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 22 June and 17 August 2018 at the CCMA offices, Anton Lembede St, Durban. The applicant represented herself. The respondent was represented by its regional HR manager Mr……………
3. The respondent handed in a bundle of documents on 22 June 2018. None of the documents was disputed by the applicant.
4. A pre-arb was conducted on 22 June 2018 with the consent of both parties. For this purpose a list of issues that are usually encountered in alleged misconduct cases was distributed to both parties. A typed minute of the pre-arb was distributed to both parties. After being amended at the request of the respondent, the amended minute was read into the record on 17 August 2018. Both parties were requested to ensure that their witnesses deal with the disputed issues.
5. At the commencement of the arbitration the parties were advised as follows as regards cross-examination: “*Witnesses will be subjected to cross-examination. 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 – You must put your version to the opposing witness; If an opposing witness has left out an important fact then that should be put to the witness; 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*.”
6. The applicant, being a lay-person, did not have the wherewithal to cross-examine effectively.

ISSUE TO BE DECIDED

1. Whether the applicant was dismissed unfairly. She sought reinstatement with back pay. No statutory claim was made.

BACKGROUND TO THE DISPUTE

1. The applicant is …………………(a female, age 44), a part-time general assistant in the respondent’s delicatessen at its ………………..branch in Durban. She had worked her way up to this post after commencing in May 2001 as a till packer in terms of a written indefinite term contract of employment. She was dismissed on 12 February 2018 after being suspended with pay on 30 January 2018. She earned R26.64 per hour and worked fluctuating hours. The applicant’s average weekly wage for the past 13 weeks as contemplated in s 35(4) of the Basic Conditions of Employment Act 75 of 1997 was accordingly R1004.65 for working an average of 37.74 hours per week. The applicant has not found alternative employment despite making attempts, nor has she earned anything from casual employment since the date of her dismissal. Her highest standard of education is Gr 11. As breadwinner she has 1 child dependant.
2. It was agreed that as a general assistant in the delicatessen the applicant prepared food items for sale, packaged them, served customers, and maintained the department in a clean and hygienic state.
3. The respondent is ………………………. a supermarket chain that has approximately 200 employees at the branch in question and approximately 150 000 employees at hundreds of branches around the Republic. It is a large employer.
4. The applicant was given a notice to attend a disciplinary hearing on 29 January 2018. It contained the following charge: “*Gross misconduct in that on 28/01/2018 it was discovered that you concealed property, namely a perfume set, of which you were not the lawful owner without following the correct staff buying procedure and without specific authorization from management*.”
5. It was agreed that the charge was based on the second part of para 12 of the unilaterally imposed “……………Company Rules,” which reads as follows: “*Employees must not hold or store any Company goods or property on the premises in places which are not recognised or designated as storage / holding areas for that Company property without specific authorisation of management*.” (the Rule). The company rules state that in general “*Employees must comply fully with these rules. Any transgressions will result in disciplinary action being taken, which may include dismissal*.”
6. The disciplinary hearing was held on 1 February 2018. The applicant attended; was represented by a shop steward; pleaded not guilty; heard the evidence being given against her by the respondent; gave evidence in support of her case; and requested her supervisor (one …………..Saktu) to give evidence in her favour but the supervisor declined. The applicant was found guilty and dismissed.
7. The respondent does not maintain an appeal procedure. The applicant accordingly referred an alleged unfair dismissal dispute with the CCMA on 27 February 2018. The matter was conciliated on 26 March 2018 but remained unresolved. Hence the referral to arbitration.
8. Only the respondent chose to make an oral closing statement.

