

SOUTH AFRICA / JUDGMENT

Rahn v Cheil South Africa (Pty) Ltd (JS752/13) [2017] ZALCJHB 319 (5 September 2017)

[2017] ZALCJHB 319

COURT

Labour Court Johannesburg

BEFORE

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CASE / FILE NUMBER

JS752/13

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: JS 752/13

In

the matter between:

NICOLE
JACQUELINE RAHN
Applicant
and
CHEIL SOUTH
AFRICA (PTY) LTD
Respondent

Heard:

11 September 2016

Delivered:

5 September 2017

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

- [1] In her statement of claim, the applicant seeks to have her dismissal be deemed an automatically unfair dismissal within the meaning of section 187(1)(d) and section 187 (1)(h) of the Labour Relations Act 66 of 1995.
- [2] Her claim is grounded on an allegation that her dismissal was precipitated by the lodging of a grievance with the respondent. That grievance led to a dispute being lodged at the Commission for Conciliation Mediation and Arbitration (CCMA). Following the convening of conciliation proceedings at the CCMA, she had disclosed certain confidential information, which conduct she contended was protected in terms of Rule 16 of the CCMA Rules. Thus, having made a protected disclosure at the CCMA as defined in terms of the Protected Disclosure Act No.26 of 2000, she was then dismissed, which dismissal according to her constituted an automatically unfair dismissal. Her alternative claim is that she was unfairly dismissed.
- [3] The matter initially came before Steenkamp J in view of the three exceptions raised by the respondents upon receipt of the statement of claim. The exceptions were dismissed, and it would therefore not be necessary for this court in the light of the judgment handed down on 12 June 2015 to consider whether the Court has jurisdiction to determine the alternative claim of an alleged unfair dismissal.

Background:

- [4] The facts of this matter are to a large extent common cause and may be summarised as follows:
- [5] The applicant is the erstwhile employee of the respondent, having commenced her employment on October 2011 as an Client Service/Account

Director. The respondent, is a privately-owned enterprise, and a subsidiary of Cheil Worldwide Inc, a global marketing and Communications Company, which is in the business of advertising. One of its major clients in Samsung Electronics, for which it is its internal advertising agency. In effect, the respondent is one of Samsung's chain of companies, with the latter having less than 50% share in the respondent.

- [6] The applicant reported directly to Mr Hugh Kim, the respondent's Managing Director at the time. Below the position of Managing Director was that of Vice-President or COO, which position was occupied by Mr Mark Kronenberg. During March 2012, the position of Chief Operations Officer become vacant as a result of Kronenberg leaving the employ of the

respondent. The applicant contends that she assumed all the duties and functions of the COO as well as having to fulfil her own functions as client service/account director, which led to her being overwhelmed with work.

- [7] In December 2011, there was a disagreement between the applicant and Hugh Kim regarding a particular service offering to a client. At some point, the applicant also had discussions with Kim surrounding the possibility of her being elevated to the position of Chief Operations Officer. These discussions however yielded no results.
- [8] During July 2012, the applicant lodged grievance against Hugh Kim, following what she deemed to be unfair treatment, unwarranted

harassment and being subjected to unbearable working conditions. In her grievance, the applicant also complained inter alia about the changes in the organisation and in particular her department and the work that was assigned to her, which she was of the view fell outside her scope of duties, and also since she was not consulted in that regard. She also complained about differential treatment of South African personnel as against personnel of Korean origin in the company. The applicant also brought her complaint to the attention of the respondent's client, Samsung.

- [9] On 5 July 2012, the respondent's HR Manager, Hans Kim, wrote to the applicant acknowledging receipt of the formal

grievance. On the same day, the applicant wrote a further letter to Hugh Kim, raising further grievances against him. On 6 July 2012,

Hans Kim, wrote correspondence to the applicant in which he recorded the following;

“..."

Kindly be reassured that the company is committed to properly considering and resolving your grievance through the appropriate channels.

...

You are informed that insofar as you have forwarded your grievance letter to the company's main client, SAMSUNG, your conduct is unnecessary and inappropriate for the following reasons: -

- (a) You are an employee of the company, not SAMSUNG;
- (b) The person using the email address is a senior executive in the employ of SAMSUNG (“the senior executive”);
- (c) The senior executive is not employed by or involved in any way in the management of the company;
- (d) The senior executive has no knowledge of your grievance and no useful purpose can be served by bringing your grievance under his

attention.

There is no reason for you to communicate your grievance to the senior executive of SAMSUNG. Communicating your grievance to SAMSUNG cannot advance your grievance and can only erode the company's goodwill, bring the company into disrepute with its biggest client and create risk of serious financial loss for the company.

In the circumstances, the company can only hope and trust that it was not your intention to embarrass the company or cause it any harm and the company will be communicating a request to SAMSUNG to ignore your letter.

....”

[10] A grievance meeting was held on 11 and 12 July 2012. The applicant, Hugh Kim, Ms Seran Synn, the Head of Human Resource of Cheil Worldwide Global, the parent company, attended the meeting. Seran Synn acted as the chairperson of the meeting. Hugh Kim, the target of complaints was asked to leave the meeting, as the applicant was ‘bothered by his presence’.

[11] It appears that the meeting did not yield results that were satisfactory to the applicant. On 23 July 2012, the applicant's erstwhile representatives (Ndlebe Consulting) sent correspondence to the respondent, requesting the outcome of the grievance and/ or report of the grievance meeting,

[12] On 13 August 2012, the applicant referred a dispute to the CCMA, alleging unfair labour practice related to promotion.

Conciliation having failed on 7 September 2012, a certificate of non-resolution was issued and the matter was referred

to arbitration on 3 December 2012.

[13] During November 2012, the respondent commissioned a forensic investigation to test the allegations as contained in the applicant's grievance letter. The applicant contends that the forensic investigators made no findings. At about the same time or thereafter, Hugh Kim left the respondent's employ.

