

SOUTH AFRICA / JUDGMENT

Lucas Dysel Crouse Incorporated v Commission for Conciliation, Mediation and Arbitration and Others (C784/2018) [2021] ZALCCT 3 (19 February 2021)

[2021] ZALCCT 3

COURT

Labour Court Cape Town

BEFORE

Lagrange

CASE / FILE NUMBER

C784/2018

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THE

LABOUR COURT OF SOUTH AFRICA,

HELD

AT CAPE TOWN

Case no: C784/2018

In

the matter between:

LUCAS

DYSEL CROUSE INCORPORATED

Applicant

And

THE

COMMISSION FOR MEDIATION, CONCILIATION & ARBITRATION

First

Respondent

C

M BENNET (N.O.)

Second

Respondent

EILEEN

JACOBS

Third

Respondent

Date

of Set Down: 28 July 2020

Date

of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 19 February 2021.

Summary:

(Review – Dismissal – Insubordination – breach of confidentiality – spending time on non-work related computer activities to the detriment of work – arbitrator conflating practice of voluntary disclosure amongst co-employees with workplace rule – dismissive rejection of complaints about conduct not amounting to insubordination – arbitrator misconstruing essence of charge about use of computer for non-work related purposes)

JUDGMENT

LAGRANGE J

Introduction

- [1] This is an unopposed review application to set aside an arbitration award dated 18 June 2018 in which the arbitrator found that the applicant ('LDC') dismissal of the third respondent, Ms E Jacobs ('Jacobs'), on 11 January 2018 was substantively unfair but procedurally fair and awarded her nine months' salary amounting to R135,000-00. Jacobs had worked nine years for the applicant at the time of her dismissal.
- [2] The applicant advised that it was willing to have the matter determined on papers in light of the prevailing pandemic.
- [3] The review application was filed timeously on 28 July 2018 and the record was lodged by the CCMA on 3 August, and uplifted on 15 August
2018. Within a week, the record had been given to the transcribers who delivered the transcription around 18 September 2018. There followed a significant delay before the supplementary affidavit and record were eventually filed on 21 November 2018. At the same time as filing these documents, LDC applied for condonation for the late filing thereof. The main reason provided is that LDC's counsel was initially attending bar council training at the time the transcript became available and subsequently suffered a recurrence of a previous illness and was only able to attend to the matter from 29 October 2018. Counsel was willing to provide medical certificates in support thereof if required by the court.

[4] In terms of rule 7A (8) of the Labour Court Rules the record becomes 'available' from the registrar only after the transcribed record has been filed. Accordingly, the 10-day period for filing the supplementary affidavit and any amended notice of motion expired around 3 October 2018. Consequently, the supplementary affidavit and notice of motion were filed approximately 35 days late, but still within the 60-day period prescribed by clause 11.2.2 of the Labour Court Practice Manual beyond which the late filing would have resulted in the review application being deemed withdrawn in terms of clause

11.2.3 of the manual.

[5] As a matter of legal practise, LDC should have advised Jacobs when it realised there would be a delay in filing the record and complying with rule 7A (8). Nonetheless, in the absence of any answering affidavit there is no evidence Jacobs suffered any prejudice from the delay. In the circumstances, I am satisfied that the delay in complying with rule 7A (8), though not insignificant, was not due to any neglect or simple tardiness on the part of LDC, whose actions in prosecuting the review application indicated that in most respects it had acted timeously and nothing suggests deliberate dilatoriness on its part. In the absence of any demonstrable prejudice to the respondents, condonation should be granted, having regard also to the

merits which are dealt with below.

Background

and the arbitrator's award

[6] Jacobs was dismissed after being found guilty of the following charges of misconduct:

6.1 On 01 December 2017, she breached the confidentiality between the employer and herself by obtaining and, or alternatively, observing (without consent) a list of salaries. The employee then proceeded to discuss this with several other employees without discussing it with the employer in confidence.

6.2 Continuous insubordination towards the employer to the detriment of the company, the last instance of which took place on 4 December 2017.

6.3 Jacobs spent too much time on social media and other non-work- related activities on her work computer to the detriment of the employer.

[7] A brief synopsis of the sequence of events preceding Jacobs' dismissal and other facts necessary to provide some context, is set out below.

