



- (1) Reportable Yes/No
(2) Of interest to other Judges: Yes/No
(3) Revised

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR2661/21

In the matter between:

MELANIE SMIT

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER T MNISI N.O

Second Respondent

ASHTON INTERNATIONAL

COLLEGE (PTY) LTD

Third Respondent

Delivered: 02 March 2026

JUDGMENT

GXOGXA, AJ

Introduction

- [1] This matter concerns an application seeking the review and setting aside of an arbitration award that was issued by the second respondent on 21 November 2021, under the auspices of the first respondent and case number GAEK3442-21. The applicant requests that the award be substituted with an order as follows:
- 1.1 That the compensation granted for procedural unfairness be significantly increased, and that the applicant's dismissal be declared substantively unfair; alternatively,
 - 1.2 That the matter be remitted to the first respondent for a rehearing before a commissioner who is not the second respondent.
 - 1.3 That any respondents opposing this application be ordered to pay the costs of the application jointly and severally, with the effect that payment by one absolves the other(s).
- [2] The applicant, Ms Melanie Smit (Smit), commenced employment with the third respondent in 2002. At the time she was dismissed, she held the position of administration and marketing manager, a role in which she undertook a wide range of responsibilities, including oversight of the third respondent's finances.
- [3] On 14 April 2021, the applicant was suspended from her duties. Subsequently, she was charged with misconduct pertaining to bribery, fraud, theft or unauthorised acquisition and use of the company's intellectual property, accomplice, colluding, conspiring, assisting, abetting or instigating dishonesty in that she assisted a dismissed employee that was under legal proceedings with the company to obtain information without authorization and assist a dismissed employee to elicit financial settlement from employer via her actions, as well as the distribution of such property to an individual who was not an employee, or to a third party.

- [4] A disciplinary hearing was convened, at the conclusion of which the applicant was dismissed.

The Material Background

- [5] Following her dismissal, the applicant, feeling aggrieved by the decision, referred a dispute to the first respondent. The applicant alleged that her dismissal was both procedurally and substantively unfair, seeking redress for the manner in which her employment was terminated. The applicant sought compensation for her unfair dismissal.
- [6] In respect of procedural fairness, the applicant claimed several procedural shortcomings during the disciplinary hearing. She asserted that she was denied the opportunity to call Mark Brown as her witness and she was not permitted legal representation at the hearing. Furthermore, she alleged that the chairperson presiding over the hearing was biased, which compromised the fairness of the process.
- [7] In respect of substantive fairness, the applicant disputed the claim that she had breached any workplace rule. She maintained that there was no valid justification for her dismissal based on the alleged misconduct.
- [8] Upon conclusion of the arbitration process, it was determined that the applicant's dismissal was substantively fair but procedurally unfair. This distinction recognised that, while the grounds for dismissal were justified, the process by which she was dismissed did not adhere to procedural requirements.
- [9] As a result a ruling ordering the third respondent to compensate the applicant an amount of R15 793.76 by no later than 17 December 2021 was issued.
- [10] It is this amount that is sought to be reviewed and set aside with the applicant now seeks to have this compensation amount reviewed and set aside, challenging the sufficiency of the award in light of the procedural unfairness determined at arbitration.

The Summary of the Grounds of Review

- [11] The applicant, dissatisfied with the outcome of her dismissal, initiated an unfair dismissal dispute before the first respondent. Her complaint was based on both procedural and substantive unfairness, contending that the dismissal was flawed not only in the manner in which it was conducted but also in the reasons provided to justify it.
- [12] The applicant further asserts that the commissioner committed misconduct or made a material error of law. Specifically, she argues that the commissioner failed to consider the absence of reasonable evidence to support the finding that the dismissal was substantively fair.
- [13] In support of her contention, the applicant maintains there was no valid reason for her dismissal. She points out that no witness was available to testify regarding the alleged inducement of a financial settlement with Mr Brown.
- [14] Furthermore, it is evident that Mr Brown had access to the relevant email before his departure as both an employee and director of the company. The applicant also notes that she was unable to fully present her defence due to the absence of legal representation.
- [15] The applicant additionally claims that the third respondent engaged in forum shopping by pursuing criminal charges, which were subsequently dismissed by the National Director of Public Prosecutions (NDPP) for lack of evidence. The applicant asserts that the commissioner disregarded this aspect of the case.
- [16] The applicant's fourth ground for review relates to the alleged failure to demonstrate remorse. She argues that it is unreasonable to expect an individual to accept responsibility for actions they did not commit.