[14] The dispute referred for arbitration was scheduled for 12 February

2013. The Commissioner reverted to conciliation. At these

proceedings, the applicant produced a document as evidence, which was the respondent's 2012 annual review and incentive proposal. The document included details of all personnel of the respondent, their salaries, annual review ratings and performance bonuses. When attempts at conciliation failed, the matter proceeded to arbitration. After the arbitration process, the Commissioner issued a ruling to the effect that the Commission lacked jurisdiction to adjudicate the matter, in view of the applicant's case being related to disparities in salaries.

- [15] Hugh Kim, was replaced by Kangji Kim, who had on 14 February 2013 scheduled a meeting with the applicant wherein she was questioned about how she came to be in possession of the annual review and incentive proposal which she had produced at the CCMA. The applicant refused to divulge the source of the information. On the same day, Kangji Kim confiscated the applicant's laptop, and the services of KPMG were engaged to investigate how the document ended up in the applicant's possession.
- [16] On 19 February 2013, Kangji Kim again questioned the applicant as to how she came into position of the document. The applicant's response was that she had found it on her desk. Kangji Kim requested her to return the document as it was a sensitive document and contained confidential information. The applicant then requested to consult with her legal representative.
- [17] At a later stage, the applicant dispatched an email to Kangji Kim, indicating that the document would not be returned as it was to be utilised in future litigation. Kangji Kim then sent her an e-mail, recording the prior requests to disclose the source of the information and to return same as well as her refusal to do so.
- [18] The applicant was thereafter on 5 March 2013 issued with a notice to attend a disciplinary enquiry to be held on 11 March 2013. The allegations against her were:

"CHARGE 1

1. On or about 12 February 2013 you disclosed confidential financial information of Cheil SA at the Commission for Conciliation, Mediation and Arbitration ("CCMA).
2. The document that you disclosed included inter alia details of all personnel of Cheil SA's 2012 Annual Review and Incentive Proposal ("the document").
3. The document included inter alia details of all personnel of Cheil SA and their salary, annual review ratings and performance bonus.
4. The information contained in the document is highly confidential and you were not authorised or permitted to have the document in your possession.
5. You were not authorised or allowed to directly or indirectly reveal or disclose the contents of same to any person or entity.
6. You were not authorised or allowed to remove the document from the offices of Cheil SA.
7. Your aforesaid conduct resulted in you having breached the Secrecy and Confidentiality Undertaking as contained in your Letter of Appointment signed by you on 6 October 2011.
8. Your aforesaid conduct resulted in you having breached Confidentiality and Intellectual Agreement signed by you on 6 October 2011.
9. Your possession and use of the confidential information contained in the document:

- a. Was done for your personal gain and not in the best interest of Cheil SA;
 - b. Was unauthorised and unlawful as you were not authorised or allowed to directly or indirectly reveal or disclose the contents of the same to any person or entity.
 - c. Was unauthorised and unlawful as you were not authorised or allowed to remove the document from the office of Cheil SA.
10. As result you are guilty of gross misconduct in that you breached one or more or all of the following duties:
- a. Your duty of confidentiality owed to Cheil SA:
 - b. Your fiduciary duties;
 - c. Your duty to respect your employer's interest in confidential information;
 - d. Your duty to avoid a conflict of interest;
 - e. Your duty to act with authority;
 - f. Your duty to act with good faith;
 - g. Your duty to act with due care;
 - h. Your duty to act in accordance with express or implied contractual duties to inter alia act in good faith with due and proper care and due regards to policies of Cheil SA;
 - i. Your duty to respect employer's property rights and interest;
 - j. Your duty to respect employer's interest, good name and reputation;
 - k. Your duty to respect employer's personal interest;
 - l. Your duty to maintain the fabric of the relationship;

CHARGE 2

- 11. On or about 14 February 2013 Mr KJ Kim, the Managing Director of the Company asked you directly how you had obtained the document. You refused to reveal how you had obtained same.
- 12. On or about 19 February 2013 you were requested by Mr, KJ Kim to return the document. You refused to return the document.
- 13. This was recorded in an email Mr KJ Kim on the same date.
- 14. You confirmed your refusal in an email to Mr KJ Kim wherein you indicated:
"1) Regarding the return of return of the document in question

My counsel has advised me that we will not returning this, as we will be using it in future litigation”

15. Your aforesaid refusal to return the document is a direct disobedience of Mr KJ Kim’s direct and lawful command, order or instruction and was without justification. You are accordingly guilty of gross insubordination.
16. Your aforesaid refusal to return the document, which is the property of Cheil SA resulted in you having breached the Confidentiality and Intellectual Property Agreement signed by you on 6 October 2011.
17. As a result of your aforesaid refusal you are guilty of gross misconduct in that you breached one or more or all of the duties set out in paragraph 10 a-l.

CHARGE 3

18. On or about 11 February 2013 you opened confidential documents on Cheil SA’s computer and/ or network, such documents were opened via your own personal optical media, of which you were not authorised to have in your personal possession.
19. The documents that were opened are:
 - a. Cheil Global Compliance Guidelines (dated July 2012);
 - b. Cheil’s Global Compliance Guideline (dated 29 August 2012);
 - c. Cheil’s Worldwide Code of Business Conduct;
20. Your aforesaid conduct resulted in you having breached Cheil’s Electronic Communications Policy which was signed by you on 22 February 2012.
21. As a result of your aforesaid conduct you are guilty of gross misconduct in that you breached one or more or all of the duties set out in paragraph 10 a-l.

