JURISDICTION, DETAILS OF THE HEARING AND REPRESENTATION

1. I satisfied myself that the ………………..had jurisdiction to hear this matter.
2. The arbitration hearings were held on 23 October 2017 and 12 February 2018 in the boardroom at the Department of Labour, Langalibalele St, Pietermaritzburg. The applicant was represented by Adv S Murray instructed by …………Attorneys, while the respondent was represented by its HR manager Mr ………………
3. Both parties handed in their respective bundles of documents at the outset. After being given an opportunity of perusing the bundles, both parties indicated that they did not dispute any document as regards its authenticity or the correctness of its contents. The respondent handed in further documents on 12 February 2018 and these were similarly accepted by the applicant as being correct and authentic. (The applicant objected to the latter documents being handed in as he considered it to be an “ambush,” but he could not show any prejudice.)
4. With the consent of the parties a pre-arb was conducted 23 October 2017. For this purpose a checklist containing issues that one encounters in alleged misconduct cases as distributed to both parties. The parties were advised to keep notes of the issues on which there was agreement, and issues on which there was a dispute. They were also informed that no evidence need be led on the issues on which there was agreement, but that they must 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 test the reliability, credibility and relevance of evidence, and 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. Depending on the context any reference to the applicant may nor may not include reference to his legal representative.

ISSUE TO BE DECIDED

1. Whether the applicant was dismissed unfairly. He sought reinstatement with back pay. (He applicant also sought leave pay amounting to 8 days but failed to lead any evidence on that claim.)

BACKGROUND TO THE DISPUTE

1. The applicant is ……………………. (male age 47), a night shift supervisor and second in charge. He commenced full-time employment with the respondent in terms of a written contract of employment on 5 July 2004, subject to a 2 month probationary period. He was dismissed on 20 July 2016. He earned R2346.77 per week (or R10 168.57pm) for working 4 night / 46 hour week. The applicant has not obtained alternative employment despite making attempts, nor has he earned anything from casual work. His highest standard of education is Gr 10. As breadwinner he has 3 dependants (2 adults and 1 child).
2. The respondent is …………………….(PTY) LTD, a manufacturer and supplier of …………. to the automotive industry. At its ………………. plant it employs approximately 530 persons. It has 6 branches in the Republic employing approximately 1900 persons (including those in Pietermaritzburg).
3. Despite alleging that the applicant was guilty of misconduct, viz desertion, the respondent failed to conduct a hearing into the alleged misconduct. There is a dispute whether the applicant was urged to appeal. Be that as it may the applicant did not appeal even though he was aware of the rules and procedures of the respondent. Instead, he referred an alleged unfair dismissal dispute to the ……………. on 27 September 2016 together with an application for condonation.
4. The following is a short history of the process that has occurred since that date:
   1. The condonation application was granted on 24 November 2016;
   2. The matter was set down for con/arb on 17 February 2017. It remained unresolved;
   3. The respondent then launched an application for the rescission of the condonation application on 24 February 2017. It was opposed. The application was refused for lack of jurisdiction on 24 March 2017;
   4. On 28 July 2017 at the arbitration (before a different commissioner), the applicant made a successful application for legal representation. The matter did not proceed on that day because the respondent indicated it also desired legal representation;
   5. In the event on 23 October 2017 the respondent chose to proceed without being legally represented.