[8] Jacobs was employed LDC, a small firm of attorneys, on 5 January 2009 as a litigation secretary. She did typing work for Crouse and a couple of other attorneys.

- [9] On Friday, 1 December 2017, Jacobs was standing in for the bookkeeper, Ms. Joubert ('Joubert'), at the office reception. She looked at a document on the desk containing amongst other things details on staff salaries. Perusing this, Joubert realised that Joubert and another secretary, Ms. Hoffman, had received salary increases but Jacobs and another administrative employee, Ms. Morrie ('Morrie'), had not.
- [10] Jacobs told Morrie what she had learned and the two of them demanded a discussion with Crouse about why others had received increases but they had not. A heated discussion ensued. Crouse refused to discuss it with them stating that there were 'individual reasons' why they were not given increases and he would discuss it with them separately when he felt it was necessary. This incident was the basis for the first charge against Jacobs.
- [11] The next Monday, 4 December 2017, a meeting was convened with Jacobs, Crouse and Mr De Klerk ('De Klerk'), another attorney in the office. The incident on Friday was discussed as well as Crouse's unhappiness with Jacobs being on social media and playing games during working time. He also complained about what he considered to be her slapdash work performance as evidenced by her typing errors. He expressed the view that he should have dismissed her long ago but had felt sorry for her. He invited Jacobs to resign but she declined the suggestion and said he could do what he wanted. It was this last remark of Jacobs which prompted the charge of insubordination. It is apparent from the evidence that Crouse was in something of a rage in the meeting during which he banged his desk at one stage, and was shouting and probably swore. Jacobs claimed he had called her a "fucking liar", but this was not put to Crouse when he was cross-examined.
- [12] Jacobs had previously been issued with a warning letter on 8 September 2017 by Crouse concerning the firm's unhappiness with a number of aspects of her work performance, namely: slow responses to instructions; poor file organization, of a recurrent nature; regularly on social media platforms; absence of respect for authority when instructions are given, and general lack of interest and poor work ethic. She was requested to improve the performance to the satisfaction of the firm and to bring any reasons for the poor performance complained of to the firm's attention. The letter concluded in the following terms:

'If this conduct stated above does not significantly improve in the near future, as requested, it can lead to a disciplinary hearing which could result in your dismissal.'[1]

- [13] On 11 September 2017, Jacobs had contemptuously dismissed these concerns in a letter in the tersest terms, viz:

'RE: Formal Notice Regarding Work Performance

I refer to the above and acknowledge receipt of your document of 8 September 2017.

I refer to paragraphs 1-7, which are considered ridiculous and untrue.'[2]

The paragraphs Jacobs referred to were those setting out the specific complaints of poor performance in Crouse's warning letter,

which are mentioned above. She claimed that, because she was angry at the time, her attorney had advised her against writing the detailed response she had intended to make.

[14] Jacobs' defence to the charges of misconduct for which she was dismissed are set out in abbreviated form below.

14.1 The salary information which she shared with Morrie, had not been considered confidential in the past and it was Morrie who had decided to initiate the meeting with Crouse. Jacobs merely accompanied her to the meeting. Morrie conceded this and also conceded that she had discussed the issue with Jacobs and had raised that with other attorneys in the office. Mary also testified that, previously, discussion of each other's salaries amongst the four administrators had been commonplace.

14.2 The meeting of 4 December was supposed to have been to resolve problems but it was clear Crouse had no intention of doing that. Her remark was not insubordinate in nature given that he had just told her to resign and also that she should "go and sit on her fat backside as usual". Like some of her other evidence, this was not put to Crouse.

14.3 In relation to the complaint about her spending working time on social media and the like, Morrie had testified that 'everyone' was on Facebook on their cell phones in the office.

The arbitrator's award

[15] The arbitrator found that the salary information was anything but confidential and was left lying around on Joubert's desk. Salary advices were left in the shared printer 'for anyone to pick up and read'. He also found that, prior to November 2017, the discussion of salaries amongst the four administrative staff was a matter of general discussion. Even though she did discuss the other two staff members' salaries with Morrie, this was not a breach of confidentiality that undermined the trust relationship, and there was nothing to suggest Jacobs would breach client confidentiality.