CHARGE 4

22. On or about and during the period April 2012 to September 2012 you used Cheil SA electronic mail and internet system to send out copies of your curriculum vitae to other prospective employers.
23. The use of Cheil SA electronic mail and internet system is there to assist you in the performance of your job and for the use of official Company business. It is not intended for persistent personal use.
24. Your aforesaid conduct in persistently utilising Cheil SA electronic mail and internet system for personal use resulted in you having misused and breached Cheil’s Electronic Communications Policy.

25. As a result of your aforesaid conduct you are guilty of gross misconduct in that you breached one or more or all of the duties set out in paragraph 10 a-l

CHARGE 5: (Added over the course of the hearing)

26. On or about 25 ay 2012, you used Cheil SA electronic mail and internet system for your personal use to send out forbidden content to another person.
27. The use of Cheil SA electronic mail and internet system is there to assist you in the performance of your job and for the use of official Company business. It is not intended for persistent personal use.
28. Your aforesaid conduct resulted in you having misused and breached Cheil's Electronic Communications Policy which was signed by you on 22 February 2012.
29. As a result of the aforesaid conduct you are guilty of gross misconduct in that you breached one or more or all of the duties set out in paragraph a-l.
- [17] At the conclusion of the disciplinary enquiry, the applicant was found guilty of the charges preferred against her and a sanction of dismissal was imposed. Aggrieved by the outcome of the disciplinary enquiry the applicant referred an unfair dismissal dispute to the Commission. On 27 May 2013, conciliation failed and the matter was brought to this court by way of a statement of claim.

The trial proceedings:

- [18] The Court is required to determine whether the dismissal of the applicant was automatically unfair as contemplated in section 187 (1)
- (d) and section 187 (1) (h) of the LRA. In the alternative, the court must determine whether the dismissal was fair.

[19] The salient features of the applicant's testimony are as follows;

19.1 When the Commissioner on 12 February 2013 suggested that the parties should revert to conciliation, she had handed in the respondent's annual review and incentive proposal in support of her case, and those documents had not been disclosed to anyone outside of the conciliation process;

19.2 She had found the documents on her desk, and there was no reason for her to return them as they were only used at the conciliation process.

19.3 The request by Kangji Kim to return the documents constituted

harassment, and she deemed his instruction in that regards as being unlawful, as she intended to produce the document in support of her grievance, and to use it meaningfully in order to find a settlement of the dispute. It was necessary for her to use the document at the CCMA as the respondent had not been honest in dealing with her grievance.

19.4 In response to the allegations against her that led to the

disciplinary enquiry, she confirmed that she had declined to give evidence at the internal enquiry in regard to the charges relating to the document in question, as her understanding was that she had acted in good faith when she produced the documents at the CCMA;

19.5 She had not signed the respondent's Electronic Communication

Policy, and according to her, the document was in any event not confidential as she had downloaded other documents in order to prove her case.

19.6 Regarding the allegation pertaining to the use of the respondent's

e-mail and internet service to send out copies of her CV to other prospective employers, the applicant's response was that she initially sent out her CV on her personal e-mail from the respondent's account.

19.7 Under cross-examination, she conceded that she was bound by the terms of her contract of employment, and further conceded that the document in question contained personal information of other employees which was confidential. She further conceded that she took the confidential document home, and that there was a potential of damage to the respondent if the documents got in the wrong hands. She however reiterated that she had treated the nature of the document as confidential.

19.8 She denied when it was put to her that she was not entitled to have possession of that document. She further testified that upon receiving the document on her desk, she did not ask anyone about it.

19.9 The applicant also conceded that she had obtained other documents

from the respondent in preparation for her case through a subpoena, and that the same process was available at the CCMA. She reiterated

that although the respondent had the Electronic and Communication Policy, she did not sign it and did not regard herself bound by it as it was meant to give the respondent leverage and to be used against her.

19.10 On being asked what was the protected disclosure he had made in view of the fact that Hugh Kim had left the respondent's employ at the time that the dispute was lodged, her response was that the disclosure was in respect of the grievance he had laid against Kim, but conceded that the protected disclosure arose subsequent to Kim leaving. She nevertheless conceded that Kim was dismissed from the respondent's employ because of her grievance

19.11 The applicant conceded that there were two meetings held in respect of her grievance, including one attended to by the respondent's senior employees from its overseas operations, and further that the

grievance was entertained which resulted with an outcome. She nonetheless contended that the 'injustices' against her

were not rectified subsequent to the meetings.

19.12 On being asked the reason her grievance had led to her dismissal, her response was that the same grievance had not been resolved, even by Kim's successor, and her conditions of employment had become more intolerable. Her contention was that the fact that she had laid a grievance against Kim was the reason that she was dismissed, and not for misconduct.

19.13 The applicant further conceded that at the time that she got possession of the documents in question, she already knew that two other male colleagues were paid more than her. She however contended that the document was meant to prove that the respondent had been lying about disparities in wages.

[20] The evidence of the respondent as presented by Kangji Kim through an interpreter (Ms Yubin Jung) was as follows;

20.1 He was appointed as Managing Director of the respondent on 1 January 2013 and oversees the respondent's South African operations. He had heard of the applicant's grievances, even though they were addressed to his predecessor. He also knew the applicant having interviewed her in November 2012 as part of an audit conducted in the respondent's branches in South Africa.

20.2 On 13 February 2013, the respondent's COO, Denis Chang brought it to his attention that a confidential document was presented in the CCMA, and he was concerned as to how the applicant could have obtained it, as only himself, the HR Manager, CFO and two other people from the finance division were the only ones entitled to have knowledge or possession of the document. Other than these individuals, personnel in the respondent's Human Resources in Dubai also had access to such documents, and even then, they treated such them with confidentiality.

20.3 Kim enquired from the applicant as to how she got to be in possession of the document, and she had refused to reveal her source. About two or three days later Kim had again asked the applicant where she got

the document and her response was that she found it on her desk. Upon being instructed to return the document, the applicant refused.

