**DETAILS OF HEARING AND REPRESENTATION**

1. I satisfied myself that the …………..had jurisdiction to hear this matter.
2. The arbitration hearings were held on 17 June and 21 July 2015 at the MEIBC offices in Mercury House, Anton Lembede St, Durban. The hearing on Saturday 19 September 2015 was arranged by agreement at the premises of the respondent. The applicant was represented by attorney Mr ………..while the respondent was represented by HR manager Mr …………. Mr …….’s application to represent the applicant was unopposed. Having regard to the complexity of the matter the application was granted. (Depending on the context, references to the applicant include references to his attorney.)
3. The respondent handed in a bundle of documents. The applicant was given an opportunity to peruse the bundle. He thereafter admitted the documents as regards their authenticity and the correctness of their contents. A further page handed in later was paginated as page 36 and similarly admitted.
4. A pre-arb was conducted with the consent of the parties on 17 June 2015 to narrow down the issues. A typed minute thereof was distributed to both parties. It recorded the issues on which there was agreement and issues on which there was a dispute. On 21 July 2015 both parties confirmed the correctness of the minute. It was then read into the record. The parties were advised that they must keep the minute handy and ensure that their witnesses deal with the disputed issues as identified in the minute.
5. On 15 September 2015 the matter was postponed due to the applicant’s attorney’s illness.

**THE ISSUE TO BE DECIDED**

1. Whether the applicant was unfairly dismissed. He sought compensation.

**BACKGROUND TO THE DISPUTE & DETAILS OF PRE-ARB**

1. The applicant is ……………….(age 37), a rigging supervisor. He commenced employment with the respondent in March 2007 and was promoted to the position of rigging supervisor approximately 18 months before his dismissal. He was dismissed on 1 April 2015. The applicant was employed in terms of a series of fixed term contracts that were concluded as and when the respondent obtained work from its clients. It was agreed that there were breaks between some of the employment contracts. The applicant earned R39 750 per month for working a 5 day / 50 hour week. He remains unemployed despite making attempts at finding alternative employment. He has not earned anything from any type of casual work. The applicant indicated that as breadwinner he supported 4 adults and 2 children. His highest standard of education is grade 11.
2. The respondent is ………………(PTY) LTD, a business that fabricates and erects plant and equipment for its clients at their respective sites. It employs approximately 2300 persons. The respondent is part of a group that employs over 14 000 persons and has branches in all provinces in the Republic.
3. The applicant was suspended on 6 March 2015 and given a notice to attend a disciplinary hearing on 24 March 2015. The notice contained the following charge:

*“It is alleged that you are involved in or facilitated the employment of unsuitable / unqualified individuals on the TM1 project during the period of your employment on that project. You are alleged to have received payment(s) in return for securing employment for individuals that may otherwise not have been employed. This amounts to serious misconduct in contravention of the Group Five disciplinary code and procedure and is a serious breach of the trust relationship required between employer and employee. If you are found guilty you may be dismissed.”*

