REPUBLIC OF SOUTH AFRICA

LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case No: D600/11

In the matter between

TOYOTA SA MOTORS (PTY) LTD	**Applicant**
and	
CCMA	**First Respondent**
COMM. A DEYZEL	**Second Respondent**
UASA	**Third Respondent**
MARIE PRETORIUS	**Fourth Respondent**

Heard: 27 May 2013

Delivered: 12 September 2013.

Summary: Review of an award – Sufficiency of evidence - whether the second respondent applied his mind properly to all material evidence led by the parties at the arbitration hearing and whether the award he issued was one that a reasonable decision maker could have come to – passing on of email with offensive material – award reviewed, set aside and substituted.

JUDGMENT

CELE, J

Introduction

[1] The second respondent's arbitration award dated 4 July 2011 issued in this matter under the auspices of the first respondent is the subject of this review application brought in terms of section 145 (2) of the Act[1]. The award re-instated the fourth respondent to the employment of the applicant. She opposed the review application, duly assisted by the third respondent, being a registered trade union.

Factual Background

[2] The fourth respondent, Ms Pretorius was in the employment of the applicant and had 16 years of service when her employment came to an end. She was in the position of a Senior Manager with no previous disciplinary record. She worked with a number of employees and for purposes of this application they included the following:

1.	Graham Allardice	Project Manager	36 years of service;
2.	Marie Pretorius	Departmental Manager	16 years of service;
3.	Quinton Oosthuizen	Production Coordinator	5 years of service;
4.	Kenneth Aitken	Manager	20 years of service;
5.	Heinrich Beneke	Principal Engineer	20 years of service;
6.	Benny Olivier	Manager	15 years of service.

[3] During the period around March to April 2010, Ms Pretorius and all of her colleagues hereinabove mentioned and hereafter referred to as employees, were among recipients of an e-mail which they then forwarded on to other persons. The e-mail inter alia contained an article that was published in a

[1] The Labour Relations Act Number 66 of 1995.

newspaper. On some of the e-mails the subject of the e-mail was indicated as "The future South Africa" and on others "The future SA- not pleasant reading." Some of the e-mails had been prefixed by the following comments above the article:

> 'Written by an ex Safrican and published in a UK newspaper.
>
> Let us hope he has it wrong.
>
> There are lots of articles doing the rounds, this is by FAR the best.
>
> I have always tried to understand why Africa has not prospered with all the mineral wealth and available labour.
>
> This is without doubt the most plausible explanation for me.
>
> Rgds
>
> Graham'

[4] After the applicant became aware of the circulation of the e-mail it decided to subject Ms Pretorius, a Mr Hugh Norman and the six employees to an internal disciplinary hearing where they faced a misconduct which it described as:

> 'It is alleged that you have distributed an offensive email, using the company's computer/email facilities'

[5] The decision to charge them was premised on the policy held by the applicant governing the use of its e-mail system. The policy was couched in the following terms:

> 'Employees must not send or forward email communications that contain offensive, discriminatory, harassing or inappropriate content which include but not limited to 'racist, sexual, offensive, degrading, derogatory or discriminatory content'.

[6] The applicant also had a disciplinary code and procedure (DCP) which prescribed certain disciplinary actions or sanctions for certain transgressions. In the case of first transgressions the prescribed sanctions were that:

- Category 2 offence - counseling,
- Category 3 offence - final written warning
- Category 4 offence - dismissal

[7] The misuse of company e-mail and/or internet facilities was a category 2 offence, while negligence was a category 3 offence and gross negligence a category 4 offence. The circulation and/or distribution of racially offensive language and/or material were listed as a category 4 offences. Paragraph 1.3 of the DCP provides inter alia that:

> 'Before a hearing is constituted, facts surrounding the alleged misconduct have to be properly investigated by the direct supervisor or delegate (who should act as the initiator on behalf of the company in the disciplinary process) to ensure justifiable evidence, which warrants the constitution of a hearing'.

[8] Paragraph 4 of the DCP determines the following:

> 'It is a prerequisite that a proper investigation be done before suspending an employee and/or a disciplinary hearing is constituted'.
>
> .....
>
> Only after the conclusion of a proper investigation will the facts determine whether a disciplinary hearing is necessary." "In order to establish whether an offence has been committed, the following process must be followed: Investigate and establish the facts'.

