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 10 November 2017, 24 January 2018, 2 February 2018 and 16 March 2018 at the CCMA offices, Anton Lembede St, Durban. The applicant was represented by ……………………. (attorney) after an unopposed application was made for legal representation due to complexity, while the respondent was represented by (group HR manager). The former had 5 years of experience in representing parties at arbitration while the latter had 17 years. Ms ……………..also had training in IR.
3. The arbitration was postponed as follows:
	1. On 8 September 2017 at the respondent’s instance due to Ms………….being on vacation; and
	2. On 25 January 2018 at the respondent’s instance due to the unavailability of a key witness.
4. Documents were handed in as follows:
	1. Both parties handed in their respective bundles of documents on 10 November 2017. None of the documents were disputed by either party as regards authenticity or the correctness of their contents;
	2. The respondent handed in an additional bundle on 24 January 2018. The contents thereof were not disputed by the applicant; and
	3. On 16 March 2018 the applicant handed in a transcript of a telephone conversation that he had had with an erstwhile colleague ……………... It was not disputed by the respondent.
5. With the consent of the parties a pre-arb was conducted on 10 November 2017. For this purpose a checklist containing the issues that one normally encounters in alleged misconduct arbitrations was distributed to both parties. A typed minute of the pre-arb was distributed to the parties. The parties indicated on 24 January 2018 that the minute was correct. It was then read into the record. The parties were advised to keep the minute handy to remind them constantly of the issues and to ensure that their witnesses deal with the disputed issues.
6. At the commencement of each new hearing day the parties were advised as follows: “*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. 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 dismissed unfairly. He sought compensation. No statutory claims were made.

BACKGROUND TO THE DISPUTE

1. The applicant is …………………..(male age 39), who had risen to the rank of operations supervisor. He commenced full-time employment as a driver / hose-maker / stores assistant (after serving a 6-month probation) in terms of a written indefinite term agreement on 1 May 2005 and was based at the respondent’s Pinetown site. He was dismissed on 4 April 2017. He earned R19 760pm and worked a 5 day / 42.5 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 11. As breadwinner he had 3 dependants (1 adult and 2 children).
2. The respondent is ………………(PTY) LTD t/a …………., a ……………..engineering business. It employs approximately 800 employees in the Republic at 24 branches. It also has representation elsewhere in Africa.
3. The applicant was given a notice to attend a disciplinary hearing on 28 March 2017 containing the following charges: “*Charge 1: Unauthorised absence from work – you were absent from work without management’s permission on 20 March 2017; Charge 2: Breach of contract of employment – you failed to inform management of your absence from work by 10h00 on 20 March 2017; Charge 3: Insubordination – you were reminded on 3 January 2017 that absence from work without notifying management is a serious disciplinary offence and that it constitutes gross misconduct and breach of contract. However you continue not to adhere to this rule intentionally*.”
4. It was agreed that the disciplinary code (DC) is contractually binding on the applicant. It provides for the following offences:
	1. *Absent 1-2 days refers to being absent from work without permission and / or without reasonable cause*. It prescribes a written warning for the first offence; a final written warning for the second offence; and dismissal for the third offence;
	2. *Failure to notify the office of absence from work*. An employee has a duty to notify his employer of his absence within a reasonable period (at least on the first day of absence). It is of the utmost importance to establish exactly why he failed to do so, especially if communication channels were at his disposal. It prescribes the same sanctions as in para a above;
	3. *Insubordination refers to an unwillingness to submit to authority ie directly challenging the authority of a supervisor*. It prescribes a final written warning for the first offence and dismissal for the second offence;
	4. *Breach of contract is any material breach of the employment contract committed by an employee, whether intentionally or via negligence*. It prescribes dismissal for the first offence.
5. The disciplinary hearing was conducted on 30 March 2017. The applicant attended, represented himself, pleaded not guilty, gave evidence in support of his case, but was found guilty only of charges 2 and 3 and dismissed. The respondent maintains an appeal procedure but the applicant chose to refer a dispute directly to the CCMA on 24 April 2017. The matter was set down for conciliation on 16 May 2017 but remained unresolved. Hence the arbitration.
6. For purposes of the arbitration only charges 2 and 3 will be dealt with.
7. Both parties submitted written closing statements on 20 March 2018.

