

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR3390/05

In the matter between:

EDGARS CONSOLIDATED LIMITED (EDCON)

Applicant

and

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER RAYNOLD BRACKS

Second
Respondent

TELMORE PILLAY

Third Respondent

— JUDGMENT

—
FRANCIS J

Introduction

1. This is an application to review and set aside an arbitration award made by the second respondent (the commissioner) after he had found that the third respondent's dismissal by the applicant was substantively unfair and the sanction was inappropriate. The third respondent was reinstated with no loss of benefits.
2. The application was opposed by the third respondent.

The background facts

3. The third respondent was employed by the applicant on 24 March 1994 as a

Retirement Fund Supervisor and was earning R12 600.00 at the time of her dismissal.

On 20 January 2005 she received the following email from her colleague, Pride Ntuli:

“Two unemployed Afrikaners see a sign in a police station Window saying “2 blacks wanted for Rape” Hannes says 2 Koos “Fokken kaffirs kry al die lekker jobs”.

4. She forwarded this email to some of her friends and family members who were not employed at the applicant. The applicant received the following email from a company that had complained to its human resources director at head office about the offending email:

“Dear Jyoti

As discussed with you please find the email below which was sent to a member of our staff from an Edcon email address.

This email has upset a number of our staff.

Our policy is to prohibit the sending or arranging to receive any material that may contain pornographic, racist or offensive material, which we believe that this email is both racist and offensive.

Your assistance with this matter would be greatly appreciated.

Kind regards

Carmen Schneider

HR Department”.

5. The third respondent was subsequently charged with the following misconduct:

“Failure in your duty to demonstrate acceptable conduct in that:

On the 20 January 2005, at Edgardale, you used the Company’s electronic mail to transmit offensive mail internally and externally, thereby causing harm to the

Company's reputation".

She appeared at a disciplinary enquiry on 12 April 2005 where she pleaded guilty and was dismissed. Her appeal was unsuccessful. She then referred the matter to the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA) for conciliation and after conciliation had failed to arbitration.

6. The commissioner found that her dismissal was substantively unfair and reinstated her with no loss of benefits.
7. The applicant felt aggrieved with the award and brought this application.

The evidence led at the arbitration proceedings

8. It is not necessary to refer to the evidence led at the arbitration proceedings in any great detail since the third respondent had pleaded guilty. The applicant called Barbara Ursula Ramothwala as its only witness. She testified that she is an investigator in the employees' relations department and investigated the matter. She was also the initiator. During March/April 2005 a request was received from Dr Ferndale the human resources director, to investigate an email which was derogatory and contained racial slurs. On receipt of the complaint, she contacted the company from which the email emanated, to ascertain the real complaint and asked one Carmen Schneider who had laid the complaint to send her the document. She gave the email to the Information Technology department. They confirmed that the email had been forwarded from the applicant. Her investigations revealed that the third respondent had forwarded the email to her sister who is employed at another company. She met

the third respondent and showed her the email. She did not deny that she had forwarded the email. She refused to reveal where the email initially emanated from. She apologised and said that she thought it was a joke. Every person whose name appeared on the email forwarded to them was investigated. They were not charged because none of them stored the email. The applicant has an email policy which states that its email system must not be used for transmitting, retrieving or storing of email messages that are obscene or pornographic nature, discriminatory or harassing nature, derogatory or inflammatory, that is related to race, age, religion, physical attributes, obscene or offensive, illegal, of a nature that encourages or promotes the disregard of the policy and politically controversial. The third respondent was charged with having breached the applicant's email policy. She appeared at a disciplinary enquiry and pleaded guilty. It was only during mitigation of sanction that she stated that Ntuli was the person who had forwarded the email to her. The applicant had attempted to ascertain the whereabouts of the email on Ntuli's computer but could not retrieve it. In the third respondent's employment contract, specific reference is made in it to the email policies of the applicant. In respect of the procedure Ramothwala said that the third respondent had said that she did not require legal representation as she felt comfortable representing herself. The third respondent was asked whether she knew what she did was a dismissable offence and said she did. She had admitted guilt out of her own free will and there was no plea-bargaining at the hearing. The third respondent's immediate superior before her dismissal was Moosa Khan who had no role in the disciplinary enquiry. He would have been informed about the outcome of the disciplinary hearing. If other employees had been involved, the same process would have been followed. If the message was sent by one of the applicant's employees, it would have contained the applicant's address.