[9] The content of the article in the e-mail was of six pages, as supplied by counsel for the applicant to the heads of argument furnished for this application. The second respondent made an extract from the article and I think it suffices for purposes of this application. Such extract reads:

> 'I expect, like me, you are aware that there has never been a prosperous black led country, but perhaps just blamed their "bad luck" or whatever for that uncontradictable fact….(sic)

There are those who say “No we have such a strong economy, such sophisticated infrastructure, such a talent pool, that we can never sink.”

My belief is that they have not considered the root cause of Africa’s failure. A cause that is not spoken about as it is fearfully politically incorrect, and probably illegal to speak about…

The cause is the deficiencies of the “black mentality” for want of a better word…

Unfortunately, racist or not, that is proven and a fact. Google it and you will find that for over 70 years, in test after test, done by dozens of university professors and Nobel laureates plus USA government studies, Jews are the most intelligent of humans followed by East Asians. Then come westerners then, trailing by a large margin, people of African descent…

I.Q. measurement measures different facets of intelligence and mental competence. Sadly it is in the absolutely vital sphere of cognitive ability that blacks score worst. This means they score abysmally in things like forward planning and anticipating the consequences of their actions…

Why the lecture on I.Q.?

Well for a start you must understand that our ruling party are (sic) voted into power by a largely moronic plebiscite. I use the word moronic intentionally. If the cut off point for moronic is an I.Q. of 70, half of the voting population would be classified as such

Only one in 40 black SAns achieves the average I.Q. of his white fellow citizens

Simply put, they are bloody stupid, and they rule us. Furthermore Zoooooma says they will rule us until the scored coming. I believe him.

This explains why the ANC have such idiots in their positions of power and influence, the likes of Zuma, Malema, Khompela and Cele. They are, unfortunately the best they have. Well they are the best blacks they have. All

the critical positions are held by Indians, coloureds or whites, something I am grateful for

The black/white polarization is growing. Whites are gatvol at the waste, corruption and stupidity of the black elite. Blacks are demanding, as their right, the wealth of the whites by means of redistribution of assets. No matter that they have not worked for those assets, they claim them as spoils of war

You have a few years left to enjoy hat is left of the glorious SA lifestyle…

Enjoy it while you can, and enjoy it in the Cape where the population mix is more favourable, but be aware that change is inevitable. Your children must get a world class education, because they will not be adults in SA. Get assets stashed offshore, you and your children will need them there'.

[10] The disciplinary enquiry was chaired by Advocate M. Poseman. Mr Norman pleaded guilty and he was given a final written warning. Despite pleading not guilty the employees were found guilty and were dismissed from the applicant's employment. The employees lodged an internal appeal against their dismissal which was chaired by a TOKISO panelist, Ms J. Moodley. Ms Pretorius changed her plea from not guilty to guilty although she continued to maintain that she had not read the e-mail prior to sending it out. However, all seven employees were not successful with the appeal.

[11] Paragraphs 24 and 25 of the award, which appear not to be in dispute, contain what the second respondent understood to be common cause facts and disputed material and read:

'24 The respondent's e-mail usage policy was formally admitted in the applicants' written argument. It was further formally admitted that the applicants were aware of the e-mail usage policy. The applicant did not dispute that each one of them used the respondent's e-mail facilities to distribute the e-mail referred to in paragraphs 16 to 18 above. All of them agreed that the e-mail was offensive but "not all agree that it is racist." It was conceded at the outset of the arbitration that the applicants had breached

a rule. Their case was that they breached the rule negligently and that the sanction was unfair.

25. The following underlying issues had to be decided at arbitration:

1. What the charge was that the employees were dismissed for and whether that differed from the charge that they were charged with?

2. Whether the charge that the employees were charged with or dismissed for constituted a category 4 offence?

3. Whether the e-mail contained racist remarks and/or opinions?

4. Whether the employees were aware at the time that they forwarded the e-mail that the e-mail contained offensive and/or racist remarks and/or opinions?