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1. It was agreed that the contractually binding disciplinary code prescribes dismissal for the first occurrence of the following offence: “*Giving or receiving or attempting to give or receive a bribe (money or gifts) in exchange for work or any other favour related to the company or its operation*.” The charge was based on this offence.
2. A disciplinary hearing was held on 27 March 2015 at which the applicant represented himself. He pleaded not guilty to the charge but was found guilty and dismissed. He completed both an appeal and a review form and handed them in.
3. A checklist with the issues that one usually encounters in arbitrations for alleged misconduct was distributed to both parties at the commencement of the pre-arb. The applicant raised the following procedural issues, all of which were disputed by the respondent:
	1. That the chairperson was an internal chairperson. As such he was said to have failed in his duty to be impartial and unbiased;
	2. That certain witnesses whose identities remained unknown were permitted to give evidence over the telephone. The respondent submitted that this procedure was necessary because the applicant had threatened or intimidated its witnesses. The applicant disputed that he had done so;
	3. That the applicant was not permitted to raise mitigating factors;
	4. That he was not allowed to appeal;
	5. That no medical exit interview had been conducted;
	6. That he was given a letter of dismissal in an unprocedural manner; and
	7. That there was a delay in informing him of his dismissal.
4. Insofar as the substantive issues were concerned, the following was either agreed to or disputed as the case may be:
5. The applicant agreed that there is a general duty on the part of all employees to be honest in the workplace. He also agreed that the following principles in the Code of Ethics were important and reasonable but of which he had not been informed previously:
	* 1. That the respondent will operate within the laws of South Africa, codes of industry practice and standards laid down by statutory bodies;
		2. That the respondent will not resort to bribery to further its business interests;
		3. That it will act with disregard for any personal ulterior or improper motive, such as personal gain; and
		4. That its employees will adhere to the respondent’s policies and procedures and apply them fairly throughout the organisation.
6. The applicant agreed that he had the following duties and responsibilities as the rigging supervisor:
	* 1. The moving and lifting of usually heavy equipment plant and equipment at the site of its client – Transnet;
		2. Managing approximately 50 employees and that this involved the performance of certain management functions;
		3. From time to time have contact with Transnet (the respondent’s client) to ensure that work was performed to its satisfaction; and
		4. To sit on the interview panel when job applicants are being interviewed for vacant rigger positions. He agreed that his assessment of the suitability of applicants (technical or otherwise) carried greater weight than the others on the interview panel.
7. Without admitting any wrongdoing the applicant admitted that the respondent had suffered reputational damage;
8. The applicant disputed the charge against him. He disputed having received any payment in return for facilitating the employment of any job applicant;
9. The applicant submitted that the charges were fabricated against him because he was the first Black rigger employed by the respondent and that when he was promoted to the post of supervisor, disgruntled and unsuccessful colleagues who had also applied for the post had fabricated these charges against him. The respondent disputed that the charges were fabricated;
10. The applicant indicated that he did not intend raising any issue relating to the consistent application of discipline;
11. The applicant agreed that the charge was serious. Again he emphasised his innocence;
12. The applicant agreed that the disciplinary code was contractually binding on him and that he was aware of its contents. He however disputed that he was aware that the offence in question had the prescribed sanction of dismissal;
13. It was agreed that the applicant had a clean disciplinary record;
14. The applicant submitted that progressive or corrective sanction would have been more appropriate in the circumstances. The respondent submitted that dismissal was the only fair and appropriate outcome;
15. The respondent submitted that the matter was aggravating because it involved dishonesty and that the respondent had suffered reputational damage. The applicant disputed that he had been dishonest;
16. The applicant submitted that he had not shown remorse because he was innocent;
17. It was agreed that the applicant had long service. However the respondent submitted that this should be held against the applicant as he was a senior employee who knows the rules after having spent many years with the respondent. The applicant for his part submitted that the long service should be counted in his favour because he had served the respondent loyally for many years and that he had been a good performer as an employee. It was not disputed that the applicant was a good worker;
18. It was disputed whether there had been a breakdown of trust serious enough to warrant dismissal.
19. The respondent submitted in closing that the dismissal should be upheld as being fair, while the applicant submitted to the contrary.

