IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG CASE NO: JR2915/08

In the matter between:

WOOLWORTHS (PTY) LTD Applicant

and

COMMISSIONER LAZARUS MATLALA N.O. First Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

KGOTHO MOLAPO Third Respondent

JUDGMENT

FRANCIS J

Introduction

1. This is an opposed application to review and set aside an arbitration award made by the first respondent (the commissioner) on 24 November 2008 under case number GATW7842-08 in terms of which the commissioner had found that the third respondent's dismissal was substantively unfair and ordered that he be reinstated and be given a final written warning.

2. The third respondent is applying for condonation for the late filing of his answering affidavit. The condonation application was opposed by the applicant. I am satisfied that a proper case has been made out for condonation.

The background facts

3. The third respondent was employed by the applicant as a Flexi 28 Cellular Sales Consultant since September 2004. On 18 June 2008, management in the Jacaranda store received a complaint from the textile manager of the Connect Brooklyn store concerning the nature of an email sent by the third respondent to a computer in his store. The email sent by the third respondent contained offensive, xenophobic and sexually explicit material. Not only is the content offensive, but also politically sensitive. Emails of this nature are prohibited by the applicant's policy.

4. On 24 June 2008 the third respondent was charged with gross misconduct in that he had sent an email containing offensive and explicit material. This resulted in a breach of company policies and procedures, with specific reference to the email policy. A disciplinary enquiry took place on 26 June 2008 and he was found guilty of the charge against him. He was dismissed on 9 July 2008. He referred an unfair dismissal dispute to the second respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA) for conciliation and arbitration.

The arbitration proceedings

5. Simon Mathonsi was the applicant's first witness. He testified that he was the chairperson at the third respondent's disciplinary hearing. The third respondent did not dispute that a rule existed prohibiting the conduct that he was found guilty of. He did not dispute that the rule was valid and reasonable. He was aware of the rule since he had signed the disciplinary code. The code is made available to all employees both in the store and on the intranet system. He breached the rule by sending an offensive and explicit email to other stores. During the enquiry the third respondent did not dispute the applicant's evidence

concerning what happened on the date in question and he could further not explain why the email had been deleted. Notwithstanding the fact that he had previously been warned by the store manager and had committed similar misconduct again, was an indication that he had not taken the warning seriously or changed his behaviour. Employee's computer log in passwords is confidential.

5. The applicant's second witness was Hester Potgieter. She testified that she is employed by the applicant as the manager of its Jacaranda store. She was the investigating officer and initiator at the third respondent's disciplinary hearing. She had received a complaint from the applicant's Brooklyn store stating that the third respondent had sent an unacceptable email containing xenophobic and explicit material. She was responsible for investigating the complaint. The investigation revealed that on 18 June 2008 at approximately 18h01, the third respondent had sent an email to fellow employees. The emails were sent to several stores including Connect Centurion Park, Connect Menlyn, Connect Sammy Marks, Connect Sunny Park, Connect The Reds, Connect Market Street and Connect Brooklyn. Emails passwords are confidential and each employee must ensure that his password is kept secret. Although two other employees had access to the store's computer, they had already clocked out by the time that the emails were sent on the day in question. The third respondent's shift only ended at 19h00 that day. This was evident from the Weekly Staff Sheet. She had previously seen explicit emails on the computer used by the third respondent. She had confronted him about the emails and had specifically warned him that email abuse leads to disciplinary action and invariable dismissal. The third respondent replied that she was not entitled to tell him what he could display on the computer. After giving him a warning, she had thought that his conduct

would improve, but this was not the case. The applicant's policies prohibit the misuse of email facilities. The email had initially been sent to the third respondent by Sipho Ntuli, a departmental manager employed by the applicant. He was given a final written warning for sending the email. He was not charged with the same charge as the third respondent. The applicant's email policy is made available to all employees in the stores and on the intranet system. The purpose of the policy is to protect the applicant and employees by prescribing acceptable conditions for email use. Abuse of the email system may lead to dismissal.

6. The applicant's third witness Rebecca Motau testified that she was employed by the applicant as the departmental manager at its Jacaranda store. Leon who is also employed by the applicant at its Brooklyn store told her that he had received an email from the third respondent containing 'horrible pictures'. She asked the third respondent what he had sent to Leon. He replied that he had not sent any emails to him. She went to the office to telephone Leon at the Brooklyn store later that day and was told by a colleague in the office that the third respondent had earlier telephoned the Brooklyn store too. Each employee has a responsibility to protect his or her computer password. No other employee may use that password. The third respondent was not in the menswear department when the emails were sent. The specific email sent by the third respondent was deleted.

