



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



7 September 2026

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: 2025-087146

In the matter between:

NATIONAL STUDENT FINANCIAL AID SCHEME

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

C M BENNETT N.O.

Second Respondent

ZENOBIABRAHAMS

Third Respondent

Heard: 3 September 2026

Delivered: 7 September 2026

JUDGMENT

DE KOCK, AJ

Introduction

- [1] This is an application in terms of s 145 of the Labour Relations Act (the LRA)¹ to review and set aside an arbitration award of the second respondent, Commissioner C M Bennett (the Commissioner), issued under the auspices of the first respondent under CCMA case number WECT17350-23 and dated 29 April 2025. The applicant is the National Student Financial Aid Scheme (NSFAS), a public entity established by statute and the third respondent's former employer. The first respondent is the Commission for Conciliation, Mediation and Arbitration (the CCMA). The third respondent is Ms Zenobia Abrahams, who was reinstated in terms of the arbitration award. Neither the CCMA nor the Commissioner opposes the application. Ms Abrahams opposes the application. Adv I Jamie SC appeared for NSFAS and Mr M Aggenbach for Ms Abrahams.
- [2] The Commissioner found the dismissal procedurally fair but substantively unfair. He ordered retrospective reinstatement with effect from 12 May 2025, with continuity of employment and full accrual of benefits, and backpay of R1 045 000, being 20 months' remuneration at R52 250 a month, payable by 25 May 2025.
- [3] The notice of motion seeks the setting aside of the award, costs against any respondent who opposes, and further or alternative relief. It does not, in terms, seek substitution or remittal. At the hearing, however, Mr Jamie SC submitted that the relief sought, in the event that the review succeeds, is that the award be set aside and the dispute remitted to the CCMA for arbitration afresh before a different commissioner. The Court proceeds on that footing.

Background

- [4] The following facts are common cause or are not disputed. Ms Abrahams was engaged by NSFAS on 1 November 2006. At the time of her dismissal, she held the position of Accountant: Budgeting and Expenditure, was a shop steward of the Public Servants Association (the PSA) and earned a gross basic salary of R52 250 a month. Between 17 March and 11 October 2022,

¹ Act 66 of 1995, as amended.

she forwarded or blind-copied nine work emails, containing NSFAS information, to her personal Gmail account. That she did so is common cause.

[5] Ms Abrahams was placed on precautionary suspension on 17 March 2023. A disciplinary hearing before an external chairperson, Ms A Ralarala, sat between 26 April and 18 August 2023 and resulted in a finding on the merits and a recommendation of summary dismissal. She was dismissed on 14 September 2023. The arbitration was heard on 15 and 16 April 2025, and the award followed on 29 April 2025.

[6] The charge, as amended, was recorded as common cause in the pre-arbitration minute in these terms:

‘1. Charge 1: Gross Negligence / Intentional Disclosure of privileged and confidential information

1.1. In that during the period January 2022 to October 2022 you, without authorisation, blind copied your personal email address, outside of the NSFAS network, on several confidential emails containing sensitive NSFAS information.

1.2. In doing so, you exposed the organisation to reputational, financial and organisational risk. Your conduct also constitutes a breach of, amongst others:

(a) Clause 14.5.2 (iv) of the NSFAS Information Security Policy which, in order to prevent data leakage, the installation of unauthorised applications, or the spread of malware, prohibits the forwarding of work-related emails to personal accounts; and

(b) Clause 5.4.3 of the NSFAS ICT Security Management and Acceptable Use Policy which sets out various restrictions on email usage.’

[7] Two entries in the NSFAS Disciplinary Policy Annexure are in issue, and their content is common cause. Item 15 reads ‘Negligent and/or intentional disclosure of privileged and confidential information or documents’, for which the sanction is dismissal on a first occurrence. Item 40 reads ‘Failure to follow

or observe NSFAS policies and procedures', for which the sanction is a final written warning on a first occurrence and dismissal on a second.

- [8] Two policies underlie the charge. The first is the ICT Security Management and Acceptable Use Policy (the Acceptable Use Policy), whose clause 5.4.3 sets out restrictions on email usage. The second is the Information Security Policy, whose clause 14.5.2 lists twelve prohibited acts to prevent data leakage, the installation of unauthorised applications or the spread of malware. Item (iv) of that list is to 'Forward work-related email messages to personal accounts'; item (vii), separately, is to 'Send or disclose confidential information to unauthorised people, violating NSFAS' policies or using email in a way that increases NSFAS' legal and regulatory liability'.