SURVEY & ANALYSIS OF EVIDENCE AND ARGUMENTS

1. The respondent called the following witnesses in support of its case: ………….. (production manager for 3 years and the applicant’s immediate superior; previously production supervisor; employed by respondent for 26 years); …………….. (HR manager for 10 years and the respondent’s representative at the arbitration); ……………. (HR administrator for 3 years); ……………….. (supervisor of the applicant and employed by the respondent for 34 years).
2. The applicant gave evidence in support of his case and called his brother …………… in support of his case. Naidoo is an erstwhile employee of the respondent.
3. The respondent made an opening statement consisting of 9 pages. Both parties submitted written closing statements. The applicant was asked to make closing submissions on issues that he raised with the respondent’s witnesses but did not himself mention when he himself gave evidence (in order to test his credibility); and on the levels of hostility shown by the parties to each other (in order to determine whether reinstatement was a fair and appropriate remedy). In the event, the applicant failed to make any submission on these issues in his closing statement.
4. The following was agreed to, common cause, undisputed or conceded during the pre-arb, or the arbitration proper:
   1. The applicant was absent from the workplace from 10 May 2016 to 20 July 2016;
   2. The applicable rule is that the applicant is required, as an employee, to attend at work on a regular basis unless he has been excused;
   3. The applicant is entitled to absent himself from his workplace if he is afflicted by an injury or illness provided that he informs the respondent of his absence; and provided further that he has sick leave due to him;
   4. Applicant worked in the press-shop;
   5. There is heavy equipment in the press-shop;
   6. The disciplinary code is a collective agreement;
   7. The disciplinary code in para 3 provides for “*absence from work without permission or notification*.” It provides for a written warning for the first offence; a final written warning for the second offence; and dismissal for the third occurrence. While in para 7 provides for “*desertion – away from work for five or more working days without permission or good reasons*.” It prescribes dismissal in such cases;
   8. The staff notice dated 7 August 2015 which states that “*employees who are absent from work for longer than 5 days will receive a registered letter from HR informing them of their failure to inform the company – employees have 7 days to respond – failure to do so a second registered letter will be sent and failure to respond will result in your termination of services for desertion. Once terminated, you will still have the right to appeal against the dismissal in terms of the ………..main agreement*;”
   9. Para 7.4 of the MIBCO main agreement provides: “*Desertion: An employee will be regarded as having deserted from his employer’s service after a continuous absence of five working days and without notification to his employer of his whereabouts. Provided that (a) the employer attempts to contact the employee in writing at his last known address supplied by the employee; (b) the employee was duly notified in writing of the necessity to furnish his employer with his address and any changes of address; (c) the employee shall be allowed a period of one month to lodge with his employer a written appeal against his dismissal*.”
   10. The respondent has always had, historically, a problem with absenteeism;
   11. The aforesaid staff notice also provides that - “*in cases of desertion, during the appeal, employees complain that they did not receive the letter because it was sent to the old or wrong address. The Company reiterates the rule that it is the responsibility of the employees to inform the HR department or payroll department when they change their addresses and bank account details, respectively. The onus is on you the employee to do so – the company cannot be held responsible for letters going to the wrong address and monies paid into the wrong bank account*.”
   12. Desertion is a serious offence;
   13. No issue of inconsistency was being raised by the applicant;
   14. The applicant had a clean disciplinary record;
   15. The applicant had long service;
   16. The respondent sent a registered letter dated 6 July 2016 to the applicant’s address being ……………..Rd, Pietermaritzburg, 3201 in the following terms: “*Dear Mr ……………., unauthorised absence from work. You have been absent from work from Tuesday 17 May 2016 to date. In terms of the company’s conditions of employment you had to inform the company of your impending absence before the commencement of your shift alternatively during the course of your shift – you have failed to do so. You are therefore advised that unless you contact the Human Resources Department by no later than the close of business 16h30 on 13 July 2016 you will leave us with no choice but to assume that you are no longer interested in honouring your employment contract with …………….(Pty) Ltd, PMB manufacturing site. Consequently, we may have no option but to terminate your services on the grounds of desertion. We trust that the above will not be necessary and look forward to your co-operation herein. Signed “…………..*;”
   17. There was no evidence that the letter had reached its destination or had been collected by the applicant from the post office;
