, labeling him or her as a misfit, disregarding him or her, denouncing him or her outside the group and systematically harming him or her. The malevolence ignites like a wildfire. Instead of being a regular member of the group - the victim becomes a scapegoat. [...] As mentioned, malevolence in the workplace usually begins with an extreme negative attitude of one employee towards another employee; usually (in 80 to 90 percent of the cases) of a superior to an employee who is subordinate to him or her. The negative attitude can be expressed in a systematic and destructive criticism of any action that the victim performs; it may manifest itself in the imposition of tasks that the victim cannot meet and he or she obviously fails to fulfill them; it may be embodied in accusing the victim of inefficiency; [...] in his or her social and professional isolation; in insults, humiliations and yelling at the victim." (ibid., p. 154)

Hence, it is necessary to make a distinction between the causes, while emphasizing the element of causality required between the sexual harassment and the persecution, in relation to the cause which is originating in the Law for the Prevention of Sexual Harassment. Proving the causal relationship can be evident for example from the proximity of the persecution to the incidents of sexual harassment, the complaint about it or the inquest of it (Netanel R. Bushary and Adv. Ron Ben-Ari **Sexual harassment: theory and practice** – 23, 305, 315-317, 309 (2017) hereinafter: "**Bushari and Ben-Ari”**)).

72. At this stage, there is no room to elaborate on the differences between persecution on the backdrop of sexual harassment and malevolence at work beyond the background which was described above. It will be noted that the National Court was recently required to address the issue in the case of Labor Appeal 21934-02-21 **Yitzchak Hakmon – the State of Israel et al.** (September 6, 2022) (hereinafter: "**the Hakmon case”**) and within the framework of the established rulings, the cause of persecution at work was based on the duty of good faith in the implementation of a contract.

### C.1.g The responsibility of the employer

73. Paragraph **7** of the law defines the responsibility of the employer to "take reasonable measures" to prevent sexual harassment or persecution "within the framework of a relationship of employment, by its employee, or by a supervisor on its behalf even if he is not its employee." In addition, the law establishes concrete steps that the employer must take for this purpose, including: determining a way to submit a complaint on the

subject; the efficient handling of complaints; the effective handling of every complaint and the taking of steps to prevent the recurrence of cases and to repair the harm to the complainant; determining regulations that include, among other things, instructions for how to submit a complaint and how to handle it (for an employer of over 25 employees). These duties are detailed in the regulations for the prevention of sexual harassment (the duties of the employer,) 5758 - 1998 (hereinafter: the "Regulations)". According to the regulations, the employer is obliged, for example, to appoint a person who is in charge of the domain of sexual harassment who will inform the complainant about the methods of handling the complaint, conduct an effective inquiry into the complaints without delay, and more (Rule 4 - 6 of the regulations; for more information, please see Labor Appeal 1567/04 **the Jerusalem Municipality – Jane Doe A** (July 3, 2006)). Added to these are paragraph **7** of the Law for Equal Opportunities at Work, which anchors the prohibition on the employer from harming an employee on the basis of sexual harassment or a complaint on the subject.

74. In the established rulings, the various obligations were explained and guiding rules were outlined on the subject. For example, it was determined that publication of regulations is a separate obligation of the employer and does not depend on the decision on whether the claimant has proven sexual harassment or persecution (Labor Appeal 51504-01-14 **Anonymous v. Jane Doe** (September 8, 2015)). It was also determined that when an employer proved that the regulations were posted throughout the work place in several languages, it published information about

this on the Internet and sent a circular on the subject to its employees each and every year - in the same circumstances, a case arose in which it complied with its obligation by virtue of paragraph **7** of the law (**the Zamir case**, in paragraphs 62 - 58 of the judgment). Recently, the obligations of the employer to properly conduct an inquest and clarify the complaint with regard to sexual harassment and taking reasonable measures to prevent sexual harassment in Labor Appeal 40699-02-21 **Maya First v. the Haifa University** (July 5, 2022) (Published in accordance with the decision of December 12, 2022 hereinafter: "**The case of Maya First**)".

75. At the same time, it was emphasized in the established rulings that it is not enough to fulfill these obligations formally. Because, the responsibility of the employer is substantial. For example, in the case of **Mike's - Place**, it was emphasized that:

> "66. We insisted on the great importance of the existence of the provisions of the law and the regulations, not only in a technical-formal way but mainly in a substantial way that serves the purpose of the things in a proper way. The things take on a new validity when it comes to a workplace where the boundaries between what is permitted and what is forbidden may be blurred, due to its unique nature, such as in the current case it is a pub where alcoholic beverages are served, and the atmosphere is loose and one that can be a breeding ground for prohibited wrongs of sexual harassment. The importance of creating a proper and fair climate in workplaces,



including creating a work environment which is based on the values of human dignity and liberty and equality between the sexes, requires the taking of increased care in order to comply with the provisions of the law and the regulations in a substantial way. The role and duty of the employer is to bring the issue of sexual harassment to the awareness of the employees, and to actively take care of the prevention of sexual harassment in the work place. In the case on hand before us, unfortunately, the company failed to fulfill this duty." (ibid).

In this context, the employer is required to take into account the nature of the workplace in order to legally fulfill his obligations. In the case of the **So and So company**, for example, it was clarified that:

"46. The picture that emerges from all of this is that there were enough warning signs to assert the existence of a risk of an incident of sexual harassment, taking into account the integrated nature of the compound and the message that emerges from this combination, the use of alcohol in the compound without it being proven that it was trivial matters, and the knowledge that the other person behaves differently and abnormally when he consumes alcohol. From the combination of these, in our opinion, the duty to take preventive measures arises in order to ensure that the boundaries are not crossed under the auspices of the "business culture of the place", as the other partner put it in his testimony.

47. Despite the warning lights, which it noticed, the company did not take preventive measures as required. The company claimed that it was up to the appellant to request to stay in a separate hotel, but since the responsibility for taking preventive measures rests with the employer, it cannot transfer this responsibility onto the shoulders of the employee or absolve itself of the responsibility on the pretext that the employee did not request a protected work environment. This and more. The employer must ensure the existence of safe work arrangements, and it is doubtful whether an offer to the employee that only he or her should distance him or herself from a problematic work arrangement - can be considered a reasonable preventive measure under the circumstances. This, in particular in circumstances where the differentiation places the employee in a position of tension between the occupational commitment and his or her personal security."

**Therefore, when the compliance of the employer with its duties is examined, an examination is made of the fulfillment of its duties on the substantial level, even while tracing the sincerity of its efforts to investigate the complaint and prevent the recurrence of cases of sexual harassment in its premises, in accordance with the established rulings.**

**C.2. From the general to the specific**

76. **As mentioned, after examining the arguments of the parties and the determinations in the judgement, we have found that**

**the appeal should be accepted**. This is for the reasons detailed below:

(a) The Court erred in determining that the appellant did not prove the existence of the events which she claims had tantamounted to sexual harassment. This determination is unreasonable in a way that requires intervention, among others for the following reasons:

The Court applied the rules of evidence with regard to some of the testimonies incorrectly and determined that they were hearsay evidence; The many laws with regard to the evolving nature of witnessing a victim of sexual harassment were not implemented at all; The transcript recorded by the mother of the appellant near the events of the night of the party which was submitted as evidence to strengthen the version of the appellant was not discussed in the judgement; Not enough weight is given to the gaps in the version of the 2nd respondent and to the details in his testimony that strengthened the version of the appellant.

(b) The Court erred in its legal conclusion that the events claimed by the appellant do not amount to sexual harassment, even if the appellant had proved them. In particular, it erred in its conclusion that the appellant did not commit an indecent act, that there was no element of repetitiveness, and as a result it should not be examined whether the appellant expressed disapproval and resistance to the acts. **Based on all of these - the Court erred in its determination that sexual harassment was not proven in this case**.

(c) The Court erred in its conclusion that the employer complied with its obligations to handle the complaint of the appellant and to prevent the recurrence of similar cases. This gives little weight to the substantial failures of the company respondent in complying with these obligations.

(d) The Court erred when it dismissed all the allegations of harassment against the backdrop of the filing of the complaint with regard to sexual harassment.

**C.2.a Is the intervention of the appeals court required in determining the credibility of the versions?**

77. As for the credibility of the version of the appellant, it was determined in the judgment that her testimony "suffered from incoherence." This, especially because there was a difference between dividing the events into three distinct events as described by the appellant in the affidavit, and the way they were divided in her testimony in court. It further added that "the plaintiff stated in her affidavit that the contact included touching her buttock, while in her testimony in court she said for the first time that the defendant touched her groin" (para. 4 of the judgement). Also, the court gave little weight to the testimonies on behalf of the appellant claiming that it was hearsay, while that the version of the 2nd respondent which was supported by the testimony of the dining hall manager was found to be more credible.