5. Whether dismissal was a fair and appropriate sanction?

6. Whether the applicant applied discipline consistently?'

[12] The second respondent found the dismissal of all six employees to have been fair and that they were not entitled to any relief but found the dismissal of Ms Pretorius to be unfair and he ordered the applicant to re-instate her with limited retrospective effect. The applicant initiated the present application to the extent that the finding was in favour of Ms Pretorius.

Chief findings of the second respondent

[13] The second respondent made a number of findings in this matter. Those relating to other employees are relevant to this application due to a number of similarities in their cases. The findings may be outlined as that:

1) Mr Allardice and Mr Beneke had similar versions. Both admitted reading the e-mail and sending it on. Despite reading it before sending it on, they said that they did not appreciate at the time that the e-mail

was offensive. Their versions were improbable as it was hard to believe that anybody reading the e-mail would fail to realize that it contained racist remarks and comments and that it was offensive. Mr Allardice and Mr Beneke were guilty of such serious misconduct and the sanction of dismissal was warranted.

2) Mr Aitken, Mr Oosthuizen and Ms Pretorius had similar versions. They all gave evidence to the effect that they had commenced reading the e-mail and they stopped at some point and then sent it on to others without knowing that it contained racist remarks or comments or that it was offensive. The version of Mr Aitken and Mr Oosthuizen was inherently improbable insofar as it suggested that they forwarded the e-mail on without having read the whole of it. The applicant proved on a balance of probabilities that Mr Aitken knew the e-mail had racist contents when he sent it on. He was guilty of an offence for which dismissal was prescribed.

3) Mr Oosthuizen's version was that he read the e-mail up to some point and that he merely browsed through the remainder of the e-mail. According to him his eye caught a part of the e-mail referring to East Asians as the second most intelligent group. He then sent it on thinking that it might be of interest to his two Indian colleagues. The version that that was the only reason why he sent it on was inherently improbable. Racist comments and remarks occurred early on in the e-mail and it was more probable that Mr Oosthuizen came across it and that he knew the e-mail contained offensive racist remarks and comments. What was said above about Mr Allardice, Mr Beneke and Mr Aitken applied equally to Mr Oosthuizen.

4) The chairperson of the disciplinary enquiry appeared to have found that Ms Pretorius and Mr Olivier were unaware of the content of the e-mail when they sent it on. She posed a rhetorical question and answered it:

'Does the fact that Pretorius and Olivier were unaware of the contents of the e-mail detract from a finding of guilt? In my view it doesn't – they are still guilty of distributing an e-mail which is objectively offensive'.

5) Ms Pretorius and Mr Olivier did not take issue with the finding referred to in the preceding paragraph. They admitted that they breached the rule but contended that they were merely negligent. Ms Pretorius however took issue with another finding of the chairperson expressed as:

> 'How does the fact that Pretorius and Olivier had not read the e-mail before sending it affect the sanction and does this in fact mean that they could be treated differently within the context of the company applying its rules consistently. In my view the fact that they had not read the e-mail is irrelevant'.

6) The chairperson of the disciplinary enquiry erred in finding that it was irrelevant whether or not Ms Pretorius and Mr Olivier had read the e-mail prior to sending it on. It was highly relevant when it came to considering the fairness of the sanction to make a finding whether it was a case of sending the e-mail on without knowing that it contained offensive racist material or whether it was a case of sending it on with full knowledge of that fact. The first type of misconduct is obviously not as serious as the second type and, depending on the circumstances, fairness might call for a lesser sanction than dismissal to be imposed in the case of the first type of misconduct.

7) That Mr Olivier did not know what the contents of the e-mail were when he sent it on was not acceptable. The version that he advanced at the disciplinary enquiry that he sent it on to five people without reading it was inherently improbable. It was further improbable that he would have done so merely because of the title and because he thought Mr Allardice had endorsed it. He did not testify during the arbitration and on the available evidence it could not be found that his state of mind at the time when he sent the e-mail on was such that it constituted a mitigating factor. On the contrary the most probable inference to be drawn from the circumstances was that he knew what the contents of the e-mail were when he sent it on. Like in the case of Mr Allardice, Mr Beneke, Mr Aitken and Mr Oosthuizen, Mr Olivier knowingly breached the rule against sending offensive racist material through the

respondent's e-mail system and that the sanction of dismissal was not unfair.

