REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 158/2011

In the matter between:

HRP DISTRIBUTION **Applicant**

and

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY **First Respondent**

D AMERICA N.O. **Second Respondent**

ALTA CLAYTON **Third Respondent**

Heard: **6 November 2012**
Delivered: **13 November 2012**

Summary: Review – misconduct – finding within range of reasonable outcomes – not reviewable.

JUDGMENT

STEENKAMP J

Introduction

[1] What happens at home, stays at home. The third respondent, Ms Alta Clayton – an employee of the applicant who was based at @Home, a division of Foschini – should have taken this aphorism to heart, instead of taking her involvement in a love triangle into the workplace. Her subsequent behaviour led to her dismissal; but the arbitrator (the second respondent) found that it was unfair and ordered the applicant to reinstate her. The applicant seeks to have that award reviewed and set aside in terms of section 145 of the Labour Relations Act.[1]

Background facts

[2] The applicant company distributes goods to a number of retailers. The Foschini Group is its biggest customer. The employee, Ms Clayton, was employed by the applicant and based at @Home, a division of Foschini. She was involved in a sexual relationship with one Freddy[2], a fellow employee. The relationship soured and Freddy turned his attentions to Ms Levonia Boer, an employee of Foschini. Clayton did not take kindly to this state of affairs. She sent Boer a number of unflattering emails. She also left a black lace night-dress (in an envelope) on Boer's desk, together with a handwritten note setting out in fairly lurid detail her sexual adventures with Freddy while he was living with Boer, and a description of his tattoos.

[3] The applicant company formed the opinion that these shenanigans led to the company's name being brought into disrepute with Foschini. It sent Clayton a letter forbidding her to make further contact with Boer. It transpired that, despite this, Clayton sent Boer at least one more email message. The applicant then called Clayton to a disciplinary hearing to answer to the following allegations of misconduct:

[1] Act 66 of 1995 ("the Act").

[2] His surname is not mentioned.

1. *Failure to obey a reasonable and lawful instruction*

Failure to adhere to an instruction via email of the 29th October 2010 sent by Len Swanepoel not to make contact with Levona [Boer] again making use of the company's equipment in company time and via company email system thereby bringing the company name into disrepute with an important client namely Foschini.

2. *Unacceptable behaviour*

In that you harassed an employee of HRP's biggest customer by way of sending emails and dropping envelopes with private and intimate clothing on her desk at the workplace thereby causing embarrassment to the company's management and bring the name of HRP into disrepute.

3. *Gross misconduct – failing to comply with the company email policy.*

In that you were making use of the company email system by sending private and offensive emails to an employee of a major customer.

[4] The applicant found that the employee had committed the misconduct and dismissed her. She referred an unfair dismissal dispute to the Bargaining Council (the first respondent).

The arbitration award

[5] The arbitrator dealt with each of the three allegations of misconduct. He found that the employee had not committed the misconduct complained of in the first two instances. He found that she had contravened the email policy, but that the company had not applied it consistently, and that her conduct was not gross. In these circumstances he concluded that the sanction of dismissal was not fair and that the employee should be reinstated retrospectively.

Review grounds

[6] The applicant based its review application on the main ground that the award was unreasonable.

[7] In amplification, it raised the following three (fairly vague) grounds of review:

7.1 The arbitrator committed a gross irregularity in that he did not apply his mind to the evidence presented.

7.2 The arbitrator committed an irregularity and acted unreasonably by finding that the sanction of dismissal was unfair.

7.3 The arbitrator reached a conclusion without properly applying his mind to the evidence.

Evaluation / Analysis

[8] The test to be applied is that outlined in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*[3], viz whether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion.

[9] In his written and oral argument, Mr *Jackson*, for the applicant, dealt with each of the allegations of misconduct and the arbitrator's findings , before dealing with the question of sanction. I shall follow the same sequence.