[16] The arbitrator also found that there was no evidence of 'continuous insubordination' which was the description used in the charge. He noted that Jacobs' response to the warning letter was 'probably not the most tactful', but had not prompted any adverse response from Crouse. Similarly, her reaction to the effect that Crouse should do what he wanted, was a normal reaction given Crouse's 'boorish behaviour'.

[17] In relation to the charge concerning time spent on social media, the Commissioner found that the failure to provide comparative evidence of other staff, and simply stating that their use of social media was "not a problem", was insufficient justification for not providing comparative data. This related to a computer usage monitoring programme the firm had installed after Jacobs peremptory denial she spend too much time on non- work related computer activity. The arbitrator found that the evidence showed that the time Jacobs spent

on Facebook was 54% of her non-work usage on the computer, but that this was not to be confused with the percentage of time she spent on non-work usage overall, which was a much smaller percentage. It is apparent the arbitrator felt he had been misled by the employer's witnesses on the interpretation of the monitoring report. The upshot was that the arbitrator found he had no way of determining to what extent Jacobs' use of social media was excessive in relation to other staff. He also found that the use of social media in the office was widespread and there was no policy in place to control it. He concluded that all he had was an allegation unsupported by evidence that Jacobs' non-work use of the computer was comparatively excessive and interfered with work output.

Grounds of review

[18] The applicant has formulated its grounds of review on the basis of reasonableness, albeit that the formulation of the complaint is somewhat incomplete.

[19] It is now well established that a party that wishes to review an arbitration award on the basis of unreasonableness or some other misdirection by the arbitrator in the assessment of evidence must satisfy the following test:

[31] ... Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the enquiry or undertake the enquiry in a misconceived manner. There must be a fair trial of the issues.

[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted s 145 of the LRA, F confining review to 'defects' as defined in s 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome

would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.’ [3]

(emphasis added)

Accordingly, a party reviewing an arbitration award on grounds of reasonableness must satisfy the stringent requirements of the test as it has been developed by the LAC. Furthermore, the grounds of review must be set out in the founding papers and new grounds may not be advanced in heads of argument.[4] Consequently, regard is only had to those grounds raised in the founding papers, which were also pursued in the heads of argument. The grounds relate principally to the reasonableness of the arbitrator’s findings on each act of misconduct.

Findings on the breach of confidentiality

[20] LDC argues that the arbitrator failed to appreciate that factually the evidence could not support a conclusion that salary information was not confidential. Secondly, it is not a rule that has to be stated explicitly, but is a well-known workplace principle.

[21] The evidence of Crouse was that Joubert brought him the salary information in a folder and if Jacobs had, on occasion, taken the

folder back to Joubert from his office, that did not mean she became privy to the information inside it. Joubert testified that the salary information was on the second page of a stapled document, which was not kept on her desk, but on a small shelf and the front page of the document detailed debit orders. Under cross-examination, Joubert agreed that the file with salary advices was on her desk but maintained it was in a closed file. Joubert did concede that everyone knew about the firm’s items of expenditure. She also confirmed that even though the payslips were printed on a common printer shared by 10 staff, she would retrieve them from the printer and nobody else was supposed to see the payslips. Morrie confirmed that the salary information she was shown was on the second page of the document and the first page was folded back, so the second page was open. It also emerged from Joubert’s evidence that Jacobs and Murray only came to know of the increases given to herself and Hoffman about two months after they had been implemented. Morrie’s confirmed that the salary information was private even though salary slips might sometimes be found by others on the printer. She was called by Jacobs to come and have a look at the salary sheet.

[22] I agree with the applicant that the arbitrator conflated the ease with which salary information could be discovered or revealed, with the existence of a principle that salary information was not supposed to be private. It does not logically follow that lax precautionary measures which made it relatively easy to discover salary information of other staff implied that the firm had an 'open book' policy on remuneration. Similarly, the fact that the administrative staff may have previously discussed their salaries amongst themselves, did not mean that LCD endorsed such discussion.

