IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR958/16

In the matter between:

JDG TRADING (PTY LTD t/a SUPPLY CHAIN SERVICES **Applicant**

and

MYHILL, E L *N.O* **First Respondent**

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **Second Respondent**

SOLIDARITY obo AS SCHLEBUSCH **Third Respondent**

Heard: **20 July 2018**

Delivered: **11 September 2018**

Summary: **Review application – award not one that another reasonable decision maker could reach – Commissioner failing to appreciate that consistency only a factor to consider when determining fairness of dismissal - award reviewed and set aside. Employee challenging fairness of dismissal based on alleged inconsistency in the application of credit card policy. Failure by managers to take**

disciplinary action when policy breached over a period of time does not automatically render dismissal unfair if action is taken later based on continued breach. Employee needs to illustrate that failure to take action resulted in inconsistency which rendered dismissal unfair.

JUDGMENT

E BESTER, AJ

Introduction:

[1] This is an application for the review and setting aside of the arbitration award dated 18 March 2016 issued under the auspices of the second respondent (the CCMA) by Commissioner E Myhill (the Commissioner) under case number GAJB23031-15 (the award) and for the substitution of the said award by an order of this Court, alternatively for the award to be remitted to the CCMA for determination by a different Commissioner, as well as for costs. The Applicant also applies for condonation for the late filing of the review application. The applicant's condonation application is unopposed. In light of the satisfactory explanation for the three-week delay, which is relatively short in the circumstances, I am satisfied that condonation should be granted.

Background to the application for review:

[2] The third respondent's member in this matter, who will be referred to herein as the respondent, was dismissed by the applicant following allegations of misappropriation of company funds, in that he allegedly used his company credit card for purchases that he was not entitled to and which led to the applicant suffering a loss of R1028.40 over the period June 2015 to July 2015.

[3] The following issues are common cause:

3.1 The respondent travelled a lot in the execution of his duties and as such was issued with a company credit card in order to pay for certain expenses incurred during business trips;

3.2 The applicant has a credit card policy in place which regulates the use of the credit card;

3.3 The respondent was aware of the said policy.

[4] The relevant portion of the credit card policy, under paragraph 3 thereof, provides that:

> "3.1 Unless otherwise authorised, only expenses incurred by the cardholder, must be paid for i.e. do not pay for anyone else's expenses such as accommodation. For meals, the most senior person pays to ensure that combined expenses are approved at most senior level.
>
> 3.2 The following limits are applied. In line with cost savings users must endeavour to spend less and not use these limits as "targets". These limits may be budgeted downwards in specific departments in which case the lower limit must apply. The following relates to expenses whilst "sleeping out". Employees may only sleep out if the location being visited is further than 150 kilometres from their home base.
>
> 3.2.1 Accommodation per person should not exceed the approved budget of R700.00 per night.
>
> (Based on a market related three-star facility).
>
> 3.2.2 The maximum allowance for food and beverages is R300.00 per day, unless when the accommodation includes breakfast, then this amount reduced (sic) to R225 per day. The following should be used as a guideline:
>
> (a) Breakfast should not exceed R75 and is allowed when sleeping over and the accommodation did not provide breakfast. Breakfast is also allowed in

the morning where an employee travels to destination that is further than 150km from home base.

(b) Lunch is allowed when sleeping out or where the destination is further than 150 kilometres from the home base. The cost of lunch should not exceed R75 all included.

(c) Dinner and beverages of R150.

3.2.3 Limits may not be accumulated or carried forward i.e. did not have lunch so spent for dinner was R200."

[5] The applicant illustrated that the respondent, on many occasions during the period June 2015 to July 2015, used his company credit card to buy lunch and/or dinner when he was already at home or close to his house before lunch or dinner time and exceeded the amounts allowed for the purpose of paying for lunch or dinner. On one occasion, the respondent bought cigarettes and claimed it as being breakfast.

[6] The respondent's case is that he interpreted the provisions of the credit card policy to the effect that he was entitled to use the credit card to buy lunch and dinner on days that he travelled in excess of 150 kilometres, even if he was back home at lunch or dinner time or before. He claimed that he travelled in excess of 150 km on each of the occasions that the applicant used to illustrate the alleged credit card abuse. He furthermore alleges that, apart from the buying of cigarettes, which he claims was a mistake, he did nothing wrong in that his former managers were aware that he used the credit card in this manner and they approved his usage thereof in this manner.

<u>The award:</u>

[6] The Commissioner accepted that the purpose of the credit card policy is to allow employees to use company credit cards to pay for food and accommodation when they are on business trips more than 150km away from their homes and

that the respondent defeated this purpose by using his credit card when he was already back home or close to home.