20.4 When the applicant refused to return the document, Kim in writing again instructed her to return, and she again refused, stating that she had obtained legal advice and was informed that she should keep it for future litigation. It was upon her response that KPMG was brought in to investigate the matter, and the applicant's laptop was confiscated. These events were followed by the institution of disciplinary proceedings against her.

20.5 Kim's contention in regard to the document was that the applicant had no authority to have it in her possession, nor was she entitled to remove it from the respondent's premises or reveal it to anyone.

20.6 In regard to the alleged disparities in wages, Kim testified that the one person that the applicant compared her salary to was the Executive Creative Director, who was entitled to earn more than her, as creative personnel earned more than her. There was therefore no basis for the applicant to compare her salary with this individual. The second individual that the applicant compared her salary to (Chris Lee), was a Korean expatriate, who was a special case as all personnel in that category had different packages.

20.7 Under cross-examination, it was put to Kim that the applicant could not have been charged in view of the fact that the document in question was disclosed within the confines of Rule 16 (1) of the CCMA Rules[1]. His response was that the issue that led to the applicant being charged was how she had obtained the documents, the fact that she refused to return them to date, and that it was not known what she had done with them. He disputed when it was put to him that his instruction to the applicant to return the document or to reveal her source was unlawful.

20.8 Kim further conceded that there was no evidence to suggest that the applicant had accessed the document through her laptop. He however contended that her version that she found it on top of her desk was not probable, as if this was the case, she should have disclosed this the first time that she was asked. Kim added that even if this was the case, she was supposed to report the issue to management. In view of the confidential nature of the document.

20.9 In response to a question whether the applicant ought to be dismissed based on the allegations against her, Kim's contention was that there were five charges against the applicant, and the first, second

and third were of a serious nature. He conceded that the charges pertaining to the abuse of e-mail were not serious to warrant a dismissal. He denied however that any of the charges were a witch hunt against the applicant.

The arguments and evaluation:

[21] As already indicted, the applicant's claim is based on three grounds, being, automatically unfair dismissal within the meaning of section 187(1)(d) and section 187(h) of the Labour Relations Act 66 of 1995[2], and in the alternative, that the dismissal was unfair.

(a) The section 187 (d) claim:

[22] The salient issues raised in argument on behalf of the applicant are as follows;

22.1 What was said in the conciliation is confined to the conciliation room, and it is impermissible for anyone to reveal what was said within the ambit of the conciliation.

22.2 The confidentiality was broken by Chong when he revealed what took place at conciliation, which breach was followed by Kim when he instituted an investigation into what Chong had reported back from the conciliation, which investigation had in turn led to the dismissal of the applicant.

22.3 If the court did not hold that the charges could not be brought against the applicant, then it would follow that the sanctity of the conciliation proceedings would be breached, and this would allow employees to be dismissed for what they had revealed in conciliation. In this case, the applicant was dismissed for having disclosed the document to her attorneys, which was then produced at conciliation, and that subsequent charges flowed from that disclosure.

22.4 The causal connection in this case was that but for the disclosure of the document at conciliation, the investigation would not have taken place and the charges (3 – 5) would not have been brought against the applicant.

22.5 In view of the above factors, the applicant was therefore dismissed as a result of first, having exercising her right in terms of the LRA, i.e., by referring an unfair labour practice dispute, and taking part in the conciliation proceedings, which was contrary to the provisions of section 187 (d) (ii) of the LRA read together with section 138 (3) of the LRA[3], and second, having disclosed a document to her attorney and counsel, which was produced during conciliation proceedings (which is a protected disclosure), and this was contrary to section 187 (h) of the LRA.

22.6 The first disclosure as above was shielded by the confidentiality of the conciliation proceedings, which matter had already been pronounced by Steenkamp J in his judgment in respect of the three exceptions raised initially by the respondent, and the charges were therefore impermissible, as was the investigation that had followed as a result of the breach of confidentiality.

[23] The respondent's arguments about the section 187 (1) (d) of the LRA are as follows;

23.1 The dismissal of the applicant was not connected to her referral to the CCMA, and in order to sustain this claim, she had to rely on a conspiracy between the respondent and the chairperson of the internal enquiry, Adv. YF Saloojee. In this case however, there was no evidence of conspiracy in that the issue referred to the CCMA pertained to a salary discrepancy between what the applicant earned and what the other two comparators.

23.2 In any event, there was justification for the disparities in wages as testified upon by Kim, which evidence was not disputed by the applicant. It was further pointed out that the applicant had not provided any factual support for a conclusion that she reasonably believed that the contents of the confidential document showed, or tended to show that she was being discriminated against.

- [24] In instances where a dismissal is alleged to fall within the ambit of section 187(1) of the LRA, the starting point is that the evidentiary burden to produce evidence that is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place rests on the applicant. If the applicant succeeds in discharging this evidentiary burden, it is then for the respondent to demonstrate that the reason for the dismissal did not fall within the ambit of that provision by section 187(1) of the LRA[4].
- [25] In further addressing the question of onus in respect of automatically unfair dismissal claims under section 187 of the LRA, the Labour Appeal Court in *Kroukam v SA Airlink (Pty) Ltd*[5] held that:

‘In my view, s 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an

automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstances envisaged in s 187 for constituting an automatically unfair” dismissal.

And,

“The further question then arises as to the approach to the evidence led by the respective parties. The answer can be illustrated by way of the following example: Assume that an employee can show that she was pregnant and dismissed upon the employer gaining knowledge thereof. The court would examine whether, upon an evaluation of all the evidence, pregnancy was the 'dominant' or most likely cause of the dismissal.”

