IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA4/18

In the matter between:

EOH ABANTU (PTY) LTD **Appellant**

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

BONGANI KHUMALO N.O. **Second Respondent**

BRETT DANNEY **Third Respondent**

Heard: **30 May 2019**

Delivered: **15 August 2019**

Summary: Review application – employee dismissed for distributing valuable intellectual property of the employer to an acquaintance – commissioner finding that the categorisation of the charge not competent and found employee not negligence- held that:

Employers embarking on disciplinary proceedings, not being skilled legal practitioners, sometimes define or restrict the alleged misconduct too narrowly or incorrectly. Further that there is no requirement that competent verdicts on disciplinary charges should be mentioned in the charge sheet - subject though to the general principle that the employee should not be prejudiced.

Evidence proving that employee negligent and wrongfully distributed valuable intellectual property – appeal upheld and Labour Court's judgment set aside.

Coram: Waglay JP, Murphy and Savage AJJA

JUDGMENT

MURPHY AJA

[1] The appellant appeals against the judgment of the Labour Court (Steenkamp J) in which it dismissed the appellant's application to set aside the award of the second respondent ("the commissioner") holding the dismissal of the third respondent ("Danney") to be substantively unfair and awarding him compensation in the amount of R600,000.00, being the equivalent of 10 months' remuneration.

[2] The appellant provides payroll administration services. Danney commenced his relationship with the appellant in 2006 by rendering services to one of the appellant's clients, Wesbank, but through a company other than the appellant. In September 2010, he was employed by the appellant and continued from that time to render services to Wesbank as an employee. At the time of his dismissal in September 2011, he was the team leader for the Microsoft server administrators.

[3] The issues in this appeal require some understanding of software activation keys. These keys are 25 character codes, including letters and numbers. There are three relevant types of software licence product activation keys. First, a volume licence key used to activate multiple installations of a software product on multiple computers. Volume licence media is required to use this software. Second, a beta key which is used to activate pre-released software that is still being tested and is not commercially available on the market. It is common for software development companies such as Microsoft to make this software available for free download for technical people to evaluate prior to its release. These keys are freely available to the public. Third, a KMS key,

which is an activation key embedded in the software product itself with the activation being done on the organisation's internal server rather than on the internet.

[4] Wesbank purchased from Microsoft 500 "multiple activation keys" for Windows 7 Professional and 5000 multiple activation keys for Windows Office 2010. The keys were intended for use by Wesbank employees for official purposes. Wesbank prohibited third parties from utilising the software licences for which it had paid.

[5] In 2011, Danney's girlfriend, Monica Sabbioni ("Sabbioni"), a database administrator, asked him to assist with the installation of Microsoft Office software on her mother's personal computer. On 20 June 2011, Danney sent two beta keys to Sabbioni's mother which he had privately downloaded. Sometime after sending these beta keys, Sabbioni asked Danney to resend them. In response to this request, on 10 August 2011, Danney sent another e-mail to Sabbioni's mother. This time he sent a volume licence key which he downloaded from the appellant's server. He said he did so after checking on the KMS server and thinking he was sending the beta key he had previously sent. He explained that he did not simply re-send the original e-mail of 20 June 2011 containing the beta keys because he could not find it in his e-mail sent box.

[6] The key did not work and Sabbioni's mother was not able to install the software. Danny claimed that he thought this was because the computer in question was out-of-date. It transpired later that the volume licence key was unusable because Sabbioni's mother did not have the requisite volume licence media and the key was defunct.

[7] The e-mail of 10 August 2011 was picked up by internal forensic investigators a few weeks after it was sent. Danney was called to a meeting and asked by his manager ("Bruwer") whether he had ever sent out a Wesbank's key and he answered that he had not. Bruwer suggested that he check. Danney recalled that he had sent keys to Sabbioni's mother and assumed he had done nothing wrong. He went to check with the desktop support personnel

who confirmed that the key he had downloaded and sent on 10 August 2011 was, in fact, the volume licence key. He testified that he had not picked this up because the volume licence key did not appear on the KMS server where he had checked. After learning that he had sent a volume key, he informed the investigators of this.

[8] Danney was suspended on 14 September 2011. A disciplinary hearing took place on 19 September 2011. It is common cause that the disciplinary policy of Wesbank applied to Danney. He was charged with the following:

> '1. Contravention of section 4.2.1. of the Wesbank disciplinary code namely, theft, fraud, dishonesty or the unauthorised removal of any material from the Bank, or from any person or premises where such material is kept in that you dishonestly distributed the Wesbank Microsoft office licence keys to a Raymond Billson and Roberta Sabbioni on 20 June 2011 and again on the 10th of August 2011.
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> 2. Contravention of section 4.2.9 of the Wesbank disciplinary code namely, being in breach of the Bank's confidentiality agreements and/or by divulging such confidential information, in that you divulged information you obtained through your position as Team Leader Server Administration, to external unauthorised personnel.
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> 3. Contravention of section 4.2.19 of the Wesbank disciplinary code namely, disregarding or breaching the bank's code of ethics, in that you dishonestly distributed the Wesbank Microsoft Office licence keys to a Raymond Billson and Robert Sabbioni on 20 June 2011 and again on the 10th August 2011.'