[23] Even so, the arbitrator's conclusion that this did not mean that Jacobs could never be trusted to preserve confidential information is not far-fetched. The salary information she discovered by prying was information of direct personal interest which concerned

the salary of a colleague, whose remuneration, like that of all for administrative staff was normally a matter of common knowledge and openly discussed amongst them. Although Crouse clearly believed that one lie begets another, which can happen, there was no evidence that in the nine years Jacobs had worked for him that he had ever had reason to distrust her with the confidential information of clients, or that she believed there was no difference between information protected by attorney-client privilege and information pertaining to the remuneration of a colleague, which was normally common knowledge.

[24] This does not validate the arbitrator's attribution of a practice of voluntary disclosure amongst fellow employees to an implied policy of the employer, but it might have some bearing on the gravity of the misconduct in deciding if the sanction of dismissal

was appropriate.

The arbitrator's findings on insubordination

[25] The applicant takes issue with the arbitrator's characterisation of the acts of insubordination as being two separate discontinuous instances of alleged insubordination and therefore not of an ongoing nature. The gist of the complaint is that the arbitrator allegedly failed to appreciate that, not only did Jacobs contemptuously ridicule the warning letter and refuse to address the factual allegations contained, but she made no effort to amend her conduct particularly in relation to her use of social media during working hours.

[26] Crouse had testified that matters had 'snowballed' after Jacobs had been issued with the warning letter in September. It was her response to the letter which prompted the firm to install software to monitor the computer usage of administrative staff. What it showed was that, despite a two week delay in installing the software, she spent a considerable amount of time on the computer playing games or using social media. He accepted that administrative staff were free to go on to social media platforms provided that their work was done timeously. Crouse testified that it was because of the problems with Jacobs' performance that she was monitored.

[27] Jacobs was shown the information from the monitoring program at the meeting on 4 December 2017 in part to challenge her dismissive

response to those accusations with objective evidence. Amongst the material presented, for example, was a screenshot showing she was playing solitaire on her computer while Van Blerk was waiting for her to finish working on a contract and she told him she was still busy with it. Although Crouse denied saying to her rhetorically “Who is the liar now?”, when confronting her with this material, Van Blerk clearly did recollect Crouse saying something to that effect. Van Blerk also reluctantly confirmed that Crouse was shouting and banged his hands on the desk during the meeting.

[28] In, *Mamlala v SA Local Government Bargaining Council & others* (2018) 39 ILJ 2454 (LAC), the LAC characterized insubordination is a form of misconduct thus:

‘[28] The contract of employment between employer and employee is one to be interpreted subject to the constitutional right to fair labour practices and the legislation which gives effect to that right. An appropriate degree of mutual trust, respect and courtesy is to be shown by both employer and employee towards the other in the context of an employment relationship. Our courts have traditionally viewed respect and obedience as implied duties of an employee under the employment contract, with the outdated reliance on obedience intended to refer to the employee’s duty to act in good faith and adhere to the lawful and reasonable instructions of the employer.

[29] Insubordination involves a persistent, wilful and serious challenge to, or defiance of the employer’s authority; a ‘calculated challenge’ to the employer’s authority, which is deliberate or intentional. An employee’s wilful flouting of, or refusal to accept the reasonable and lawful instruction of the employer constitutes misconduct because it poses a deliberate and serious challenge to the employer’s authority, with the sanction of dismissal reserved for instances of gross insubordination.’ [5]

[29] Jacobs’ response to the warning letter was clearly dismissive and derisory in tone. Nevertheless, it was an intemperate response to allegations rather than to instructions. It was a sweeping rejection of any wrongdoing on her part. It is true that in dismissing the complaints as unfounded, she clearly saw no reason to take any corrective action, but that is not the same as wilfully defying an instruction. She simply did not accept the shortcomings she was accused of. At most, there was a tone of disrespect in her letter, but it was not a sentiment expressed in the presence of others, and fell short of insubordination, let alone gross insubordination sufficient to warrant dismissal.

[30] I also cannot find any fault with the arbitrator’s reasoning that her response to Crouse to the effect that ‘he must do what he likes’, was not an unreasonable one after his aggressive outburst and demanding she should resign. Based on the evidence before the arbitrator, and notably that of Van Blerk, that there was sufficient evidence to support his inference that Crouse’s behaved in a ‘boorish’ manner. Van Blerk gamely tried to brush Crouse’s conduct away on the basis that that Crouse was not being personal when he behaved abrasively

towards staff, whether

they were administrative or professional. The fact remains, it was not an implausible inference to draw that Jacobs' remark was not out of place in the context of Crouse's uncouth behaviour.