The award

- [9] The Commissioner's analysis runs from paragraph 17 to paragraph 25 of the award. It is short, and the case turns on a close reading of it. At paragraph 17 he recorded, as common cause, that Ms Abrahams had breached the IT policies in so far as they prohibit the forwarding of work emails to private accounts. The breach was therefore never in issue before him, and it is not in issue now.
- [10] At paragraph 18 he held that there had been no disclosure. His stated reasons were that NSFAS had led no evidence of any disclosure of privileged and confidential information or documents; that Ms Abrahams was herself already fully aware of the information; that she could not be described as an external party; and that the risk of the documents becoming available to, in his words, 'hackers and the like' was a consequence that had to be probable rather than merely possible to carry weight.
- [11] At paragraph 20 the Commissioner set out his test for gross negligence:
- 'Gross Negligence is an attitude of reckless disregard - despite knowing the probable consequences of an act or omission, the person proceeds with that particular act or omission. The courts have alluded to leaving the employer's property so exposed that thieves may carry it off.'

[12] At paragraph 21 he asked whether Ms Abrahams had acted with reckless disregard and found that she had not. He held that NSFAS had vastly overstated the risk, which he considered negligible, and he accepted her explanations for retaining the material, weighing them against NSFAS's reservation of a right to delete the contents of email accounts on its servers.

[13] Paragraph 22 is the pivot of the award. Having noted that NSFAS accepted the policies had not been socialised in the accustomed manner, and that the only policy acknowledged at log-on was the Acceptable Use Policy, which in the form submitted into evidence does not contain the prohibition on forwarding emails to private accounts, the Commissioner reasoned:

'In any event, both entries in the disciplinary code recorded above at paragraph 19 infer that the accused has knowledge of the policies. It would hardly be fair to discipline an employee for breach of a rule of which the employee was unaware, so logically, when the code refers to a failure to follow or observe a policy, it is referring to a failure on the part of someone who ought to have known better.'

[14] At paragraphs 23 to 25 the Commissioner concluded that the conduct fell under item 40, that NSFAS had failed to prove that dismissal was an appropriate sanction for the breach of rule, and that the dismissal was accordingly substantively unfair. He held that any procedural defect arising from the failure to consult the PSA had been cured.

The test on review

[15] The distinction between review and appeal is the frame within which this application must be decided, and both parties, correctly, began there. Under s 145 of the LRA, as informed by the Constitution, an arbitration award will not be set aside merely because the Court would have decided the matter differently. The award stands unless it is one that a reasonable decision-maker could not reach on the material before the Commissioner (*Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*).²

² 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); [2007] ZACC 22 at para 110.

- [16] Reasonableness is not, however, the only enquiry. The reasonableness of the outcome is tested together with the process by which it was reached. A review court must ask whether the arbitrator considered the principal issue before him, whether he undertook the enquiry the dispute called for and undertook it in the right manner, and whether the result is one a reasonable decision-maker could reach. Latent or patent irregularities warrant interference where, singly or cumulatively, they result in a misconceived enquiry or a decision that no reasonable decision-maker could reach (*Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*).³
- [17] That an error be present is not enough; it must be a material error. An error or irregularity is material where it has a distorting effect on the arbitrator's conception of the enquiry, on the delimitation of the issues, or on the outcome, such that the result is rendered unreasonable; and a reviewing court will not set an award aside for an error that could have made no difference to the result (*Head of the Department of Education v Mofokeng and Others (Mofokeng)*).⁴
- [18] Two limbs of the enquiry must be kept apart, because the parties' arguments occupy different grounds. The first is whether the outcome, on the material before the arbitrator, falls within the range of reasonable outcomes. The second is whether the arbitrator misconceived the nature of the enquiry and whether he asked and answered the right question at all. A misconception of the nature of the enquiry is a reviewable irregularity of a distinct order. Where it is established and is material, the award falls to be set aside not because its result is one the Court would not have reached, but because the arbitrator did not decide the question the dispute required him to decide. The Court has kept these two limbs distinct in what follows. A discrete, material error of law

³ (2014) 35 ILJ 943 (LAC); [2014] 1 BLLR 20 (LAC); [2013] ZALAC 28 at paras 14 and 16; *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA); [2013] ZASCA 97 at para 25.