8) Had it not been that Ms Pretorius version was corroborated by the results of the polygraph examination it would be found that her version was inherently improbable and would for that reason have been found that it was more probable that she knew what she was sending on. In such event it would not have been possible to exclude the possibility that her version might be true.

9) Mr van Biljon's evidence indicated that he was sufficiently qualified and experienced to give expert evidence that the examination was conducted according to acceptable and recognizable standards and that the outcome of it was sufficiently reliable that it might be regarded as corroboration of Ms Pretorius' version. There was further no other expert evidence gainsaying his version. His evidence was acceptable and it was found that she did not show any physical signs of being deceptive when she gave responses during the polygraph examination to the effect that she did not know about the racist contents of the e-mail at the time when she forwarded it. The corroboration of Ms Pretorius' version was such that it rendered her version more probable. It was accordingly accepted as a fact that Ms Pretorius did not know at the time when she sent the e-mail on that it contained offensive racist remarks and comments. She was still negligent in not checking what the e-mail contained before sending it on but the misconduct was far less serious than that committed by the other employees or for that matter by Mr Norman who on the summary given by Ms Posemann knew what he was sending on. Taken into account was the fact that applicant's disciplinary code prescribed a final written warning for negligence. The circumstances were not such that a finding of gross negligence would have been justified. Accordingly, it was found that the dismissal of Ms Pretorius was substantively unfair.

10) The submission made on behalf of the other employees that it constituted inconsistent applicant of discipline to have dismissed them and not Mr Norman, was taken into consideration. In her evidence Ms Posemann explained what led her to impose a lesser sanction in the

case of Mr Norman. Mr Norman pleaded guilty during his enquiry and indicated remorse whereas this was either not true of the employees or true to a lesser extent in their cases. Mr Norman also reported the matter to his superior before it could be discovered. It was more probable that, the failure or refusal of the employees to admit at their enquiry that the e-mail contained offensive racist material necessitating the calling of witnesses to prove that fact, soured the relationship. Requiring of the applicant to bring people who were aggrieved to the disciplinary enquiry probably had a similar effect. It was not unfair to draw a distinction between Mr Norman and the employees other than Ms Pretorius.

11) It was not possible to find that the applicant should have disciplined further employees in connection with forwarding the e-mail. Mr Killian's version about the report that Mr Hendrik Pretorius made to him was more probable than Mr Pretorius' version. Mr Killian's evidence explained why no disciplinary action was taken against Mr Hendrik Pretorius. On the version Mr Pretorius one would have expected Mr Killian to have taken some disciplinary action against him and his version that Mr Killian simply turned a deaf ear to his confession was improbable.

12) The employees raised a procedural issue about the failure of the applicant to do a better investigation, which as it was alleged, would have identified further perpetrators. The employees however, failed to disclose information to the applicant about who some of such perpetrators might be. It was alleged that the failure on the part of the applicant to do a detailed investigation rendered the procedure unfair and that it caused inconsistent application of discipline. The applicant proved on a balance of probabilities that it conducted such an investigation as could have been expected to be done and that no inconsistent application of discipline occurred.

13) In the circumstances, only Ms Pretorius will be awarded relief. In terms of section 193 (2) of the Act an employee who is unfairly dismissed is entitled to reinstatement unless certain exceptions exist. None of the exceptions were applicable in the present matter and the applicant

would accordingly be required to reinstate Ms Pretorius in its employ. The applicant was able to continue employing Mr Norman and, because the circumstances relating to Ms Pretorius are not much different, there should for that reason not be a problem with reinstating her.

14) Ms Pretorius was however, to a great extent responsible for the situation that developed; so much so that the outcome of the polygraph test had to tilt the scales in favour of a finding that she did not know at the time when sending it on, that the e-mail contained racist remarks. The reinstatement will for that reason be limited to operate with retrospective effect from a date six months prior to the date of issuing the award. At the time of issuing the award the remuneration due to Ms Pretorius as a result of the retrospective operation of the reinstatement amounted to R180 000-00. This amount was calculated on the basis that she earned R30 000-00 per month.