9. The third respondent testified that she was referred to an email sent by Ntuli which was forwarded to various people. She identified all the people who were working for the applicant except one Lawrence Dire. She said that Ntuli and all of them were still in the employ of the applicant. At the time of the incident she had deleted the email but obtained a copy from Somaya Hassan. She referred to her grounds of appeal and said that she stood by them. She identified the statement that she had drafted for Ramothwala which was done after the email was sent. She had approached Khan before she drafted the statement and told him that she did not want to disclose the name of the person who had sent her the email. He told her that he had already told Ramothwala that he had spoken to her and that she had admitted receiving it from Ntuli. After her discussion with Khan, she then drafted the statement. The third respondent said that no evidence was led at the disciplinary enquiry. She was referred to the minutes of the disciplinary enquiry. She said that after she was approached by Ramothwala and had spoken with Khan, he advised her not to deny sending the email. This was why she admitted guilt at the disciplinary enquiry. Khan also told her that he had spoken to Andrea Wiehahn who told him that she should go through the motions and would only receive a written warning as a worst case scenario. Khan told her further that even if the adjudicator recommended a dismissal, such recommendation would be substituted with a final written warning. Based on what she was told, she felt comfortable that she did not need representation and therefore pleaded guilty. She had four character witnesses but was told by the chairperson of the disciplinary hearing that there was no need for this because she had pleaded guilty. They were the people to whom she had sent the email.

The commissioner's award

10. The commissioner in his award summarised the evidence led and both parties closing arguments. He said that there is a rule which prevents the transmitting, retrieving or storing of any email messages which are derogatory or inflammatory, i.e. related to race, age, religion, physical attributes, sexual preferences or any such matter and makes it an offence for which an employee may be dismissed even on the first occasion. The existence of the rule was not disputed. It was clear from the third respondent's evidence that she was not the author of the email but had received it from Ntuli, viewed it as a joke and then forwarded it to her sister where the complaint came from. This was clearly a contravention of the company rule to which she pleaded guilty.

11. The commissioner said that whilst he was satisfied that the applicant had shown, on a balance of probabilities that the third respondent had breached the rule, he was equally satisfied that she did not wilfully breach the rule as she forwarded an email which she received from Ntuli who was a colleague. In addition the email was intended as a joke, and although he should not condone this, it had become a normal practice within the organisations to pass these emails around. He was not convinced that the applicant had proven that the email was derogatory, inflammatory or even malicious, especially when it is considered that the email was passed on by a colleague who is black. The applicant testified that the third respondent was aware of the rule as it is referred to in her contract of employment under the heading "Policies and Procedures". She did not contest this evidence and he found that she was aware of the rule.

12. The commissioner said that the third respondent had argued that the rule was not consistently applied since Khan informed her that he had told Ramothwala that the email was forwarded by Ntuli. This was denied by the applicant. The commissioner said that even if it were found that the applicant did not know this, they were at least aware about who had sent the email from the third respondent's submissions in mitigation where she stated that after she had received the email from Ntuli from their department, she transmitted the email to family and friends without paying much attention to the content. The applicant's explanation about why no action was taken against Ntuli was that they could not find the email on her system. The commissioner said that he found this unconvincing and was highly unlikely. Even if this were true, the applicant should have enquired from the third respondent whether or not she still had the hard copy of the email. The charge against the third respondent was that she had used the applicant's electronic email to transmit offensive mail internally and externally. The commissioner found that the applicant clearly acted inconsistently since this was the same offence committed by Ntuli as it appeared from the evidence that the email was transmitted both internally and externally. No plausible reason was given why even on the day of the arbitration hearing, no action had been taken against Ntuli. The applicant should at the very least have charged both of them.
13. The commissioner said that the process of deciding the appropriate disciplinary sanction is complex. Dismissal should only be considered as a last resort and is normally reserved for most serious transgressions like theft, gross dishonesty, physical assault of the employer, and wilfully endangering the safety of others. In deciding whether or not the third respondent should be dismissed, the following factors need to be taken into account: her length of service, in this case 11 years, her disciplinary