[7] The Commissioner however held that the respondent's dismissal was unfair. In arriving at that conclusion the Commissioner applied the reasoning:

7.1 In *NUM and Others v Amcoal Collieries and Industrial Operations Ltd*[1] in which it was held that a historical inconsistency occurs where an employer has in the past, as a matter of practice, not dismissed employees or imposed a specific disciplinary sanction for contravention of a specific disciplinary rule, but then decides to dismiss or impose that sanction for the contravention of the rule;

7.2 Le Roux et al[2] as referenced in the *Amcoal* matter, where it is stated that the unfairness of this type of inconsistency appears to be based on the argument that failure to discipline or impose a sanction for the contravention of a rule in the past has created the impression that such actions will not be taken for such contravention. Failure to have taken action in the past may also be an indication that the employer did not regard the rule as valid.

[8] The Commissioner held that:

> "there is evidence that Schlebusch (the respondent) had used his credit card in contravention of the policy for a significant period and time and, despite him having disclosed his use of his card to two managers, Botha and Dreyer, he was never reprimanded by either of them".

[9] Based on the aforesaid, the Commissioner concluded that the applicant acted inconsistently and found that the dismissal of the respondent was not the appropriate sanction for contravention of the credit card policy of the applicant and that the applicant had failed to prove that it had a good reason to dismiss the respondent.

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[1] (1992) 13 ILJ 1449 (LC).
[2] South African Law of unfair dismissal (7th Ed) p110.

The review application:

[10] The applicant seeks to review the Commissioner's award on the basis that it is, amongst others, unsound, grossly irregular and unreasonable.

[11] In support of the above the applicant contends that:

11.1 The fairness of the respondent's dismissal in this matter does not turn on inconsistency, in that there is no evidence that other employees have been found guilty of the same misconduct and have not been dismissed. The applicant submits that inconsistency means that the applicant disciplined some employees for similar transgressions but others not. In the absence of evidence to this effect, according to the applicant, there cannot be an issue of inconsistency. The applicant thus contends that the Commissioner failed to determine what the applicant terms as the "*real legal principle*", namely that of waiver. The Commissioner should, according to the applicant, have determined whether or not the applicant, through its conduct and actions, waived its right to discipline the respondent by, whilst being aware of it, reconciling itself with the misconduct and condoning the non-compliance with the policy.

11.2 The respondent's version, namely that he disclosed the use of the credit card to his managers but that they did not reprimand him, is insufficient to establish a defence for his conduct. The applicant contends that the respondent needed to prove that the said managers were actually aware that he acted in contravention of the policy and condoned such contravention by not disciplining him. This, the applicant further contends, the respondent did not do as all he did was show that he submitted his credit card reconciliation forms to them. The respondent also did not present any evidence that the applicant had been aware of the actual misconduct that took place before and opted not to act on this knowledge.

11.3 The Commissioner failed to apply his mind to the applicable requirements when determining whether or not dismissal was an appropriate sanction

and ignored the clear evidence of the applicant that the trust relationship between the parties had broken down.

Evaluation

[12] In *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others*[3], Van Niekerk J stated the following:

> "[10] The legal principles applicable to consistency in the exercise of discipline are set out in Item 7 (b) (iii) of the Code of Good Practice: Dismissal establishes as a guideline for testing the fairness of a dismissal for misconduct whether 'the rule or standard has been consistently applied by the employer'. This is often referred to as the 'parity principle', a basic tenet of fairness that requires like cases to be treated alike. The courts have **distinguished** two forms of inconsistency – **historical and contemporaneous** inconsistency. The former requires that an employer apply the penalty of dismissal consistently with the way in which the penalty has been applied **to other employees** in the past; the latter requires that the penalty be applied consistently as between two or more employees who commit the same misconduct. A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a subjective element - an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed by the employee used as a comparator (see, for example, *Gcwensha v CCMA & Others* [2006] 3 BLLR 234 (LAC) at paras 37-38). The objective element of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to different treatment, usually in the form of a disciplinary penalty less severe than that imposed on the claimant. (See *Shoprite Checkers (Pty) Ltd v CCMA & Others* [2001] 7 BLLR 840 (LC), at para 3.) Similarity of circumstance is the inevitably most controversial component of this test. An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of inter alia differences in personal

[3] [2009] 11 BLLR 1128 (LC).

circumstances, the severity of the misconduct or on the basis of other material factors*".* (Own emphasis, references excluded)

[13] Sutherland AJA in *National Union of Mineworkers, obo Botsane v Anglo Platinum Mine (Rustenburg Section)*[4] held that:

> "The idea of inconsistency in employee discipline derives from the notion that it is unfair that like are not treated alike. The core of this 'factor' in the application of employee discipline (it would be a misconception to call it a principle) is the rejection of capricious or arbitrary conduct by an employer.'