78. **In these determinations, the court erred and therefore our intervention is required. Now we will go and present the details.**

79. <u>In relation to the kissing attempts</u>, the appellant described when questioned by the 2nd respondent that on the first occasion the

2nd respondent tried to kiss her and she managed to avoid it, but then he tried again and then "I stood up, he [the 2nd respondent - V.W.L.] tried to approach me again, I pushed him with my hand, I told him that I needed to go and I started walking quickly to the area of the people." (Prot. M/10 on p. 52) In her inquiry, the appellant described that with regard to the first incident, the 2nd respondent asked her at the party why was she crying, while she was smiling, then he crossed his hand with hers and led her aside "crossing his arm with mine and taking me to a secluded area on the beach is the first step". And when they were in a secluded place, "he doesn't get confused and approaches me straight up and literally kisses me here (the witness points with her left hand to her right cheek") (ibid., p. 58 - 59).

80. In relation to the contact in the car, the main points of the description of the incident by the appellant will be presented as they are (Prot. M/10 p. 59 – 60):

> **"Q. Where does he touch you, you mentioned for the record?**
>
> A. (The witness demonstrates while sitting) I sit on the left side of the vehicle, he sits in the middle, he initially crosses his hand with mine (the witness demonstrates his right hand with her right hand) My hand was resting on my thigh, he laid his right hand on my right hand and touches. At some point he slides his hand to here (the witness points to the inner part of the thigh), at some point it reaches the groin and this continues throughout the entire ride, we arrived quite quickly, the

distance between the **** and the quarters is not great, he took my phone.

**Q. I'll give you a second to think and tell me if what you described in the car, that's it, are you sure about that?**

A. It can't be forgotten.

**Q. If I tell you that now you omitted the apparently worst touch that 2nd defendant touched you, will you try to remember one more time?**

A. The worst touch for my part is the touch on the inner thigh near the groin. That he started hugging me before that.

**Q. In paragraph 36 of your affidavit, read it, did you forget something or did you not?**

A. (The witness looks at the paragraph) On my thigh he caressed it.

[...]

**Q. I'm telling you that in paragraph 36 you don't mention touching the upper groin near the genitals at all, right? You don't mention it at all? Where is it accurate, here or in the affidavit?**

A. Here.

**Q. How do you explain that? That exactly as we are here, about two years after the event, exactly here, is this more accurate than your affidavit?**

[...]

A. I repeat my answer; it is very embarrassing to say that someone touched your inner thigh.

**Q. Is it easier to say butt?**

A. Than saying you were touched in the groin.

[...]

**Q. There is a fundamental difference between your version and the version of the 2nd defendant and **** [the witness - V.W.L], with regard to your getting into the car,**

A. Only mine or also that of **** [witness - V.W.L,] when I went towards the mall and looked for a taxi and he came and offered us a ride after that?

**Q. And you claimed that the three of you are going, you **** and *** [the male witness and the female witness – V.W.L]?**

A. [...] He [the witness - V.W.L.] offers us a ride to the quarters, we sit in the car and in the 90th minute the harasser enters, closes the door and we start the ride.

**Q. He gets into the car and *** starts driving?**

A. Yes.

**Q. *** knows what happens in the car?**

A. I do not know.

**Q. Didn't you try to get his attention?**

A. I could not move the harasser, the attacker away from me.

**Q. You didn't mention, you didn't tell him enough, leave me?**

A. Nothing.

**Q. How do you explain that? Are there people around you?**

A. You said at the beginning that you were apologizing, as a woman I didn't think I needed to defend myself, **** [the female witness - V.W.L.] is sitting in the car, the man touches me in places I didn't know that someone I didn't want would touch me."

81. As detailed in the normative review above, it is settled law and established rulings that the version of victims of sexual harassment may contain inaccuracies, gaps and even contradictions (see above in paragraphs 64 - 65 of this ruling). Examining the **hard core** of the version of the appellant shows that her version is uniform and clear: during the party of the employees at the beach, the appellant and the 2nd respondent were alone, he tried to kiss her and she refused, then he tried to kiss her again and she went to her girl friend and asked to leave the party. The two went to the car of the dining hall manager who offered them a ride and suddenly the 2nd respondent joined. In the front of the car sat the girl friend and the manager of the dining hall who was driving and in the back seat the appellant and the 2nd respondent. During the ride, the 2nd respondent laid his hands on the body of the appellant, including on her thigh, and took her phone. The girl friend was not feeling well, so the four went to the quarters of the employees. When they arrived, the girl friend vomited and the appellant and the 2nd respondent escorted her to the room. **This is, therefore, the hard core of the version of the appellant and we found that it is a reliable hard core supported by the testimonies of both sides**.

82. Admittedly, the appellant divided the order of events differently between her affidavit and her testimony so that, for example, the

kissing attempts on the beach were initially described as one event and later as two different events. Despite these differences, the hard core of the version of the appellant remains completely the same and the difference is purely phraseological -terminological. In this context, **the claim of the appellant is accepted that the manner in which the events are divided should not be held against her**. The claim is also accepted that her description of the events as "assault" and "serious assault" should not be held against her. This is a legal matter that the appellant is not aware of and it is clear that she used this language to describe her subjective feeling in the situation.

83. The version of the appellant is supported first and foremost by the version of the 2nd respondent and its main points are presented verbatim (Prot. M/11 on pp. 95 -97)

> **Q. What was so special about ***? [intended for the appellant - V.W.L.]**
>
> A. There was nothing special, we were just at a party and it “flowed” (easy going).
>
> **Q. What was “flowing” for you? explain?**
>
> A. What is the question.
>
> **Q. What did you mean by the word “flow”?**
>
> A. You asked if she was special, I said no, we drank and we “flowed”.
>
> **Q. what was “flowing”?**
>
> A. A conversation developed [so in the original - V.W.L.] and we went to the beach something like 20 meters from the guys at the party, we went for a cigarette, she asked me what my name was and what

my job was, so I told her Chef Tournant, she told me she was a discharged soldier, a preferred work this was approximately our conversation.

[...]

**Q. Tell me what was the physical contact like when you sat with her?**

A. The only place I sat with the plaintiff was in the car. At the beach I did not sit with the plaintiff, we stood, like 20 meters from all the guys on the beach, we did not sit.

**Q. And then what happened when you were standing? What did you do physically?**

A. It was a pleasant conversation; I came closer trying to kiss her.

**Q. what did she say? Do?**

A. She moved her face and said she was worried about ****

**Q. Is that all that happened?**

A. Yes. We went back to the party.

[...]

**Q. How did you interpret it when you tried to kiss her and she wasn't interested?**

A. She didn't say she wasn't interested, but that she was worried about the girl friend.

**Q. Have you understood that she is interested in kissing you?**

A. No.

[...]

**Q. If she showed you that she wasn't interested and you understood it anyway, why did you lay your hand on her leg in the car?**

A. Let's say that when we left the sea together to the car, from the **** to the car, we walked on foot along the promenade to the car in the parking lot in front of the mall, hand in hand, we also walked like that (the witness demonstrates that they walked with arms crossed), on the one hand she moved her face on the beach and I knew she was worried from **** [the girl friend - V.W.L.], on the other hand, she walks hand in hand with me the entire promenade, she didn't show that she was angry or that I was bothering her, so I thought it was okay, if it bothered her she had words she could say to me , **** [the 2nd respondent – V.W.L.] it bothers me, I opened the door of the for her, she entered, **** [the manager of the dining hall - V.W.L.] does not drink alcohol, **** [the girl friend - V.W.L.] sat in the front, I opened for her [the appellant - V.W. L] the car from the left side, she got in, I circumvented and got into the car from the right side and we started riding [...]

**Q. I ask you why did you lay your hand on her in the car if she refused your kiss?**

A. But we walked hand in hand all the way down the promenade so I understood that everything was fine. this was the impression.

**Q. That's why you laid hands on her?**

A. Yes, a hand on the shoulder.

**Q. Demonstrate?**

A. (The witness demonstrates that he sat on the right side of the plaintiff and laid his left hand on her shoulder).

**Q. She didn't want you to kiss her, but was it okay for you to lay your hand on her?**

A. Nevertheless, we walked together hand in hand on the promenade. Even when I laid my hand on her shoulder, she didn't say anything."

