JURISDICTION, DETAILS OF THE HEARING AND REPRESENTATION

1. I satisfied myself that the CCMA had jurisdiction to hear this matter.
2. The arbitration hearings were held on 21 October 2016; 16 January 2017 and 28 February 2017 at the CCMA offices, Anton Lembede St, Durban. The applicant was represented by Mr …………. (………..official) while the respondent was represented by Ms ………….(HR manager). The former has 10 years of experience in representing parties at arbitration while the latter had no experience. The interpreters were Ms P Nkosi (October 2016) and Mr N Gasa (January & February 2017);
3. The respondent handed in a bundle of documents. After an examination of the bundle the applicant accepted all the documents therein as being correct and authentic. On 28 February 2017 the applicant handed in photographs of a damaged blue denim jacket said to have featured in the alleged misconduct.
4. A pre-arb was conducted on 21 October 2016 to identify the disputed issues and issues on which there was agreement. A minute of the pre-arb was handed to both parties 16 January 2017. After perusal the parties confirmed the correctness thereof and it was then read into the record. Both parties were urged to keep the minute handy to remind themselves of the disputed issues, and to ensure that their witnesses deal with the disputed issues.
5. At the outset the parties were advised as follows: “*The purpose of cross-examination is, amongst other things, to show that your version is more probable than that of the other side. It is important to bear 3 things in mind when cross-examining – (a) You must put your version to the opposing witness; (b) If an opposing witness has left out an important fact then that should be put to the witness; (c) If you consider that any evidence of the witness to be false or incorrect then that should also be put to the witness. The purpose of all this is to give the opposing witness an opportunity of commenting on your version. It is very important to contest evidence that you disagree with because evidence that is left uncontested is likely to be accepted as being true. An adverse inference may be drawn if you do not put your version or put a new version ie a version that was not part and parcel of your case previously*.” The above reminder was repeated at the commencement of each hearing day.

ISSUE TO BE DECIDED

1. Whether the applicant was dismissed unfairly. She sought reinstatement and back-pay. She also sought leave pay but was unable to quantify it. She was advised to consult with the Department of Labour in this regard. (The respondent disputed that any leave pay was due to the applicant.)

BACKGROUND TO THE DISPUTE

1. The applicant is …………………(female age 36), a full-time machinist. She commenced in a temporary capacity on 7 September 2009 but 3 months later was employed in terms of a written indefinite term employment contract. She was dismissed on 9 June 2016. She earned R771.39pw (or R3342.43pm) for working a 5 day / 45 hour week. She remains unemployed despite making attempts at finding alternative employment. She has not earned anything from casual work. As breadwinner the applicant supported 20 dependants (5 adults and 15 children). The applicant’s highest standard of education is Gr 11.
2. The respondent is …………………….(PTY) LTD, a manufacturer of linen. It employs approximately 220 persons at the plant in question and has 1 branch.
3. The applicant was suspended with pay on 2 June 2016 and given a notice to attend a disciplinary hearing on 7 June 2016. The notice contained 3 charges: “*1. Gross & disorderly conduct; 2. Unacceptable & threatening behaviour; 3. Assault & abusive behaviour*.”
4. The respondent maintains a unilaterally imposed disciplinary code that provides as follows:
   1. Disorderly conduct – examples being: agitation, victimisation, intimidation, incitement; any behaviour unacceptable, conduct prejudicial to maintenance of good order within the company. It prescribes a final written warning for the first offence and dismissal for any further offence;
   2. Threatening behaviour – example being any act or language that may lead to violent behaviour. It prescribes a final written warning for the first offence and dismissal for any further offence;
   3. Unprovoked assault – examples being assault (unprovoked); attempted assault (unprovoked). It prescribes dismissal for the first offence;
   4. Assault – examples being fighting, minor assaults lead to no injury, assault / attempted assault. It prescribes dismissal for the first offence.
5. The applicant attended the hearing on 7 June 2016 and was represented by a shop steward. She pleaded not guilty to all the charges but was found guilty and dismissed. The respondent maintains an appeal procedure but the applicant chose to refer her dispute to the CCMA on 10 June 2016. The matter was set down for conciliation on 7 July 2016 but remained unresolved. Hence the arbitration.