And

> 'It has application in two respects. Mainly, it is a recognition of the unfairness of the condemnation of one person for genuine misconduct when another indistinguishable case of misconduct by another person is condoned. The second application is the recognition of the unfairness that results when disparate sanctions are meted out for indistinguishable misconduct to different persons"[5].

[14] I do not agree with the applicant's argument that inconsistency can only take place where there are more than one employee involved. The code of good practice: Dismissal as contained in Schedule 8 of the Labour Relations Act provides as follows:

> **"Dismissals for misconduct**
>
> (6) The employer should apply the penalty of dismissal consistently with the way in which it has been applied to **the same** and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration. (Own emphasis).
>
> **7. Guidelines in cases of dismissal for misconduct**.-Any person who is determining whether a dismissal for misconduct is unfair should consider—

[4] (JA2013/42) [2014] ZALAC 24 (15 May 2014) at para 25
[5] At para 26.

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the work-place; and

(b) if a rule or standard was contravened, whether or not –

….

(iii) the rule or standard has been consistently applied by the employer;…"

[15] *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others* as well as *National Union of Mineworkers, obo Botsane v Anglo Platinum Mine (Rustenburg Section)* were decided in the context of inconsistent application of discipline between different employees. I am of the view that these cases cannot be interpreted to imply that inconsistency cannot take place in the context of inconsistent application of a rule relating to a single employee.

[16] In *SA Commercial Catering and Allied Workers Union andOothers v Irvin & Johnson Ltd*[6] the Labour Appeal Court at paragraph [29] held that:

> "In my view too great an emphasis is quite frequently sought to be placed on the 'principle' of disciplinary consistency, also called the 'parity principle.' Consistency is simply an element of disciplinary fairness. Every employee must be measured by the same standards. Discipline must not be capricious. It is really the perception of bias inherent in selective discipline which makes it unfair "(*references not included).*

[17] An employer can act inconsistently by not enforcing a rule at a prior point in time, only to enforce it thereafter, without warning, in respect of the same employee. In that context, the inconsistency is based on the impression which is created that the rule or standard in no longer applicable; is not regarded as serious by the employer, that disciplinary action will not necessarily be taken for non-compliance with the rule or that the type of behaviour is condoned by the employer. If the rule is then suddenly enforced, resulting in dismissal, the

[6] [1999] 20 ILJ 2302 (LAC).

inconsistent application of the rule by the employer will be a factor which must be considered in order to determine whether the dismissal was unfair.

[18] In *Minister of Correctional Services v Mthembu NO and Others*[7], the Court held as follows:

> "The consideration of consistency or equality of treatment (the so-called "parity principle") is an element of disciplinary fairness, and it is really "the perception of bias inherent in selective discipline that makes it unfair." (See *Early Bird Farms (Pty) Ltd v S Mlambo* [1997] 5 BLLR 540 (LAC) at 545H-I; *SA Commercial Catering And Allied Workers Union and Others v Irvin & Johnson Ltd* [1999] 20 ILJ 2302 (LAC) at 2313D-E; *Cape Town City Council v Masitho and Others* [2000] 21 ILJ 1957 (LAC) at 1960F-1961F and *National Union Metal Workers of SA v Henred Fruehauf Trailers [1994] ZASCA 153; 1995 (4) SA 456(A) at 463G-I.)* When an employer has in the past, as a matter of practice, not dismissed employees or imposed a specific sanction for contravention of a specific disciplinary rule, unfairness flows from the employee's state of mind, i.e. the employees concerned were unaware that they would be dismissed for the offence in question. (own emphasis) When two or more employees engaged in the same or similar conduct at more or less the same time but only one or some of them are disciplined, or where different penalties are imposed, unfairness flows from the principle that like cases should, in fairness, be treated alike."

[19] The above forms of inconsistency are distinguishable from the principle of condonation of an employee's conduct by the employer, in terms of which principle the employee will be able to argue that the failure by the employer to take action when an incident of misconduct occurred, prohibits the employer from taking disciplinary action at a later stage for that incident of misconduct in appropriate circumstances. The condonation of misconduct under such circumstances is akin to a waiver by the employer of its right to take disciplinary action later, in that the employer, with full knowledge of an act of misconduct,

[7] (JR953/04) [2006] ZALCJHB 30 (24 March 2006) at para 8.

elected deliberately to “forgive” that particular act of misconduct and not to take action or to take action within a reasonable time period.