From these words it appears that the 2nd respondent tried to kiss the appellant and she refused. Although according to the claim of the 2nd respondent the appellant moved her face and said that she was worried about her girl friend, he answered unequivocally that he did not understand from her in any way that she was interested in a kiss. The words of the 2nd respondent complement the version of the appellant according to which when the 2nd respondent tried to kiss her, he succeeded in kissing her near the mouth. Also, the 2nd respondent does not dispute the description of how they sat in the car, so that the appellant sat in the left part of the car and the 2nd respondent got in from the right. The words of the 2nd respondent support the version of the appellant with regard to the position in which they were sitting in the car.

84. The testimony of the manager of the dining hall shows that he saw that the girl friend was not feeling well and asked her to sit in the front of the car. He also described that during the ride he occasionally looked backwards (Prot. M/11 p 109). In his affidavit he stated that "toward the end of the party, a number of

hotel employees gathered, among them the plaintiff, the defendant and the undersigned. At some point the plaintiff and the defendant stepped aside. After a while they returned to the group of hotel employees while holding hands and continued to walk hand in hand until we reached the parking lot. Even before they got into my car, I suggested to go out to eat. The plaintiff agreed. We got into the car and next to me sat **** (the girl friend of the plaintiff [...]) [...] The plaintiff and the defendant sat in the back of the car, close together and holding hands." (Paragraph 6 of the witness affidavit, attached as Appendix M/7 to the notice of the appeal). With the claim of the witness on his behalf in his affidavit that the two were holding hands and not because he laid a hand on the shoulder of the appellant and replied: "I will answer you, one hand on the shoulder and the other hand on her hand. Two hands are busy, where exactly is the contact with the buttock?" (Prot. M/11 p. 98) **The version of the witness also supports the description of the appellant of the manner of sitting in the back seat. The appellant is on the left side, the 2nd respondent entered from the right. According to the description of the witness, the two sat side by side, meaning that the 2nd respondent sat in the middle of the car as described in the version the appellant.**

85. <u>In relation to the touching in the car</u>, the judgement stated that the witness and the 2nd respondent "testified that the touching was consensual and included holding hands and the hand of the defendant was on the shoulder of the plaintiff. This, after they reached the car holding hands." (Paragraph 44 of the judgment;

please see also ibid., para. 59). We will refer to this statement now.

86. The court returned and referred to the claim that the appellant and the 2nd respondent returned to the car holding hands as a reinforcement of the version of the 2nd respondent and the consent of the appellant to the touch in the car. This, despite the fact that the 2nd respondent did not provide any explanation or alternative version of the sequence of events from the attempted kiss to his arrival, hand in hand with the appellant, according to his claim, to the car. From his version it is not clear why the two went to the car and at what point the witness joined and why. The parties disagree on this matter. According to the argument of the appellant, the 2nd respondent laid his hand in hers before the kissing attempts, when he suddenly led her to the secluded part of the beach where he tried to kiss her. According to the argument of the 2nd respondent, this happened when they went to the car together after the kissing attempts. **In this case, the court erred in the weight it gave to the allegation of the crossing of the hands and on its decision with regard to it**. First, the version of the appellant provides a detailed and reasonable explanation for the occurrence of the events, in contrast to the version of the 2nd respondent which raises unresolved question marks. Second, even if it was proven that the 2nd respondent and the appellant did indeed arrive at the car holding hands, this does not indicate the sincere consent of the appellant to the holding of hands in front of the car, much less to the touching of her body in the car - whether it was a hand on the shoulder or a hand on the hand, according to the version of the 2nd respondent, or whether it was a touch to the

buttock and groin, according to the version of the appellant. **Therefore, the decision on the claim and the weight given to it are wrong**. And Nota Bene - a conclusion according to which simply walking to the car with clasped hands, after refusing a kiss, constitutes consent to intimate contact between the parties here is completely wrong (it should be mentioned that the established rulings even states that the testimony of a victim of assault or sexual harassment should not be examined according to its plausibility or rationality. In particular, in relation to cases in which the victim acted in a way that endangered her or in a way that is inconsistent with the fact that she was attacked (please see above in paragraph 64 of this judgment)). **Therefore, we found that the version of the appellant with regard to the crossing of the hands should be accepted and we were convinced that the appellant and the witness went to the car without the 2nd respondent and he joined by surprise.**

87. With regard to the contact in the car, we found that the version of the 2nd respondent and the witness is not superior to the version of the appellant. The parties agree, therefore, that it was a short ride during the hours of darkness. As mentioned, the witness was driving while the 2nd respondent and the appellant sat in the back of the car. Hence, even if the witness saw that one of the hands of the 2nd respondents rested on the shoulder of the appellant, it is not clear that he saw what the 2nd respondent was doing with his hands throughout the entire ride, and it is not reasonable under the circumstances of the ride described above (since the two were sitting in the central and left part of the back seat, i.e., the side behind the driver). In addition, the testimony of the witness and

the reference of the 2nd respondent to it show that they both agree that inside the car the 2nd respondent and the appellant were holding hands. These words significantly strengthen the version of the appellant who agrees that there was holding of hand but that the holding was done on her thigh and the 2nd respondent slid his hand towards the inner thigh and past the groin. **Therefore, we found that the version of the appellant was more detailed and accurate, and the version of the 2nd respondent (including the testimony of the dining hall manager who testified on his behalf) was less reliable, and part of it even strengthens the version of the appellant.**

88. As for the weight given to the testimony of the girl friend and the testimony of the mother of the appellant, **the court erred when it determined that it was hearsay testimony** (paragraph 36 of the judgment). These are, therefore, testimonies that are not intended to prove the content of the words of the appellant, but to point to the fact that they were said, and hence they are not hearsay evidence and they strengthen the version of the appellant. For example, in the **Jane Doe 2008** case, the testimony of the sister of the appellant, who spoke with her on the phone after the incident, was accepted and she "testified about the state of mind of the appellant in real time and directly, after she had sex with the respondent for the first time". It was determined that the Regional Labor Court erred in its ruling that it was hearsay testimony (ibid., in paragraph 61 of the judgment).

89. In the testimony of the girl friend, she describes the events that she found out from the appellant on the day after the party, which she did not see herself, and describes: "They were talking on the

couch when they went to the side, apparently he tried to kiss her, she got up, took me and left, and then when we got to the road **** [The manager of the dining hall - V.W.L.] came, it's less relevant, I sat in the front, she sat in the back and told me that he started touching her. I remember she asked me to sit with her in the back and I probably didn't do it" (discussion protocol dated March 11, 2019 on p. 14, attached as Annex M/9 to the notice of the appeal (hereinafter: "**Prot. M/9**")). The girl friend also clarifies that in relation to the contact in the car, she did not see the things herself "(I was with my head leaning on the window to the side", ibid). The court should have given weight to this statement, which strengthens the credibility of the testimony of the girl friend, and not to go back and stick to the fact that she was drunk as an excuse for not taking into account the testimony. **Hence, the testimony of the girl friend actually strengthens the version of the appellant and its credibility on the assumption that they prove the mere statement of the things and not their content.**

90. As for the testimony of the mother of the appellant, this is how she described what her daughter told her (Prot. M/9 on p. 32 - 33):

> "Two years after, telling you exactly, it would not be accurate, that's why I bothered and came to her and documented as much as I could, and this is the affidavit that I'm submitting and I can say what happened at home that she said that she experienced a sexual harassment. I tried to find out what happened she was very upset and did not go into details with me except to say that there was a Purim event where she went with

**** [the witness - V.W.L.] They were sitting with some friends, and then there was someone whom she defined at the time as a chef who took her aside with some excuse, they sat, he tried to kiss her, she didn't agree, he tried again, she moved away from him, she went and took **** [the girl friend- V.W.L.] who was not at her best because she had been drinking. I think at that moment I interrupted her, I was very upset by this situation, just by the thought that my daughter was sexually harassed and we always tell it won't happen to me, but this time it happened to me, and the truth is exactly the reason she was afraid to tell me because I don't go over it in silence, I immediately asked her who the direct superior was and I immediately called him.

[...]

After the first kiss that she told him no? It's not when you say no what do you mean? There is no doubt here, and then get in the car with her? She was very clear and sharp in her conduct, I don't want you, and following them and getting into the car this is grave."