- [19] To the extent that the applicant alleged that it was as a consequence of lodging a grievance against Hugh Kim that she was dismissed, it can now be accepted as settled that the lodging of a grievance does indeed constitute an exercise of a right conferred by the LRA for the purposes of a claim under section 187 (1) of the LRA. This was confirmed in *Mackay v ABSA Group and another*[6], where it was held that;

“Therefore in keeping with the main object of the Act, ie of resolving all labour disputes effectively, and with the constitutional guaranteed right to fair labour practices it must follow that a purposive interpretation of section 187(1) would mean that the exercise of a right conferred by a private agreement binding on the employer and employee as well as participation in any proceeding provided for by such agreement was also contemplated in that section. As in casu, the participation by an employee in a privately agreed grievance procedure, must have been contemplated as a proceeding in terms of this Act, ie when section 187(1)(d) was enacted. This is on the basis that the disputes specifically mentioned in section 187(1) are of the same kind as the dispute in casu.”

- [20] To conclude on this issue, it is accepted that an employee who lodges an internal grievance should enjoy protection under the provisions of section 187

- (1) (d) of the LRA. This is because the act of lodging a grievance is merely an assertion of a right not to be treated unfairly, something which is guaranteed under the protection of fair labour practices enshrined in section 23 (1) of the Constitution and section 185 (b) of the LRA. Support for this view as also correctly pointed out on behalf of the applicant is further found in *Jabari v Telkom SA (Pty) Ltd*[7] where it was held that where the dominant reason for the applicant's dismissal in that matter was predicated on the fact that he had initiated grievance proceedings against the respondent's management, in challenging its unfair labour practices,

"...the applicant had the constitutional and statutory right to initiate and pursue grievances against the respondent, as long as his actions were motivated by a bona fide belief that the respondent was subjecting him to unfair labour practices."

- [21] The approach to be followed, (albeit it was formulated within the context of an automatically unfair dismissal based on section 187(1) (g) of the LRA) in establishing

whether a dismissal is automatically unfair is that as set out in *Van der Velde*[8] by Van Niekerk AJ (as he then was) in the following terms;

"In summary, and in an attempt to crystallise these views and to formulate a test that properly balances employer and worker interests, the legal position when an applicant claims that a dismissal is automatically unfair because the reason for dismissal was a transfer in terms of section 197 or a reason related to it, is this:

- the applicant must prove the existence of a dismissal and establish that the underlying transaction is one that falls within the ambit of section 197;
- the applicant must adduce some credible evidence that shows that the dismissal is causally connected to the transfer. This is an objective enquiry, to be conducted by reference to all of the relevant facts and circumstances. The proximity of the dismissal to the date of the transfer is a relevant but not determinative factor in this preliminary enquiry;
- if the applicant succeeds in discharging these evidentiary burdens, the employer must establish the true reason for dismissal, being a reason that is not automatically unfair;
- when the employer relies on a fair reason related to its operational requirements (or indeed any other potentially fair reason) as the true reason for dismissal, the Court must apply the two-stage test of factual and legal causation to determine whether the true reason for dismissal was the transfer itself, or a reason related to the employer's operational requirements;
- the test for factual causation is a 'but for' test- would the dismissal have taken place but for the transfer?

· if the test for factual causation is satisfied, the test for legal causation must be applied. Here, the Court must determine whether the transfer is the main, dominant, proximate or most likely cause of the

dismissal. This is an objective enquiry. The employer's motive for the dismissal, and how long before or after the transfer the employee was dismissed, are relevant but not determinative factors.

· if the reason for dismissal was not the transfer itself (because, for example, it was a dismissal effected in anticipation of a transfer and in response to the requirements of a potential purchaser of the business) the true reason may nonetheless be a reason related to the transfer;

· to answer this question (whether the reason was related to the transfer) the Court must determine whether the dismissal was used by the employer as a means to avoid its obligations under section 197.

(This is an objective test, which requires the Court to evaluate any evidence adduced by the employer that the true reason for dismissal is one related to its operational requirements, and where the employer's motive for the dismissal is only one of the factors that must be considered).

· if in this sense the employer used the dismissal to avoid its section 197 obligations, then the dismissal was related to the transfer; and

· if not, the reason for dismissal relates to the employer's operational requirements, and Court must apply section 188 read with section 189 to determine the fairness of the dismissal.

[22] In my view there is no reason why the above principles should not find application in alleged automatically unfair dismissal disputes under section 187 (1) (d) of the LRA. In the same manner as with section 187 (1) (g) disputes, the applicant must;

19.1 prove the existence of a dismissal and establish that there was underlying grievance which led to her dismissal;

19.2 adduce some credible evidence that shows that her dismissal was causally connected to the lodging of the grievance in question;

19.3 if the facts show more than one reason may have been the reason for the dismissal, the applicant must show that the lodging of the grievance was the 'dominant or most likely reason for the dismissal'.

[23] If the applicant succeeds in discharging these evidentiary burdens, the respondent must establish the true reason for dismissal, being a reason that is not automatically unfair. This requirement is in tandem with the principle that in order to ascertain whether a dismissal constitutes an automatically unfair dismissal in terms of s187 of the LRA, one must ascertain the true reason for such a dismissal[9].

[24] In this case, it was common cause that the applicant was dismissed. Having past the first hurdle, it can also be accepted that the applicant had lodged a dispute as illustrated in the common cause facts and via evidence summarised elsewhere in this judgment. The issue remains whether the dismissal was because of the grievance that was lodged.

[25] I accept that the disciplinary proceedings against the applicant came about as a result of what transpired at the CCMA on 12 February 2013.