record which was clean and most important, the circumstances under which the misconduct was committed. In this case the third respondent testified that she had passed the email on to family and friends after receiving it from a black colleague, viewing it as a joke. It was therefore clear that there was no malicious intention. This could hardly be viewed as a wilful breaking of the rule or a derogatory or inflammatory as it was clearly intended as a joke. The fact that she did not wilfully disobey the rule was an important factor in deciding whether dismissal was an appropriate sanction or not and required that each case be judged on its own merits. The commissioner said that for the reasons stated above he accepted that the third respondent did not intentionally breach the rule. In the light of her length of service and clean disciplinary record, he found that the dismissal was too severe a sanction. He found that the third respondent's dismissal was substantively unfair for the reasons stated above and because the sanction imposed was not appropriate. The more appropriate sanction would have been a final written warning.

14. The commissioner said that as far as procedural unfairness is concerned, he found that new evidence was presented to the committee in that they were aware that the email was passed on to the third respondent by Ntuli. In addition certain undertakings were given to the third respondent by senior members of the applicant. The least they should have done was to verify the correctness of this information. The fact that these undertakings were made could not be ignored as they would have influenced the applicant's approach to the case. He was not persuaded by the applicant's evidence that there was no plea bargaining between the chairperson and found this to be irrelevant.

15. The commissioner said that regarding the issue of the inadmissibility of the evidence, he was not convinced by the argument of the third respondent's representative that the evidence was inadmissible as the email was sent to the applicant by a third party after intercepting it in that company. Also that the third respondent had pleaded guilty to the offence and under the circumstances there was no reason to call further witnesses.

16. The commissioner ordered that the third respondent be reinstated by the applicant by 1 December 2005 on conditions no less favourable to those that governed her employment at the time of her dismissal. The applicant was ordered to pay her back pay in the sum of R75 600.00 which is the equivalent of six months.

The grounds of review

17. The applicant has limited its challenge to the following three grounds of review:
 - 17.1 The commissioner committed a gross irregularity in the conduct of the arbitration proceedings and thereby arrived at a decision which no reasonable decision maker could have reached in finding that the third respondent did not intentionally breach the applicant's email policy and that her dismissal was therefore substantively unfair;
 - 17.2 The commissioner committed a gross irregularity in the conduct of the arbitration proceedings and thereby arrived at a decision which no reasonable decision maker could have reached in finding that dismissal was too harsh a sanction in the circumstances and that her dismissal was therefore substantively unfair;
 - 17.3 The commissioner committed a gross irregularity in the conduct of the arbitration proceedings and thereby arrived at a decision which no reasonable

decision maker could have reached in finding that the dismissal of the third respondent to be procedurally unfair.

Analysis of the evidence and arguments raised

18. The commissioner's award was issued before *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR 1097 (CC). It is now trite that in deciding whether an award is reviewable the only question that needs to be asked is: Is the decision reached by the commissioner one that a reasonable decision maker could not reach? This Court is concerned with the reasonableness of the conclusion itself. If the outcome is reasonable, it does not matter that there are flaws in the reasoning employed by the commissioner. This Court is not concerned whether the commissioner was correct or whether it agrees with the commissioner. There is a range of decisions that will fall within the bounds of reasonableness by the Constitution. This Court must simply ensure that the commissioner's decision falls within those bounds. To succeed, the applicant must establish that the decision falls outside the bounds of what are reasonable.

19. The reasonable employer test as a means of determining whether to interfere with a sanction imposed by the employer has been rejected by *Sidumo*. Clear guidelines have been given about what factors need to be considered in considering the sanction. The following quotation that appears at page 1131 at paragraphs 78 and 79 of *Sidumo* suffices:

"In approaching the dismissal dispute impartially, a commissioner will take into account the totality of the circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course

consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.

To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision, a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances."

20. Before dealing with the grounds of review, the applicant is clearly no longer challenging the commissioner's finding that the applicant was inconsistent in not having charged Ntuli with the same misconduct as the third respondent. The commissioner's finding that there was inconsistency on the part of the applicant was reasonable. The simple fact is it was Ntuli who had distributed or forwarded the offensive email to the third respondent. The applicant was provided with a hard copy of the email and should have charged her with the same misconduct that the third respondent was charged with. She appears on the facts to have been guilty of the same misconduct. The hard copy clearly showed that it was sent by Ntuli to the third respondent. This alone is a basis to dismiss the review application since it is trite that an employer must be consistent when disciplining employees for the same misconduct.