**This testimony, similar to the testimony of the girl friend, serves to strengthen the very statement of the appellant after the events and this strengthens her version.**

91. In this context, it is appropriate to refer to the documentation made by the mother of the appellant on April 3, 2017 (hereinafter: "the **transcript**)", which was not mentioned in the judgment. In a nutshell, it will be clarified that from the transcript it is possible to learn, for example: already at this stage the appellant described

that the 2nd respondent laid his hand in hers before the kissing attempts; that the appellant told the 2nd respondent that she should take care of her girl friend following his statements that she was tough and that she should break free, when they went to the secluded place on the beach, this is contrary to the claim of the 2nd respondent that after the kiss attempt she turned her head and said that she should take care of her girl friend; The transcript shows that the two discussed the role of the 2nd respondent at the hotel after the attempt of the first kiss and before the attempt of the second kiss, when the appellant tried to change the subject according to her claim, while the 2nd respondent claims that on the way to the secluded place they talked about it and that there was only one kiss attempt; In the transcript it is even mentioned that the 2nd respondent laid his hands on the shoulders of the appellant and the touch reaches the buttock, the thigh and also moves to caressing the thigh, meaning that the movement of the hand in the groin area was mentioned at this stage. In addition, it was mentioned that the phone was taken. **These are just examples, but they also contribute to proving the very statement and not the truth of its content**. And Nota Bene, precisely the similarity between the words of the appellant and the version of the 2nd respondent - in relation to the topics of the conversation, in relation to the fact that he laid his hands on her shoulders, in relation to the position in which they sat in the car, etc., indicate that in the version of the 2nd respondent there are true statements that complement and strengthen the more detailed and more reliable version of the appellant.

92. Another conclusion that served to strengthen the version of the 2nd respondent in the judgement is that the appellant did not seek the help of those around her. **This conclusion is wrong and even if it were correct, it should not be held against the appellant** (paragraph 37 of the judgment). When we received the version of the appellant, we were impressed that she did ask her girl friend to leave the party after the kissing attempts, and we found that her request was a request for help. Likewise, the attempt to attract the attention of the guard in the building of the quarters. The aforementioned established rulings that the behavior of victims of sexual offenses should not be examined through the lens of reasonableness and rationality, stems from the fact that in such situations, fear and terror may paralyze or lead to conduct aimed at preventing further harm, such as leaving the place without confronting the offender. **In these cases, it is precisely the seemingly small actions, such as a request to leave, a request that her girl friend sit with her in the back of the car, a piercing look at the guard - all of these are evidence of the plight of the victim. And in this context, we accept a version of the appellant**. It should be emphasized that even if she had not sought help, this should not be held against the victim. In this context, it should not be held against the appellant the fact that in her conversation with the Commissioner she stated that she did not know whether the events of the night of the party amounted to sexual harassment, as well as her decision not to file a complaint with the police. As described in the normative part, phenomena of suppression and avoidance of reporting are

common among victims of harassment and sexual offenses (please see above in paragraphs 65 - 66 of this judgment).

93. Another gap that was emphasized in the judgement is the developing version of the appellant so that in the court she told for the first time that the 2nd respondent touched her groin during the ride. As mentioned in the **Goldblatt** case, it was argued that "the gradual disclosure of things does not in itself, to inflict damage the credibility and trustworthiness of the victim of the crime" (ibid., at paras. 104 - 106 of the judgement). **On the contrary, it is possible that the evolving nature of a version complaining about sexual harassment may strengthen the claim that she is indeed a victim of sexual harassment. This, of course, in addition to the other reinforcements that exist, for example in the case on hand before us, including a reliable and coherent hard core**. Because the development of the version of victims of sexual offenses over time is a common phenomenon recognized in our established rulings, and it stems from the shame and fear involved in describing the difficult events as they were (paragraphs 64 - 66 of this ruling). Indeed, even the court noted that the appellant "bound the contradiction with embarrassment on her part to tell *** [the Commissioner - V.W.L] about it." The same embarrassment and shame stood out consistently from her testimony (please see the parts of her testimony cited in paragraph 80 of this judgment). **As an alternative to accepting that embarrassment as a natural reason for the development of the version of the appellant, in accordance with the established rulings, the judgment determined that the developing version is in fact a contradiction in the version of the appellant. This**

**statement is wrong**. It should be mentioned that since we accepted the transcript as evidence of the actual saying of the words, this is a further reinforcement of the version of the appellant. Thus, even if the appellant took time to reveal the touch in the groin area throughout the procedure, the transcript provides evidence that she said that there was caressing and touching in the thigh area close to the time of the incident.

94. In view of the above, and since this is the core of the version of the appellant, we did not find it appropriate to rule on the matter of the dispute as to whether the 2nd respondent took the phone of the appellant. For the same reason, we did not find that it was necessary to examine in depth the escort to the quarters, since in the context of the appeal it was not claimed that sexual harassment occurred at this stage. Therefore, the discussion held in this paragraph is sufficient for the purpose of making a decision.

95. At the end of the examination of the credibility of the versions of the parties, it should be mentioned that indeed the advantage of the trial court in this context is in its direct impression of the evidence. However, that direct impression has no decisive weight or is superior to an examination of the core of the variants and its coherence. Also, the decision on this case must be made in accordance with the rules of the law and the established rulings, in particular in relation to the weight of the evidence and the legal conclusions derived from them, and especially when it comes to the claim that the appellant was sexually harassed.

96. In the case on hand before us, the determinations of the judgment in relation to the fact that the version of the 2nd respondent is preferable are based on an excess of weight given to the claim that

the two went to the car holding hands and the erroneous conclusion that the appellant consented to what was happening. Insufficient weight was also given to the testimonies brought on behalf of the appellant on the basis of a wrong determination that these were hearsay testimonies and no reference was made to the transcript made by the mother of the appellant close in time of the incident. In addition, significant weight was given to the changes in the version of the appellant in the affidavit compared to her testimony in the court and it was determined that these are contradictions, contrary to the settled law and the established rulings. **Based on these errors and re-examining them - the reliable and convincing version of the appellant must be accepted. Acceptance of this version is valid not only for the hard core described, but for the entire version including the parts that developed during the procedure as detailed above.**

**C.2.b Did the 2nd respondent commit an indecent act? (Sexual harassment according to paragraph 3(a)(2))**

97. In the judgment it was determined that "if it is not proven that the contact was in the buttocks or in the groin and if it is not proven that the kiss did not end with an attempted kiss only" then it was not proven that the 2nd respondent committed towards the appellant an "indecent act" (paragraph 44 of the judgment). The court did not analyze the basics of the paragraphs of the law, so since we have accepted the version of the appellant, we will do so now.

98. Paragraph **348** of the Penal Code states that an obscene act is "an act for the purpose of sexual stimulation, gratification or humiliation.". As stated in the established rulings, the obscene

nature of the act stems from the same subjective sexual goal, which does not have to have a side effect, and an attempt to achieve it is sufficient. According to the established rulings, this depends on the circumstances, and it is possible that even an act that is assumed to be innocent will be considered obscene in a certain situation, and vice versa (Civil Service Appeal 6737-02 **the State of Israel v. Nachum Zaken** (February 5, 2003)). In the **Katsav case** various actions were recognized as obscene acts, such as close hugs between the complainant and the harasser that were accompanied by laying down the head in the hollow of the neck and the sniffing of the complainant or by saying that her lips are sensual. Thus, it is possible to learn about the sexual nature of the act also through **the way it was done and the atmosphere that surrounded it**.

99. In the case on hand before us, the attempt of the first kiss took place in an atmosphere that was not innocent: at night, at a party on a beach in a secluded area, when the two barely knew each other and after that the 2nd respondent returned and asked the appellant to “loosen” herself (to be easy going), and even claimed in his testimony that things "flowed" between them. Of course, this is not an innocent act and the 2nd respondent acted with the aim of obtaining sexual satisfaction or stimulation. The attempt of the second kiss may also be for sexual stimulation or satisfaction. This can be learned from the very first attempt and the sayings that accompanied it. In addition, this can be learned in retrospect from the fact that the 2nd respondent continued to try to force himself on the appellant in an attempt to make her comply with his wishes, for example by getting into the car with

her and laying his hands on her. After these acts, and against the background of the aforementioned circumstances, it is clear that any contact with the body of the complainant in the car is intended for sexual stimulation or satisfaction.

100. On the basis of the aforementioned, we found that the court erred in ruling that to decide the question of whether an indecent act took place, it must be proven that contact was made in the buttock or in the groin area. **Therefore, it must be determined that in the actions of the 2nd respondent during the events of the night of the party, he sexually harassed the appellant according to the provisions of paragraph 3 (a) (2) of the law**.