Grounds for review

[14] The applicant made submissions that the arbitrator, in conflict with the behests of the Act, handed down an award which was not of a reasonable and objective decision maker, failed to apply his mind, misconducted himself, committed a gross irregularity, exceeded his powers by acting unreasonably or unjustifiably in making various findings including but not limited to:

1. Finding that there was a distinction between Mr Norman and third respondent's case in circumstances where:

   - Mr Norman pleaded guilty at his disciplinary enquiry, showed remorse in circumstances where he had reported to his manager the receiving of the email;
   - In contrast Ms Pretorius pleaded not guilty at the disciplinary enquiry, showed no remorse at the enquiry or at the appeal and demonstrated what can only be described as false remorse at

the arbitration. Ms Pretorius at the arbitration was of the view that the email was not racist and but only offensive.

2 By justifying his findings namely that:

- Ms Pretorius had not read the email before sending it off;
- As another employee who had committed the same offence receiving a final written warning, she would be able to maintain a trust relationship.

[16] In respect of the question of whether Ms Pretorius read the email before sending it off, it was submitted that on a balance of probabilities, it was highly improbable and in fact impossible for her to have decided to send the email on to persons with children when the introductory paragraph was silent on crime and the World Cup, but if she had read the entire email she would have read such references. The submission was that it was clear from the paragraph that she read that there was nothing in that paragraph which pertain any facts which would allow her to reach that conclusion. The arbitrator was said to have overlooked the fact that deep into the article there was specific reference to tragedies which were said to have happened in Africa coupled with two warnings:

'a. Your children must get a world class education, because they will not be adults in SA;

b. Get assets stashed off shore, you and your children will need them there'.

[17] In opposing the review application the third and fourth respondents submitted, inter alia, that:

1) The charges applicable to Ms Pretorius relate to the distribution of an offensive e-mail. No reference was made to "racially" offensive e-mails in the respective charge sheets and it was submitted that the applicants should rather have been charged with the misuse of company e-mail facilities.

2) Ms Pretorius was under the impression that the allegation against her only referred to an offensive e-mail and did not refer to a racist e-mail. It was only at the disciplinary hearing where it became clear that the employer's intention was to charge them for sending a racist e-mail and where they were labelled as racists by Mr Kilian. Ms Pretorius was also of the view that the sending of the e-mail did not constitute an offence as she did not consider the e-mail to be offensive, let alone racist. It was only after Mr Rajoale testified at the disciplinary hearing that Ms Pretorius realised that the e-mail was offensive to other race groups.

3) Mr Kilian testified that if an employee receives a racist e-mail, he must report it to his Manager or to the HR Manager. Mr Kilian confirmed that no disciplinary action was taken against anybody who received the e-mail but failed to report it to his Manager or to HR. The applicant therefore allows for employees to receive offensive, racist e-mails without having to report it to their managers, even though they have a rule to that effect.

4) Ms Pretorius said that she did not read the e-mail but for the subject and the paragraph where Mr Allardice typed his name where he indicated that he hoped that the author had it wrong. Ms Pretorius therefore did not have knowledge of the contents of the e-mail before sending it on. She could therefore not have known that it was offensive. She was negligent at the most for forwarding an e-mail without bringing herself up to speed with the content thereof.

5) No proper investigation was done by the applicant to identify possible perpetrators. The applicant was asked to present the investigation report but could not. That clearly showed that no investigation docket existed. The excel spreadsheet was simply a spreadsheet with names, it was not a complete investigation which could show which e-mail addresses were scanned, what criteria was allegedly used to scan the computers and what the overall results were. At no stage did the applicant indicate that they were not able to complete such an exercise. The fact that the names of Messrs Oosthuizen and Hennie Pretorius were omitted from the report, begs for an answer and Mr Kilian had no explanation.

6) The lethargic attitude of the applicant showed that they were not genuine in their attempt to investigate and to find the perpetrators that sent the e-mail on. The sending of offensive e-mails could therefore also not be such a serious offence if they were not willing to do a proper investigation.

