REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

IN CAPE TOWN

CASE NO: C683/11

In the matter between:

SOUTH AFRICAN REVENUE SERVICE	**First Applicant**
Aand	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
J J KITSHOFF (*N.O.*)	**Second Respondent**
SOLIDARITY obo BOTHA F N J	**Third Respondent**

Delivered: 10 February 2015

Summary: (Review – employer altering recommendation of chairperson of disciplinary enquiry – *ultra vires* collective agreement – unjustified subjection of employee to double jeopardy – procedurally unfair – Substantive fairness – unreasonable for arbitrator not to have made an adverse finding on trust relationship – dismissal substantively fair).

JUDGMENT

LAGRANGE, J

Introduction

[1] This matter concerns an application to review and set aside an arbitration award in which the arbitrator found that the dismissal of the employee concerned, Mr F N J Botha ('Botha') was procedurally and substantively unfair and reinstated him.

[2] Botha was found guilty by the chairperson of the internal disciplinary enquiry breaching the policy of SARS prohibiting the downloading and, or alternatively viewing, pornographic material on the Internet. The chairperson found that there was no evidence that Botha's activity had impacted negatively on colleagues or on the work of SARS, or on Botha's performance. Even though Botha was evasive in dealing with the so-called business-related reasons for downloading the material, the chairperson did not think that the misconduct was of a dishonest nature, but simply that he took a chance of using the unrestricted access he had been granted to look at such sites as a licence to search any material. The chairperson further noted that SARS had dismissed some employees for downloading pornographic material at work, but there was no evidence that this had been communicated to other members of staff to make them aware of the severity with which such misconduct would be treated. Botha had a clean disciplinary record and she did not think that the conduct was such that it prevented the continued employment relationship intolerable. Accordingly, the chairperson decided to issue Botha with a final written warning for violating the policy.

[3] SARS did not agree with the sanction determined by the chairperson and after giving Botha an opportunity to make representations why the sanction decided by the chairperson should not be substituted with the sanction of dismissal, dismissed Botha. Botha's union referred two disputes to arbitration arising from his dismissal. The first was an interpretation and application of the collective agreement which embodied to the disciplinary procedure. The second was an unfair dismissal dispute.

[4] In an award issued by a CCMA Commissioner in April 2011, the Commissioner declared that SARS had acted in breach of the collective agreement concluded on 7 June 2007 when it reviewed and altered the sanction imposed by the chairperson. Despite this finding, he declined to award any consequential relief, which he was entitled to, because the fairness of the dismissal would be determined by the arbitrator hearing that dispute. The applicant did not review this declaratory award, but only seeks to set aside the latter award which decided Botha's dismissal was unfair.

The award

[5] The arbitrator concurred with the decision of the previous arbitrator that SARS had acted in breach of the collective agreement and added that merely because the collective agreement was silent on the question of whether or not SARS could change the sanction of the chairperson, in the absence of a provision permitting such a variation by the employer and in the light of clause 10.6.6 of the agreement which obliged it to implement the chairperson's decision, there was no scope for an interpretation which would allow the employer to do something which was not contemplated by the parties to the agreement.

[6] The arbitrator also decided that the opportunity afforded to Botha to make representations why the sanction of the chairperson should not be substituted with the sanction of dismissal did qualify as a pre-dismissal hearing. At this point, it should be mentioned that the representations made by Botha understandably concerned the impropriety of the 'review' process unilaterally adopted by SARS. Taking account also of the employer's complete disregard of the collective agreement, the arbitrator was satisfied that the dismissal was procedurally unfair.

[7] The arbitrator considered evidence given by Van der Westhuizen to the effect that the standard operating procedures of SARS required that investigations concerning alleged non-payment of tax were not supposed to commence without written confirmation of the information provided by an informant. In this case, the information provided concerned the website

addresses of two pornographic material sites, which supposedly would have revealed the identity of a business that was not paying tax. The arbitrator was not persuaded that the information in the tipoff was important enough to justify Botha obtaining permission for special Internet privileges (SIP) to view such websites and was clearly sceptical about whether the tipoff was genuine. He noted that Botha had failed to keep his superior, Mr Van der Westhuizen informed of the progress of the investigation and to justify the need for continued access to such websites. Ultimately Botha had obtained no evidence as a result of this access and even when he had ceased accessing such websites by the end of March 2010 he did not advise Van der Westhuizen that he could remove the authorisation. He found the applicant was guilty of breaching the policy governing access to such material.