**C.2.c Did a sexual harassment occur there? (According to Paragraphs 3(a)(3)–(6)**

101. With regard to the provision of Paragraph **3(a)(3)-(4)**, the Regional Labor Court determined in its judgment that:

> "30. Points from last to first. We were not convinced that objectively an event or events took place that amount to sexual harassment according to one or more of the paragraphs of the law listed above, and we will specify.
>
> [...]
>
> 44. The testimony of the plaintiff Suffered from a lack of coherency. In the affidavit she referred to three incidents - two kisses on the cheek at the beach and touching the car during the ride. In the hearing she stated that the first incident was the kiss at the party, the second was the touching in the car and the third was his arrival to the room. The description of the events

contradicts the description of the events by the defendant and Mr. *** [the witness - V.W.L] [...]

45. The incident cannot be treated as a number of suggestions or references [...] also according to the argument of the plaintiff in the hearing from the beginning of the incident to its end - a period of time of "**about an hour to an hour and a half**". Before the event, the interaction between the parties was only one or a few times and consisted of saying hello, certainly there were no offers or references that amount to harassment on these occasions. [...] In other words, the element of repetitiveness is required in order to complete the conditions of paragraph **3 (a) (3)** and paragraph **3 (a) (4)** of the Law on the Prevention of Sexual Harassment - was not met. Since we determine it in this way, we are not required to address the question is whether the plaintiff expressed a lack of interest or not." [the emphasis appears in the original]

**In this regard, the court erred in its conclusions on the legal level.**

102. It is not disputed that, in accordance with the established rulings, kissing attempts as well as touching the inner thigh towards the groin are suggestions of a sexual nature or references to the sexuality of the appellant in accordance with these paragraphs of the law (please see paragraphs 40 - 41 of this ruling). It should be mentioned that the acts were done after trying to convince the appellant to be more "loose", when the 2nd respondent described the situation as "flowing" between them. In

addition, the circumstances of the event, and the background to them, show the sexual context in them (please see above paragraph 99 of this judgment). Hence the foundation of the suggestions or references had been met.

103. As described above in the normative review, the settled law and the established rulings state that the element of repetitiveness can also exist during a single event at the same place and time, and this component is intended to deal with a case of a single slip of the tongue, but the component should not be interpreted in a way that deviates from the goals of the law (paragraphs 43 - 44 of this ruling, and in particular the **Mike's - Place case**, in paras. 23 - 24 of the judgment). **Following this, it is clear that there is no place to limit the component of the repetitiveness in time, as it was not limited in place. It is easy to compare examples where short-term acts can be considered not only suggestions or references but real obscene acts. There is no need to graze in other fields of jurisprudence, after all on hand before us is a touch on the inner thigh that moves towards the groin of the appellant which constitutes an indecent act and it lasts for a few seconds-minutes. Does limiting of the requirement for repetitiveness to a certain time serve the purpose of the law? The answer to that is negative. There is no doubt that the purpose of the law was not intended to examine the length of time that victims of sexual assault can endure serious and offensive behavior such as this**. Hence the element of repetitiveness was met.

104. Finally, the Regional Labor Court considered that the question of the external expression of the objection of the

appellant should not be discussed. There may be a situation where the existence of one element will affect the interpretation of the existence of another element. In the case on hand before us, since we accept the version of the appellant, her claim that she rejected the 2nd respondent at the very beginning is also accepted and this fulfills the component of expression of the objection which is required in the paragraph. To this, it should be added that the fact that the appellant did not hold the hand of the male appellant, and sat in the left part of the car that allows distance between the two, expresses her opposition and disapproval to the actions. But as mentioned, the 2nd respondent did not listen to these messages, not when they appeared in speech and actions when he tried to kiss her, and not at the distance that she tried to get from him when she left the secluded area on the beach, left the party and sat in the back seat of the car - as far away from him as she could.

105. Even if the version of the 2nd respondent was accepted that the appellant refused the kiss but, in her behavior, afterwards expressed consent, we have already rejected this claim above. This is both in light of the discrepancies in the version of the 2nd respondent according to which he returned to the car with the appellant holding hands, and because the meaning of its acceptance is not consistent with the established rulings on the meaning of free consent (please see above paragraph 86 of this ruling). **Hence, as for the kissing attempts, the external expression component of the objection was proven, whereas in relation to the contact in the car, in the absence of the admission of the 2nd respondent of the objection of the appellant to the actions, it is doubtful that the appellant has**

**demonstrated an external manifestation of her objection** (although in any case this type of objection is not required when we determined that paragraph **3(a)(2)** is fulfilled as detailed above). Therefore, we turn to paragraph **3(a)(6)** of the law to examine the applicability of the exception that makes it unnecessary to prove this component.

106. As elaborated in the normative review above, the established rulings outlined various signs that indicate the existence of a relationship of subordinating authority which can be classified into two levels - formal and informal (paragraph 53 of this ruling). In the present case, although the appellant was not formally subordinate to the 2nd respondent. The parties do not dispute that the 2nd respondent was not part of the hiring process, and did not have the subordinating authority to dismiss her; He did not set her work assignments, did not give her instructions or talk to her about the terms of her employment and it is clear that he did not supervise her work in any way. However, I accept the version of the appellant, according to which, in her opinion, the 2nd respondent could have given her instructions and influenced her work since he was her senior in view of his hierarchical proximity to the chef, and in particular in light of the fact that the color of his uniform was black like that of the chef's (Prot. M/10 on p. 46 – 48).

107. At the same time, from an objective point of view, it is difficult to accept the claim that there was actual subordination or a subordinating authority between the parties. The working interface of the two was actually a single case, one shift in which the 2nd respondent replaced a cook and took out dishes to the

lobby. It should be noted that in the essence of the role of the 2nd respondent, in light of his seniority, there was a potential for subordinating authority to arise between the two, for example if the manager of the lobby was not present and the 2nd respondent was required to replace him (Prot. M/11 on p. 101 - 103) but in the case on hand before us we are talking about a single and exceptional case in which the 2nd respondent served in the position of a cook, which according to the descriptions of the parties is equivalent to a waitress and not senior to her. Therefore, it is difficult to accept a claim that there was direct or indirect formal subordinating authority between the two. On the informal level, the 2nd respondent was indeed older than the appellant by about a decade and he was the one who initiated the interaction between the two at the events of the night of the party. However, in our approach, these indications alone are not enough to lead to the conclusion that subordination existed between the parties (which is a basic condition for the existence of subordinating authority), even if it was indirect as required by the established rulings.

108. **Therefore, in the case on hand before us indeed, as determined by the court, there was no relationship of a subordinating authority between the appellant and the 2nd respondent.**

109. **Did a relationship of influence exist in the circumstances of the case**? The circumstances lead us to a "grey" area. On the one hand, there is no reason to state that subordinating authority existed between the two. On the other hand, under the circumstances of the case, it is clear that there were differences of

power between the parties and that the 2nd respondent had a certain power of influence over the appellant, even if only from her subjective point of view. From a professional point of view, a review of the catering and food service employee groups at the hotel shows that while the appellant was relatively junior as a waitress in the lobby, the 2nd respondent worked in a fairly senior position, close to the chef**. In this respect, the 2nd respondent was in a position of professional strength, compared to the appellant, since his role in the workplace was more significant**. From a status point of view, given his role, the 2nd respondent was in contact with many employees, at different levels, including managers of various departments in the hotel, and he was also close to the chef, who reports directly to the managing director of the hotel. Also, the 2nd respondent worked at the hotel for about a year and a half - not a long time by itself, but the appellant was a very new employee (only about three weeks) and a junior in the hierarchy of the hotel (as shown in Prot. M/11 on p. 94) Also, the age gap between the parties, even if it is not very large (about a decade), but considering the young age of the appellant, contributed to increasing the power gap between the two in terms of status. **Therefore, it can be said that there was a difference of power between the 2nd respondent and the appellant in terms of status, which does not amount to a relationship of a subordinating authority, but weakens the appellant vis-à-vis the 2nd respondent. This does not change the burden of proof, as we have determined in a relationship of a subordinating authority, to the harasser, but this must be taken into account when examining the burden of proof which**

**is assigned to the appellant given the relationship of influence between the parties**.

110. In this state of affairs, it therefore follows that the 2nd respondent had the ability to influence the appellant professionally, and his connections at the work place gave him a more stable status than the appellant. **Therefore, a *relationship of influence* existed between the parties**. This nature of the relationship between the appellant and the 2nd respondent justifies, as stated, the application of a special standard to the 2nd respondent and requires him to be extremely careful in the way in which he behaves towards female and male employees at the hotel, as mentioned above.