First charge: failing to obey a reasonable instruction

[10] The arbitrator found that the company had failed to prove on a balance of probabilities that the employee had failed to obey the instruction sent to her on 29 October 2010 not to make contact with Boer again. He found that, although the branch manager, Len Swanepoel, had sent the employee an email with that instruction at 16h05 on 29 October 2010, the evidence did not establish that she read it on that day. The evidence did establish that she "modified" the email at 07h29 on 1 November 2010. She had sent Boer an email shortly before that. The arbitrator found, on a

[3] [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC).

balance of probabilities, that Clayton had probably sent the email to Boer before she had read Swanepoel's email.

[11] The applicant complains that the arbitrator "ignored proof" that the email of 29 October was received by Clayton at the same time it was sent, i.e. 16h05 on 29 October. That is simply not correct. The arbitrator accepted that the email was "received" at that time; however, the arbitrator correctly pointed out that that was not proof that it was read at the same time. In fact, the evidence that the applicant relies upon – a computer printout – shows that the email was "received" at that time, but also clearly notes that no "read receipt" was requested or provided. At most, it serves to prove that the email appeared on the employee's email server at that time. It is highly improbable that it could have been read at exactly the same time it was sent. On this ground, the arbitrator's award cannot be faulted.

[12] What the arbitrator did disregard, was an interjection by Clayton while Swanepoel was being questioned by his representative. While he was being questioned about the email, he referred to the printout reflecting that it had been "modified" and he expressed the opinion that Clayton may have deleted the email; it appears from the transcript that she then interjected to state that she had printed it. In response to a further question by the arbitrator, she stated that she printed it "after 4" on 29 October 2010.

[13] When Clayton testified, the arbitrator questioned her about this interjection during Swanepoel's testimony. She then stated that her computer had crashed and that she printed it on "the Monday". The arbitrator then asked her what date that was. She replied: "I think it was the first. The 29th". It is common cause that the 29th of October was a Thursday. Under cross-examination Clayton repeated that she only printed it on "the Monday". The evidence on this point is far from clear. At most, it could point to an inference that she may have read Swanepoel's email on the afternoon of 29 October. The failure of the arbitrator to deal with this aspect does not amount to a gross irregularity. Had he dealt with it, it is unlikely that it would have led to a different conclusion on sanction. It was not a material

piece of evidence. In my view, this oversight in itself did not prevent a fair trial of the issues and it does not render the award reviewable.

Second charge: unacceptable behaviour

[14] It is common cause that Clayton left a night-dress (in a sealed envelope) and a handwritten letter referring to her relationship "full of passion for sex" with Freddy, on Boer's desk at Foschini. The arbitrator quite correctly considered this to be inappropriate behaviour.

[15] The arbitrator did not, however, consider this inappropriate behaviour to have brought the company's name into disrepute. In coming to that conclusion, he considered that "no Foschini management became involved in the dispute".

[16] The applicant submitted that Foschini management had, in fact, become involved. It based this submission on the fact that Boer's supervisor, Ms Margo Moses, sent an email to the applicant's human resources director, Mr Jack Enright, and to Frank Faro on 3 November 2010 (after Clayton's disciplinary hearing had commenced). Moses complained that Clayton's actions were distracting Boer, who had to give her job her undivided attention and who had to "be focused at all times". She asked the company to "please get Alta to stop her childishness and tell her that she must apologise to Levona". (Clayton did subsequently apologise to Boer).

[17] Based on this, the applicant says that "Foschini constituted 55% of applicant's business and the company could simply not afford to lose Foschini as a client". That is hardly likely. It beggars belief that a large company like Foschini would terminate its contract with a supplier because a junior employee of that supplier had sent some embarrassing emails of a private nature to its junior employee.

[18] Ms Moses is Boer's supervisor. Depending on one's definition of "management", it is an open question whether Foschini's "management" became involved in the sordid love triangle; at most, Ms Moses expressed concern about the effect of Clayton's childish behaviour on Boer's productivity. It is inconceivable that this lover's tiff would have been escalated to board level or that it would have led to the loss of Foschini as

a customer. The applicant's protestations to the contrary amount to gilding the lily. Clayton's behaviour, embarrassing and inappropriate as it was, could not be seen as bringing the employer into disrepute.