[31] In respect of the arbitrator's finding that there was no evidence of insubordination, that is not a finding no reasonable arbitrator could have reached on the evidence before him. His observation that Crouse did not react to the dismissive tone in her letter as being indicative that he did not see the response as a challenge to his authority as such, it is also not a groundless one. Having regard to the thrust of Crouse's evidence, his principal focus after receiving Jacobs' response that her flippant rejection of the complaint was unfounded.

Findings on computer usage

[32] The issue of the time spent by Jacobs on her computer for non-work related purposes, was directly linked to the complaint about her work performance. The applicant argues there was no justification for the arbitrator to conclude that there was no established rule on private use of the computers. The firm's evidence was not that the practice was forbidden, but simply that it was only permissible when there was no work which required to be done. It was the act of engaging in social media activity or playing games at the expense of finishing work which lay at the heart of the charge, not the private

use of the computer as such.

[33] I agree with the applicant that the evidence could not support a conclusion that there was no policy about private usage of the computers, and the correlative conclusion the arbitrator implicitly made that no workplace rule had been broken is insupportable. The arbitrator also reasoned that because there was no comparative monitoring evidence provided of other staff he could not conclude that Jacobs' non-work use was comparatively excessive. In this respect, the arbitrator misconstrued the charge. The charge did not concern whether her private usage was excessive compared to other staff but whether she devoted too much time to it at the expense of her work. In essence, the charge concerned her failure to prioritise her work activity over non-work use of the computer to the detriment of her performance. There was in fact evidence that other professional staff she was supposed to type for, felt they could not rely on her to complete assignments given to her timeously and resulted in them doing the typing work themselves. When Crouse gave evidence that it was complaints from two of the other lawyers she was

supposed to assist which partly prompted the September morning letter, he was not challenged directly on that. Jacobs' defence

was to say that it was because she prioritized his work over theirs, but she did not dispute that he was only part of the time directly engaged in the legal practice because he was pursuing other business interests and therefore his work requirements did not 'crowd out' the typing needs of other attorneys in the office, whom she was supposed to help. Van Blerk also testified that he had resorted to doing his own typing because he could not be sure she would complete work in time.

There was evidence too that she had been playing solitaire at a time when she should have been attending to a contract.

[34] It is fair to say that the monitoring evidence tendered by the applicant at the arbitration was poorly presented by Crouse and Van Blerk. The arbitrator's impression that it was not accurately portrayed is not without justification. Nonetheless, it is sufficiently clear from the monitoring report documents referred to that between approximately one quarter to one third of Jacobs' time spent on the computer during the period monitored was spent on non-work related computer activity.

[35] Consequently, had the arbitrator focused on the charge itself and not been side-tracked by the lack of comparative data, he would have found it difficult to conclude that Jacobs' non-work-related time spent on the computer had not negatively affected her work.

[36] In concluding that the applicant had failed to prove that Jacobs conduct deserved dismissal, the arbitrator stated:

"it may well have warranted a further warning, however to justify that would also require a general imposition of standards of conduct in the administration in so far as confidentiality, non-work use of office computing, use of social media etc. is concerned. It is unacceptable to sanction an employee in respect of a breach of

standards that are all about custom and practice not endeared to offer a breach of non-existent workplace rules or standards. In so far as the alleged insubordination is concerned respondent failed to lead evidence on its continuous nature and beyond [the] applicant's response to the letter of 8 September 2017 that she was in fact insubordinate at all, especially on 4 December 2017."

[37] In the upshot, while the arbitrator's conclusion on the charge of insubordination is one that is not sustainable on review, his conclusions about non-existent standards in respect of confidentiality of employee remuneration and non-work use of computers are ones that no reasonable arbitrator could have reached on the evidence before him.

Substitution

[38] In light of the analysis, the court is left in the position where it must decide if dismissal was an appropriate sanction, given that the arbitrator's findings on two of the charges cannot be sustained on review.