The Evidence appearing from the disciplinary hearing and CCMA record

- [17] The respondent led two witnesses, Ms Cloete and Ms Hullet, former being Business Manager for Ashton Colleges and latter being an Information Technology manager of the respondent.
- [18] Ms Cloete's evidence was that the applicant forwarded an email containing a parent's financial situation to her Gmail account and this email ended up in Mr Brown's documentary evidence at Mr Brown's CCMA hearing against the respondent long after Mr Brown was dismissed from the school.
- [19] Evidence of Ms Cloete proceeded to state Mr Brown did not have the specific email forwarded to applicant's Gmail account and he could not have it as he was already dismissed in April 2021 at the time to applicant forwarded the email.
- [20] Mr Brown is the applicant's brother who was dismissed by the third respondent in November 2020. It was found with the assistance of Ms Hullet, that the applicant forwarded the email to her private Gmail account on 6 April 2021.
- [21] During the cross-examination of Ms Cloete, Ms Cloete agreed that Mr Brown was a director of the third respondent until 12 April 2021 but she disputed that Mr Brown could use the company information after he was dismissed thus changing her version from the earlier one that Mr Brown could not have the email as he was not one of the recipients.
- [22] It became clear during the cross-examination of Ms Cloete that the basis of the belief that Mr Brown could not have had access to the email was because he was suspended and his emails were locked the day he was dismissed and it is now known that Mr Brown ceased to be a director of the company on 12 April 2021.
- [23] Ms Hullet confirmed that the applicant forwarded the email she could no longer recall to her Gmail account. Ms Hullet also found that at the time when the email was sent, Mr Brown had already returned his laptop to the respondent and the

email was already locked out by her. The laptop was returned on 25 November 2020.

- [24] Upon scrutinising the documents discovered by Mr Brown, the email in question was clearly coming from a Google Mail and Ms Hullet could not explain any further as she stated she does not work on a Google server.
- [25] The applicant presented her evidence, and she was supported by Mr Brown. The applicant's testimony was that she was suspended on 14 April 2021 and later she was subjected to a disciplinary hearing on 21 April 2021.
- [26] In preparation for her disciplinary hearing, she through her legal representatives requested to call Mr Brown as her witness.
- [27] Her request was declined without any reason. This was done despite the respondent's policy providing for one to call witnesses for a hearing.
- [28] The email from about financial situation of parents was sent during Mr Brown's tenure as a Director of the third respondent and an EXCO member and Mr Brown would have been privy to it and he would have been copied on the email.
- [29] In response to the allegation of bribery, the applicant denied this allegation on the basis that the information stated in that charge is a public domain information and financial liaison, bursar and principals were all privy to it. Mr Brown was also entitled to that information.
- [30] On the charge of collusion, the applicant denied it and stated that there was no proof presented of her eliciting financial settlement and on industrial espionage, there was also no evidence there in that she never gave any information to Mr Brown.
- [31] The explanation for forwarding the email to her Gmail account on 6 April 2022, was that she was constantly in hospital as her husband was sick and there was a likelihood that she would be called for Mr Brown's hearing to be a witness for the third respondent so she wanted to prepare for that likelihood.

- [32] The applicant testified in the disciplinary hearing that when she discussed the issue of an email with Mr Brown, Mr Brown stated that he had set up a programme as a director to access anyone's email or anyone's computer.
- [33] Mr Brown testified that during hard lockdown in 2020 he had directed that he wanted to know everything about the company in particular when parents were giving the three months' notice to withdraw their child from school. He testified that he was signing off each family leaving the school in order to determine whether the numbers were increasing or decreasing, and he confirmed it is at that stage that the email in question would have come into his knowledge.
- [34] Even if he did not have the email, because he was still a director of the company and if it was proven he received it from the applicant, that would have been well within his right because he was not an outsider, if one has regard to the fact that he was the director of the third respondent until 12 April 2021.
- [35] Mr Brown testified that the settlement at his arbitration was entered into between him and Mr Buys, prior to the arbitration and no lawyer was involved and as such that settlement was not induced by any document.
- [36] The entire version of Mr Brown in relation to how he obtained the email was not put to the witnesses for the respondent. Mr Brown's evidence on how the settlement of his CCMA matter was reached was also not disputed as the person who represented the third respondent was not called at all.