7) Mr Hugh Norman was charged for exactly the same offence, pleaded guilty and was issued with a final written warning. The reason being that he had allegedly shown remorse and according to Ms Poseman, the chairperson of the hearing, this made his case different to that of Ms Pretorius.

8) Mr Kilian on behalf of the employer did not agree with the chairperson of the hearing and he was of the opinion that Mr Norman should also have been dismissed. In Mr Kilian's closing argument, he argued that Mr Norman changed the subject line and deleted the first paragraph in an attempt to avoid detection of the monitoring system of the company.

9) The applicant was of the view that Ms Pretorius did not show any remorse. Remorse in the context of workplace incidents was often difficult to deal with. One can speculate that employees may be reluctant to apologize because this may be perceived to be an acknowledgement of wrongdoing and may get them into trouble. Remorse is a complex emotion, a mixture of shame and regret for the apparent victim. But supposed remorse may as well be linked to the perpetrator's own sense of regret that it happened at all and that he got caught.

10) Ms Pretorius testified that she showed remorse and she did in fact show remorse in different ways. She did it in her statement to the chairperson of the hearing by saying that she was sorry if she offended anyone, she also did it by saying that she was sorry and by way of changing her plea to guilty. The fact of the matter is that there was no complainant to whom they could say that they were sorry. She did not harm anybody and therefore there was nobody to whom she could have said sorry to.

11) No direct evidence was presented that the trust relationship between Ms Pretorius and the employer had been damaged. The only evidence

to this effect was that of Mr Kilian, The Senior Manager of Labour Relations and a former NUMSA Chairperson, who accused Ms Pretorius of being racist, simply because they forwarded an e-mail. Ms Pretorius was not the author of the e-mail. It was not her ideas, views and opinions in the article, but she was dismissed for those views of an anonymous person.

12) Dismissal was not the appropriate sanction in this matter where Ms Pretorius did not have any previous disciplinary records and where she had long years of loyal service to the company. In the absence of allegations of dishonesty, the length of service of Ms Pretorius ought to have carried a lot of weight in circumstances where the employer cannot prove that the trust relationship was damaged.

Evaluation

[18] In this application it has to be ascertained whether the second respondent applied his mind properly to all material evidence led by the parties at the arbitration hearing and whether the award he issued was one that a reasonable decision maker could have come to.[2] A consideration of this application will largely entail the examination of the facts of this matter. This must not be construed as treating a review application as an appeal.

[19] The crisp issue turns, as it must, on whether Ms Pretorius read more portion of the email than she admitted to. This much is clear, as a point of departure, when mind is had to the rationale underlining a different treatment meted out to Mr Olivier.[3] At some stage after Ms Pretorius received the controversial email, she mulled over it and finally decided that she would pass it on. Common sense tells us that she had to select the recipients of the email. That process involved the exclusion of some people she knew and the inclusion of others. The contents of the email had to be relevant to the people she had selected. She also had to feel comfortable in sending each of the selected few. The process of sending the email further on meant that she identified herself with the contents thereof which she had read. It has to be remembered

[2] See *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 ILJ 2405 (CC).
[3] See paragraphs 62 and 63 of the award.

that she was a Senior Manager dealing with audits. She must be taken to have had an analytical eye and mind to written material. Her evidence in this regard is very much telling as it says:

> 'I looked at the first page and actually I saw the subject "The Future of South Africa'
>
> 'Then I read the little written by an ex-South African and published in the UK paper. I read that paragraph and that is as far as I read in this email.[4]
>
> ....
>
> I think true South Africans, everybody are concerned about South Africa. We've got all kids and we're all worried that they might go to other countries. Also my really concern was just before the World Cup at that specific stage, there were talks about the crime rate, things were not in place ...'[5]

[20] The portion she said she read had no reference to crime and South Africa not being ready for the World Cup. Deep into the email there are references to crime and the World Cup, and that was what she said motivated her concerns for South Africans with children. In the content of the article there is considerable reference to issues affecting white South Africans leaving South Africa and children and crime. The portion of the email she said she read could not cause the concerns she said she had. Put differently, it is reading deep into the email that she could have been concerned about crime and South Africa not being ready for the World Cup. She spoke of people with kids who were all worried that they (the kids) might go to other countries. She would have had to have read the email further than she admitted to have that concern. The probabilities of this matter point towards Ms Pretorius having read the email contents much more than she was prepared to admit to. Her evidence was clearly far from the truth.