SURVEY & ANALYSIS OF EVIDENCE & ARGUMENT

1. The following gave evidence for the respondent: …………..(floor foreman of 5.5 years); ………. (chairperson of the disciplinary hearing and holding substantive post of planning manager for 6 years and employed by respondent for 38 years); …………….. (machinist for 5 years). The applicant gave evidence and called the following in support of her case: ……….. (packer for 3 years and employed by the respondent for 4 years); …………….(service hand and machinist for 5 years and employed by the respondent for 6 years. She was at all relevant times a …… shop steward).
2. The following was either common cause, agreed to, undisputed or conceded during the pre-arb or the arbitration proper:
   1. That the rule in relation to charge 1 was that employees must conduct themselves properly and in an orderly manner in the workplace. Insofar as charge 2 was concerned, the applicable rule was that employees may not threaten other employees. insofar as charge 3 was concerned, the applicable rule was that employees may not assault other employees;
   2. That the rules were reasonable, valid and served important purposes. The applicant accepted that she was aware of these rules and that breach thereof would lead to dismissal;
   3. That a physical confrontation had occurred between the applicant and a colleague one Manyathi outside the respondent’s premises near a bus-stop on 31 May 2016;
   4. That Manyathi was dismissed as a result of the incident;
   5. That Manyathi had over the years directed verbal abuse at the applicant relating to a personal matter not relevant to these proceedings;
   6. That the applicant had reported this abuse to the floor foreman (but referred to as the manager in the proceedings) Gopi on numerous occasions and to the HR department on the morning of 31 May 2016;
   7. There is no evidence that Manyathi had ever reported any abuse directed at her from the applicant;
   8. Gopi had attempted to resolve the differences between the applicant and Manyathi to no avail. He counselled them several times but this did not have any lasting impact;
   9. There is no evidence that Gopi reported to HR that either the applicant, or Manyathi or both, should be dealt with either through progressive or corrective discipline in order to send out a clear and unambiguous message to both on the acceptable conduct in the workplace;
   10. During November 2015, Mpila, in her capacity as shop steward had attempted a reconciliation, also to no avail;
   11. That the constant bickering between the applicant and Manyathi had caused disruption in the workplace;
   12. That the applicant had in an attempt to avoid Manyathi, taken to having her lunch alone in the toilet rather than the canteen;
   13. That on the morning of the incident 31 May 2016, after being abused, the applicant had herself gone to the HR department and reported the abuse. Gopi had asked her why she had gone to HR and she informed him that she had reported the abuse to him for years and nothing concrete had been done. The person spoken to in the HR department was Ms K Badenhorst (the respondent’s representative in the arbitration);
   14. The applicant had never laid a formal grievance against Manyathi but there is no evidence that anyone in authority advised her to do so;
   15. On 31 May 2016 the applicant had used a broom to sweep the floor. Manyathi had stepped onto the broom for no particular reason;
   16. That Manyathi was armed with a broken bottle during the incident;
   17. That the applicant had used a blue denim jacket to shield herself from any harm during the incident;
   18. That the applicant’s alleged misconduct on 31 May 2016 had not occasioned any direct loss, harm, damage or prejudice to the respondent except the aforesaid disruption;
   19. That the issue of consistency was not being raised by the applicant;
   20. That the charges were serious and if the applicant engaged in them then it must be found that the dismissal was fair;
   21. That the applicant had a clean disciplinary record;
   22. That the applicant had long service;
   23. That the applicant’s position has not been filled due to a downturn in business.
3. Before an analysis is conducted of the evidence on the disputed issues, it is appropriate that a few words be said about the actions / omissions of the respondent in this saga. It was common cause that all employees and Gopi were aware of the difficulties between the applicant and Manyathi. Gopi had attempted in good faith to counsel them on several occasions in vain. Even though these persistent difficulties were having an impact on the shop-floor he never once requested HR to intervene. I accept that as a foreman (or manager) he may have had little experience in conflict resolution but he ought to have realised his limitations, alternatively realised that his efforts were bearing no fruit. As such he ought to have informed the HR office at an early stage to take steps. The respondent has rightly shown concern about violence in the workplace, but it could have done better by taking steps to avoid the situation that is the subject matter of this arbitration.