7. The third respondent testified in his own defence and said that he did not dispute that he sent the emails. He denied knowledge of the applicant's policy against misuse of email facilities. Although he had signed the applicant's email policy, the first time he saw the

policy was when he was suspended. He was unaware of the policy since his employment commenced in 2004. He said that Ntuli sent him emails during June 2008. He opened the emails, read them and closed them. Other employees in the store had access to his email password. He went through an orientation exercise when he commenced employment. He should have been given a final written warning as this was his first offence, and because Ntuli was given a final written warning. Potgieter previously warned him about sending explicit emails.

The arbitration award

8. The commissioner issued an award dated 24 November 2008. He noted that the third respondent denied that he had sent the email and said that another employee Ntuli sent the e-mail but was not dismissed. The third respondent contended that the applicant was inconsistent in applying the sanction of discipline. The commissioner has recorded the evidence led in his award. It is not necessary to repeat this. The commissioner found the third respondent guilty of the misconduct. It is not necessary to repeat this.

9. The commissioner then dealt with the rule or standard and whether it was applied consistently. He said that it was common cause that another employee of the applicant, one Ntuli sent the email in question to the third respondent on 18 June 2008. The sending of such an email constituted a contravention of the applicant's email policy. According to the applicant's witness, Ms Potgieter, who was the investigating officer, Ntuli was not dismissed for that offence, but was given a final written warning. Both Ntuli and the third respondent committed the same misconduct, but only the third respondent was dismissed. No explanation was given for the unequal treatment of employees who

committed the same offence. The general principle in employment law is that employers must be consistent and fair in applying discipline. The commissioner referred to *Mabanina & Others v Baldwin Steel* [1999] 5 BLLR 453 (LAC) and *National Union of Metalworkers of South Africa v Council for Mineral Technology* (1998) 3 LLD 448 (LAC). In *SACCAWU & Others v Irvin & Johnson (Pty) Ltd* (1999) 20 ILJ (LAC) it was held that consistency is a principle of disciplinary fairness that every employee must be measured by the same standards and that discipline must be capricious in the context of selective/inconsistent discipline. The commissioner said that having found that the third respondent contravened a rule and/or standard regulating conduct in, and of relevance to the workplace, found that the applicant was inconsistent in applying discipline to two employees who committed the same misconduct.

10. The commissioner said that although the applicant's witness testified that the sanction for contravening the email policy was summary dismissal, he found it strange that the applicant chose to dismiss only one employee, and gave another employee a final warning, although they committed the same offence. The commissioner said that if the applicant could tolerate employing Ntuli, who committed what it termed serious misconduct, the applicant could, in the same spirit, tolerate a continued employment of the third respondent. The commissioner found that the selective dismissal of the third respondent was not an appropriate sanction, as it did not apply to all employees for the same offence.

The grounds of review

11. The applicant felt aggrieved with the award and brought a review application. It contends that the award is reviewable in terms of section 145(2) of the Labour Relations Act 66 of

1995 (the Act) and/or the principles of fair administrative procedure and/or in terms of the common law grounds of review and/or because his decision does not withstand the test on review for *inter alia*, the following further reasons:

11.1 The commissioner unreasonably found and/or committed a gross irregularity and/or misconducted himself in finding that the applicant had acted inconsistently by issuing Ntuli with a final written warning, but dismissing the third respondent in circumstances where they had both committed the 'same' misconduct. This finding was incorrect. The employees were not charged with the same offence and the two cases are distinctly distinguishable. On this basis, the commissioner failed to take into account the fact that although Ntuli had sent the email to the third respondent, that the third respondent's conduct was different and far more serious as he had previously been warned for displaying offensive material on the applicant's computer and further that management of the Jacaranda store had received a complaint from another store concerning the contents of the email sent by the third respondent. Convincing and uncontested evidence detailing why different charges had been laid against Ntuli and the third respondent, why the outcomes of their enquiries were different and further that the trust relationship between the third respondent and the applicant had broken down irretrievably, was led by Ms Potgieter. The commissioner's finding that the applicant had failed to give an explanation for imposing different sanctions in the circumstances or that the applicant had been inconsistent in disciplining the two employees, was therefore unfounded and without merit.