[21] The second respondent's assessment of the evidence of Ms Pretorius left very much to be desired. He accorded her more credence that was justified by the evidence she led. He should have concluded that Ms Pretorius had read

[4] See pages 213 to 214 of the transcript.
[5] See page 216 of the transcript.

either the entire email or much more of it than she admitted. His failure to properly assess her evidence amounts to the commission of a gross irregularity.

[22] While the internal disciplinary hearing was continuing, Ms Pretorius was subjected to a polygraph testing. It is trite that the results of a polygraph test are, alone, not reliable.[6] Mr van Biljoeon conducted the polygraph test to Ms Pretorius. His evidence was that she told him, in the course of the test that the contents of the email were racist, using the description "racialistic", according to her. This description by Ms Pretorius amounts to a previous inconsistent statement when seen against her subsequent denial at the arbitration hearing of the knowledge of what was in the email. She had to have read deep into the email to be able to say it was racist. Her version could therefore not have been probably true. In the circumstances, the arbitrator's finding in this regard are unreasonable as he should simply have found that Ms Pretorius had read more in the email than she agreed to.

[23] The fairness of the dismissal sanction was attacked by the third and fourth respondents. They said that dismissal was not the appropriate sanction in this matter where Ms Pretorius did not have any previous disciplinary records and where she had long years of loyal service to the company. In the absence of allegations of dishonesty, the length of service of Ms Pretorius ought to have carried a lot of weight in circumstances where the employer cannot prove that the trust relationship was damaged.

[24] The honesty of the contrition of Ms Pretorius was a difficult issue to assess. She decided to plead not guilty at the internal disciplinary hearing. When she realised that her job was on the line, and upon advice by her representative, she changed the plea to that of guilty during the appeal hearing. In her view, the charges were nothing but the making of a mountain out of a mould. She felt that it was unfair that she had lost her job for something that was so ridiculous, saying people took the article and made a big thing about it. According to her the unions never knew anything about the e-mail until Mr

[6] *Food and Allied Workers Union on behalf of Kapesi and Others v Premier Foods Ltd t/a Blue Ribbon Salt Rive* (2010) 31 ILJ 1654 (LC).

Kilian gave it to the chairperson of NUMSA. Some of her friends, even those on Director level, were said to be shocked by the way the matter was handled by the applicant. They thought that they would receive a warning and that would have been the end of it.

[25] The email can only be described as shocking and an example of the worst type of racist writing one could possibly imagine. To the majority of the South Africans, it is highly offensive and demeaning. It has an attack on the dignity of the sitting head of State, whose status embodies the unity of the South Africans. The email is of hate speech material. No wonder Mr Emanuel Rajoale was reduced to tears at the enquiry when the contents of the email were discussed. Ms Pretorius, in continually rejecting that the mail is racist, in essence rejects the applicant's stance on racism which clearly undermines the trust relationship. The applicant would be justified in not trusting Ms Pretorius not to disturb its racial harmony and the accompanying industrial peace.

[26] I do not deem it necessary to deal in details with the issue of how the matter was investigated upon. The relevance of the absence of a docket and the usage of spread sheets have all not been shown. How each case is investigated will depend on the facts and circumstances of that case. Where an employee is for instance caught red handed, the extent of investigations may not be as deep as when the suspect of some wrong doing is unknown.

[27] When the material evidence of this matter is properly considered, the award cannot stand. Ms Pretorius was clearly guilty of category 4 misconduct. The appropriate sanction is none other than a dismissal.

[28] The following order shall issue:

1. The review of an arbitration award in this matter is granted.
2. The dismissal of the fourth respondent, Ms Pretorius, by the applicant was substantively fair.
3. No costs order is made.

_____

Cele J

Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Adv.C.A.Nel
Instructed by :	Macgregor Erasmus Attorneys
For the Respondent:	Adv. L.Pretorious
Instructed by	UASA