4. The respondent repeatedly put to the applicant and her witnesses the applicant’s failure lodge a formal grievance against Manyathi. (There was no evidence that anyone in management had informed her about this procedure.) I find this disingenuous because there is a general duty on any employer to create and maintain a safe and healthy workplace. The abuse directed to the applicant from Manyathi qualifies as harassment. I cannot find any authority for the proposition that a victim of harassment must lodge a formal grievance to activate the duty of the employer to protect her.
5. I find as follows on the disputed issues:
   1. Whether the applicant breached the rules by provoking an attack on Manyathi:
      1. It was common cause that all 3 charges arose out of the incident on 31 May 2016. There is an element of duplication in the charges;
      2. It can be accepted as a general proposition that violence is unacceptable in the workplace or outside the workplace if it has an impact in the workplace;
      3. It was common cause that there was a violent incident between the applicant and Manyathi. The issue to be determined is who provoked the incident;
      4. Saragee (respondent’s witness to the incident) stated that she did not know who started the incident. While the applicant denied having provoked the attack. In the circumstances I find on the probabilities that the applicant did not provoke the attack.
   2. Whether the applicant used a weapon during the incident:
      1. There was evidence of weapons being used during the incident. Saragee stated that she had seen the applicant wielding a clipper (a sharp and dangerous tool). She did not see Manyathi carrying any weapon but had “heard” that she had a bottle. In cross examination she stated that “I do not know if one had a clipper and the other a bottle.” Saragee went on to state that the applicant was trying to defend herself and she had done so with the clipper. (My emphasis.) As for the applicant she denied having any weapon. Her version was that she had tried to shield herself with her denim jacket;
      2. Manyathi was armed with a broken bottle was undisputed;
      3. A finding has already been made that the applicant did not provoke the attack. The converse of that finding is that Manyathi provoked the attack. If that is the case then it is not necessary to make a finding whether the applicant had a weapon or not because respondent’s own witness – Saragee – stated that the applicant had tried to defend herself. I find that one may legitimately use self-defence to ward off an unprovoked attack and one may do so by means of a weapon.
   3. Whether the applicant breached the rules or engage in any misconduct during the incident on 31 May 2016: Having regard to the findings made in paragraphs *a* and *b* above, I find that the applicant did not breach the rules, nor did she engage in any misconduct. I find her conduct to be lawful and as such she ought to have been found not guilty of the charges.
   4. Whether the charges were fabricated against the applicant having regard to her charge that the floor manager one ………..“favoured” Manyathi: There was no evidence of any bad blood between Gopi and the applicant. Nor is there evidence that Gopi “favoured” Manyathi.
6. Since the applicant did not breach the rules nor engage in any misconduct there cannot be any question of a breakdown of trust between the parties. In any event the evidence indicated that there is no bad blood between the applicant and her line manager Gopi. There is no evidence to show that a good working relationship cannot be restored between the parties.
7. This case was essentially about the respondent’s failure to distinguish clearly between an aggressor (Manyathi) and a victim (applicant) and to treat both as being equally culpable. That is untenable. In all the circumstances I find that the applicant was dismissed unfairly.
8. The applicant sought reinstatement with back-pay. There is no obstacle to her being given that remedy. The applicant was dismissed on 9 June 2016, ie 8 months and 3 weeks ago. The back-pay accordingly amounts to R29 053.61 (R3342.43 x 8 = R26 739.44; R771.39 x 3 = R2314.17).

AWARD

1. The dismissal of the applicant is unfair.
2. …………………….(PTY) LTD is ordered to reinstate ………………..retrospectively to 9 June 2016 in its employ on the same terms and conditions that governed her employment prior to her dismissal.
3. ……………………..(PTY) LTD is ordered to pay …………………..R29 053.61 within 14 days of being informed of this award.
4. …………………is to tender her services to ………………..(PTY) LTD within 48 hours of being informed of this award.

Dated at DURBAN on this 2nd day of MARCH 2017.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

R J PURSHOTAM

*Commissioner*