11.2 The commissioner unreasonably and/or incorrectly found and/or committed a gross irregularity in finding that the sanction of dismissal was inappropriate,

despite his finding that the third respondent had breached a valid and reasonable policy in circumstances where he had known and understood the consequences of such a breach and further that no other employee could have committed the misconduct. The applicant said that a reasonable decision-maker could not reach the same conclusion. There is no prospect that a reasonable decision-maker - including a CCMA commissioner - could not on the facts of this case, find that dismissal was an unfair sanction. The sanction of dismissal was consistently applied in circumstances where employees are found guilty of charges such as the one laid against the third respondent.

11.3 The commissioner unreasonably found and/or committed a gross irregularity and/or misconducted himself in ordering the applicant to reinstate the third respondent with a final written warning. Although the commissioner accepted that the third respondent was guilty of misconduct, he failed to take into account the fact that he was an unconvincing and unreliable witness and further that the applicant's policies provide that dismissal is the appropriate sanction where employees are found guilty of such misconduct. Notwithstanding the fact that the commissioner found that the third respondent's version was inconsistent and contradictory, he made a finding in his favour who failed to take the commissioner into his confidence and in so doing should not have been granted the protection of the CCMA.

11.4 For the reasons set out above, the commissioner unreasonably ordered and/or committed a gross irregularity and/or misconducted himself and/or exceeded his powers in ordering the applicant to reinstate the third respondent.

Analysis of the facts and arguments raised

12. The commissioner correctly found that the third respondent was guilty of the misconduct that he was charged with. That finding is not being challenged on review. An employer must show that the rule that an employee has breached has been consistently applied by it.

13. It is common cause that Ntuli a departmental manager had sent the offensive email to the third respondent. The third respondent circulated the same email to other employees. Both of them contravened the applicant's rule on the distribution of offensive email. In terms of the applicant's code they should have been dismissed. The third respondent had raised the issue of inconsistency during the opening address. The onus was therefore on the applicant to show that it was consistent in the application of discipline. There is no evidence that the third respondent had a written warning in his file. All that had happened was that he was warned by Potgieter about being in possession of such offensive material.

14. Had Ntuli deleted the offensive email, the third respondent would not have received it and circulated it. He is employed in a senior position than the third respondent. Potgieter testified that Ntuli also went into a hearing and the charge against him was not the same as that which the third respondent was charged with. Ntuli received a final written warning which was twelve months. The reason why he received this was that he had sent the explicit material to one person next door and not to the Connect counter where women are working at times. He was a breadwinner and a father of six. She said that she could not recall all the details and was not the chairperson of the disciplinary hearing. She said that the third respondent kept on receiving emails from Ntuli but did not confront him or

stopped it.

15. It is clear from the testimony of Potgieter that she was speculating when dealing with Ntuli's case. She did not really know what the exact charge was that Ntuli was charged with. She could not explain why a different penalty was imposed on him. Up to this day, it is not clear what charge was preferred against Ntuli. The applicant has failed to show why two employees who have committed the same misconduct were charged differently and treated differently. It is not clear whether Ntuli was charged differently. It is simply unclear why Ntuli was treated differently from the third respondent. The applicant did not deem it necessary to call the chairperson of the disciplinary hearing in Ntuli's disciplinary hearing. He could have cleared many things. The applicant has failed to justify why the the third respondent was treated differently.

16. This Court had found *Edgars Consolidated LTD (Edcon) v CCMA & Others* [2009] 1 BLLR 56 (LC) that an employer in dismissing an employee for transmitting racist email from a colleague to family and friends, but not disciplining the colleague was inconsistent and unfair. The employee was reinstated.

17. The commissioner has not committed any reviewable irregularities. The commissioner's finding that there was inconsistent treatment and that the dismissal was substantively unfair is a decision that a reasonable decision maker would have taken. The commissioner found that a final written warning should have been given.

18 The application stands to be dismissed.

19. There is no reason why costs should not follow the result.

20. In the circumstances I make the following order:

20.1 The application is dismissed with costs.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT	:	K LAPHAM INSTRUCTED BY PERROT, VAN NIEKERK, WOODHOUSE, MATYOLO INC
FOR THIRD RESPONDENT	:	T SEBOKO INSTRUCTED BY MOTLANTHE INC
DATE OF HEARING	:	28 SEPTEMBER 2010
DATE OF JUDGMENT	:	8 DECEMBER 2010