SURVEY & ANALYSIS OF EVIDENCE AND ARGUMENTS

1. The respondent called the following witnesses in support of its case: …………………(the branch manager where the applicant worked; he had held that post for 4 months; he had previously worked as sales manager for 4.5 years in the fresh food department); and ……………..(the second-in-charge in the delicatessen; and employed by the respondent for 16 years). Only the applicant gave evidence in support of her case.
2. During the pre-arb the applicant indicated that she did not intend raising any procedural issue.
3. The following was agreed to, common cause, undisputed or conceded during the pre-arb and / or the arbitration:
	1. The applicant was aware of the Rule;
	2. The Rule was devised to avoid shrinkage, ie to ensure that all stock was accounted for;
	3. The applicant brought the perfume gift set from the toiletries department to her own department, ie the delicatessen;
	4. The applicant intended purchasing the gift set a few days later when she was paid her wages;
	5. …………..was in charge of the delicatessen, and she was the applicant’s supervisor;
	6. The dimensions of the gift set were approximately 25cm x 12cm x 12cm;
	7. Breach of the rule was serious;
	8. When the gift set was discovered, Govender had asked who the item belonged to, and the applicant had informed him that she intended to buy it;
	9. Govender had asked the applicant why she had not followed the proper procedure for purchasing and the applicant’s response was that Saktu had suggested that the item be left in the Vienna box in the refrigerator;
	10. The gift set, as long as it lay in the Vienna box, was not available for sale to the respondent’s customers in the normal course of events;
	11. The respondent maintains a dedicated entrance and exit for its employees, and they are searched by security personnel when they enter and leave the workplace;
	12. The charge against the applicant was not fabricated;
	13. The applicant had shown remorse;
	14. The applicant had a clean disciplinary record bar for a few times when she was given verbal warnings for late-coming;
	15. The applicant had long service; and
	16. Govender, as manager, had not had a problem with the applicant before the incident in question.
4. Before making findings on the disputed issues, I pause make two observations:
	1. The Rule was said to have been devised for the purpose of reducing shrinkage. This was understood by Govender to mean the reduction of unaccounted for stock. While I agree that the Rule serves a useful purpose, it must also be observed that it is improbable that employees will conceal items simply for the purpose of concealing. It is more likely and probable that they will conceal them with the purpose of purchasing at a later stage. It is akin to “reserving” an item for oneself. In this regard it must be kept in mind that all the employees are normal human beings with normal needs and wants. They are consumers of goods and services and as such are also customers of the respondent;
	2. It would be improbable, having regard to its dimensions, for that item to be taken out of the store undetected because employees are security searched on their entry and exit.
5. The following findings are made on the probabilities on the disputed issues:
	1. Whether the applicant had been made aware that breach of the Rule was a dismissible offence: Even though the applicant stated that she was not aware that breach of the rule was dismissible, she did not dispute the respondent’s assertion that employees were made aware in meetings that breach of the rule was dismissible. I accordingly find that she was aware. Whether the offence is indeed dismissible, objectively speaking, and having regard to the facts of this case, is a question that is dealt with below in para 20f.
	2. Whether the applicant informed ……………..(the applicant’s supervisor) that she intended purchasing it once she was paid the following Monday; Whether Saktu had suggested that it be kept in the Vienna box in the refrigerator on the top shelf; Whether the applicant brought a crate for Saktu to stand on, and whether Saktu placed the gift set into the Vienna box on the top shelf of the refrigerator: This was the applicant’s version. The respondent attempted to dispute it by way of Govender’s hearsay evidence. I have to accordingly find for the applicant on these issues. This finding is an important mitigating circumstance.
	3. The role of …………….in the misconduct: The applicant’s undisputed evidence was that Saktu was on duty on the day of the disciplinary hearing. The applicant accordingly attempted to enlist her assistance at the disciplinary hearing to confirm her version but Saktu refused on the grounds that she (ie Saktu) could jeopardize her own job. The applicant has been consistent in raising these issues all along but for some inexplicable reason the respondent failed to lead the evidence of Saktu to rebut the version of the applicant. It is possible to drawn an inference: that the respondent may be attempting to shield Saktu from disciplinary action. If that is so, then that would amount to inconsistency. But I do not make a finding in that regard. (The respondent belatedly, during its closing statement, agreed that Saktu’s evidence may strengthen its case, and that it was willing to call her. It was indicated to it, that if it was attempting to postpone the arbitration, that application was refused.)
	4. Whether the applicant breached the Rule: Applicant admitted to breaching the Rule. Whether she ought to have admitted the breach is an issue that warrants closer examination having regard to undisputed role of Saktu. The latter part of the Rule talks about obtaining “specific authorisation of management.” “Management” can connote either the branch manager (Govender) or the person that manages the applicant (Saktu). Having regard to the role played by Saktu, the applicant had her “specific authorisation.” This finding is not intended to detract from the applicant’s admitted breach of the Rule. However it must be taken into account as a mitigating factor.
	5. Whether the concealment of desirable stock items (whether as a result of low sale price or shortage of such item) was a common occurrence in the respondent’s store: The parties disputed this issue. I cannot make a finding on the probabilities on this issue.