   18. The respondent sent a registered latter dated 13 July 2016 to the applicant’s address being ………………Pietermaritzburg, 3201 in the following terms: “*Dear Mr …………., unauthorised absence from work. We refer to our letter dated 6 July 2016 with regards to the above, to which we have had no response. Your failure to contact the Company in terms of your employment contract clearly indicates that you no longer wish to be bound by the said contract. Finally, we must remind you that unless you contact the Human Resources Department by no later than the close of business 16h30 on 20 July 2016, we will terminate your services. We trust that this will not be necessary and await your response in person and/or in writing. Signed “………………*;”
   19. The letters were not received by the applicant;
   20. The letters were both sent to the old address of the applicant as he had failed to inform the respondent of his new address;
   21. The respondent failed to use the tollfree number printed on the registered slip to ascertain whether the letters has reached the applicant;
   22. The respondent had his cellphone number;
   23. WhatsApp correspondence had been conducted (during the applicant’s absence) between the applicant and his manager Lettman about the applicant’s health and his visits to the hospital;
   24. Sick notes were dropped off by the applicant’s brother in the sick note box. Even though the respondent disputed whether these were dropped off, I will accept that they were because the respondent failed to call the nurse/s who clear the box to verify whether the sick notes were indeed found in the box or not;
   25. A “staff complement – termination of employment” form was completed on 26 July 2016 indicating that the applicant’s employment had been terminated on 20 July 2016. The decision to terminate was made by and the document recording that fact was signed by Lettman and countersigned by Seeparsad. The reason for the termination was recorded therein as being “desertion;”
   26. The date of dismissal was 20 July 2016 but no documents were prepared on that day;
   27. Clause 14.5 of the employment contract states that “*the party terminating the contract must do so in writing*;”
   28. The applicant arrived at his workplace on 28 July 2016 and had a meeting with Lettman and Seeparsad;
   29. The respondent was aware that the applicant was the victim of alleged robbery in 2015 in which he had, in order to escape, had sustained a back injury and a fractured femur while jumping over a wall;
   30. Seeparsad’s oral evidence was that when an employee returns from alleged desertion – and whose employment has in the meanwhile been terminated – the respondent does not charge such employee with desertion. Instead it offers such employee the right to appeal on their return. If good reason is given for the desertion then the employee is reinstated. If there is no good reason offered, then the termination stands;
   31. The right to appeal was not offered to the applicant in writing;
   32. No letter was sent in terms of the ……………agreement informing the applicant of his dismissal;
   33. No disciplinary hearing was held even though desertion constitutes misconduct.
5. Having regard to the above facts I find the applicant’s dismissal to be substantively and procedurally unfair for the following reasons:
   1. It is not clear to me why the respondent sends out registered letters when communicating with its employees. I did not get any meaningful response when I put to the respondent’s representative whether it was fruitful to persist with registered letters having regard to the post office’s pathetic record in delivering letters. It was common cause that there are more effective means of communicating, such as WhatsApp. This facility, besides delivering the message instantaneously, has the bonus of indicating to the sender whether the message has been received and read by the recipient;
   2. Correspondence was being conducted between Lettman and the applicant about the latter’s state of health and his need to remain at home to recover from the back pains. The respondent must therefore be taken to have been aware of the reason for his absence;
   3. Desertion requires evidence that the employee has an intention to abandon his employment. There was no such evidence led by the respondent;
   4. Even though desertion constitutes misconduct the respondent failed to conduct a hearing into the misconduct. It appears that in cases of desertion it is the respondent’s policy not to conduct a hearing. I find such policy to be inconsistent with fair labour practice. I find further that affording an appeal is a poor substitute to a proper hearing;
   5. Various policy documents of the respondent and ………….were referred to during the arbitration. Not one of them prohibits the respondent from having a hearing into the alleged misconduct.
6. For the purpose of determining whether the applicant should be afforded the remedy of reinstatement – the primary remedy – I intend to analyse the evidence on an issue on which a significant amount of time was spent during the arbitration: whether the applicant had suffered an IOD on 9 May 2016. There are a number of conflicts between the evidence of the applicant and the respondent in this regard. I find the respondent’s witnesses Lettman and Omar to be credible witnesses who did not have an axe to grind with the applicant. The former was described by the applicant himself as a “good man” while the latter generously gave the applicant a lift to and from work for many years. The applicant had a good relationship with both. For the reasons contained in the next paragraph I prefer the evidence of Lettman and Omar over that of the applicant.
