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 5 March, 24 & 25 May 2018 at the CCMA offices, Anton Lembede St, Durban. The applicant represented himself while the respondent was represented by Mr S ……………….. (senior LR specialist).
3. Documents were handed in as follows:
	1. Both parties handed in their main bundles of documents on 5 March 2018. The respondent did not dispute any of the applicant’s documents except to say that the version of the disciplinary code included in his bundle was the “old” version. Be that as it may the respondent indicated that it did not object to the old version being used in the arbitration. The applicant for his part disputed the following in the respondent’s bundle: page 5 paras 3.3.11-15; page 7 para 3.4.9; page 12 paras 4.2-4; p 13 para 4.5; p 14 para 5.3; p 15 para 4.5-6; page 50;
	2. On 24 May 2018 the respondent handed in a further bundle. None of the documents therein were disputed by the applicant.
4. With the consent of the parties a pre-arb was conducted on 5 March 2018 after they were handed a checklist containing the issues that one normally encounters in alleged misconduct related dismissals. A minute thereof was distributed to both parties by email. The parties examined the minute and indicated that it correctly reflected the pre-arb proceedings. The minute was then read into the record. The parties were informed that insofar as there was agreement on issues, that those issues would form part of the evidence immediately. The parties were then invited to ask their respective witnesses to deal with the disputed issues. The parties were also requested to keep the minute handy so as to remind themselves of the issues in dispute.
5. At the commencement of each new hearing day the parties were advised as follows as regards cross-examination: “*Witnesses will be subjected to cross-examination. The purpose of cross-examination is, to test the credibility and reliability 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*.”

ISSUE TO BE DECIDED

1. Whether the applicant was unfairly dismissed. He sought reinstatement with back-pay. No statutory claims were made.

BACKGROUND TO THE DISPUTE

1. The applicant is …………………. (a male, age 54), process manager for the past 20 years. He commenced full-time employment on 27 July 1983 as a picker in terms of a written indefinite term contract of employment. (He had joined the respondent as a casual 6 months before that.) He was dismissed in writing on 28 November 2017. He earned R38 000 per month for working a 5 day / 40 hour week. The applicant has not obtained alternative employment despite making attempts. He has also not earned anything from casual work. His highest standard of education is Gr 10. As breadwinner he has 3 dependants (1 adult and 2 children).
2. It was agreed that as a manager the applicant led a team of 3 team-leaders and 20 pickers.
3. The respondent is ………………… CENTRE. The respondent employs 300 employees at the distribution centre (DC) where the applicant worked, and approximately 6000 employees at stores countrywide.
4. The applicant was given a notice to attend a disciplinary hearing on 7 August 2017. The notice contained the following charge: “*During the period from the 17 May 2017 to August 2017, you failed to take corrective action on your subordinates when it was required. Such conduct breached the trust relationship between the company and yourself*.”
5. The charge was based on a section of the disciplinary code (the Code) which provides for the “*Duty to be diligent and efficient*” with the specific offence being “*Failure to protect the interests of the Company*.” This Code came into effect in September 2014. The applicant for his part submitted that he was not aware of this version of the Code. He submitted a version (in his bundle) that predated the above version. The section relied on by the applicant was headed “*Employees are required to be competent and diligent*” and the specific offence relied upon by him was “*Failing to take disciplinary action when necessary / required*.” The respondent indicated that it had no objection to the use of the older version of the Code. It was agreed that both versions of the Code prescribe a final written warning for the first offence and dismissal for the second offence.
6. It was agreed that the Code is contractually binding on the applicant.
7. The hearing sat on the following dates: 11 September, 5 October, 10 October and 2 November 2017. The applicant attended all the sittings; pleaded not guilty; was represented by a colleague of his choice; heard the evidence given by the respondent, and gave evidence in his own support. Ultimately he was found guilty and dismissed. The finding was that “*during the period 2 July 2017 to August 2017, you failed to take corrective action on your subordinates when it was required. Such has breached the trust relationship between the company and yourself*.”
8. The applicant’s appeal against the sanction was unsuccessful. He referred an alleged unfair dismissal dispute with the CCMA on 19 December 2017. The matter was set down for conciliation on 15 January 2018 but remained unresolved. Hence the referral to arbitration.
9. The respondent made an oral submission in closing, while the applicant made a written submission.