[19] In this regard, the present circumstances are far removed from those in *Timothy v Nampak Corrugated Containers (Pty) Ltd*[4] -- a case on which Mr *Jackson* relied. In *Nampak*, the employee had been dismissed for having *inter alia* impersonated an attorney, acting dishonestly and bringing his employer into disrepute. That could hardly be equated with sending a few salacious emails to a customer's employee "to make her jealous", as was Clayton's intention. As Davis JA said in *Nampak*[5]*:*

> "A reasonable decision maker would have engaged in an objective evaluation as to whether the employee brought the company into disrepute. An objective test enjoins an examination, in all the circumstances, of the nature of the conduct, evaluates the turpitude and seriousness thereof and then makes an evaluation as to whether the charges can be sustained."

[20] In this case, the employee's actions, albeit childish and deliberate, are not of such a serious nature that it can be said to have brought the company into disrepute. It does not quite equate to "turpitude", i.e. depravity or base action of the kind that would bring the company (as opposed to the employee) into disrepute.

[21] I do not agree that the arbitrator's finding in this regard – i.e. that the employee's actions were not dismissible, even though she acted inappropriately – was so unreasonable that no reasonable arbitrator could have come to the same conclusion.

Charge 3: failing to comply with email policy

[22] It is common cause that the employee did breach the company's email policy. However, the arbitrator found that this instance of misconduct was not so gross as to justify dismissal. In coming to this conclusion, he took into account that the company had not enforced and applied the policy consistently.

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[4] [2010] 8 BLLR 830 (LAC).

[5] *Supra* 833 F-H.

[23] The applicant took issue with this finding, specifically arguing that the employee's conduct was "gross" because of the "insinuation of criminality" imputed to Boer. But this email was in response to that of Boer, apparently arising out of a further dispute over a cellphone, stating:

> "You are leaving me no choice but to proceed through Foschini to lay a formal criminal charge against you."

[24] Clayton responded in an email in these terms:

> "Be very very careful 'criminal' [*sic*]".

[25] Clayton was not cross-examined with regard to the meaning of the email. It does not appear to me to impute criminality to Boer; inelegantly stated as it is, it could also be read as an exhortation to Boer not to threaten Clayton with criminal charges.

[26] On this ground, the finding of the arbitrator is also not so unreasonable that no reasonable arbitrator could have come to the same conclusion.

Sanction

[27] The arbitrator had regard to *Sidumo*[6] and considered the totality of circumstances in order to decide whether dismissal was a fair sanction. He took into account that:

27.1 The parties had not indicated that the employee's misconduct had destroyed the trust relationship;

27.2 given the employee's length of service of more than nine years, progressive discipline had not been properly considered and applied;

27.3 the employee's behaviour was inappropriate, but did not constitute gross misconduct;

27.4 the company did not apply the email policy consistently.

<u>Conclusion</u>

[28] The conclusion reached by the arbitrator was not so unreasonable that no other arbitrator could have come to the same conclusion.

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[6] *Supra.*

Costs

[29] The employee successfully opposed the application for review. Yet it does not axiomatically follow that she is entitled to her costs. In considering whether to award costs to the successful party, this court has to take into account both law and fairness.[7] In terms of the arbitration award, she is to be reinstated. The arbitrator, when reversing the sanction of dismissal, did not substitute it with a lesser sanction, despite having found that the employee's behaviour was inappropriate. I do not consider it appropriate to make a costs order for two reasons: firstly, the parties will have to rebuild their relationship and a costs order may have a chilling effect on that exercise. Secondly, the employee will not be able to recover her own legal costs from the company. That may have the salutary effect of persuading her to think twice before displaying her dirty laundry, whether of an intimate nature or otherwise, at her or a customer's workplace again.

Order

[30] The application for review is dismissed. There is no order as to costs.

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Steenkamp J

APPEARANCES

APPLICANT:	B M Jackson
	Instructed by Telfer Inc.
THIRD RESPONDENT:	M R Banderker
	Instructed by Halday attorneys.

[7] LRA s 162.