SURVEY & ANALYSIS OF EVIDENCE AND ARGUMENTS

1. The respondent called the following witnesses in support of its case: ……………. (key accounts manager for 6 years; previously sales manager; employed by the respondent for 33 years); ………………… (technical sales representative for 6 years); …………… (area manager for KZN and branch manager for Durban; area manager from June 2017; employed by the respondent for 21.5 years). Only the applicant gave evidence in support of his case.
2. The following was either agreed to, common cause, undisputed or conceded during the pre-arb or the arbitration:
	1. No procedural issues were being raised by the applicant;
	2. *The applicant had shown competence and ability as a driver and later as an assistant hose maker. Hence he was promoted to position of store-man. From that position the applicant steadily worked himself up to the position of internal sales representative. A new position was then created for the applicant – that of operations supervisor. He held that position until his dismissal;*
	3. *As operations supervisor the applicant was a member of management;*
	4. *The applicant was a key link and performed various critical functions and duties including the following:*
		1. *Liaise between the sales department and the workshop, both being big departments;*
		2. *Control the stores;*
		3. *Control the drivers, including the collection and delivery of equipment to customers. This would be done in liaison with the 7 sales representatives and the workshop;*
		4. *Health and safety representative;*
		5. *Member of the KZN employment equity forum;*
		6. *Back-up internal sales;*
	5. *The applicant was considered to be so critical that “without him the operation fails;”*
	6. *The respondent was “quite happy” with the applicant’s performance of his duties and functions;*
	7. *The branch comprised of 6 sales representatives, 5 administrative staff and 7 workshop staff. All reported to Login;*
	8. *The applicant was aware of the applicable rules in the DC and had been trained thereon;*
	9. *The employment contracts for 2005 and 2007 both provide for an employee (or a member of the family) to inform the employee’s manager of the reasons for the employee’s absence before 10am on the day of the absence;*
	10. *The purpose of requiring that the respondent be informed of an absence is so that work is conducted smoothly and efficiently, and the respondent can make alternative arrangements for the execution of the work and order. In other words disruption is minimised;*
	11. *It was also necessary to enforce discipline in the workplace consistently so that other members of staff do not get the impression that ill-discipline is condoned;*
	12. *The applicant was provided by the respondent with a cell-phone, computer and a 3G card. In other words he had the means to make contact with Login, his manager;*
	13. *The applicant and Login had been colleagues for 11 years;*
	14. *The applicant had been ill for a long period of time – at least from 2015. He was absent frequently and had exhausted the entire cycle of his sick leave entitlement and the days due to him for annual leave. After having exhausted these categories of leave, he proceeded to take unpaid leave to attend to his illness;*
	15. Only Login is authorised to excuse an employee’s absence from work;
	16. In relation to charge 1 the applicant was found not guilty because he had produced a sick note to justify his absence on 20 March 2017;
	17. The applicant was absent from the workplace on 20 March 2017 and returned on 22 March 2017;
	18. *During his absence, the duties and functions of the applicant were performed by others;*
	19. *The respondent reminded the applicant on 3 January 2017 of his duty to inform management before 10h00 of any intended absence from work;*
	20. *The respondent had on behalf of the applicant applied for disability benefits from the pension fund (aka boarding). It was agreed further that this application had not been finalised because medical reports remained outstanding;*
	21. *The respondent did not explain why it failed to deal with the problem of the applicant’s constant absenteeism before it became a crisis. Login for his part had difficulty in grasping the distinction between an incapacity inquiry and an application for disability benefits;*
	22. There were no issues relating to consistency of the application of discipline in the workplace;
	23. The charges against the applicant were serious;
	24. The applicant served the respondent loyally and faithfully over many years;
	25. The applicant had the following warnings against his name:
		1. Warning issued on 9 January 2017 for unauthorised absence from work;
		2. Written warning issued on 9 January 2017 for absence without leave;
		3. Final written warning issued on 22 December 2016 for reporting to work and not complying with the branch policy of conducting a mandatory breathalyser test upon entrance to the premises; upon conducting the breathalyser test at 08h00, results indicated an alcohol level exceeding 0.05g/l BRAC;