SURVEY & ANALYSIS OF EVIDENCE AND ARGUMENTS

1. The respondent called the following witnesses in support of its case: ……………..(operations manager at the DC; she has held that post since 2012; and has been employed by the respondent for 35 years. She was the applicant’s immediate superior); ……………..(process manager at the DC for 6 years and employed by the respondent for 30 years; and a colleague of the applicant); …………… (the respondent’s representative at the arbitration; and senor labour relations specialist for 9 years). (In his closing statement the applicant made a number of complaints against Naidoo, but failed to put these to him during cross-examination. For purposes of the arbitration I cannot take these complaints into account.)
2. The applicant gave evidence and called the following witnesses in support of his case: ……………….. (process team leader for 10 years and employed by the respondent for 15 years; a subordinate of the applicant); …………….(clerk for 20 years and employed by the respondent for 22 years). Both witnesses attended in response to subpoenas that were served on them by the applicant.
3. During the pre-arb the applicant indicated that he did not intend raising any procedural issues.
4. The following was either common cause, agreed to, undisputed or conceded during either the pre-arb or the arbitration:
	1. The hierarchy at the distribution centre (DC) is as follows: general manager; 4 senior managers (including the operations manager, Khan, who was the applicant’s immediate superior); 3 managers; and 9 team-leaders; each team-leader has approximately 20 pickers working with him in a team;
	2. During 2017 the applicant’s workload was reduced because he was not coping. The applicant was enrolled into the Performance Improvement Plan in February 2017 due to his unsatisfactory performance as manager. The applicant had proceeded on long leave in March 2017 and on his return he resumed participation in the Plan;
	3. The applicant’s department was in Khan’s words: “a “mess;”
	4. The respondent had devised detailed policies and procedures to ensure that proper discipline is followed in the workplace. The applicant was aware of them and had been intensively trained on them. It was agreed that they were reasonable and served an important purpose to ensure the smooth and orderly running of the workplace. The applicant agreed that he understood these documents and had no difficulty in the past in implementing them;
	5. In cases of doubt the applicant had access to his line manager or the general manager in order that he can seek clarity or guidance on any disciplinary or performance related issue;
	6. That as a manager the applicant had the following duties:
		1. To ensure that his team-leaders perform their duties properly and adhere to the disciplinary code (the Code);
		2. To ensure that there is discipline in the workplace and to take steps against any team-leader who is not complying with the Code;
	7. There is no provision in the Code, or any policy or procedure of the respondent which gives the applicant the discretion to depart from the Code;
	8. The respondent’s HR manager …………. had in 2012 sent out an email to all managers (including the applicant) in which he emphasised that managers must not condone non-performance and indiscipline in the workplace;
	9. Late-coming; absenteeism; poor performance (ie failure to satisfy targets); loitering; extended tea-breaks; and the failure to meet deadlines were some of the issues that occurred on a regular basis in the applicant’s team;
	10. A number of the applicant’s team-members were guilty of the above offences and the applicant merely spoke to them and largely failed to take formal action as prescribed by the respondent’s policies and procedures. On the rare occasions when he took action, it was as a result of much prompting from his manager Khan;
	11. The applicant had received numerous emails from Khan directing and instructing him to act against members of his team who were not adhering to the Code;
	12. The behaviour and conduct of the applicant’s team-members had caused harm, damage, prejudice and loss to the respondent;
	13. Other employees and managers had noticed the approach the applicant had towards disciplining his team. This had caused a level of disharmony in the workplace due to the rules not being enforced against the applicant’s team while being enforced normally against team-members working in other sections of the DC. This had caused employees in other sections feeling aggrieved or victimised to such an extent that the trade union SACCAWU had taken up the issue of the inconsistent application of discipline with the respondent on behalf of its members;
	14. The applicant had no enemies in workplace who would welcome his downfall or who would act in bad faith against him;
	15. No issue of inconsistency of the application of discipline was raised by the applicant;
	16. The applicant had received 2 final written warnings both valid for 12 months:
		1. The final written warning given on 16 May 2017 was as follows: “*This serves to inform you that your employer regards your conduct wherein you failed to take corrective action against employee for placing incorrect label which resulted in stock loss against the DC as unacceptable and inappropriate. This action is in serious breach of your contract of employment. As an employee, you are required to adhere and abide by the rules and procedures of the workplace as set by your employer and to exhibit conduct which is acceptable and appropriate. You are hereby reminded that a repeat of said conduct or conduct of a similar / related nature will result in further disciplinary action being taken against you, including the possibility of dismissal*.”