7. I intend affording the applicant relief by way of compensation, and not reinstatement, because I find that the employment relationship has probably become intolerable for the following reasons:
   1. The applicant emphasised repeatedly when cross-examining the respondent’s witnesses the following:
      1. that there is heavy machinery in the press-shop where the applicant worked (which was common cause);
      2. that the applicant was required to exert himself physically when performing his duties;
      3. that on 9 May 2016 he had suffered an IOD to his back while performing physically demanding work;
   2. He also repeated in various affidavits that he had suffered a “massive” back injury while working;
   3. There was no dispute that the respondent employs cranes to move anything weighty in the press-shop. In other words it is not necessary for an employee to use muscle power to lift or move anything heavy. In any event on 9 May 2016 he was not lifting or moving anything of significant weight. It is therefore not clear why the applicant put these questions or propositions to the respondent’s witnesses. The only inference that one can draw is that he was attempting to mislead (or possibly deceive) the respondent’s witnesses because when he gave evidence, the applicant was careful not to mention any incident that triggered the alleged injury. His evidence was that he was moving a few screens each weighing 500 grams when he experienced spasms in his back. He conceded that these spasms were related to the back injury that he had suffered when he was the victim in a robbery incident in 2015. In his closing statement the applicant mentions that an “incident” led to the “injury” but failed to describe the alleged incident. Therefore on his own version there was no IOD;
   4. The applicant was present while the respondent’s witnesses were being cross-examined. I find that the questions posed by the applicant about the use of physical strength were inappropriate, through no fault of his legal representative: I find that the applicant probably issued incorrect instructions to his legal representative. I am therefore fortified in my finding that the applicant attempted to mislead the respondent’s witnesses;
   5. It was common cause that the applicant was familiar with all the rules and procedures of the respondent. Besides, he had made an IOD claim about a decade ago. Despite that he did not follow the protocol for the reporting of the alleged IOD on 9 May 2016 nor did he make any COIDA claim;
   6. Lettman indicated that he was aware that the applicant had suffered an injury to his back in the 2015 incident and that he had tried in October or November 2015 to accommodate the applicant – a key man – by asking him to remain seated during his shift and oversee the staff. He submitted that the applicant had agreed to this proposal. This was not disputed in cross-examination by the applicant. When giving evidence however, the applicant failed to acknowledge this accommodation by Lettman. Instead he persisted in repeatedly submitting (in cross examination and while giving evidence) that the respondent had failed to listen to his appeals to be allocated day-shift;
   7. If the applicant’s version in the above paragraph is correct, then he would have probably lodged a grievance. He failed to do that even though he knew about such process. His reason: Lettman was a “good man;”
   8. Having regard to the above I find that the applicant was attempting to paint the respondent as being an uncaring employer that cruelly dismissed him for desertion;
   9. During the arbitration the applicant and his brother both displayed a high level of hostility towards the respondent’s representative. The proceedings had to be paused to enable tempers to cool. They blamed him personally for the applicant’s woes. Such hostility cannot, I find, be conducive to a good working relationship being restored between the parties if the applicant is reinstated.
8. Having regard to the applicant’s long service he would have ordinarily been afforded significant compensation. But he must be penalised for the manner in which he presented his case / put questions to the respondent’s witnesses. Having regard to these factors I find it just and equitable that compensation be awarded to the applicant in an amount that he would have earned over 2.5 months This amounts to R25 421.42 (R10 168.57pm x 2.5).
9. The applicant submitted a document in which he consented to any monetary award, if so ordered, being paid into the trust bank account of his attorney.

AWARD

1. The applicant’s dismissal is found to be unfair.
2. …………………(PTY) LTD is ordered to pay ………………R25 421.42 within 14 days of being informed of this award.
3. The payment to the applicant is to be made into the trust bank account of his attorney details of which are as follows: Name of account: ……………………

Dated at DURBAN on this the 22nd day of FEBRUARY 2018.

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

R J PURSHOTAM

*Commissioner*