**SUMMARY & ANALYSIS OF EVIDENCE**

1. The following gave evidence for the respondent: ………….(the chairperson of the disciplinary hearing. He has held the substantive post of director of ……Division for 5 years and has been with the respondent for 34 years); and …………. (foreman rigger for 9 months);
2. Only the applicant gave evidence in support of his case.
3. The observation must be made at this stage that the applicant, *represented by an attorney*, did not put his version to the respondent’s witnesses on critical issues. As such a number of issues remained unchallenged. When asked by me, the applicant stated that he had not informed his attorney of those issues. I find that an applicant who fails to brief his attorney fully of all relevant issues cannot be heard to complain when findings are made against him in terms of the rules of evidence.
4. The applicant strained his credibility when he complained that the respondent had not conducted workshops to train its employees about the dangers of receiving gifts and bribes.
5. The evidence on the disputed procedural issues and my findings thereon are as follows:
	1. Whether the chairperson was partial and biased: The applicant’s evidence was that the chairperson was partial and biased because he also worked for the respondent. I reject that proposition for the following reasons:
		1. It was common cause that the chairperson had never had any interaction with the applicant before;
		2. It was common cause that the chairperson works in a different business unit of the respondent;
		3. It was the chairperson’s evidence that he had, at the disciplinary hearing, asked the applicant whether he was happy with him being the chairperson and that the response received was in the affirmative. This was not challenged when the chairperson was cross-examined. However when he gave evidence the applicant stated that he was not asked at the outset of the hearing whether he was satisfied. I cannot accept the evidence of the applicant on this issue as being credible;
		4. The applicant stated when giving evidence that he had been asked to leave the hearing room at some stage and that the chairperson had conducted discussions with the respondent while he remained outside. That allegation was not put to the chairperson when he was being cross-examined. I find that if that was indeed the case it would probably have been raised during the pre-arb, or at the least put to the chairperson when he was being cross-examined.
	2. Whether the applicant had threatened or intimidated any witnesses: I find that the applicant probably did threaten and intimidate witnesses (or at least Vusinkosi) for the following reasons:
		1. Vusinkosi stated that he had been threatened by the applicant. It was not put to him at any stage during his cross-examination that he had not been threatened by the applicant. As for the applicant, he stated when giving evidence, that he had not threatened nor intimidated any witnesses. Having regard to the unchallenged evidence of the Vusinkosi, I find that the applicant did probably threaten and intimidate him;
		2. It was conceded by the respondent that Vusinkosi was hesitant when giving evidence on this issue. It however placed emphasis on the statement made by Vusinkosi that he had hesitated because the applicant had advised him that he (ie the applicant) was disappointed in Vusinkosi for giving evidence for the respondent;
		3. Having regard to my own observations, I cannot find that Vusinkosi hesitated because he was lying. Rather, I find that as a young man he felt awed and overwhelmed by the occasion of the arbitration;
		4. That the applicant did not threaten or intimidate the respondent’s witnesses was not put to the chairperson. Nor was he asked whether any evidence had been put before him of threats or intimidation.
	3. Whether the taking of evidence over the telephone was unfair: I find that it was fair for the following reasons:
		1. I accept the general rule of practice that an accuser must face the accused when making the accusation. However that rule can be relaxed when there is evidence of threats or intimidation. Having regard to the finding made in the preceding paragraph, I find that it was not unfair to take telephonic evidence during the disciplinary hearing;
		2. It was not put to the chairperson in cross-examination why he had not asked the applicant for his view on the wisdom of taking evidence over the telephone.
	4. Whether the applicant was permitted to raise evidence in mitigation: The chairperson confirmed that the applicant had been given an opportunity to raise evidence in mitigation. He was not challenged on this during cross-examination. However when the applicant gave evidence, his submission was not that he was not permitted to lead evidence in mitigation: his submission was that he had not been afforded enough time to give such evidence as he felt that the chairperson was “rushing”. (Whether the chairperson rushed or not is not clear because that allegation was not put to him.) The applicant did not say what evidence he would have put before the chairperson if he was afforded more time. Be that as it may I find that the applicant was probably permitted to raise evidence in mitigation during the disciplinary hearing.
	5. Whether the applicant was allowed to appeal: The undisputed documents show that the applicant completed the appeal documents in his own hand and submitted them to the respondent. In other words he was indeed allowed to lodge an appeal, and I find accordingly. During the arbitration the issue mutated: the applicant complained that he had not been given a full appeal hearing and that he had not been informed of the outcome thereof. The respondent for its part submitted that it decides appeals on paper and that the applicant had indeed been informed of the appeal process by a text message. It also referred to a 3-page letter addressed to the applicant headed “*Review of dismissal application form*”. A perusal of that letter suggests that it is effectively a dismissal of the applicant’s appeal. I cannot decide whether this issue constitutes procedural unfairness for the following reasons:
		1. No evidence was led whether the applicant had a contractual entitlement to an appeal;
		2. There was no evidence of any collective agreement that provides for these procedural entitlements. (This being common in the public sector.);
		3. The LRA provides that one is entitled to refer an alleged unfair dismissal dispute with the CCMA regardless of whether an appeal process has been completed.
	6. Whether an exit medical interview had been conducted: It was common cause that the interview had not been conducted. However it was not disputed that this requirement is imposed on the respondent by its client Transnet. I cannot therefore find that the respondent is guilty of procedural unfairness as regards this issue.
	7. Whether the applicant’s dismissal letter had been given to him in an unprocedural manner: The applicant was aggrieved that he had been given the letter of dismissal outside his home by an employee who had been tasked to deliver it to him. It is not clear to me why this constitutes procedural unfairness, and as such I desist from making a finding.
