



**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN**

Reportable/Not Reportable

Case no: CA 12/2014

In the matter between:

**GEORGE ALEXANDER GREY**

**Appellant**

and

**EDUCATION LABOUR RELATIONS COUNCIL**

**First Respondent**

**P J WILLIAMS N.O**

**Second Respondent**

**DEPARTMENT OF EDUCATION**

**(WESTERN CAPE)**

**Third Respondent**

**Heard: 1 September 2015**

**Delivered: 23 October 2015**

**Summary:** Appellant, a high school educator for 28 years, was dismissed on grounds of unprofessional conduct for having had sexual relationship with a 17-year old learner in contravention of s17(1)(c) of the Employment of Educators Act. Arbitrator found dismissal substantively fair but awarded three months' compensation for procedural unfairness. Labour Court upheld arbitration award on review. On appeal held that arbitrator's decision fell within the bounds of reasonableness required. Conduct constituted breach of s17(1)(c) and sanction of dismissal appropriate. Appeal dismissed with costs.

Coram: Waglay JP, Coppin JA et Savage AJA

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## JUDGMENT

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SAVAGE AJA

- [1] Our Constitution provides that '(e)very child has the right to ...be protected from maltreatment, neglect, abuse or degradation'.<sup>1</sup> In *Centre for Child Law v Minister of Justice and Constitutional Development and Others*,<sup>2</sup> it was stated:

'The Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer, and their ability to make choices generally more constricted, than those of adults. They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults.'<sup>3</sup>

- [2] Section 17(1)(c) of the Employment of Educators Act 76 of 1998 (EEA) requires that an educator found guilty of having had a sexual relationship with a learner of the school where he or she is employed "*must be dismissed*" from his or her employment. With a high prevalence of educator-on-learner sexual misconduct in South Africa,<sup>4</sup> our law reflects that sexual misconduct with a learner constitutes an abuse, not only of the authority and responsibility vested in an educator, but of the rights of the child given that "...no child has equal power to say 'no' to a parental figure or to anticipate the consequences of sexual involvement with a caretaker. In such an unequal relationship the adult (educator) bears sole responsibility for...sexual activity with a minor".<sup>5</sup>

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<sup>1</sup> Section 28(1)(d) of the Constitution of the Republic of South Africa, 1996.

<sup>2</sup> 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC).

<sup>3</sup> At para 26.

<sup>4</sup> De Wet A and Oosthuizen I "Opvoeder-tot-leerder seksuele teistering in sekondêre skole" 2007 *TG Supp* 7(4) 86-102 at 87; SA Coetzee "Law and Policy Regulating Educator-on-Learner Sexual Misconduct" 2012 *Stell LR* 76-87 at 76.

<sup>5</sup> McGrath 2000 [www.mcgrathinc.com](http://www.mcgrathinc.com) 1-2 quoted in D Smit & V Du Plessis "Sexual Harassment in the Education Sector" PER / PELJ 2011(14)6 173 / 217-217/217.

- [3] The appellant, a high school educator employed by the Department of Education (Western Cape) for 28 years, was summarily dismissed from his employment on 6 April 2011 for having engaged in a sexual relationship with a female 17-year old grade 12 learner enrolled at the Cape Town school where he was employed. Aggrieved with his dismissal, he referred an unfair dismissal dispute to the Education Labour Relations Council. At the arbitration hearing, the learner, who was during the course of her evidence subjected to lengthy cross-examination by the appellant's legal representative, detailed the development of her relationship with the appellant during grade 12 from the exchange of telephone calls, text messages, e-mails and her receipt of gifts from the appellant, to him kissing her on school hiking club outings and at her home where he visited her on two school days when she was absent from school. She stated that on four occasions she and the appellant had sexual intercourse at his home from 23 March 2010 until 8 July 2010, detailing the circumstances of the intercourse and where in his house it occurred on each occasion. In addition, on an evening when she had told her parents she was attending a school fashion show, she left the school premises with the appellant who drove to a secluded area where the two kissed while she sat, at his request, on his lap in his vehicle naked from the waist up in order that her breasts could touch his chest.
- [4] A detailed account of the relationship, her infatuation with the appellant and three of the instances of sexual intercourse were detailed in the learner's diary, with the relationship unearthed when her mother found the diary and read its contents.
- [5] The appellant denied the relationship with the learner, dismissing it as a figment of her imagination and putting her evidence down to teenage fantasy. He made much of the fact that the learner had variously admitted and then denied the relationship to her parents and senior school officials and suggested that her evidence as a result lacked credibility and was unreliable. The learner admitted having changed her version in an attempt to protect the appellant, explaining that she felt responsible for the situation in which he found himself.