⁴ (2015) 36 ILJ 2802 (LAC); [2015] 1 BLLR 50 (LAC) at paras 31 to 33; *SA Library for the Blind v Commission for Conciliation, Mediation and Arbitration and Others* (2019) 40 ILJ 422 (LC); [2018] 12 BLLR 1210 (LC); [2018] ZALCPE 33 at para 27.

is likewise a legitimate ground of review in its own right, and not merely a species of unreasonableness (*National Bargaining Council for the Road Freight and Logistics Industry v Deyssel NO and Others*).⁵

The parties' respective cases

- [19] NSFAS advances three grounds in its papers; a failure to determine whether the transmission was a disclosure, the imposition of an evidentiary threshold requiring probable rather than possible harm, and the application of a subjective rather than an objective test for gross negligence. As argued, however, they resolve into a single proposition: that the Commissioner misconceived the nature of the enquiry. The third of these grounds, that the Commissioner applied a subjective rather than an objective test for gross negligence, was not pressed in argument as a discrete ground of review; NSFAS accepted that the characterisation of the conduct as 'gross negligence' was, on the facts, of no moment, the repeated and deliberate blind-copying of confidential material to a personal account over several months being plainly intentional, and the Court accordingly does not decide, as a freestanding question, whether the test the Commissioner articulated was correct, but treats the complaint, with the others, as an aspect of the misconception of the enquiry.
- [20] The charge, NSFAS submits, was the forwarding of confidential information outside its controlled environment, in breach of clause 14.5.2(iv); the Commissioner, however, decided the case as though the charge were the disclosure of information to an external third party, a matter falling under clause 14.5.2(vii) which was never charged, and in doing so imposed a requirement of probable harm that no element of the charge contained. Having answered the wrong question, he classified the conduct under item 40 rather than item 15, and the sanction finding followed from that classification. NSFAS submits that the misconception is material and that the appropriate remedy is remittal.

⁵ (2025) 46 ILJ 1679 (LAC); [2025] 8 BLLR 790 (LAC); [2025] ZALAC 25 at para 42.

[21] Ms Abrahams answers that this is, in substance, a sanction review. The breach was common cause; the only live question was the appropriate sanction; and on that question the standard is reasonableness. The Commissioner applied the employer's own disciplinary code, which prescribes a final written warning for a first offence of the kind he found, and held that NSFAS had failed to discharge the onus, which rested on it, of proving that the trust relationship had broken down or that continued employment had become intolerable. On that footing, she submits, the outcome falls within the range of decisions a reasonable arbitrator could reach, and the grounds advanced are in truth grounds of appeal dressed as review. She relies in particular on the recent restatement of the sanction-review standard in *Mondi South Africa (Pty) Ltd v National Bargaining Council for the Wood and Paper Sector and Others (Mondi)*.⁶

Evaluation

[22] The starting point is what was, and what was not, in dispute. That Ms Abrahams committed the conduct described in charge 1.1; that she blind-copied, over a period of some seven months, nine confidential emails containing sensitive NSFAS information to her personal Gmail account is common cause, and the Commissioner so found at paragraph 17. What was in dispute was not whether that conduct occurred, but its character: whether it was to be treated as the negligent or intentional disclosure of privileged and confidential information under item 15 of the code, or as a mere failure to follow a policy under item 40. That characterisation drives the sanction, and it is the real question the arbitration had to decide.

[23] The charge, properly read, is clear, and it was not said at the arbitration to be unclear, ambiguous or misunderstood. Charge 1.1 sets out the conduct: the unauthorised blind-copying of confidential emails to a personal address outside the NSFAS network. The first sentence of charge 1.2 states the consequence said to follow from that conduct; exposure of the organisation to reputational, financial and organisational risk. The second sentence of charge

⁶ (2026) 47 ILJ 1858 (LAC); [2026] 8 BLLR 786 (LAC); [2026] ZALAC 20 at paras 12, 20 and 21.

1.2 then identifies the policy provisions said to have been breached in the doing of it: clause 14.5.2(iv) of the Information Security Policy and clause 5.4.3 of the Acceptable Use Policy. The gravamen of the charge is therefore the placing of confidential information onto a personal platform outside the employer's control. It is not, and it nowhere purports to be, an allegation that Ms Abrahams passed the information to some further, external person.

[24] That distinction is drawn by the policy itself. Clause 14.5.2 prohibits, at item (iv), the forwarding of work-related emails to personal accounts, and, separately and distinctly, at item (vii), the sending or disclosure of confidential information to unauthorised people. Ms Abrahams was charged under item (iv). She was not charged under item (vii). Yet the Commissioner's reasons at paragraph 18 for finding 'no disclosure'; that she was 'already fully aware of the information', and that she 'cannot be described as an external party' are reasons that go only to item (vii). They answer the question whether confidential information was passed to an unauthorised outsider. That was not the question the charge posed. Whether Ms Abrahams was herself aware of the information, and whether she was an external party, are immaterial to a charge of forwarding information out of the controlled environment, because the mischief at which item (iv) is directed is the removal of the information from the employer's control, whatever the identity or knowledge of the person to whose personal account it is sent. On this central question the Commissioner asked the wrong question and answered it.