		2. The final written warning given on 6 July 2017 was as follows: “*This serves to inform you that your employer regards your conduct wherein you failed to comply with store discipline requirements at the Durban DC from 6 June 2017 to 1 July 2017 as unacceptable and inappropriate. This action is in serious breach of your contract of employment. As an employee, you are required to adhere and abide by the rules and procedures of the workplace as set by your employer and to exhibit conduct which is acceptable and appropriate. You are hereby reminded that a repeat of said conduct or conduct of a similar / related nature will result in further disciplinary action being taken against you, including the possibility of dismissal*.”
		3. It was agreed that the applicant had received a similar warning in 2015 but that it had since expired;
	17. The applicant had long service;
	18. In relation to the issue of the breakdown of trust, that no allegations of dishonesty were being made against the applicant;
	19. The applicant had sent a 6 page document to the respondent in February 2017 with the heading “Request for early retirement package to be brought forward.” He supported the request by setting out the allegedly unbearable conditions that he had to endure; his unusual working hours and how they impacted on his wife and his lifestyle; how he was being expected to take corrective action against his team which he found to be unreasonable; how he was required to take action against his team-members for their poor performance; the alleged failure of the respondent to be flexible and understand his personal matters; that he was aggrieved at receiving the final written warnings; the stress that was caused by him being placed on the performance improvement plan; and the impact on his physical and mental health;
	20. The applicant did not get any response from the respondent to the above request.
5. I make the following findings, on the probabilities, on the disputed issues:
	1. Whether the applicant, as manager, has a discretion in the meting out of discipline to his team-members: The applicant stated that he relied on bullet 4 on p 5 of the Misconduct Policy for submitting that he had a discretion. The para reads as follows: “*It should however be noted that the disciplinary code serves primarily as a guideline to the company and to employees. In this regard it may not be possible to pre-determine an outcome for a specific offence that will be fair in every possible circumstance. The guiding principle must always be to elect an outcome that is fair in those particular circumstances*.” The respondent for its part submitted that the para preceding this para was relevant. It reads as follows: “*In addition to creating awareness of unacceptable conduct, the Edcon disciplinary code together with procedures of this nature aim to ensure consistency in the application of discipline*.” I find that the applicant did not have a discretion for the following reasons:
		1. There is no reference in any of the documents to the exercise of discretion in the meting out of discipline. I find that if it was intended that a discretion must be exercised, that the respondent would have devised criteria for the exercise of the discretion. The applicant failed to show that any such criteria existed;
		2. There was no evidence that the use of a discretion had led to any improvement in the conduct and behaviour of the applicant’s team-members; or that his approach had led to greater consistency and uniformity. Rather, the evidence is in the opposite direction;
		3. The applicant submitted that one Louis Govender (erstwhile ER officer) had conducted a presentation a few years ago in which he encouraged the applicant and other managers to use their discretion. Naidoo (also a manager) had attended this presentation. He stated that Govender had not said that the meting out of discipline was discretionary. Naidoo himself did not use any discretion when dealing with disciplinary issues. I find accordingly that Govender did not say that discretion must be used when enforcing discipline;
		4. The respondent is entitled to insist on the best and most effective manner in which the Code must be applied and thereby to ensure that there is consistency and uniformity in the application of discipline in the workplace. It is also entitled to direct its managers, such as the applicant to implement that approach. For the applicant to insist that he will apply it having regard to his discretion is a recipe for chaos;
		5. No other manager used discretion and the respondent was aware of this because each disciplinary or corrective action must be documented and posted to the intranet where Khan examined it and satisfied herself that it was in conformity with the respondent’s policies and procedures; and
		6. Khan had heard of the existence of a discretion for the first time at the disciplinary hearing: the applicant had never told her about his use of a discretion before that. I find accordingly that the applicant fabricated that defence at the hearing, and persisted with it at the arbitration.
	2. Whether the applicant breached the Code: A finding has already been made that the defence relied on by the applicant – that he had a discretion – has no substance. Having regard to the numerous instances of his failure to implement discipline, I find that the applicant was correctly found guilty of having breached the Code.
	3. Whether the charges were fabricated against the applicant: During the pre-arb the applicant submitted two reasons for the charges having been fabricated against him: that during the strike in 2014 the applicant was given preferential exit privileges that were denied to other members of management: the strikers removed burning tyres and barricades to allow his vehicle to pass but refused to remove such obstacles to allow other members of management to pass; and that in March 2017 after the applicant’s return from long leave he was welcomed by a loud “roar” given by all members of staff in the DC. The respondent disputed that the charges were fabricated. At the arbitration the applicant declined to support these submissions by way of evidence. I accordingly find that the charges were not fabricated against the applicant.