- [6] Having had regard to the evidence before him, the arbitrator found no plausible reason to doubt the truthfulness of the learner's evidence, no motive for her to lie and no evidence to support the appellant's contention that the sexual encounters she described were fantasy or imaginary. The arbitrator rejected as unreliable, either lacking in credibility or as constituting hearsay, the evidence that the appellant's wife, his son and an employee who it was claimed had variously been at his home on the dates he was accused of having had sexual intercourse with the learner. The learner's familiarity with the layout of appellant's house supported her version of events and the arbitrator rejected as "peculiar" the appellant's explanation that she had, in spite of his indication that she should not, walked through the house when at her request they had gone to his home to collect movies.
- [7] The arbitrator accepted that although the learner had felt under pressure to testify against the appellant, who she had at first naïvely resolved to protect, her evidence was nevertheless credible and reliable. Conversely, an adverse inference was drawn against the appellant who the arbitrator found to have failed to disclose the messages he had sent to the learner in an attempt to seek to influence a retraction from her or to "*contaminate her evidence*" in order that it should lack credibility. The arbitrator rejected the appellant's contention that the learner's intermittent changes in her version regarding the alleged relationship were lies, finding that they were most probably occasioned by the appellant's own attempts to unduly influence her to protect himself or cause sufficient doubt to render her evidence unreliable. The arbitrator concluded thus:

*'Even if my analysis in respect of a specific incident or sexual encounter is wrong, the totality of the Learner's evidence has enabled the Respondent to discharge its burden of proving, on a balance of probabilities, that the Applicant had a sexual relationship with the learner at the school where he is employed. In this regard, the applicant's own perception of the learner regarding his claim that the diary entries was her fantasies and imagination is indeed relevant because he had no such perception of that before the allegations emerged. Accordingly, he cannot escape taking responsibility for his own actions when his denial of being involved in a sexual relationship with*

*the learner is based on vilifying her evidence (and credibility) which he himself had contaminated. Therefore, the applicant's submission that the learner's evidence is totally unreliable and untruthful fails.'*

- [8] The arbitrator concluded that a sexual relationship with the learner has been shown to exist and that in spite of the appellant's years of service and clean disciplinary record, his dismissal was substantively fair. His dismissal was nevertheless found to have been procedurally unfair in that the chairperson of the disciplinary hearing had demonstrated bias towards the appellant during the hearing as a result of which he was awarded three months' compensation.
- [9] The appellant, dissatisfied with the outcome of the arbitration, took the matter on review to the Labour Court (Visagie AJ) claiming that the arbitrator had committed a number of reviewable irregularities which justified the setting aside of the award. The Court *a quo* found no reviewable irregularity to have been committed by the arbitrator, who had not misconceived the nature of the enquiry before him. The arbitrator's assessment of the evidence was not faulted and although the learner's diary was found less relevant, the Court *a quo* found that the conclusion of the arbitrator that a sexual relationship existed was one that a reasonable decision-maker could reach on the material before him. It followed that the review application was therefore dismissed with no order made as to costs.
- [10] The appellant now appeals against the judgment of the Labour Court, with leave of that Court. At the outset of the appeal hearing and with no opposition raised by the third respondent, the appeal was reinstated. This followed the appeal having been deemed to have been withdrawn given that the record had not been filed within the time period provided in Rule 5(17)<sup>6</sup> with no extension of the period within which to do so had been granted by the Judge President.
- [11] The appellant on appeal contends that the Court *a quo* erred in finding that: the arbitrator had not misconceived the nature of the enquiry before him; that

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<sup>6</sup> Rule 5(8) states: '*The record must be delivered within 60 days of the date of the order granting leave to appeal, unless the appeal is noted after a successful petition for leave to appeal, in which case the record must be delivered within the period fixed by the court under rule 4(9).*'

the arbitrator had properly analysed the evidence which showed that a sexual relationship with the learner was proved; and that the decision of the arbitrator was one which a reasonable decision-maker could have reached on the material before him. In doing so, the appellant attacks the arbitrator's finding that the entries in the learner's diary were not indicative of fantasies but rather recorded actual events on the basis that this was not supported by the evidence; and with the learner's apparent inability to explain what had happened to the appellant's semen after the instances of alleged sexual intercourse.