[25] It may be said against this reading that the charge is headed 'Gross Negligence / Intentional Disclosure of privileged and confidential information', and that the Commissioner was therefore entitled, indeed invited, to ask whether a disclosure had occurred. That is the best point available to Ms Abrahams, and the Court has weighed it. It does not withstand scrutiny, for three reasons. The first is that a charge is read as a whole, and where its heading and its particulars diverge, it is the particulars that govern; the heading is a label, and the label is of less importance than the substance of

what the employee is called upon to answer. (*EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*).⁷

[26] The particulars here, in charge 1.1, identify the act charged as the unauthorised blind-copying of confidential emails to a personal account, and they tie it, in charge 1.2, to clause 14.5.2(iv); the prohibition on forwarding and not to clause 14.5.2(vii). The second is that 'disclosure' is not a synonym for disclosure to an outsider. The word is used in item 15 of the disciplinary code itself; 'disclosure of privileged and confidential information or documents' to describe the very conduct with which this charge is concerned, and it is item 15 for which NSFAS contended. Read in the light of the code it invokes, the heading points towards item 15, not away from it; it does not narrow the charge to a passing of information to a third party. The Commissioner's error was therefore not that he asked whether there had been a disclosure; he was entitled to but that he gave 'disclosure' a meaning, namely transmission to an external party, that neither the charge, nor the policy, nor item 15 of the code requires, and acquitted on that narrowed meaning. The third is that the Commissioner nowhere held that the heading entitled him to read a third-party element into the charge. He assumed it. An assumption is not a finding, and it is one the Court is satisfied was wrong. Whatever term the heading used, then, the misconduct prosecuted was defined by the particulars and by the policy provisions the charge invoked; namely, the unauthorised removal of confidential information to a personal account outside the employer's controlled environment. That is the conduct the Commissioner was required to characterise, and it is not answered by asking whether the information reached an outsider.

[27] The Commissioner compounded that misdirection by requiring that harm be probable rather than merely possible. He held that, for the risk of the material reaching 'hackers and the like' to 'carry weight', the consequence had to be probable and not merely possible, and, finding no such probability established, concluded that there had been no disclosure. But probability of

⁷ (2019) 40 ILJ 2477 (LAC); [2019] 12 BLLR 1304 (LAC); [2019] ZALAC 57 at paras 16 and 17.

harm is no element of the conduct charged. NSFAS is a public entity that holds the personal information of tens of thousands of students and is obliged to safeguard it. It is entitled, through rational policies whose lawfulness is not challenged in this review, to determine for itself what risks it will bear and to prohibit its employees from removing confidential information from its controlled environment, without having to prove, in any given instance, that harm was probable. The enquiry the Commissioner was required to undertake was not whether harm was probable, but whether the conduct charged was established. This was established. The Commissioner was then required to determine how it fell to be classified, and what sanction was appropriate. By making probable harm the touchstone, the Commissioner introduced a requirement the charge did not contain, and the policy does not impose, and he decided the matter on it.

[28] The consequence of the misdirection is not confined to paragraph 18. It carried directly into the classification of the conduct and into the sanction. Having found 'no disclosure', the Commissioner reasoned that the conduct was not the intentional disclosure of confidential information under item 15 but a failure to follow a policy under item 40, for which the code prescribes a final written warning on a first occurrence. The whole of his sanction reasoning, at paragraphs 23 to 25, proceeds from that classification: that the conduct is an item 40 matter; that a final written warning is the prescribed sanction; that NSFAS therefore failed to prove that dismissal was appropriate; and that the dismissal was, in consequence, substantively unfair. Remove the finding of 'no disclosure' and the classification that rests on it, and nothing in the award supports the sanction finding.

[29] It is at the point of materiality that this application is decided, and it is decided against the award. The Commissioner's error was not a stray remark that left the outcome untouched. It had a distorting effect on his conception of the enquiry, on his delimitation of the issues, and on the outcome, in the manner *Mofokeng* requires before an award will be disturbed. The sanction finding; the dispositive holding of the award is not independent of the misconception; it is its product. This is therefore not a case in which a correctly directed

arbitrator would necessarily have reached the same result. On the contrary: an arbitrator who recognised the conduct for what the charge alleged it to be; the intentional and repeated removal of confidential financial material, including a trial balance and a payroll schedule of salaries across the organisation, from a public entity's controlled environment to a personal account over which the employer had no control might well have classified it under item 15, for which the prescribed sanction is dismissal. Whether that classification is ultimately correct is not for this Court to decide; it is enough, for materiality, that the misconception went to the heart of the classification and that a different and reasonable classification was open. The materiality requirement is met.