		4. Final written warning issued on 10 January 2017 for insubordination – on 22 December 2016 you requested leave from management from 3 January 2017 to 6 January 2017. The leave was not granted by management because you had no leave days available to you. However you went ahead and took leave from 3 to 6 January undermining management’s authority;
3. The italicized passages in para 16 above is the evidence of Login – the respondent’s principal witness. Based on that evidence the following is the context or background against which the issues of this case must be resolved:
	1. The applicant became afflicted by illness – leading to his frequent absence from work. He exhausted all forms of leave and reached the stage where he was taking unpaid leave from time to time. He performed “key” or “critical” functions;
	2. The applicant’s frequent absences was having an adverse impact on the respondent and its customers. His duties were carried by his colleagues and it is probable that they would not have been pleased to have to do so. Having regard to the evidence of Login one gets the distinct impression that the respondent had reached the end of its tether with the applicant. It had, due to the applicant’s absence, endured many months of hardship and inconvenience to itself and its customers;
	3. The respondent was aware that the applicant was having difficulty in fulfilling his duty to attend in the workplace, hence its assistance to the applicant to make the application for disability benefits;
	4. By failing to conduct an incapacity inquiry, the respondent prolonged the many months of annoyance, inconvenience and disruption to its work and customers. Had it done so, it would have had the benefit of ascertaining the following:
		1. The nature, duration and effects of the applicant’s illness;
		2. Whether the effects of the illness were temporary or permanent;
		3. The extent to which the applicant’s condition limited the applicant’s ability to perform his normal functions and duties;
		4. In consultation with the applicant determine whether any accommodation was necessary;
		5. Whether the applicant’s presence in the workplace posed any safety issues to himself and others;
		6. Whether the applicant, if he ever recovers, will be in a position to assume or full or partial fitness to perform his normal duties and functions;
		7. Measures short of dismissal having regard to the nature of the job, the period of anticipated absence, the seriousness of the illness and prognosis for recovery. Alternatives in this regard may have entailed moving the applicant to another – less critical – post including demotion (with the applicant’s agreement of course);
		8. Having regard to the prognosis, whether the applicant should be dismissed because he was unable to fulfil his duties to the respondent.
4. I find on the probabilities on the disputed issues as follows:
	1. As regards the applicant’s defence to charge 2, whether he informed the driver – …………. – before 5h30 on 20 March 2017 of his intended absence from the workplace: It is not necessary to make a finding whether Jay was informed or not because it was undisputed that it is the duty of an employee to inform his or her manager. The applicant, on his own version, failed to inform Login. I reject the applicant’s defence that he was about to take medication at 5.30am on 20 March 2017 because that defence was not put to Login in cross-examination. Subject to what is stated below in para 18d (as regards the alleged breach of contract), I find that the applicant was correctly found guilty of the offence of failing to notify the respondent of his absence from work.
	2. If ………………. was informed, whether he informed the applicant’s branch manager Robert Login of the applicant’s intended absence from the workplace: Having regard to the finding made in the previous paragraph, it is not necessary to make a finding on this issue.
	3. Whether the applicant is guilty of charge 3: Charge 3 reads as follows: “*Insubordination – you were reminded on 3 January 2017 that absence from work without notifying management is a serious disciplinary offence and that it constitutes gross misconduct and breach of contract. However you continue not to adhere to this rule intentionally*.” The respondent submitted in closing that the reminder given to the applicant on 3 January 2017 constituted an instruction or order with which he had failed or refused to comply. I respectfully disagree. I find that the applicant ought to have been found not guilty of insubordination because there was no evidence that the applicant was given an instruction or order and that he failed or refused to comply: a reminder or request by an employer to an employee to comply with the rules does not constitute an instruction or order. Insubordination is not committed where an employee engages in conduct that he has been reminded previously not to commit. A fair course of action that ought to be followed in such circumstances is for an employer to charge the employee with the specific offence – but not insubordination. The evidence shows that the applicant was indeed charged with the specific offence – being charge 2. In the circumstances I find that the applicant was wrongly found guilty of charge 3.