[20] The mere failure to take disciplinary action against an employee who contravenes a rule for a period of time does not automatically mean that the employee has been led to believe that the rule is no longer applicable; is not regarded as serious by the employer, that disciplinary action will not necessarily be taken for non-compliance with the rule or that the type of behaviour is condoned by the employer. The employee has to illustrate that the failure by his employer to take action has resulted in him having a *bona fide* belief to that effect.

[21] In this case, the respondent claims that the employer acted inconsistently and that the credit card policy was no longer applicable in that his managers were aware of his credit card usage in contravention with the credit card policy but did not reprimand him. On this basis alone, his dismissal was held to be unfair. The respondent did not however illustrate that the failure by his managers to reprimand him created a *bona fide* belief that the policy was no longer valid or applicable as he alleges. He merely illustrated that he used his credit card in contravention with the policy and that his credit card reconciliation statements were approved by his former two managers. He did not present any evidence to the effect that any of the two managers comprehended fully that he contravened the policy and condoned his contravention thereof knowingly and with such comprehension. He did not put this to his managers at the disciplinary hearing when he had the opportunity to do so but only presented evidence in this regard for the first time when the employer’s case was already closed. He also did not call any of his former managers to give evidence hereto during the arbitration proceedings.

[22] The respondent did not seriously dispute the fact that the policy was applied in full force elsewhere within the workplace as well as his department. The overwhelming probabilities are that the employee was not only fully aware of the

existence of the policy (which is common cause) but that he "took chances" by contravening it and "got away" with it for a while. This can never equate with a genuine *bona fide* belief that a policy is no longer applicable or not regarded as serious based on the inconsistent application of the policy by the employer.

[23] An arbitrator is required to determine whether the sanction imposed by the employer is fair and not to impose a sanction afresh. In *African Bank v Magashima and Others*[8] Tlhotlhalemaje AJ (as he then was), held that:

> "In determining whether an employer had acted fairly in dismissing an employee, an arbitrator should also consider the factors outlined in *Sidumo*[9]. Other than these factors, where an employee claims inconsistency, further factors inclusive of those outlined in *Sidumo* to be considered include the following:
>
> a) The circumstances surrounding the act of misconduct committed by individual employees;
> b) The personal circumstances of the employees, including their length of service, and the employees' disciplinary records;
> c) The positions they occupied at the time of the commission of the misconduct, the nature of the duties they performed and hierarchy within the organisation;
> d) The severity of the misconduct or its impact on the employer and its operations;
> e) The consequences of the misconduct *vis-à-vis* the sustainability of the employment relationship between the employer and the employee, and also as between co-employees;
> f) Whether the employees have shown genuine contrition. Genuine contrition implies that an employee owned up to the misconduct as soon as it took place, and showed remorse from that moment. This should be distinguished from the charade of showing remorse at disciplinary

[8] [2014] ZALCJHB 298 at para 24.
[9] 2008 (2) SA 24 (CC) at Paras 78 – 79. These include the totality of the circumstances of the matter; whether what the employer did was fair; the importance of the rule that the employee breached; the reason the employer imposed the sanction of dismissal; the basis of the employee's challenge to the dismissal; the harm caused by the employee's conduct; whether additional training and instruction may result in the employee not repeating the misconduct; the effect of dismissal on the employee and the long service record of the employee.

> proceedings, purely for the purposes of pleading in mitigation of sanction."

[24] The Commissioner indeed took no account of the fact that the applicant testified that the trust relationship between the parties had broken down, or for that matter, of any other relevant factor when considering whether a dismissal is fair. He failed to appreciate that consistency is an element of a fair dismissal and not a rule onto itself. Had he taken account of other relevant factors, including the evidence of the respondent relating to the trust relationship; the fact that, instead of accepting accountability for his actions, the respondent preferred to opportunistically base his case on the failure of his managers to take action as well as the position of the respondent as risk officer, he would have held that the dismissal of the respondent was fair.

[25] In the light of the aforesaid, I find that the Commissioner's award is not one that a reasonable decision maker could have reached based on the evidence before him and therefore should be set aside.

[26] The respondent opposed the review application in circumstances where he had an award in his favour. His opposition of the review application was not unreasonable in the circumstances and does not warrant a cost order.

[27] In the premises the following order is made:

Order

1. The late filing of the applicant's review application is condoned.
2. The arbitration award is set aside and substituted with an order that the dismissal of the employees was substantively fair.
3. There is no order as to costs.

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E Bester

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant:	Mr. A.J Posthuma of Snyman Attorneys
For the respondent:	Ms N Ras of Solidarity