[8] Turning to the question of the appropriate sanction, the arbitrator found it strange that when Van der Westhuizen became aware that Botha was accessing the prohibited material he did not take immediate steps to stop the SIP access nor did he discuss it with Botha, despite supposedly viewing Botha's misconduct as offensive and serious and as a breach of trust. SARS also allowed Botha to continue working in his position as an investigator for 10 months after it knew of his misconduct but did not suspend him. Further, Botha also had a clean disciplinary record. The arbitrator concluded that SARS had not made out a case that there had been irretrievable breakdown in the relationship as required by the judgement in ***Edcon Ltd v Pillemer NO & Others***.[1]

[9] The arbitrator also took account of the employer's own policy guidelines for determining an appropriate sanction and noted that the guidelines distinguish between downloading images of nudity for which a final written warning was deemed appropriate and the downloading of pornographic images for which dismissal was the recommended sanction. The guidelines also required the chairperson to consider the nature of the case, the seriousness of the misconduct, the previous record of the employee and sanctions imposed in similar cases. In his evidence, Botha

[1] (2008) 29 *ILJ* 614 (LAC)

had referred to the case of another employee who had been found guilty of viewing pornographic material whilst on overtime duty and had been given a final warning. The arbitrator was persuaded by arguments of the employer that the cases were based on different merits and found that it had acted inconsistently in dismissing Botha. In summary, the arbitrator found that the nature of Botha's misconduct was not so offensive that his continued employment could not be justified. The arbitrator reaffirmed the decision and sanction of the chairperson of the disciplinary enquiry as the appropriate outcome.

Grounds of review and evaluation

[10] During argument at the review application hearing, the applicant emphasised that the issue in the arbitration was whether or not the collective agreement concluded between SARS and the Public Servants Association of South Africa ('PSA') committed SARS to substitute the sanction imposed by the disciplinary enquiry chairperson with the sanction of dismissal.

First ground of review-imputation of an overriding requirement of trust and confidence in the employment relationship into the collective agreement

[11] Firstly, the applicant attacked the arbitrator's interpretation of the collective agreement and submitted that he had applied the wrong test when he interpreted it to mean that the parties to the agreement did not intend to give SARS the power to alter the sanction. The applicant claimed that the arbitrator applied the test for assessing evidence and not a test that would be applied in the interpretation and application of collective agreements. It formulated this in the following terms: "Do the words of the collective agreement read in context and against the objects of the agreement had been giving effect to the objects of the labour relations act, preclude SARS from dismissing Botha, despite a breakdown of trust and confidence in the employment relationship such that SARS finds its continuation is intolerable?"

[12] After this matter was heard, the same argument in relation to the same collective agreement was later advanced by SARS before the LAC in ***SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others***.[2] The argument was dismissed in that forum in the following terms:

> *"[28] The wording of the collective agreement does not only make it abundantly clear that the chairperson's pronouncement on penalty is a final sanction, but, in my view, it also leaves no room for interpretation in favour of the parties having intended to provide in the collective agreement a term granting a right to SARS to substitute its own sanction for a sanction imposed by its chairperson . Whilst it is trite that the duty of trust and confidence on the part of an employee is a term implied by law in an employment contract, I do not think that such implied term extends to include the right of an employer to substitute its own sanction for that of the chairperson, particularly in a situation such as the present where the parties in a collective agreement elected expressly to confer on the disciplinary chairperson the sole power to impose the final sanction."* [3]

[13] In light of this pronouncement, the applicants cannot succeed on this ground, quite apart from the fact that in this case there is also the previous arbitration award, which had already determined that the collective agreement did not allow SARS to substitute its own decision for that of the chairperson of the disciplinary enquiry. The applicant had also not set aside that decision, which effectively rendered the concurrence of the arbitrator in the award which is the subject of this review merely obiter. The LAC decision effectively confirms the correctness of the arbitrators' concordant interpretations of the collective agreement and puts that issue to rest.

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[2] (2014) 35 *ILJ* 656 (LAC)

[3] Per Ndlovo, JA at 665.

Second ground of review - the rationality of the arbitrator's finding that there was no irretrievable breakdown in the trust relationship.

[14] The essence of the applicant's criticism of the arbitrator's reasoning in arriving at the conclusion he did, is that because of certain evidence presented in the arbitration hearing his conclusion was not one that a rational arbitrator could have reached. The factors identified by the applicant which it identifies and submits render the arbitrator's findings irrational are the following:

14.1 Van der Westhuizen gave evidence that he had authorised Botha's special internet access to pornographic sites because of a representation made by Botha that he needed such access to investigate potential tax evasion, but he was shocked when he learnt that Botha had lied about this.