	4. Whether the applicant was guilty of breach of contract: The DC requires that breaches of contract must be material. There was evidence that the applicant breached the contract. But there was no evidence or argument that it was material. In the circumstances the applicant ought not to have been found guilty of breach of contract.
	5. Whether the respondent suffered any loss, damage, harm or prejudice as a result of the applicant’s absence on 20 March 2017. In this regard the respondent submitted that it had suffered disruption to its operations on that day: The absence of the applicant, and his failure to notify his manager thereof, did cause disruption to the work of the respondent. Having regard to what the respondent had endured over many months already, the disruption was not something new.
	6. Whether dismissal was a fair or appropriate sanction: I find the dismissal to be unfair and inappropriate for the following reasons:
		1. The finding has already been made that the applicant was wrongly found guilty of insubordination and of breach of contract. He was however found guilty correctly of “Failure to notify the office of his /her absence from work” in the DC (on p 43 of the respondent’s bundle). With this being the first occasion when the applicant was found guilty, I find that a written warning ought to have been imposed in terms of the DC;
		2. The respondent submitted that the applicant already had a number of warnings to his name, including a final written warning, and on that basis argued that if the warnings are taken cumulatively, the sanction of dismissal is fair. I respectfully disagree. I find that all the warnings, except one, deal with issues relating to the applicant’s absence from work over a period of time. The observation has been made that the disciplinary issues could have been avoided that the respondent taken steps without delay to convene an incapacity inquiry.
	7. Whether the applicant had long service: There can be no doubt that the applicant had long service, he having served from 2005.
	8. Whether there had been a breakdown of trust serious enough to warrant dismissal: The respondent submitted that it could not trust the applicant anymore because he had failed to inform it of the duration of his absence and it had “no way of knowing” how long he was to be absent. This had an effect on the planning and control of the business. There is no doubt that the applicant, holding such a critical position and being a member of management, exhibited a degree of irresponsibility in not informing Login of his intended absence. Being a single incident, I cannot find that there was a breakdown of trust serious enough to warrant dismissal. After all, the DC itself provides that a written warning be given in the first instance and a final written warning in the second instance.
	9. Whether the employment relationship between the parties had become intolerable: I find that the respondent contributed significantly to making the relationship between the parties intolerable by failing to conduct an incapacity inquiry. (The applicant submitted while giving evidence that Login had verbally abused him. This evidence will not be taken into account as it was not put to Login in cross-examination.)
5. In all the circumstances I find the dismissal of the applicant to be unfair. It is necessary to state that if the issues discussed in para 17 are disregarded, I would have still come to the same conclusion.
6. The applicant sought compensation. The applicant’s loyal and faithful service over many years was curtailed due to circumstances beyond his control by the advent of the illness. Through ability, industry and exertion he had risen to a position considered to be so critical that Login conceded that without the applicant “the operation fails.” I repeat: had an incapacity inquiry been conducted timeously, it is conceivable that the applicant may still have been fulfilling his breadwinning responsibilities and been productively employed – albeit in a role with reduced (ie non-key) responsibilities.
7. I would have been disposed to afford the applicant compensation equivalent to 6 months of pay, but he must be sanctioned for his guilt on charge 2. There will accordingly be a deduction of 2 weeks of pay. I find therefore that the amount of compensation that is justly and equitably due to the applicant amounts to R108 680 (R19 760pm x 5.5).

AWARD

1. The dismissal of the applicant is unfair.
2. ………………….. is ordered to pay …………………R108 680 within 14 days of being informed of this award.

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

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

R J PURSHOTAM

*Commissioner*