However, having assessed the overall evidence presented, the history and background to this dispute, the complaints that led to the grievances and the grievance meetings held, and the ultimate referral of the dispute, it is my view that the applicant has not demonstrated that there is a credible possibility that her dismissal was due to her having lodged the grievance or having referred dispute to the CCMA. In essence, the lodging of the grievance or the referral of a dispute to the CCMA was not the 'dominant or most likely cause' of her dismissal. My conclusions in this regard are based on the following observations;

- i. In regard to the grievance lodged, it is common cause that the target of the complaints was Hugh Kim, whom the respondent conceded had a fraught relationship with the applicant. It is further common cause that at least two grievance meetings were convened by the respondent in order to resolve the grievance in question. This had included the involvement of the respondent's overseas based personnel, and there can be no doubt that the matter was viewed in serious light by the respondent.
- ii. Significant with these grievances meetings are its outcomes and the applicant's views in regard to these outcomes. It is further of relevance to note that the initial referral to the CCMA on 13 August 2012 came about whilst on the applicant's own version, she was still waiting for the outcome of the grievance hearing held on 11 and 12 July 2012. Further on her own version, the referral was lodged due to the reason that the applicant had appointed an expatriate to the position which formed part of her grievance.
- iii. The dispute referred was unsuccessfully conciliated on 7 September 2012. Arising from her grievance, Cheil Worldwide Global had initiated a forensic investigation into the respondent. Resulting from these investigations, Hugh Kim then left the respondent's employ in February 2013, having served notice. At the time that the arbitration proceedings were convened on 13 February 2013, Hugh Kim had left.
- iv. The applicant, despite conceding that attempts were made by the respondent to resolve her grievance, and which had resulted in an outcome, including the departure of Hugh Kim, nonetheless contended that the 'injustices against her were not rectified', and that her conditions of employment had become more intolerable. As to what these 'injustices' were or how her conditions of work became more intolerable remains unclear. If the alleged injustices related to the disparities in wages, this issue was then in my view, sufficiently dealt with and explained by Kangji Kim in his evidence.

[26] To summarise then, and in view of the timeline between the lodging of the grievance, the referral of the dispute and the convening of proceedings before the CCMA, I am not satisfied that the applicant has adduced some credible evidence that shows that her dismissal was causally connected to the lodging of the grievance in question. I am further satisfied that as shall further be illustrated in this judgment, the facts and the evidence point to more than one reason as the reason for the dismissal. Be that as it may, the applicant failed to demonstrate that the lodging of the grievance was the 'dominant or most likely reason for the dismissal'.

[27] To the extent that the applicant had lodged the grievance, I am satisfied that the respondent had sufficiently dealt with that

grievance internally. The outcome may not have been to the applicant's satisfaction for reasons that at best appear unexplained or dubious. In my view, it is not sufficient to simply allege that 'injustices' have persisted after a grievance was dealt with, without elaborating upon what those 'injustices' were. To the extent that any further grievances may have persisted in relation to wage disparities, the CCMA had declined to determine the matter in any event, and in these proceedings, Kangji Kim had proffered a perfectly reasonable explanation which was uncontroverted, as to the reasons the disparities in salaries

existed. In circumstances where the respondent had explained the disparities in wages, which formed the nub of the applicant's

referral, I fail to appreciate the reason it would dismiss her for that reason.

(b) The section 187 (1) (h) claim:

[28] The above provisions renders a dismissal automatically unfair if the reason for the dismissal is a contravention of the Protected

Disclosure Act by the employer, on the basis that the employee had made a protected disclosure. Again, the principles set out in Van Der Velde as stated elsewhere in this judgment find application in such a claim.

[29] The applicant's starting point, to the extent that the provisions of Rule 16 of the CCMA Rules were relied upon, was that in his judgment[10] when dealing with the respondent's exceptions, Steenkamp J had confirmed that disclosures of the document in question at conciliation proceedings were shielded by Rule 16 (1). The respondent's argument on the other hand was that it was deeply ironic that the applicant opportunistically sought to be shielded from her misconduct by the provisions of Rule 16(1) which, in a limited manner, accords privacy and confidentiality to conciliation proceedings, when it was her intention to use the confidential document in arbitration proceedings.

[30] The starting point in the determination of this issue is that section 138 (3) of the LRA permits a Commissioner at the CCMA to suspend arbitration proceedings with the consent of the parties and to revert to conciliation. In my view, once the Commissioner does so, there can be no doubt that the provisions of Rule 16 would ordinarily apply, irrespective of the fact that the matter was scheduled for arbitration.

[31] As I understood Steenkamp J's judgment, the learned Judge had merely confirmed the legal position in regard to Rule 16

(1) without pronouncing on whether the disclosure made at conciliation in this case was shielded by confidentiality enshrined in that rule, or whether the disclosure made was protected under the PDA. This much can be gleaned from paragraph 18 of the judgment where it was held that 'Whether or not the disclosure was a protected one as defined in the Protected Disclosures Act is best determined after hearing evidence at trial'.

[32] The relevant provisions of the PDA are as follows; Section 5 provides that

"Any disclosure made-

- a) to a legal practitioner or to a person whose occupation involves the giving of legal advice; and
- b) with the object of and in the course of obtaining legal advice, is a protected disclosure."

A 'disclosure' within the definition section of the PDA

"means any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following:

- (f) unfair discrimination as contemplated in the Promotion of Equality

and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or

- (g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed;"

[33] It was argued on behalf of the applicant that the document in question was disclosed to the respondent during conciliation to show differences in salaries and to point to discrepancies between the applicant's version and that of the respondent, and that it was of no consequence how the document was obtained or whether she was entitled to it.

[34] There are however inherent difficulties in the applicant's approach. Inasmuch as it is appreciated that the disclosure of the document would ordinarily have been shielded by the provisions of rule 16 (1), the difficulty is that the document, to the extent that it revealed the discrepancies between the applicant's wages and the other two individuals she had compared herself with, would not have provided any proof of anything beyond what was known to the respondent, and which Kangji Kim had fully explained in these proceedings.