14.2 Both the chairperson and the arbitrator were clearly not persuaded that Botha had made the application for special access for a *bona fide* purpose.

14.3 Botha was a criminal investigator, whose position required him to be beyond reproach.

[15] When Botha requested special internet access in September 2009, the motivation he gave for the privilege was "Required in criminal investigation as well as shop steward duties." In a further request for such access made by Botha in October 2009, his motivation was that, "for investigation purposes access to all areas are required". The items in the restricted categories he sought access to, were websites containing amongst other things sexually related material, gambling, interactive content, entertainment, advocacy and drug-related content. The file types associated with this material in the *pro forma* request for special Internet privileges were described as falling into the categories of entertainment, legal and criminal. Van der Westhuizen accepted that Botha, who was a shop steward, might need to visit sites with legal content, but when Van der Westhuizen was alerted to the fact that Botha was accessing websites with pornographic content, he could not find any evidence of a matter that Botha was involved in as a shop steward that might require him to visit

such sites. Van der Westhuizen also said that he had seen no evidence of any criminal investigation being conducted by Botha.

[16] When he was asked why he had seen it necessary to act against Botha, Van der Westhuizen said that he felt that Botha had broken the trust relationship when he had not used the special internet access he had granted him for the reason it was given. When Botha's transgression was revealed, Van der Westhuizen felt that it required close scrutiny of his actions.

[17] In terms of a future working relationship, Van der Westhuizen also expressed the view that he had been offended by Botha's claim in the disciplinary enquiry that Van der Westhuizen had tried to entrap him, whereas Van der Westhuizen had only come to know about Botha's conduct when it was reported to him by head office. Van der Westhuizen was challenged under cross-examination about why he had not alerted Botha to stop him visiting such sites, at the time he had notified the Human Resources Department about Botha's apparent misconduct. He said he had refrained from speaking to him directly because Botha was a shop steward and the policy was that the issue should be channelled through the HR Department. Van der Westhuizen emphasised that the allegation by Botha that he had tried to entrap him would affect their working relationship because in future every time Botha did something he would say that Van der Westhuizen was 'looking over his shoulder' again. Later under cross-examination, Van der Westhuizen said that he was disappointed when he learnt that Botha had been visiting sites he should not have been going to.

[18] The cross examination of Van der Westhuizen focused on the relative seriousness of Botha's misconduct. At no stage was it put to Van der Westhuizen that Botha had visited such sites for *bona fide* purposes relating to an investigation or his duties as a shop steward, nor was he asked if that would change his attitude towards Botha if that had been the case. It was also never put to Van der Westhuizen that the first form requesting privileged access, in which Botha had said that he needed it for a criminal investigation as well as shop steward duties, was never

approved. Botha seemed to believe it was relevant that he did not need special access to the internet for his shop steward duties because he already had access to legal material on his computer and because of this Van der Westhuizen ought to have realised that his motivation for privileged access on the basis of shop steward duties was not a significant part of his motivation. Insofar as this was relevant, Van der Westhuizen was not questioned about it.. Likewise Botha's version that he had ticked the box asking for access to certain restricted categories of website rather than for specific website addresses purely for the purposes of accessing pornographic sites whereas he would have specified a website address if he wanted to do legal research to assist him in his shop steward duties, was also not put to Van der Westhuizen. In passing it is worth mentioning that it was a curious feature of Botha's defence that he should not be blamed if others granted him privileged access under a misapprehension about what he needed it for.

[19] Botha testified in his evidence in chief that he had received an anonymous telephone call from someone who claimed that some entity had placed advertisements promoting a pornography business on two websites, but the entity was not registered for income tax purposes. His first request for privileged access was not granted, but when he received another call from the complainant asking what had been done about the complaint, he made a further application for special access. Once he had obtained access, he claimed it was necessary for him to monitor the websites on an ongoing basis in case the advertisements in question came up, because he did not have the name of the company he was trying to investigate. He claimed this was also the reason he had not filled in the usual form required when initiating an investigation in terms of the standard operating procedures, about which Van der Westhuizen had testified. Botha testified that the standard operating procedures were not followed and were chaotic, but this was not tested with Van der Westhuizen. When he was asked why there was no paper trail of the conduct of his investigation, his response was simply that it was one of those cases where the paper trail had not been kept.