	6. Whether dismissal was a fair sanction; alternatively whether progressive or corrective sanction ought to have been implemented: I find that the dismissal was unfair and that progressive or corrective action ought to have been taken for the following reasons:
		1. Govender did not believe that warnings are of any value as he believed that they gave licence to employees to repeat the mischief. This view is not in accordance with our labour law or the judgments of our courts;
		2. The Code of Good Practice: Dismissal (Sch 8) in item 3(4) provides as follows: “*Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable.*” The applicant admitted that the breach was serious but the respondent failed to show that the breach was of such gravity that it made the employment relationship intolerable;
		3. Item 3(5) states: “*When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee’s circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself*.” The respondent failed to lead evidence that it had taken into account the factors set out in item 3 even though they were identified as disputed issues in the pre-arb minute. The respondent accordingly failed to show that the dismissal was for a fair reason as contemplated in s 188 of the LRA read together with the Code.
	7. Whether the respondent suffered any loss, damage, harm or prejudice: I accept that the concealment of the gift set removed it from the shop-floor and thereby deprived the respondent’s customers of the opportunity of purchasing it. That is a form of prejudice. But the applicant is also a customer of the respondent and there is evidence to show that she intended purchasing the gift set. I find accordingly that the respondent did not suffer any loss or damage or harm as a result of the applicant’s actions. (The finding has already been made that stealing the item was an improbability having regard to its dimensions, and the security search that is conducted on leaving the store at the dedicated exit.)
	8. Whether there were any aggravating or mitigating circumstances: Even though this issue was identified as a disputed issue in the pre-arb minute, neither party led evidence expressly on this issue. The following can however be gleaned from the evidence:
		1. Aggravating: The applicant breached the Rule even though she was aware of the Rule.
		2. Mitigating:
* The applicant admitted to Govender that the item belonged to her when he questioned staff;
* She admitted to breaching the Rule;
* Her expression of remorse;
* The long service;
* The clean disciplinary record: she was a first offender;
* Saktu, her supervisor, had assisted her in the concealment;
* It is possible to interpret Saktu’s involvement as giving the applicant “specific authorisation;”
* The respondent had not suffered any loss, damage or harm as a result of the misconduct.
	1. Whether there had been a breakdown of trust serious enough to warrant dismissal: The applicant submitted that she remained a trustworthy person. The respondent failed to lead any evidence of a breakdown of trust. It must be noted that at no stage did the respondent make any allegation or lead evidence of dishonesty on the part of the applicant. I find accordingly that trust was not broken.
	2. Whether the employment relationship had been rendered intolerable; Whether reinstatement was reasonably practicable; whether a good working relationship could be restored if the applicant was reinstated; and whether reinstatement would cause a disproportionate level of disruption or financial burden to the respondent if the applicant was reinstated: The respondent failed to lead evidence on these issues even though they were expressly identified as disputed issues in the pre-arb minute. The applicant’s undisputed evidence was that there was no reason why a good working relationship could not be restored if she was reinstated, and I find accordingly.
	3. Whether another person had been appointed in the applicant’s place: Moodley submitted that he had taken the applicant’s place as the second-in-charge in the delicatessen. Even though this was disputed by the applicant, I do not see see this as an obstacle to the applicant being afforded the remedy that she seeks.
	4. Whether the applicant will be able to secure alternative employment having regard to her age; modest education; and no qualifications: Govender was confident that, despite the poor state of the economy, the applicant could find a job because she was “well experienced and skilled.” It is not clear on what basis this submission was made. As for the applicant she gave direct evidence that she had attempted in vain to obtain employment for the past 6 months. I have to accordingly find that, having regard to her age of 44 years, and lack of qualifications, she will probably remain unemployed for the foreseeable future. There is no evidence that the respondent took this factor into account when effecting the dismissal.
1. When all is said and done, I find the dismissal to be unfair. A fair and appropriate sanction having regard to the facts of this case, and with the applicant being a first offender, would have been a written warning or even a final written warning.
2. The applicant sought the primary remedy which I now intend affording to her. The respondent also failed to show why she should not be afforded this remedy. But the applicant must be sanctioned for the breach by being deprived of a significant portion – almost half – of her back pay. The back pay will be equivalent to the amount she would have earned over the past 3 months. (She has been unemployed and without income for over 6 months.) This sanction must be imposed to send a loud and clear message to the applicant of the importance of being rule-compliant in the workplace. The back pay therefore amounts to R13 059.42 (R1004.65pw x 4.333 = R4353.14pm; R4353.14 x 3)

AWARD

1. The dismissal of ………………..is unfair.
2. …………………….is ordered to reinstate ……………….in its employ as from 24 May 2018 on the same terms and conditions that applied on the date of her dismissal.
3. ………………….is ordered to pay ………………….R13 059.42 within 14 days of being informed of this award.
4. …………………is to tender her services to ……………………within 48 hours of being informed of this award.

Dated at DURBAN on this the 24th day of AUGUST 2018.

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R J PURSHOTAM

*Commissioner*