111. As mentioned, in the present case, it is not disputed that the attempt of the first kiss ended in an unequivocal refusal. As for the attempt of the second kiss, we accepted the version of the appellant according to which she refused a second time and left. Therefore, in relation to these harassments, the expression component of resistance was proven. As for touching in the car, the appellant did not prove an external expression of her refusal. However, we accepted the version of the appellant according to which she "froze" and that she left the party after the kissing attempts and tried to stay away from the 2nd respondent as much as possible, including her attempt to sit away from him in the car. Therefore, and taking into account the softened threshold required to prove an external manifestation of the resistance that is disturbed in the case of relationship of influence, **we found that also in relation to the contact with the car, the existence of an external manifestation of the resistance was proven.**

**Therefore - the two kissing attempts as well as the touching in the car constitute sexual harassment either according to paragraphs 3(a)(3)-(6) of the law, or by virtue of paragraph 3(a)(2) as we stated above**.

**C.2.d Did the employer meet its obligations under the law?**

112. Already at this stage it should be clarified - the examination of the material on hand before us shows that the company respondent did not meet the burden of proving that it met its obligations to take reasonable measures to properly handle the complaint of the appellant and to prevent the recurrence of cases of sexual harassment in the work place.

113. In the established rulings, the Regional Labor Court examined whether the employer met its obligations in an examination beyond what was necessary. Since we determined that sexual harassment took place, contrary to the determination of the Regional Labor Court, we will examine whether intervention is required in relation to its determinations with regard to the fulfillment of the obligations of the employer. In the first stage, we will examine whether the company respondent complied with its obligations at the preventive level - it took "reasonable measures, under the circumstances" to prevent the harassment or persecution (in the words of paragraph (**7a**) of the law) and whether it complied with its obligation to "establish regulations" as well as to publish them (paragraph (**7b**) of the law). In the second stage, we will examine whether the company respondent complied with its obligations on the concrete level - handled the complaint of the appellant in an efficient and proper manner and

in accordance with its obligations under the law and the regulations.

114. **As for the preventive level**, the judgment determined that the company respondent complied with its obligations by focusing on the obligation to establish regulations and publish them and by relying on two main pieces of evidence. One is a copy of the regulations bearing the signature of the appellant that was submitted during the evidentiary hearing (attached as Appendix N/1 to the case file 22307-02-18, not attached to the notice of the appeal, hereinafter: "**the signed regulations**)" on the grounds that the appellant signed it upon her admission to the work place. The second piece of evidence is a photograph of a number of regulations in different languages (attached as Appendix M/6 to the notice of the appeal, hereinafter: "**Photograph of the posted regulations**)" which is claimed to prove that the regulations were posted throughout the hotel complex. In addition, the court based its determination on the fact that the appellant stated in her affidavit that upon starting her work, she was explained that the Commissioner is the address for dealing with the issue of sexual harassment at the hotel. Based on this, it was determined that the company respondent "acted effectively, appropriately and in accordance with the law in terms of preventing sexual harassment" (Paragraphs 55 - 56 of the judgment).

115. **After examining the judgment and the arguments in the appeal, we found that the court erred in its determination**. This, in light of the weight given to this evidence and the legal conclusion derived from it.

116. With regard to the signed regulation, the appellant claimed that the Court erred in actually accepting it as evidence without investigating it. In light of the tendency of the case law and the established rulings to focus the evidentiary examination on examining the weight of the evidence, as an alternative to its admissibility, the court did not err in the very acceptance of the evidence. However, we found that the court erred in the weight that has been given to this evidence. In this context, the Commissioner did not provide a convincing explanation as to why the signed regulations were submitted late (Prot. M/10 on pp. 74 - 75). In addition, it seems that there was room to hold against the company respondent the fact that it did not submit additional examples of the regulations signed by additional employees at the time of their admission for the purpose of proof that this is a true and existing procedure. Unfortunately, it should have been held against it for not doing so in relation to the 2nd respondent and other employees who were witnesses as part of the proceeding.

117. As for the photograph of the posted regulations, the argument of the appellant must be accepted that this photograph does not prove that the regulations were indeed posted throughout the work place premises and in the quarters of the employees. From an objective point of view, the photograph does not actually allow any indication of where the regulations were posted or when the photograph was taken. This, while submitting photographs that unequivocally prove where the regulations were posted does not involve a reasonable effort, but only in changing the angle of the photograph. Even in this context, the Commissioner did not provide a convincing explanation for the thing and asked to be

content with her claim that the regulations were indeed posted in different languages in different places in the hotel (Prot. M/10 p.74 - 75). In our view, from the photograph which was submitted by the company respondent it is not clear that the regulations were posted in a conspicuous place around the work place as it is required of the employer according to the regulations.

118. **Based on the above, we believed that the determination of the Regional Labor Court that the company respondent had met its obligations to prevent sexual harassment should not be accepted**. In light of the above, there was room to give the signed regulations and the photograph of the posted regulations a lower weight. In this situation, the company respondent did not present enough evidence for the purpose of meeting the burden of proof imposed on it to establish regulations and publish them and to take reasonable measures to prevent sexual harassment, taking into account all the unique characteristics of the work place (so that compliance with this obligation imposed on the employer is not examined in a formal-technical way, but rather the employer is expected to take preventive measures in a proactive and active manner and please see in detail the **Mike's - Place** case and the **So and So company** case). Furthermore, the reading of the regulations shows that it is a general regulation which is not adapted to the specific work place that we are dealing with as required in paragraph (**7e**) of the law and expressly in regulation **8** of the regulations. In the **Mike's - Place** case, the importance of the existence of regulations which are specifically adapted to the work place in order to comply with the obligation of the employer was emphasized, especially when it comes to a ' susceptible'

(easily taken advantage of) work place (ibid., at paras. 61 - 62 of the judgment). Therefore, and in view of the complex nature of the work environment in the hotel as mentioned below, **it should have been appropriate to establish a customized and individual regulations for the purpose of fully complying with the obligation of the employer.**

119. Not only this but also that, the court did not examine the fulfillment of the obligations of the employer at the preventive level, beyond the examination of the duty to establish and publish regulations. Therefore, it should be made clear that even if the company respondent had proved that the regulations were in posted as they should have been, this would not have been enough to meet its obligations at the preventive level, since the company respondent did not take reasonable measures to prevent sexual harassment in the work place, as detailed below.

120. With regard to taking reasonable measures, it was clarified in the **Mike's - Place** case that "it is a normative - objective evaluation of reasonableness, and therefore its concrete meaning varies from case to case according to its circumstances." It was also emphasized there that the employer has an increased obligation to comply with its obligations due to its nature as a "susceptible" place where alcohol is sold "and as a result the boundaries between what is prohibited and what is permitted may become blurred" (ibid., in para. 57 of the judgment).

121. In this context, also in the case on hand before us, the nature of the work place places an increased burden on the company respondent to prevent sexual harassment for two reasons. One, is the fact that the hotel is located in a remote area of Israel, when,

like the appellant, some of its employees move to live in employee quarters during the work period, among other reasons, due to the desire to complete an extended work period and to receive a benefit for the retention at the workplace. The second is the nature of the business, which provides hospitality services to its guests twenty-four hours a day, seven days a week. In this situation, there is an intensive work environment at the place, not only in terms of the scope of the working hours but in light of the center of living which is built for the employees of the hotel around the work place. When the employees are in a distant city, working in a hotel and some of them live with the employees of the hotel in designated quarters that is assigned to them, their work place serves in practice also as their home. These unique circumstances justify the application of an increased burden on the company respondent to prove that the personal safety of each and every employee was taken care of through reasonable means which are measured according to a standard of reasonableness that corresponds to the intensive and unique working conditions at the hotel.

122. In the present case, indeed, the company respondent appointed a person responsible for preventing sexual harassment. However, it should be mentioned that the obligations of the employer include, in accordance with the regulations and the established rulings, a wide range of steps that have not been proven to have been taken by the employer in this case, including: a direct and personal demand from every superior and employee to refrain from sexual harassment, informing the employees about the phenomenon and how to handle it, placing the provisions of

the law against the eyes of the employees, as well as conducting regular training and information activities on the subject while maintaining control over the level of awareness of employees on the subject (for more, please see the **Mike's - Place case**, at para. 66; this was recently elaborated on in the **Maya First** case, at para. 27 - 33). **All of these have not been proven at all and the evidence presented by the company respondent is not even sufficient for superficial, thin and minimal compliance with these obligations.** Examining the steps taken by the company respondent in practice, shows that the examination was characterized according to our approach in conducting a "ritual" of examination, with the intention of paying just "lip service" (to do the minimum at one's obligation), and not with an attempt to conduct an inquest with regard to the complaint to the crux of the matter as well as to discover findings that would reduce the fear of future harm. The things take on a different effect in view of the elevated burden which is imposed on the company respondent in the case on hand before us, in view of the nature of the work place.