[39] Some comments have already been made about the seriousness of the disclosure of the salary information. Undoubtedly, whatever the past practice had been between Jacobs and her colleagues, that did not amount to a practice that she was entitled to pry into the firm's private financial documents to obtain the latest information on their salaries, she did not keep it to herself but disclosed it to Morrie as well, prompting the latter to Crouse. Whether Morrie was justifiably angry or not at learning of the increases given to the other two staff, that did not excuse Jacobs' conduct, and her disclosure had caused something of a ruction in

the workplace. That said, it was a limited disclosure and was the first occasion it had happened.

- [40] As mentioned, there was sufficient evidence to justify a finding on the third charge that time spent by Jacobs on non-work activities was detrimentally affecting her performance, and that she had failed to heed what was, in fact a final warning to rectify that.
- [41] Balanced against this, is the fact that in her nine years of service prior to 2017, there was no evidence that Jacobs had been disciplined for misconduct or that her work performance had been previously found wanting and had required measures being taken to remedy it.
- [42] It is apparent that the relationship between herself and Crouse had already deteriorated considerably by the time the immediate events which led to her dismissal occurred. It is probably not inaccurate to surmise that there existed an attitude of mutual disrespect between them by then. The fact that she did not seek reinstatement from the beginning reflects the fact that the relationship had broken down. However, that does not mean that the prior breakdown was necessarily of her making. Accordingly, though it obviously is relevant to the question of any relief, the pre-existing degraded relationship between herself and Crouse, does not directly impact on the question whether dismissal would have been a fair sanction.
- [43] In my evaluation, I believe the breach of confidentiality, though serious, might have been satisfactorily dealt with as a once off event having a limited disruptive effect and which was unlikely to recur if a final written warning was issued. In relation to the charge of referring non-work computer activity to work-related duties, it is more difficult to assume that a final written warning would have had any meaningful effect. Jacobs had already received a final written warning. Instead of disputing it in specific terms if she felt it was inaccurate, she rejected out of hand. It should be noted that the warning letter specifically invited her to engage with the employer about any of the complaints listed if she felt there was some justification she could provide. She contemplated sending a detailed response, but claims she was advised not to and she was worried what she might say in anger. Nonetheless, by dismissing those complaints out of hand without any explanation, thereby indicating

that she saw no reason to deal with them, it plainly suggested she did not take the complaints seriously. Further, despite the fact that there was enough evidence from the monitoring programme and of attorneys deciding to do their own typing to suggest that she had compromised her work performance, she was still not willing to admit her work had been compromised in any way. In the circumstances, it is difficult to see what purpose another warning would have served.

- [44] In the light of the discussion above, I must conclude that Jacobs' dismissal was substantively unfair and the arbitrator's conclusion on the second and third charges must be substituted together with the relief.

Order

- [1] The Applicant's late compliance with rule 7A (8) of the labour court rules is condoned.
- [2] The arbitration award issued on 18 and June 2018 under case number WECT1726-18 by the Second Respondent is reviewed and set aside.
- [3] The award is substituted with the following findings
- 3.1 The Third Respondent was guilty of the first and third charges of misconduct for which she was dismissed, but not guilty of the second charge.
- 3.2 The Third Respondent's dismissal was substantively fair.
- [4] No order is made as to costs

Lagrange J

Judge of the Labour Court of South Africa

Representatives (no appearances)- For the Applicant: None For the Third Respondent: R Appoles instructed by the Applicant.

- [1] Translated from the Afrikaans original
- [2] Translated from the Afrikaans original
- [3] Head of Department of Education v Mofokeng & Others (2015) 36 ILJ 2802 (LAC)
- [4] Tao Ying Metal Industry (Pty) Ltd v Pooe NO and Others 2007 (5) SA 146 (SCA) at 175, para [98] and Comtech (Pty) Ltd v Molony N.O and Others (DA 12/05) [2007] ZALAC 35 (21 December 2007) at paras [15] – [16].
- [4] Tao Ying Metal Industry (Pty) Ltd v Pooe NO and Others 2007 (5) SA 146 (SCA) at 175, para [98] and Comtech (Pty) Ltd v Molony N.O and Others (DA 12/05) [2007] ZALAC 35 (21 December 2007) at paras [15] – [16].
- [5] At 2464, footnotes omitted.

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Prepared on 14 October 2026 · Esheria