[20] The chairperson of the disciplinary enquiry expressly found that Botha had no business related reason for accessing the sites in question, and noted that in all but one of the cases which SARS relied on to justify the dismissal, there was an element of dishonesty or improper conduct in addition to the downloading of pornographic material. Nonetheless, it seems that the chairperson felt that the impact of Botha improperly accessing such material was minimal and given his prior disciplinary record, corrective measures would be sufficient. The arbitrator did not go so far as to make a finding that Botha had been dishonest, but clearly expressed profound scepticism about Botha's justification for proceeding with the investigation without following the prescribed operating procedures, and noted that the only evidence in support of Botha's version was a single entry in his desktop diary.

[21] Botha sought to trivialise Van der Westhuizen's feeling that he had been misled by the representation that the special access was required partly for performing his duties as a shop steward. This still does not explain why Botha made that representation, even if the application form on which it was made was not approved. It also seems that the evidence of the existence of a *bona fide* tax investigation was slender indeed.

[22] In the circumstances, it is difficult to understand how the arbitrator could have determined on the evidence that the trust relationship was not impaired by the element of dishonesty in Botha's conduct both in representing that he needed the access partly for shop steward duties and the absence of any meaningful evidence to support the probable existence of a *bona fide* investigation.

The third ground of review-the finding of procedural unfairness

[23] In essence, the applicant argues that the opportunity provided Botha to make representations why he should not be dismissed and the fact that he had been afforded an appeal was sufficient to satisfy the requirement that the dismissal was procedurally fair and it was irrational of the arbitrator to decide otherwise. An ancillary leg of this argument is that there was no need for another enquiry because all the evidence had been led in the first enquiry.

[24] In the LAC matter cited above, the LAC effectively found that SARS was abrogating to itself a right to alter the decision of the disciplinary enquiry chairperson even though the procedure only provided a right of appeal to the employee. The avenue open to SARS was to review the decision of the chairperson which it did not make use of. In that matter, there had been no attempt to afford the employee an opportunity to make representations before SARS altered the chairperson's decision. In this case, SARS did invite Botha to make submissions why he should not be dismissed, but without explaining beforehand why SARS disagreed with the sanction imposed by the chairperson of the enquiry. On the evidence, it appears that the employer's specific reasons for not accepting the chairperson's findings and for imposing a more severe sanction were not provided despite Botha asking for such detail. The specific justification for SARS's decision was only provided afterwards when it notified him of its decision to dismiss him. Be that as it may, the evidence in my mind can reasonably support the arbitrator's conclusion that the dismissal was procedurally unfair on these grounds alone.

[25] Further, even if Botha had been given an opportunity to make representations relying on his own speculation about what the employer might ultimately wish to rely on to justify his dismissal, the employer high-handedly accorded to itself the opportunity to force him to undergo a second round of deliberation about his sanction by someone who, unlike the chairperson of his enquiry was not an independent practitioner, in circumstances where it had made plain its view that it was intent on overturning the chairperson's decision, unless he could persuade it otherwise. SARS did so without advancing any reason why it would be fair to expose Botha twice to the risk of disciplinary sanction[4], simply because it did not like the outcome is not a justification for acting in this way, not to mention that it was completely contrary to a binding collective agreement displaying contempt for the terms of the agreement. This was more than enough reason to find that the employer's action was procedurally unfair.

[4] See ***Branford v Metrorail Services (Durban) & others*** **(2003) 24 *ILJ* 2269 (LAC)** at 2277-8, paras [14] – [15].

The egregious character of SARS' conduct warrants a maximum award of compensation for procedural unfairness in my view.

Conclusion

[26] In light of the above, I am satisfied that the arbitrator's finding that the dismissal of Botha was substantively unfair warrants reconsideration in the light of his unreasonable finding about his honesty. However, his finding that the process leading to Botha's dismissal was unfair was more than justified.

[27] In revisiting the substantive fairness of the dismissal, I would agree that it was not the most egregious infraction of the acceptable use policy of SARS relating to the internet. The material was not distributed and was not downloaded. There was no demonstrable negative impact on Botha's workload. Botha also had a clean disciplinary record and some impressive performance achievements. There was also the undisputed evidence that another employee who had accessed pornographic material whilst working overtime had merely been issued with a final warning, though it is important that the employee in question had pleaded guilty to the misconduct, unlike Botha.