[30] The Court has not overlooked Ms Abrahams's answer, and it does not carry the day. First, this is not an appeal in disguise. The Court does not substitute its own view of the appropriate sanction for that of the Commissioner; it finds that the Commissioner misconceived the nature of the enquiry, which is a distinct and established ground of review. Second, *Mondi* and the line of authority on sanction reviews do not save the award. Those cases hold that where an arbitrator has answered the right question; has properly identified the misconduct and weighed the appropriate sanction, a review court will not interfere merely because it would have weighed the matter differently. They do not hold that the deference owed to an arbitrator's assessment of sanction extends to an assessment built upon a misconceived enquiry. Here the Commissioner did not reach the sanction question on a correct footing; he reached it through a misclassification, and the range-of-reasonableness standard has no purchase on a finding reached by asking the wrong question.

[31] Third, *Makuleni v Standard Bank of South Africa Ltd and Others*⁸ does not assist Ms Abrahams. The Court has not yielded to a lucid argument that the result could merely be different; it has found that the Commissioner's conclusion is untenable, because it rests on a question that was not before him. Fourth, and finally, the reliance on the employer's onus under *Edcon Ltd*

⁸ (2023) 44 ILJ 1005 (LAC); [2023] 4 BLLR 283 (LAC); [2023] ZALAC 4 at para 4.

*v Pillemer NO and Others*⁹ (*Edcon*) cannot rescue the award, because the Commissioner made no finding on the trust relationship at all. The award nowhere holds that NSFAS failed to prove a breakdown in trust or that continued employment had become intolerable; its sanction reasoning rests solely on the classification of the conduct as an item 40 breach. A reviewing court may uphold an award on the reasoning the arbitrator gave; it may not uphold it on reasoning he did not employ. Whether NSFAS discharged the *Edcon* onus is a question for the arbitrator who reconsiders the matter, not a foundation on which this award can now be sustained.

- [32] One subsidiary matter should be recorded. The Commissioner's observation at paragraph 22, that it would be unfair to discipline an employee for breach of a rule of which she was unaware, and NSFAS's answering attack on his acceptance of Ms Abrahams's professed unawareness of the policies, do not affect the outcome. The Commissioner decided the matter on the footing that Ms Abrahams 'ought to have known better', and the classification of the conduct under item 40 does not turn on her state of knowledge. The knowledge question, like the appropriate sanction, is a matter for reconsideration on remittal.

Finding

- [33] For these reasons the Court finds that the Commissioner misconceived the nature of the enquiry. He answered a question; whether confidential information had been disclosed to an external party, and whether harm was probable that the charge did not pose, and he left undecided the question it did pose, namely the proper characterisation of the conduct charged and the sanction it warranted. That misconception is a reviewable irregularity within the meaning of s 145 of the LRA, and it is material, because the classification on which the entire sanction finding rests is its direct product. The award cannot stand.

⁹ (2009) 30 ILJ 2642 (SCA); [2010] 1 BLLR 1 (SCA); [2009] ZASCA 135.

[34] The remaining question is the remedy. Substitution is not appropriate and was not sought. The Court has not heard the witnesses; the proper classification of the conduct, the assessment of Ms Abrahams's explanations and her knowledge of the rules, and, if it is reached, the question of the appropriate sanction all require an evaluation of evidence and of credibility that is for an arbitrator and not for a court of review. The award falls to be set aside, and the dispute remitted to the CCMA for arbitration afresh before a commissioner other than the second respondent. The Court expresses no view on what the outcome of that reconsideration should be. A correctly directed commissioner may conclude that the conduct warrants dismissal, or may conclude that dismissal was, even so, an unfair sanction. A conclusion of either kind, reached on the question the charge in fact posed, would be that commissioner's to make and would fall to be tested, if at all, against the standard of reasonableness.

Costs

[35] Costs in this Court do not follow the result, and s 162 of the LRA requires the Court to have regard to the requirements of the law and of fairness. The requirements of law and fairness are best met by making no order as to costs against Ms Abrahams given that it was reasonable for her to defend an award made in her favour.

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

Order

1. The arbitration award of the second respondent dated 29 April 2025 under CCMA case number WECT17350-23 is reviewed and set aside.
2. The dispute is remitted to the first respondent for arbitration afresh before a commissioner other than the second respondent.
3. There is no order as to costs.



C de Kock
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv I Jamie SC

Instructed by: Cheadle Thompson & Haysom Inc

For the Third Respondent: Mr M Aggenbach

Instructed by: Maurice Phillips Wisenberg Inc