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Woolworths v Commissioner Matlala NO and Others [2010] ZALC 188

JUDGEMENT: Francis J

Introduction

This is an opposed application to review and set aside an arbitration award made by the first respondent (the commissioner) in terms of which the commissioner had found that the third respondent's dismissal was substantively unfair and ordered that he be reinstated and be given a final written warning.

The third respondent is applying for condonation for the late filing of his answering affidavit. The condonation application was opposed by the applicant. The court held that a proper case has been made out for condonation.

The background facts

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The third respondent was employed by the applicant as a Flexi 28 Cellular Sales Consultant. Management in the Jacaranda store received a complaint from the textile manager of the Connect Brooklyn store concerning the nature of an email sent by the third respondent to a computer in his store. The email sent by the third respondent contained offensive, xenophobic and sexually explicit material. Not only is the content offensive, but also politically sensitive. Emails of this nature are prohibited by the applicant's policy.

The third respondent was charged with gross misconduct in that he had sent an e-mail containing offensive and explicit material. A disciplinary enquiry took place and he was found guilty of the charge against him and dismissed. He referred an unfair dismissal dispute to the CCMA.

Analysis of the facts and arguments raised

The commissioner correctly found that the third respondent was guilty of the misconduct that he was charged with. That finding is not being challenged on review. An employer must show that the rule that an employee has breached has been consistently applied by it.



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The court noted that this Court had found Edgars Consolidated LTD (Edcon) v CCMA & Others [2009] 1 BLLR 56 (LC) that an employer in dismissing an employee for transmitting racist email from a colleague to family and friends, but not disciplining the colleague was inconsistent and unfair. The employee was reinstated.

The court held that the commissioner has not committed any reviewable irregularities. The commissioner's finding that there was inconsistent treatment and that the dismissal was substantively unfair is a decision that a reasonable decision maker would have taken. The commissioner found that a final written warning should have been given. The application was dismissed.