	8. Whether there was a delay in informing the applicant of his dismissal: The chairperson stated that the applicant was told to liaise with one Blake Walker about the outcome of the hearing and had been given a date and time to do so. This evidence remained unchallenged during cross-examination. I therefore find that there was no delay in informing the applicant of his dismissal.
6. I now proceed to deal with the substantive issues. The evidence and my findings thereon are as follows:
	1. Whether the applicant received any payment in return for facilitating the employment of any job applicant: I find that the applicant probably received payment from Vusinkosi and facilitated his employment for the following reasons:
		1. The applicant agreed during the pre-arb that the respondent’s Code of Ethics provides that one must act with disregard for any personal, ulterior or improper motive, such as personal gain;
		2. The applicant agreed during the pre-arb that he sits on the interview panel when job applicants are being interviewed for rigger vacancies. He agreed further that his assessment of the suitability of such applicants (technical or otherwise) carried greater weight than the others on the interview panel;
		3. Vusinkosi evidence on this issue was as follows: That he had previously worked for …………..at the same …………….site. That he had been retrenched and had called the applicant telephonically. During September or October 2014 he called the applicant and was advised that a rigger position was available and that he must come to Durban (from his home in Pretoria) with his CV. He emailed his CV to the applicant and handed to him a printed copy thereof in Durban. The applicant asked him for R4000. He advised him that he did not have cash with him. They arranged to meet at the Field St branch of Standard Bank where Vusinkosi drew the cash and handed it to the applicant. He was informally interviewed by the applicant. Vusinkosi then secured employment after the applicant took him to HR where the employment contract was signed. After a week the applicant asked him for an amount of R500 for “washing the balls”. (The applicant stated when giving evidence that he did not understand this phrase. However he did not ask Vusinkosi to explain it when he was being cross-examined);
		4. Except for certain minor details the evidence of Vusinkosi as regards payment of the R4000 was unchallenged in cross-examination;
		5. In all the circumstances I find that the applicant probably received payment from Vusinkosi for facilitating his employment.
	2. Whether the charges were fabricated against the applicant: The applicant gave evidence to the effect that Vusinkosi had fabricated evidence because he was allegedly part of the group that consisted of jealous, disgruntled and unsuccessful colleagues who had also applied for the lucrative post of rigging supervisor. There was no evidence that Vusinkosi had applied for the applicant’s post and therefore I cannot find any motive on the part of Vusinkosi to fabricate evidence against the applicant. In any event this version of the applicant was not put to Vusinkosi when he was being cross-examined.
	3. Whether the applicant was aware that the offence in question attracted the sanction of dismissal: The applicant conceded that he was aware that dismissal was the only appropriate and fair sanction for the offence in question.
	4. Whether progressive or corrective sanction would have been more appropriate: Having regard to the finding in the paragraph above, this issue falls away. In any event the applicant admitted that for such offences a warning is not appropriate.
	5. Whether the applicant was dishonest: Having regard to the finding that the applicant probably received R4000 for facilitating the employment of Vusinkosi, I find the receipt of such payment to be dishonest as it infringed both the Code of Ethics and the rule contained in the disciplinary code relating to the receipt of bribes.
	6. Whether long service should be counted in favour of the applicant: I cannot find that long service can rescue an employee who is guilty of serious misconduct relating to honesty.
	7. Whether there was a breakdown of trust serious enough to warrant dismissal: The applicant conceded during the pre-arb that the charge was serious. It follows therefore that if he is guilty of a serious offence then he has broken the trust that his employer reposed in him and I find accordingly.
7. Whether the applicant was involved in or facilitated the employment of unsuitable / unqualified individuals: The applicant submitted repeatedly in evidence and in argument that he was not responsible for hiring or appointing employees on behalf of the respondent and as such he cannot be found guilty of having been involved in the appointment of “*unsuitable / unqualified individuals … that may otherwise not have been employed*”. I agree. There was no evidence presented to me to the effect that the applicant was involved in or facilitated the employment of unsuitable / unqualified individuals. Indeed the evidence was to the effect that Vusinkosi was a competent and qualified candidate. However my finding is that the applicant did in reality play a role in appointing persons, rightly or wrongly, for the following reasons:
	1. He made the concession during the pre-arb that his assessment of the suitability of job applicants carried greater weight than the assessment of others on the interview panel;
	2. The gist of the charge was not that he had foisted undeserving employees on the applicant: It was that he had received payment corruptly from job applicants for personal gain;
	3. Be that as it may he did not dispute Vusinkosi’s evidence that he was interviewed informally on the site by the applicant and shortly thereafter appointed. Also undisputed was that the applicant was the only person with whom Vusinkosi had had contact in the run-up to him being appointed by HR;
	4. The applicant stated in evidence that it was not only Vusinkosi, but a “lot of people” called him to find out about job opportunities. If he was not involved in hiring or appointing people as he contends, then it is not clear why all these individuals were making contact with him. If he genuinely did not have anything to do with HR matters, then he ought to have advised such individuals that they were speaking to the wrong person and that they should direct their inquiries to the HR office. He did not do that. Instead he entertained the inquiries. The probabilities are that he did so in order to improve his prospect of receiving payments from desperate job seekers.
8. It was agreed that the contractually binding disciplinary code prescribes dismissal for the first occurrence of the following offence: “*Giving or receiving or attempting to give or receive a bribe (money or gifts) in exchange for work or any other favour related to the company or its operation*.” I find accordingly that the applicant was correctly found guilty of this offence and fairly dismissed.
9. In all the circumstances, I propose to dismiss the application.

**AWARD**

1. The application is dismissed.

**COUNCIL COMMISSIONER: RANJIT PURSHOTAM**