Furthermore, the applicant had conceded that she also had prior knowledge of the wage disparities in the sense that she had the necessary information in respect of the two people she had compared herself against. As to how the applicant

could reasonably have believed that the contents of the confidential document showed, or tended to show, that she was being discriminated against in circumstances where the alleged disparities or differences in wages were on the evidence justified is something that remains unexplained. Ultimately, there was therefore no need for the applicant to produce any document to prove a fact known to her and acknowledged by the respondent.

[35] A further difficulty is that is that the document contained personal details and information of other employees who had nothing to do with the grievance or dispute between the applicant and the respondent. I am therefore inclined to hold that the disclosure of such information, which in large parts was irrelevant for the purposes of the applicant's case was not made bona fide with the intention of proving her case.

[36] To conclude on this issue, and for reasons advanced above, even though the disclosure of the document in question at conciliation proceedings would ordinarily be shielded by the provisions of rule 16 (1) of the CCMA Rules, and further since the disclosure would have been protected under section 5 of the PDA, in the end, I am not satisfied that this disclosure was the 'dominant or most likely reason for the dismissal'.

[37] It was correctly pointed out on behalf of the respondent that the purpose of Rule 16, inasmuch as the provisions of the PDA, is not to prevent and shield employees from the consequences of their misconduct. I am further in agreement with the submissions made to the effect that Rule 16 is not sacred, or inviolate, and that a conciliation forum is meant for parties to attempt to settle their disputes, in good faith, and not absolve themselves from their misconduct. Thus, if in the course of making a protected disclosure

at conciliation proceedings or for the purposes of the PDA, an employee commits acts of misconduct, it would be untenable to turn a blind eye to the misconduct in question and then merely look at the disclosure itself. Inasmuch as employees enjoy certain protections,

employers are equally entitled to appropriately and fairly deal with acts of misconduct in the workplace.

[38] Thus, even if it is accepted in this case that the disclosure of the document at the conciliation proceedings ultimately led to the institution of disciplinary proceedings against the applicant, and that but for events at the conciliation proceedings, the disciplinary proceedings would not have taken place, ultimately it is not the disclosure of the documents at the CCMA that led to the dismissal of the applicant. In my view, it is more the events subsequent to the conciliation proceedings which ultimately led to her dismissal. Accordingly, the claim in terms of section 187 (1) (h) of the LRA should fail.

(c) The unfair dismissal claim:

[39] To the extent that the applicant has not established or produced sufficient evidence to raise a credible possibility that an

automatically unfair dismissal has taken place, it is upon the employer to discharge its onus of providing as provided for in terms

s 192 of the LRA that the dismissal was for a permissible reason as provided for in terms of s188 of the LRA.

[40] It was submitted on behalf of the applicant that in respect of charge one, the possession of the document could not have been the basis for any disciplinary action on the basis that inter alia, there was no suggestion that the applicant had obtained it through any other means other than what she testified to, namely that it was left on her desk. It was further submitted that there was further no evidence that the applicant had used the document for any other reason other than at the conciliation, and that no confidentiality was breached as she had only revealed the document to her legal advisors.

[41] The above approach however in my view misses the point. The starting point is that the applicant was less than candid about how she had obtained the document. The probability that someone might have left the document on her desk in order to assist her with her case is more than unlikely, or at worst, too much of a coincidence. Even if some good Samaritan had anonymously left the document on desk, there was no reason for her to keep Kim guessing as to the source of the document when he initially asked her. That lack of candour on her part in my view and as further attested to by Kim, put a strain on the trust relationship.

[42] As to how she had obtained the document is however secondary, in that on Kangji Kim's undisputed version, even if someone had left the document on her desk, she had an obligation, in view of its confidential nature, to bring it to Kim's attention. She nevertheless neglected to do so and kept the document for her own personal reasons.

[43] Even if the possession of the document under suspicious circumstances was not a serious offence, it is more the applicant's

interaction with Kim after the CCMA proceedings over the document that in my view broke the employment relationship. It was common

cause that Kim as the Managing Director was the highest authority in the respondent. On no less than two occasions, the applicant was instructed by Kim to return the documents as she was not authorised to have them in her possession. It is common cause that she had refused to do so.

[44] The applicant's refusal to return the document clearly constituted direct disobedience of a direct and lawful instruction by a superior, and ultimately, gross insubordination. How the applicant could have construed the instruction as unlawful or harassment in circumstances where she ought to have been aware that she was not entitled to be in possession of the document is beyond comprehension.

- [45] Whether the applicant refused to obey the instruction because of her counsel's advice is neither here nor there. The applicant had an employment relationship with the respondent as represented by Kim, and not her legal counsel. She was therefore obliged to obey a simple instruction from Kim. The fact that to date she had failed to return the documents says a lot about her resolve to keep the document in defiance of Kim's instructions.
- [46] Charges three to five relate to events after the applicant's laptop was confiscated from her. Investigations and search on her laptop in an attempt to establish where the document in question was sourced, had revealed that she had utilised the laptop for other purposes including copying company policy documents, which employees were prohibited from copying, from the company server onto her own personal device; sending her CV to prospective employers, and sending personal messages of explicit sexual nature on her work e-mail. Kim had confirmed that these charges on their own were not dismissible offences.
- [47] I accept that charges three – five would never have been preferred against the applicant but for the fact that her laptop was confiscated with a view of establishing the source of the document. I further accept that even if the cumulative nature of these charges called for a disciplinary sanction, at most, a lesser penalty would have sufficed. The matter however does not end there in view of the conclusions made in respect of charges one and two as above. Regarding allegations of gross insubordination, one always finds guidance in *Palluci Home Depot (Pty) Ltd v Herchowitz and Others*[11] where the Labour Appeal Court had the following to say;

“ . . . [A]cts of mere insolence and insubordination do not justify dismissal unless they are serious and wilful. The failure by an employee to comply with a reasonable and lawful instruction of an employer or an employee's challenge to or defiance of the authority of the employer may justify dismissal, provided it is wilful (deliberate) and serious. Likewise, insolent or disrespectful conduct towards an employer will only justify dismissal if it is wilful and serious. The sanction of dismissal should be reserved for instances of gross insolence and gross insubordination as respect and obedience are implied duties of an employee under contract law, and any repudiation thereof will constitute a fundamental and calculated breach by the employee to obey and respect the employer's lawful authority over him or her.”