21. However, I deem it necessary to consider the grounds of review. It is common cause that the third respondent was employed by the applicant for 11 years. She had received an email from a colleague, Ntuli, which she forwarded internally and externally to her friends and family. Her sister's employer discovered the email which was found offensive to their staff and requested the applicant to investigate the matter. The applicant duly conducted investigations which investigations led to the third respondent being charged with having breached the applicant's policy on email distribution. In terms of the applicant's policy it is a misconduct to distribute such offensive emails.

22. There is no doubt in my mind that the email is derogatory not only to black people but Afrikaners as well. There is also no doubt in my mind that it was a joke which is insulting and demeaning to both race groups referred to. It used racist terminology and depicted Afrikaners as stupid who could not see that the black people in the email were suspects in a rape case as opposed to that they were wanted to rape people. It also gives the false impression that black people are rapists. It was also offensive and degrading as it called black people "kaffirs".

23. The third respondent's explanation about the circumstances surrounding the plea bargaining that she would not have pleaded guilty does not carry any weight. There was clear proof before the commissioner that the third respondent had received the email from Ntuli and had forwarded it to her sister and friends. She knew that this was against the applicant's policy and despite this distributed the offensive email both internally and externally. So even if she did not plead guilty she would still have been found guilty.

24. The third respondent was not charged with racism but that she had failed in her duty to demonstrate acceptable conduct in that on 20 January 2005, at Edgardale, she used the applicant's electronic mail to transmit offensive mail internally and externally, thereby causing harm to the applicant's reputation. The fact is that she pleaded guilty to the charge preferred against her and her conduct was not that which could be expected of a supervisor.
25. The applicant has made much about the commissioner's comments that the third respondent did not intentionally breach the applicant's email policy. Intention is not an element of the misconduct she was found guilty of. What the applicant has failed to consider or acknowledge is that the commissioner has found the third respondent guilty of the misconduct. It is clear from the commissioner's award that he considered whether she acted intentionally in deciding what sanction he had to impose. There is nothing wrong with this approach and this clearly shows that the commissioner properly applied his mind to the issue of sanction.
26. The commissioner found that given the circumstances of the case, where the email emanated from, who it was sent to, the length of service, the admission of guilt, that the sanction was too harsh in the circumstances and that it would have warranted a final written warning. The commissioner has considered all the relevant factors in deciding what sanction had to be applied. It cannot be said that the commissioner's award is one that a reasonable decision maker could not have made.
27. It is unclear whether the commissioner made any finding on procedural fairness. Considering this ground of review is unnecessary. Ultimately it does not matter since

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 had found that a final written warning should have been given.

28. The issue on review is not whether the commissioner has erred or whether one agrees or does not agree with the award but whether it is a decision that a reasonable decision maker could not have made. The applicant has dissected the award in an attempt to prove that it was not reasonable. The award can be subjected to some criticism but that does not render the award reviewable. The commissioner may have taken a longer route to reach his destination but eventually arrived at the correct destination. How he got there might be subjected to criticism. Some commissioners will be concise. Others will be longwinded but if they all arrive at the correct destination which is that which a reasonable decision maker would have decided cannot be reviewed. As stated above, this Court is concerned with the reasonableness of the conclusion itself. If the outcome is reasonable, it does not matter that there are flaws in the reasoning employed by the commissioner.
29. The application stands to be dismissed save with the qualification that a final written warning be issued which is valid for 12 months from date of this order.
30. There is no reason why costs should not follow the result.
31. In the circumstances I make the following order:

31.1 The application is dismissed.

31.2 The third respondent is issued with a 12 months final written warning valid from date of this order

31.3 The applicant is to pay the costs of the application.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : M VAN AS INSTRUCTED BY
DENEYS REITZ ATTORNEYS

FOR THIRD RESPONDENT : K M PILLAY INSTRUCTED PATELIA
CACHALIA ATTORNEYS

DATE OF HEARING : 2 SEPTEMBER 2008

DATE OF JUDGMENT : 5 SEPTEMBER 2008