[9] Danney was found to have committed the offences although it was not established that he had acted intentionally. He was dismissed on 29 September 2011 for gross negligence. He then referred a dispute alleging unfair dismissal to the second respondent ("the CCMA"). The commissioner found the dismissal was procedurally fair but substantively unfair because Danney had been found guilty of the offence of gross negligence with which he had not been charged. He reasoned as follows:

> 'It is common cause that the chairperson of the disciplinary enquiry could not find any dishonesty on the applicant's part but instead he found the applicant's actions grossly negligent. I tend to agree with the applicant's representative that (a) charges 1 and 3 required respondent to prove intent on the applicant's part (b) the test for negligence is whether a reasonable person in the position of the applicant would have foreseen the harm resulting from the acts or omissions and would have taken steps to guard against that harm and (c) that the test for dishonesty and negligence are mutually destructive. It is trite law that a chairperson cannot find the applicant negligent when he was not alleged to have been negligent. It is irregular for the chairperson to find the applicant guilty on some charges, on one hand, and having changed some of the charges after the conclusion of the enquiry on the other hand, but found negligence on the part of the applicant……
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> Albeit it is apparent that the charge in respect of 4.2.21 of the code, as contended by the applicant, would have properly encompassed the actions of the applicant, I find the respondent is bound by the choices it made at the time of charging the applicant.'

[10] The commissioner did not canvass whether dismissal was an appropriate sanction for the negligence in question. However, it is clear that he was favourably disposed towards Danney, whom he considered a satisfactory and honest witness for having admitted his error once he had discovered it.

[11] In dismissing the application for review, the Labour Court concluded:

> 'Perhaps most importantly, Mr Lennox argued that the arbitrator placed too much emphasis on the charge of dishonesty as opposed to gross negligence. He referred in this regard to *Myers*:[1]
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> > 'Before dealing with the issue of sanction, I need to re-emphasise that an employer is not and cannot be expected to frame a charge sheet in respect of misconduct committed by an employee as one would prepare a charge sheet in a criminal matter. The importance of a so-called charge sheet in a misconduct enquiry is to set out the allegation that constitutes the misconduct so that the employee is aware of the case he or she is

[1] *National Commissioner, SAPS v Myers* [2012] 7 BLLR 688 (LAC) at para 97.

> required to answer. It is the allegations that constitute the misconduct which must be considered and a conclusion arrived thereon.'

That much is trite. But in this case, the employee was charged with dishonesty. That is the case he went to meet and that is the case that the employer could not prove. The arbitrator correctly found that the employer did not discharge the onus of proving intent, and thus could not prove the misconduct that it had alleged. That is why the dismissal was unfair. That conclusion is not so unreasonable that no other decision-maker could come to the same conclusion.'

[12] The essence of the charge against Danney was "theft, fraud, dishonesty or the unauthorised removal of any material from the Bank, or from any person or premises where such material is kept in that you dishonestly distributed the Wesbank Microsoft office licence keys". The finding of both the commissioner and the Labour Court was to the effect that gross negligence and negligence were not competent verdicts on the charge and that the dismissal was substantively unfair because the element of dishonesty had not been proved.

[13] The appellant contends that the decision of the commissioner was unreasonable and tainted by a material error of law. It submitted that Danney was aware of the alleged conduct comprising the charge of which dishonesty was only one element and thus was adequately informed of the case he had to meet. The charge, it argued, essentially comprised the unauthorised appropriation of the licence keys which were the property of Wesbank.

[14] The appellant submitted also that Danney's version was implausible and that the commissioner erred in concluding that his honesty was confirmed by his reporting of the error. There may be merit in these contentions, especially considering how the offence came to be discovered by Wesbank's forensic investigators. However, for reasons that follow, the issue may be confined to determining whether the commissioner acted unreasonably in concluding that a finding of negligence was not a competent verdict under the charge.