- [12] In *Herholdt v Nedbank Ltd*<sup>7</sup> the Supreme Court of Appeal made clear that the review of an arbitration award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA, being misconduct committed by the arbitrator, a gross irregularity committed in the arbitration proceedings; or in circumstances in which the arbitrator exceeded his or her powers:<sup>8</sup>

*'For a defect in the conduct of the proceedings to have amounted to a gross irregularity as contemplated by Section 145 (2)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'*<sup>9</sup>

- [13] Having had regard to the record, there is no basis on which to support a finding that the arbitrator misconducted himself or exceeded his powers, nor

<sup>7</sup> 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA).

<sup>8</sup> S 145(2) provides that: "A defect referred to in subsection (1), means-

(a) that the commissioner-

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;  
(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or  
(iii) exceeded the commissioner's powers; or

(b) that an award has been improperly obtained."

<sup>9</sup> At para 25. See too *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* (2014) 35 ILJ 943 (LAC) at para 14 with reference to *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC).

can it be said that the arbitrator misconceived the nature of the enquiry before him. The arbitration award contained a careful assessment of the extensive evidence before the arbitrator, including the two distinct versions placed before him. The arbitrator approached the irreconcilable versions before him in the manner set out in *SFW Group Ltd and Another v Martell et Cie and Others*.<sup>10</sup> He made findings as to the credibility of the various factual witnesses, their reliability and the probabilities. In doing so, he cannot be faulted for the manner in which he approached the evidence in the matter. His finding that a sexual relationship existed is supported by the learner's evidence and by the contents of her diary which provided a contemporaneous account of her relationship with the appellant.

[14] Mr De Kock submitted for the appellant that the learner's inability to explain what happened to the appellant's semen following intercourse should properly have led to her version having been viewed with suspicion. However, having had due regard to the naivety and inexperience of the learner, who on her own version had not engaged before in sexual intercourse, the arbitrator committed no reviewable irregularity in accepting the credibility and reliability of her evidence and the truthfulness of her account. In addition, the arbitrator's finding that the appellant had sought to influence the learner not to testify and to contaminate her evidence was a reasonable conclusion given that it was supported by the evidence before him which illustrated the extent to which the appellant had, in an attempt to further his own cause, abused his authority at the expense of an inexperienced young woman who is more than 30 years his junior.

[15] Furthermore, in placing reliance on the contents of the learner's diary, which amounted to a contemporaneous account which supported her version of events, the arbitrator did not misconduct himself in the manner contemplated in s145(2)(a) of the LRA. The arbitration award was justifiable in relation to the reasons given for it and fell within the range of decisions which a reasonable decision-maker could have made on the material before him. It follows that the

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<sup>10</sup> 2003 (1) SA 11 (SCA) at para 5.

Labour Court correctly dismissed the review application and there is no plausible basis for this Court to find differently and uphold the appeal.

[16] The appellant did not dispute that in the event of his having been found to have had a sexual relationship with a learner, s17(1)(c) of the EEA requires that the sanction of dismissal must be imposed. The arbitrator had regard to the mitigating factors which favoured the appellant, including the appellant's length of service and his clean disciplinary record, and concluded that the nature of the misconduct nevertheless warranted dismissal. Where an educator has abused the position of trust in which he is employed, and given that continued employment would require further and ongoing interaction with and exposure to children, dismissal is "*a sensible operational response to risk management*".<sup>11</sup> Section 17(1)(c) provides as much and the arbitrator's finding that dismissal was fair is beyond reproach.

[17] On the issue of costs, Mr *De Kock* conceded that there is no reason in law or fairness as to why costs should not follow the result. There is in my mind no reason to find differently. It follows that the appeal falls to be dismissed with costs.

#### Order

[18] In the result, the following order is made:

1. The appeal is dismissed with costs.

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Savage AJA

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<sup>11</sup> *De Beers Consolidated Mines Ltd v CCMA and Others* [2000] 9 BLLR 995 (LAC) at para 22.



I agree

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Waglay JP

I agree

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Coppin JA

APPEARANCES:

FOR THE APPELLANT:

C de Kock instructed by Bagraims Attorneys

FOR THE THIRD RESPONDENT:

J van der Schyff instructed by the state  
Attorneys

LABOUR APPEAL COURT