123. And Nota Bene, in view of that elevated burden, it would have been appropriate that those "reasonable measures" would have been taken while placing emphasis on places and events of special risk. If steps had been taken such as periodic trainings on sexual harassment for all employees, as well as a briefing or concrete guidance for the party of the employees, it is possible that the company respondent would have been able to prove that it met the burden imposed on it. The examination of the case shows that it was appropriate to guide and brief the guard at the entrance to the quarters of the employees, and even the senior employees who

were present at the party, such as the manager of the dining hall and the 2nd respondent, to conduct themselves with extra caution, to keep their eyes open, to prevent and stop any suspicious behavior that may amount to sexual harassment and the like. The case on hand before us shows how serious the situation was with the company respondent not only in the sub-enforcement but in the earlier stage of the lack of any awareness of the issue among all the employees, and among the senior employees in particular.

124. **Therefore, we found that the claim of the appellant is correct, and it must be accepted - the 2nd respondent did not prove that it took reasonable measures to prevent sexual harassment.**

125. **<u>On the concrete level</u>**, with regard to handling the complaint of the appellant, the court ruled as follows:

> "A clear picture emerges in front of us according to which the defendant handled the complaint of the plaintiff and investigated it in an optimal way, although the handling of a number of issues could have been improved. The separation between the plaintiff and the defendant was effective and achieved the goal [...] the plaintiff isא he one who asked to move to the telephone exchange and even conditioned the continuation of the inquiry on that. [...] Ms. **** [the Commissioner - V.W.L.] kept a record of the inquiry conversations she made with the plaintiff, with the defendant, and with **** [the male witness - V.W.L.] the letter summarizing the inquiry that Ms. **** delivered to the managing director of the hotel, Mr. **** agreed with

the tenor of the things, but did not completely agree with the protocols of the inquiry, as it should have been. It should be noted that although Ms. **** [the Commissioner - V.W.L] informed the plaintiff after sending the letter to the managing director and at the same time, even sent the defendant a warning letter and had a conversation with him, there was no mention of this in the writings even though it was appropriate to do so. Despite the fact that the defendant did not submit the above-mentioned documents, despite her express obligation to summarize things in writing, we trust the version of Ms. **** [the Commissioner - V.W.L.] As for the way things happened as described by her. Her testimony in this regard was coherent and orderly.

We would also note that there is a gap between the feelings expressed by the plaintiff, with regard to the degree of availability of Ms. **** [the Commissioner - V.W.L.] and the degree of transfer of information about the handling of the complaint, and the claims of Ms. **** [the Commissioner - V.W.L.] [...] However, and in light of paragraph **7 (c**) of the Law on the Prevention of Sexual Harassment as detailed above, since we determined that no incidents of sexual harassment occurred, it is not possible to hold the defendant accountable for not handling the complaint." (para. 71 of the judgment)

126. **After examining the judgment and the arguments in the appeal, we found that in this context too, intervention is required both in relation to the weight that the court gave to**

**the flaws in the process of the inquiry in the case of the appellant, and in relation to its legal conclusion.**

127. As for the manner in which the procedure of the inquiry itself was carried out, we believed that there were significant flaws that were not given enough weight. Hence no intervention is required in the actual determination that the flaws existed, but in the weight given to them by the court.

(a) In relation to the obligation to document the procedure (Rule 5 (d), 14 of the Regulations) the court found gaps between the content of the protocols and the letter summarizing the recommendations. The Commissioner explained the discrepancies by saying that she wrote the letter "with the same feeling that [the plaintiff - V.W.L.] conveyed" in an attempt "to be as authentic as possible because the managing director is sitting in front of pages and the person who sat in front of [the plaintiff] and experienced what she conveyed is myself" (Paragraph 63 of the judgment). In addition to these, other gaps were mentioned in the judgment, including: the lack of documentation for the warning conversation with the 2nd respondent at the end of handling the complaint (including failure to prove the date of its existence), the lack of documentation of a date in some of the protocols and in the final letter of recommendations. Despite the aforementioned, the judgment mentions these flaws but there is no reference to their weight and effect. Finally, the court determined that the obligations of the company respondent were legally fulfilled and thus the court erred. It should be noted that according to the argument of the

appellant there was a gap between her words in the conversation with the Commissioner and the recording of the conversation in the protocol and that the documents were prepared retrospectively after the filing of the claim. We were not required to address this claim in view of the enormity of the flaws which the court in any case recognized and we find that whether the claim is accepted, or not, it will not change our decision which will be brought forth immediately, later.

(b) In relation to the obligation to conduct a thorough examination and inquiry, including the hearing of all the relevant parties to the complaint and examining "all information" received with regard to the complaint (as per Rule 6 of the Regulations), significant flaws were found. In particular, failure to summon the girl friend for a conversation as well as failure to check the security cameras are fundamental flaws in the fulfillment of this duty. In this context, the various explanations of the Commissioner for these omissions, including the claim that this was not necessary since the girl friend was drunk at the time of the events, as well as the claim that the cameras were not checked for reasons of privacy protection, are not satisfactory and should have been given weight. In this respect, the Regional Labor Court erred.

(c) In relation to the obligation to make an operative decision with regard to a complaint without delay, in a reasoned manner and in writing, (Rule 7 of the Regulations) a fundamental flaw was also found. In fact, it is not disputed

that the appellant did not receive a final reasoned decision in writing with regard to her complaint. The decision of the managing director of the hotel was conveyed to the appellant orally and the company respondent did not present any documentation of his decision. In addition, the company respondent did not submit an affidavit on behalf of the managing director and he was not brought to testify on its behalf in order to support its testimony (the affidavit of the Commissioner was attached as Appendix M/6 to the notice of the appeal). All of these are significant flaws and should be held against the company respondent. The Commissioner was asked about this in her testimony and she did not provide a reasonable justification for the case. From this it appears that the company respondent did not prove that any decision was made with regard to the complaint of the appellant, and even if it was made it was not carried out as required by the law and the regulations.

128. **These flaws are serious deficiencies in the procedure of the inquiry which was carried out by the company respondent which were not given sufficient weight in the judgement. They show the non-fulfillment of its duties on the concrete level when the complaint of the appellant was handled.**

129. Note well the documentation of procedure of the inquiry of a sexual harassment complaint, conducting a thorough examination based on all the information and making an operative decision are the pillars of the duties of the employer in this case. The documentation of the procedure through accurate recordings, including the documentation of the date on which meetings were

held and documents were sent, is essential to fulfilling the obligation of the employer to conduct an efficient and quick inquiry. Especially when we are dealing in the field of sexual harassment, as we should remember that every small fact in it is as important as a big one, inaccurate documentation may harm the ability to inquire the truth and to do justice in practice. Also, in order to prevent harm to the complainant, it is appropriate to make accurate documentation as much as possible and to examine the issue in a comprehensive and thorough manner before formulating a letter of summary and recommendations that is forwarded to the employer. Otherwise, additional testimony will be required from the complainant, which involves mental and emotional difficulty, and in a more serious case, vital details that could influence the final decision may even be missed. Finally, making an operative decision, reasoned and in writing is essential for doing justice to the complainant and to the accused person - regardless of the content of the decision. This allows both parties to deeply understand the decision so that they can internalize it and move on. Externally, a reasoned decision may lead to the improvement of the handling of sexual harassment within the organization and to the prevention of the recurrence of such cases.

130. **Therefore, our legal conclusion is that the company respondent violated its obligations according to the law. These weighty flaws are enough to lead to the conclusion that the company respondent did not meet its obligations to properly handle the complaint of the appellant.**

131. It should be noted that in addition to the above flaws, the appellant pointed to other flaws which the Regional Labor Court

did not consider. Without going into detail and to the merit of things, for the sake of the following cases, we would like to mention them:

(a) The claim of the appellant that her mother contacted the manager of the lobby and instead to forward the complaint directly to the Commissioner, the complaint was forwarded to the food manager at the hotel, was not denied by the company respondent. This claim may indicate a violation of the duty to conduct a discreet procedure while maintaining the privacy of the complainant in the procedure.

(b) The parties disagreed with regard to the extent of the availability of the Commissioner to the appellant throughout the procedure. In our opinion, it is sufficient that the Commissioner did not deny that the 2nd respondent returned to work without the appellant being informed about it, and it was not denied that the appellant did not receive an update throughout the procedure with regard to the conversations held with the male witness and the 2nd respondent, no documents were forwarded to her and she did not receive the decision of the managing director of the hotel in writing. All of which itself requires explanation.