[15] One of the key elements of fairness is that an employee must be made

aware of the charges against him. It is always best for the charges to be precisely formulated and given to the employee in advance of the hearing in order to afford a fair opportunity for preparation. The charges must be specific enough for the employee to be able to answer them. The employer ordinarily cannot change the charge, or add new charges, after the commencement of the hearing where it would be prejudicial to do so.[2] However, by the same token, courts and arbitrators must not adopt too formalistic or technical an approach. It normally will be sufficient if the employee has adequate notice and information to ascertain what act of misconduct he is alleged to have committed. The categorisation by the employer of the alleged misconduct is of less importance.[3]

[16] Employers embarking on disciplinary proceedings, not being skilled legal practitioners, sometimes define or restrict the alleged misconduct too narrowly or incorrectly. For example, it is not uncommon for an employee to be charged with theft and for the evidence at the disciplinary enquiry or arbitration to establish the offence of unauthorised possession or use of company property. The principle in such cases is that provided a workplace standard has been contravened, which the employee knew (or reasonably should have known) could form the basis for discipline, and no significant prejudice flowed from the incorrect characterisation, an appropriate disciplinary sanction may be imposed.[4] It will be enough if the employee is informed that the disciplinary enquiry arose out of the fact that on a certain date, time and place he is alleged to have acted wrongfully or in breach of applicable rules or standards.

[17] In short, there is no requirement that competent verdicts on disciplinary charges should be mentioned in the charge sheet - subject though to the general principle that the employee should not be prejudiced. Prejudice normally will only arise where the employee has been denied knowledge of the case he had to meet. Prejudice is absent if the record shows that

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[2] *Transport and General Workers Union and another v Interstate Bus Lines (Pty) Ltd* (1988) 9 ILJ 877 (IC).
[3] *Durban Confectionary Works t/a Beacon Sweets v Majangaza* (1993) 14 ILJ 663 (LAC); and *National Commissioner, SAPS v Myers* [2012] 7 BLLR 688 (LAC) at para 97.
[4] See Le Roux and Van Niekerk: *The South African Law of Unfair Dismissal* (Juta 1994) 102 and 157.

had the employee been alerted to the possibility of a competent verdict on a disciplinary charge he would not have conducted his defence any differently or would not have had any other defence.[5]

[18] The finding of the commissioner that it was not competent to sanction Danney for negligence was accordingly a material error of law and unreasonable, and the Labour Court erred in upholding it.

[19] The requirements for a dismissal based on negligence are that the employee failed to exercise the standard of care that can reasonably be expected of him through conduct that caused loss or potential loss to the employer.

[20] The evidence establishes that Danney was at least negligent. He wrongfully distributed valuable intellectual property of one of the appellant's main clients to an acquaintance. Before sending the second e-mail, he downloaded a volume licence key. As the team leader working daily with software applications, he was required to observe a high standard of care in dealing with the intellectual property under his control. His conduct could have caused reputational harm to the appellant in that Wesbank might reasonably have concluded that its intellectual property was not in safe hands.

[21] Danney submitted that had he been charged with negligence (as a main or alternative charge) the evidence led would have been different, including different submissions in mitigation and aggravation in the event of a guilty finding. He failed, however, to identify what that different evidence would have been. In any event, the negligence was established on Danney's own version. He took insufficient care when downloading the volume licence key. When it was put to him in the arbitration that he had been negligent, he denied that he was guilty of negligence. That compounds his folly and intimates a lack of appreciation of the reputational harm to the appellant his conduct might have caused. He was entrusted as a custodian of the intellectual property of one of the appellant's clients and misappropriated it in a manner that could have damaged the trust underlying the commercial relationship.

[5] The principle is derived from our law of criminal procedure – see *S v Mwali* 1992 (2) SACR 281 (A).

[22] The fact that the codes could not be used without certain media is neither here nor there. The potential for reputational harm and perhaps a breach of the licensing conditions by Wesbank remained.

[23] The record in this matter is incomplete and was partially reconstructed. In particular, there is no record of the disciplinary hearing and its decision on sanction. The parties nevertheless agreed to proceed on the evidence before us. Given the nature of the offence, the seniority and role of Danney and his short period of service in the employ of the appellant (less than one year), the appellant justifiably lost trust in the continuation of an employment relationship. Dismissal was an appropriate sanction in the circumstances.

[24] The appellant does not seek costs.

[25] In the premises, the appeal is upheld and the order of the Labour Court is substituted with the following:

> 'The award issued by the second respondent on 13 April 2012 is reviewed and set aside and the dismissal of the third respondent is declared to have been both substantively and procedurally fair.'

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JR Murphy

Acting Judge of Appeal

I agree

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B Waglay

Judge President

I agree

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K Savage

Acting Judge of Appeal

APPEARANCES:

FOR THE APPELLANT: Adv M A Lennox

Instructed by Botoulas Krause & Da Silva Inc

FOR THE THIRD RESPONDENT: Adv T Venter

Instructed by: Allardyce & Partners