[28] On the other hand, the probabilities very strongly favour an interpretation of the evidence that Botha had not been accessing the websites for *bona fide* work purposes. His request for access was stated in the broadest terms. His visits to the sites were relatively frequent over some period of time. No explanation was forthcoming why such a prolonged investigation of a vague tip-off about alleged advertising by an unidentified pornography business would have taken so long before he decided it was fruitless. The fact that the names of two of the websites were written in his desk diary is hardly corroboration that they were part of an official investigation. Even if the approved request for access was motivated in the broadest terms, why did he feel the need to add his shop steward duties in the first motivation? Likewise even if he felt he could not mention the name of the business, for reasons of confidentiality why not at least mention the nature of his investigation in his written motivation? The fact that the permission was

granted without obtaining such detail, did not mean that any use he made of that permission was excused. The real issue is that permission was granted on the basis that he had a *bona fide* reason for making the request. The chairperson of the enquiry was clearly of the view that, having obtained wide ranging permission to surf the internet, Botha may have been tempted to abuse that access. But Botha never admitted that this was the case, because he maintained his version that all the searches he conducted were pursuant to his investigation.

[29] Van der Westhuizen clearly felt that Botha was someone he could trust previously but now he would have to regard with much more circumspection. Moreover, Botha had not merely defended himself but had impugned Van der Westhuizen's character by suggesting he had sought to entrap him by not informing him of the report received from head office. Van der Westhuizen felt he had to follow the protocol applied by SARS when dealing with disciplinary matters relating to shop stewards and referred the matter to HR. Van der Westhuizen would have to work with someone who had accused him of deviously trying to wrongly incriminate him. It also should not be lost sight of that Botha, as a special investigator was a person who had to be trustworthy.

[30] Based on the decision of Pillay J in ***SARS v Commission for Conciliation, Mediation & Arbitration & others*** [5] , the applicant argued that the dismissal was substantively unfair because SARS was in breach of the collective agreement. In that judgment, which also concerned a matter in which SARS had yet again ignored the provisions of the collective agreement and substituted its own decision for that of the disciplinary enquiry chairperson, the Court had held:

> *"[52] <u>The dismissal of the employee was substantively unfair because the decision to dismiss was not one that SARS could validly make</u>; the collective agreement barred it from substituting the decision of the disciplinary chairperson. Procedurally, the dismissal was also unfair because the process of dismissing the*

[5] (2010) 31 ILJ 1238 (LC). It must be mentioned that this was not the labour court case heard on appeal in the LAC matter previously referred to.

employee was not available to SARS; if it was available, then SARS should have afforded the employee a pre-dismissal hearing. That it did not do."[6]

(emphasis added)

[31] However, in the LAC matter previously referred to, even though the LAC held that the decision of SARS to dismiss the employee contrary to the decision of the enquiry chairperson was *ultra vires,* it proceeded to separately consider the reasonableness of the arbitrator's finding that the employee should be reinstated, taking into account the fact that the employee was remorseful and had acted with *bona fide* motives, as well as the fact that he could be accommodated elsewhere in the organisation. After doing so, the LAC concluded that the arbitrator's award met the standard of reasonableness[7]. Consequently, it appears that the LAC's approach was that the fact that the decision of SARS to override the chairperson's decision was *ultra vires* did not dispose of the need to evaluate the reasonableness of arbitrator's findings on the substantive merits of the dismissal.

[32] Because of the importance of the LAC decision, which was decided after this application was heard, I gave both parties an opportunity to file further submissions in the matter. Solidarity, representing Botha, advised it did not wish to make any submissions. No response was received from SARS. The court did receive a copy of a newspaper article on the LAC decision, apparently submitted by Botha himself, but this obviously added nothing to the LAC decision itself.

[33] In conclusion, I am satisfied in the light of the discussion above that a reasonable arbitrator would have found that Botha's conduct did warrant his dismissal.

[6] At 1247.

[7] At 366, paras [37] – [38].

Order

[34] The finding of the arbitrator in his award dated 21 July 2011 under case number WECT 3729/11 that the dismissal of the third respondent, F N J Botha, was substantively unfair is reviewed and set aside and substituted with a finding that his dismissal was substantively fair.

[35] The consequent relief awarded pursuant to that finding set out in paragraphs [75] to [76] is substituted with an order that the applicant must pay the third respondent twelve months' remuneration as compensation for his procedurally unfair dismissal amounting to R 455,170.20 based on a monthly remuneration of R 37,930-75 at the time of his dismissal.

[36] The compensation payable in terms of the previous paragraph must be paid within 15 days of the date of this judgment.

[37] Each party is to pay their own costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant:	T Bruinders, SC instructed by Routledge Modise in association with Hogan Lovells
For the First Respondent:	E M Pio of Solidarity