- [48] Applying the above principles to the facts of this case, the applicant's conduct in the light of Kim's instructions

was not a case of mere insolence and insubordination. The refusal to obey Kim's instruction was serious, wilful and persistent, and there is no doubt that it was in defiance of his authority. The applicant, including in these proceedings, failed to appreciate the error of her ways and portrayed herself as the helpless victim. Not once did she appreciate that her battle was with Hugh Kim, and it should have ended when he left the respondent's employ following upon her grievance and the internal audit conducted by the respondent. In my view, the applicant was the ultimate author of the circumstances she now finds herself in, and I am satisfied that the

respondent has discharged the onus placed on it to prove that the dismissal was the appropriate sanction, particularly in view of the conclusions made in respect of charges one and two. Further after a consideration of the requirements of law and fairness, I am not satisfied that in view of the circumstances of this case there is cause for a cost order.

Order:

[49] In the premises, the following order is made;

1. The applicant's claim of an automatically unfair dismissal as contemplated in sections 187 (1) (d) and 187 (1) (h) of the Labour Relations Act is dismissed.
2. The dismissal of the applicant was fair.
3. There is no order as to costs.

E Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Adv. MA Lennox

Instructed by:

Stewart-Garden Attorneys

For the Respondent:

Adv. A Snider

Instructed by:

Kramer Villion Norris Attorneys

[1] Which provides; 16 Conciliation proceedings may not be disclosed (1) Conciliation proceedings are private and confidential and are conducted on a without prejudice basis. No person may refer to anything said at conciliation proceedings during any subsequent proceedings, unless the parties agree in writing. (2) No person, including a commissioner, may be called as a witness during any subsequent proceedings in the Commission or in any court to give evidence about what transpired during conciliation.

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- [2] 187. Automatically unfair dismissals (1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is –
- (a) (b) (c) (d) that the employee took action, or indicated an intention to take action, against the employer by - (i) exercising any right conferred by this Act; or (ii) participating in any proceedings in terms of this Act. (e) (f) (g) (h) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act.
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- [3] 138. General provisions for arbitration proceedings (3) If all the parties consent, the commissioner may suspend the arbitration proceedings and attempt to resolve the dispute through conciliation.
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- [4] Van der Velde v Business and Design Software (Pty) Ltd and Another (2006) 27 ILJ 1738 (LC). See also Viney v Barnard Jacobs Mallet Securities (Pty) Ltd (2008) 29 ILJ 1564 (LC) at para 48, where the Court held that; “The starting point in this inquiry... is to determine whether the employee has produced sufficient evidence to raise a credible possibility that an automatically unfair dismissal has taken place. Having discharged the evidentiary burden of showing that the dismissal was for an impermissible reason, it is upon the employer to discharge its onus of proving as provided for in terms of s192 of the LRA that the dismissal was for an impermissible reason, it is upon the employer to discharge its onus of providing as provided for in terms s 192 of the LRA that the dismissal was for a permissible reason as provided for in terms of s188 of the LRA”
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- [5]
- [2005] 12 BLLR 1172 (LAC) at para 28
- [6] [1999] 12 BLLR 1317 (LC) at para 18. See also Barbara De Klerk v Cape Union Mart International (Pty) Ltd (2012) 33 ILJ 2887 (LC)
- [7] (2006) 27 ILJ 1854 (LC) at 1869
- [8] at 1748-9
- [9] See Kroukam v SA Airlink (Pty) Ltd (supra); NUMSA & Others v Driveline Technologies (Pty) Ltd & Another 2000 ILJ 142 (LAC) at 152J; Van der Velde v Business Design Software (Pty) Ltd & Another at 1745 I; and Jabari v Telkom SA (Pty) Ltd at 927A-B.
- [10] Reported under Rahn v Cheil South Africa (Pty) Ltd (2015) 36 ILJ 2657 (LC) where it was held that; “[17] The respondent argues that, as a matter of law, the applicant has not established that she was entitled to be in possession of the document or that she obtained it lawfully. Mr Boda argued that her use of the document at conciliation could not amount to a protected disclosure nor was it lawful.

[18] Whether or not the disclosure was a protected one as defined in the Protected Disclosures Act is best determined after hearing evidence at trial. Mr Lennox, for the applicant, suggested that the disclosure of the document at conciliation was, quite simply, shielded by rule 16 of the CCMA rules. I agree. That rule reads as follows: “1. Conciliation proceedings are private and confidential and are conducted on a without prejudice basis. No person may refer to

anything said at conciliation proceedings during any subsequent proceedings, unless the parties agree in writing.

2. No person, including a commissioner, may be called as a witness during any subsequent proceedings in the Commission or in any court to give evidence about what transpired during conciliation.”

[19] The intention of the rule was confirmed in *Hofmeyr v Network Healthcare Holdings (Pty) Ltd*. And in *Van Metzinger v Conservation Corporation* the court held that rule 16 does not permit reference to any discussions held during conciliation in subsequent proceedings and evidence relating to such discussions must therefore be rejected. As Van Niekerk J pointed out in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA*: “The dispute resolution system established by the LRA places a premium on conciliation.”

[20] Part of this premium must be that the parties at conciliation can speak freely and refer to documents without a residual fear that they could be disciplined as a result thereof. As the learned authors note in *Labour Relations Law: A Comprehensive Guide*, the term ‘said’ in CCMA rule 16 probably includes documents disclosed during conciliation.’

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[11] [2015] 36 ILJ 1511 (LAC) at para 22

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