Commissioner's analysis of evidence

- [37] This court cannot find fault with the analysis of evidence in as far as it relates to procedural fairness. The commissioner was correct in finding that the applicant's dismissal was procedurally unfair.
- [38] In his analysis of evidence relating to substantive fairness, the commissioner stated that Ms Smit could not justify sending an email entailing financial position of a parent to her private gmail account.

[39] The commissioner accepted that this email was exchanged between brother and sister and it is the very email that was used by Mr Brown during the arbitration at CCMA and this email led to the settlement of the dispute.

[40] It was also found that the applicant had no reason to send the email to her Gmail account other than to assist Mr Brown and as such she contravened the respondent's rules.

The Law

[41] The review court is not empowered to determine a dispute, its power is to correct the irregularities of the previous process.

[42] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration*¹, the test for review was affirmed on review as follows:

“A review court must ascertain whether the arbitrator considered the principal issue before him/her, evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decisions he or she arrived at.”

[43] The court is not required to assess every individual factor in isolation when determining how the commissioner addressed each aspect.

[44] The reviewing court must evaluate the totality of the evidence presented. The ultimate question is whether the commissioner's decision is one that a reasonable decision-maker could reach.

Analysis of Evidence

[45] Upon reviewing all evidence, including the omission of calling Mr Buys who reportedly entered into a settlement with Mr Brown as a witness, and considering inconsistencies in Ms Cloete's testimony, the court concurs with the applicant

¹ (2014) 35 ILJ 943 (LAC) at para 16.

that a reasonable commissioner would not find the dismissal in this matter to be substantively fair.

- [46] There was no substantive information provided beyond the assertion that company email was to be used solely for business communication, which the applicant acknowledged.
- [47] The presumption that the applicant forwarded an email to her Gmail account and subsequently shared it with her brother, who allegedly used it to persuade the third respondent to settle the case, is unsupported.
- [48] The conclusion that the applicant's email sent to her Gmail account was used by Mr Brown to induce the third respondent to settle his CCMA case lacks evidentiary basis, as no proof regarding the terms or grounds for settling Mr Brown's CCMA matter was presented.
- [49] The sole evidence regarding the settlement of Mr Brown's CCMA matter is Mr Brown's own testimony, indicating the settlement resulted from negotiations with Mr Buys at the door of first respondent without a formal hearing. This testimony remained uncontested by the third respondent and therefore stands.
- [50] It is established law that when an employee's dismissal is undisputed, the burden rests on the employer to demonstrate the fairness of such dismissal. The third respondent failed to meet this responsibility.
- [51] From the evidence led, the court finds that the applicant was unfairly affected by circumstances arising from her familial relationship with Mr Brown. Notably, it is apparent that the applicant experienced adverse consequences due to being Mr Brown's sister. This association led to unjust hardship for the applicant since 2021.
- [52] The applicant has informed the second respondent that she was not seeking reinstatement to her previous position, but rather requests compensation as an appropriate remedy for the unfair treatment endured.

[53] Given the applicant's history of exemplary conduct and a clean employment record, the court considers it fair and equitable to award increased compensation from half a month to ten months.

[54] In the premises, the following order is made:

Order

1. The arbitration award issued by the second respondent in case number GAEK3442-21 is hereby reviewed and set aside.
2. The arbitration award is substituted with an order that the dismissal of the applicant was both procedurally and substantively unfair.
3. The third respondent is ordered to pay the applicant compensation equivalent to 10 months' salary which is payable on or before 31 March 2026.
4. There is no order as to costs.

A. Gxogxa

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Mr Levin of Clifford Levin Incorporated

For the First and Second Respondent : No appearance

For the Third Respondent : Adv S Tilly

Instructed by : Cliffe Dekker Hofmeyr Attorneys