(c) The outcome of the complaint - the transfer of the appellant to the telephone exchange - even if it resulted from a request or a demand of the appellant herself, may indicate that no sincere attempt was made to fulfill the duty to prevent harm to the complainant. In this context, it seems that the company respondent did not prove that it did everything it could to

find a solution beyond transferring the complainant from her position and role.

(d) The passage of time from the date of the conversation of the Commissioner and the appellant, on March 20, 2017 until the transfer of the letter of summary and recommendations to the managing director of the hotel, which according to the claim of the Commissioner was forwarded on April 10, 2017 and then his decision within three days (apparently, since there is no documentation for this either) - may indicate about the violation of the duty to inquire the complaint **without delay** and to make a decision quickly. In contrast to cases where the delay results from an attempt to fulfill the role of the Commissioner properly and maintain the purity and integrity of the procedure, as happened for example in the case of **Maya First**, in this case no explanations or evidence were presented to justify the delay in inquiry of the complaint.

132. As mentioned, since we determined that the flaws which were recognized by the court were sufficient for the purpose of deciding the issue, we did not find that it was necessary to interfere with the factual determinations concerning the additional flaws described in the previous paragraph. Also, for this reason we were not required to discuss the email message submitted by the Commissioner (at a late stage of the proceeding).

133. **In view of the above, we determine that the company respondent did not comply with its obligations under the law to handle the complaint of the appellant as well as to prevent sexual harassment in the workplace.**

### C.2.e Did the appellant experience persecution or malevolence?

134. So far, we have discussed the chronicles of the appellant up to the events of the night of the party, during them and throughout the procedure of the inquiry of her complaint in the weeks after these events. Unfortunately, that was not the end of the hardships of the appellant during her employment with the company respondent.

135. According to the claim of the appellant, when she moved to work in the telephone exchange of the hotel, she was subjected to a recitation of harm doings that manifested itself in difficult working conditions and an offensive and toxic work environment. As part of the rulings, it was determined in relation to the working conditions that the appellant "did not lift the burden and did not prove that she experienced abusive employment or malevolence in the work place." The Court stated that "it is true that in most months the plaintiff worked many days in a row, without a day of rest per week, and it is possible that there was room to single out a claim component for this [...] However, this does not amount to a malevolence towards of the plaintiff" since she was paid for her work and usually received a day of rest the following week, in accordance with the law and the extension order (para. 88 of the judgment).

136. As for the allegations with regard to her work environment, it was ruled that "We found the testimony of Mr. **** [the Deputy Manager of the reception - V.W.L.] reliable and trustworthy. Mr. **** [the Deputy Manager of the reception - V.W.L.] testified that he was sensitive enough to hear the plaintiff crying and approach her, but he did not hear the late Mrs. **** [the head of

the telephone exchange - V.W.L.] yelling at her in a manner that amounted to aa malevolence. [...] The plaintiff did not make a connection between the treatment which she defined as a persecutive treatment and her complaint of sexual harassment. Even if the style of the words and the general form of discourse of the late Ms. **** was not necessarily respectful, as interpreted by the reliable testimony of Mr. ****, still, one should not substitute a general nature of the address to the various employees with the fact that we were under the impression that it was not because of malevolence towards the plaintiff in the objective sense of the term." (Paragraph 88 of the judgment). It was further added that the appellant did not file a complaint with regard to the attitude of the head of the telephone exchange and in any case when allegations are made against a deceased person the burden of proof is higher than that imposed on a plaintiff in a normal civil proceeding.

137. Already at this stage we note that the appellant focused her appeal on the claims with regard to the work environment and we did not find that there is any reason to interfere with the determinations of the judgment in relation to the working conditions. However, as for the determinations of the court in relation to the work environment, we found a number of errors that require intervention.

138. **As for the allegations of persecution due to the attitude of the head of the telephone exchange towards the appellant, we found that it was not proven that the attitude was specific towards the appellant and therefore it was not proven that it was a persecution which is based on a sexual harassment**. In

accordance with the determinations of the judgement, the deputy manager of the reception did indeed see the appellant crying, and indeed the manageress of the telephone exchange conducted herself in a manner that could be perceived as insensitive. However, the testimony of the deputy manager of the reception shows that the same attitude on the part of the manageress of the telephone exchange was not directed specifically towards the appellant.

139. **As for the additional claims of the appellant with regard to persecution, we found that the company respondent did not lift the burden of proving that persecution did not take place**. In this context, the court erred in applying the law. The burden of proving that the employer did not harm the employee based on a complaint of sexual harassment rests with the employer. In this regard, the company respondent did not meet the burden of proof. **Indeed, had it not been for the complaint, the appellant would not have moved to work in the telephone exchange, to which we will add that the 2nd respondent was returned to his job without the appellant being informed of this. It should also be emphasized the difficulties that were heaped on the appellant with regard to receiving the benefit for the retention at the workplace**. The company respondent denied the appellant her right to the benefit even though her transfer to another position was due to her complaint about the sexual harassment. The appellant had to fight for her right to the benefit that was finally given to her only as part of the judgment.

140. **Based on the above, it is clear that the appellant experienced persecution on the basis of a sexual harassment.**

## D. Remedies

141. As for the amount of compensation, the appellant claimed that for each harassment NIS 120,000 should be awarded in her favor. Also, according to the claim of the appellant, the amount of compensation for mental anguish (distress) that was awarded in her favor is very low, and there was a reason to award court costs and fees of the attorney in her favor.

142. On the basis of the above and our determinations as detailed in the judgment, the following amounts will be added to the amounts awarded in favor of the appellant as part of the judgment of the regional labor court as it is detailed below:

(a) **For the incidents of sexual harassment, the 2nd respondent will pay the appellant compensation in the amount of NIS 40,000**. This for taking into account the seriousness of the actions of the 2nd respondent which crossed over from the purely verbal to the physical level, taking advantage of the fact that the appellant was a new employee and that she drank alcohol as part of the party. Moreover, we are not talking about an implicit physical act, but an act with an unambiguous sexual connection that involved an injury to the dignity of the appellant, her right to her body, and a clear border crossing (please see details in paragraph 45 of this judgment). At the same time, we took into account in determining the amount that we were talking about one recitation of events, and that there was no relationship of a subordinating authority between the appellant and the 2nd respondent. Also, this compensation amount is determined with taking into account the fact that

at the same time the appellant is compensated by the employer.

(b) **In respect of the violation of the obligations of the company respondent, the company respondent shall pay the appellant compensation in the amount of NIS 120,000**. This since it is an employer of dozens if not hundreds of employees who did not do all which is necessary to prevent sexual harassment and even after the complaint of the appellant was filed, it conducted a very partial procedure of inquiry that worsened the injury to her. Among other things, emphasis was placed on the fact that the girl friend was not questioned, at the end of the procedure no report was issued as required by the law and the complainant did not receive the summary of the conclusions and was not informed that the 2nd respondent had returned to work. Moreover, she was even transferred from her position and role while the harasser remained in his position and role. This is compounded by the persecution, even at a relatively low level, in the context of piling up bureaucratic difficulties in the exercise of the eligibility that challenges the receipt of the benefit. In these circumstances, where the employer is the most effective and best "preventer of damage", it is required to be extremely careful about the existence of an orderly and thorough procedure accompanied by the taking of operative measures. A place where employees know that there is zero tolerance for sexual harassment, they will act accordingly.

(c) **The respondents shall bear the expenses of the appellant in the amount of NIS 25,000 as follows**: the 2nd respondent shall bear the expenses of the appellant in the amount of NIS 5,000 and the company respondent shall bear the expenses of the appellant in the amount of NIS 20,000.

(d) **The costs that were ruled against the appellant in the judgment - are hereby cancelled**.

143. **<u>Conclusion</u> - in light of all that has been said, in addition to the amounts awarded in her favor at the Regional Labor Court, the 2nd respondent will pay the appellant NIS 40,000 for the incidents of sexual harassment. The company respondent will pay the appellant compensation in the amount of NIS 120,000. In addition to these amounts, the 2nd respondent will pay the appellant a total of NIS 5,000 for her expenses in managing the proceedings, and the company respondent will pay the appellant NIS 20,000 for her expenses as mentioned. The expenses ordered against the appellant in the judgment are cancelled, and since they have been paid a long time ago, they will be returned to her.**

**Given today, Friday, 6 of Kislev, 5783 (30 November, 2022) in the absence of the parties and will be sent to them.**

<u>Signatures:</u>

Varda Wirth-Livneh, President.

Sigal Davidov Motola, Justice.

Roy Poliak, Justice.

Ms. Haya Shahar, Public Representative (Employees)

Mr. Atzmon Lifshitz, Public Representative (Employers)