	4. In his closing submissions the applicant repeatedly stated that he had been targeted by the respondent. It is not clear on what basis he made this submission because during the pre-arb the applicant conceded that he had no enemies in the workplace who would welcome his downfall or act in bad faith against him.
	5. Whether counselling was a fair manner of dealing with the applicant’s failings: The evidence shows that the respondent attempted corrective discipline and had failed. The respondent submitted that the applicant had held the position of manager for 20 years and had been reminded repeatedly of his disciplinary responsibilities. The applicant’s response, also repeatedly, was that he will not take corrective action against ill-disciplined team-members, even after being requested to do so by Khan. Khan submitted that the applicant’s approach to discipline had yielded no positive results because his team members continued to misbehave with impunity.
	6. Whether the warnings given to the applicant were unfair: During the pre-arb the applicant did not challenge the fairness of the warnings. However during the arbitration, and in his closing submissions, he challenged their fairness. There was no response from the applicant when it was pointed out to him during the arbitration that the warnings come with the following advice: “*Please note that you have the right to apply for an internal review of this warning within seven days or to refer an unfair labour practice dispute to the CCMA within 90 days*.” Not having taken heed of this advice, and not having challenged their fairness, I find that it is not open to the applicant to do so now. I accordingly make no finding on this issue.
	7. Whether there are aggravating or mitigating features: I cannot find any mitigating factor in the applicant’s favour. It was undisputed that the applicant’s failure was having a negative impact on the business; targets were not being met; and indiscipline and misconduct continued in the applicant’s team. All these difficulties were putting added pressure on other managers to accomplish the service level agreements and goals. In addition, other employees in other units felt victimised when they observed how the applicant’s team-members behaved and got away with it.
	8. Whether the alleged misconduct had led to a breakdown of trust serious enough to warrant dismissal: The respondent submitted that there had been a total breakdown of trust because the employment relationship between the applicant and Khan had deteriorated and it had become personal: the applicant’s wife (who also worked in the DC) had confronted Khan and accused her of having engineered the applicant’s dismissal. Khan submitted that the applicant had little or no commitment to the respondent’s business and as such it could not keep him in its employ. She submitted that the respondent could not have someone in management who condoned indiscipline and misconduct. She submitted further that if he was reinstated, the problems would persist because the applicant still insisted, even at the arbitration, that the meting out of discipline was discretionary. As such she submitted that a good working relationship could not be restored. I agree with the respondent.
	9. The applicant submitted that he could be trusted because he had conducted interviews, trained staff and forfeited leave due to him. All these issues were not put to any of the respondent’s witnesses and hence I cannot take them into account. In any event I cannot find that these factors are of any assistance to the applicant.
	10. Whether the dismissal was a fair and appropriate sanction: The respondent submitted that dismissal was fair and appropriate because the applicant was a manager and as such he had a duty and responsibility to uphold the policies and procedures of the respondent. The respondent submitted that it had gone above and beyond the Code by giving him two final written warnings, when it was required to only give him one final written warning. Yet, he continued to ignore and condone indiscipline, misconduct and poor performance of his team-members. The applicant for his part continued to insist that the Code was being applied wrongly by the respondent and that he had a discretion on how discipline must be implemented in the workplace. I find that the applicant’s refusal to conform, or correct his failings, left the respondent with no option but to dismiss the applicant. It is fair and appropriate.
6. The parties were requested during the pre-arb to present evidence during the arbitration on the following issue: having regard to the applicant’s poor performance and his disinclination to implement discipline in his team, whether it would have been fair and appropriate to demote him (with his consent) to a level that was in keeping with his skills and abilities, rather than dismissing him. At the arbitration the applicant indicated that he would not have consented to a demotion. Hence this issue falls away. The respondent in any event submitted that demoting the applicant to the level of team-leader would not have helped because he would have insisted on using his discretion to discipline 20 team-members. It submitted that it would be unreasonable for it to tolerate such scenario. I agree.

AWARD

1. The application is dismissed.

Dated at DURBAN on this the 29th day of MAY 2018.

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

R J PURSHOTAM

*Commissioner*