# DETAILS OF THE HEARING AND REPRESENTATION

1. I satisfied myself that the CCMA had jurisdiction to hear this arbitration.
2. The arbitration hearings were held on 28 October, 8-9 December 2015; 17 March, 30 September, 27-28 October 2016; 19 January, 16-17 March, 25-26 May and 17-18 August 2017 at the CCMA offices, Anton Lembede St, Durban. The applicant was represented by…………. official Mr ………….while the respondent was represented by its IR specialist Ms ………... The former had 6 years of experience at representing parties at arbitration while the latter had 8 years. Having regard to their experience the proceedings were conducted largely in an adversarial manner.
3. The proceedings were postponed as follows:
   1. With the consent of both parties the arbitration on 14 October 2015;
   2. The arbitration was set down for hearing on 17-18 March 2016. After an hour on 17 March the applicant fell ill and medical treatment was sought by him. The hearing did not proceed the next day;
   3. By consent on 12-13 May 2016 due to the unavailability of Ms ………;
   4. By consent on 7 July 2016 at the instance of the respondent;
   5. On 8 July 2016 the arbitration did not take place as the respondent failed to bring along ……….(one of its witnesses) even though his cross-examination was not complete. Instead it brought ………….. The applicant indicated that he would prefer to complete the cross-examination of the Pillay before commencing with Henry. That cross-examination was completed on 30 August 2016.
4. As regards interpretation –
   1. An Interpreter was in attendance throughout the presentation of the respondent’s case but no call was made on her services as the applicant indicated that he understood the evidence. The applicant however used the services of an interpreter to present his own case; and
   2. On 16 March 2017 it became evident after approximately 20 minutes into the proceedings that the interpreter’s medication was making her drowsy and thereby having a direct effect on the integrity of the interpretations. The parties agreed to disregard those proceedings and to start afresh with a new interpreter.
5. As regards documentation handed in by the parties –
   1. The respondent handed in a bundle of documents on 28 October 2015. The applicant was given time to peruse them. On resumption he indicated that except for the findings of the chairperson of the disciplinary hearing (pages 3-16), all the documents were admitted as regards their authenticity and correctness of their contents;
   2. A print-out containing the warnings allegedly issued to the applicant over the years was handed in later in the pre-arb proceedings. This document was not admitted by the applicant as being authentic or correct;
   3. The applicant indicated that the respondent had not followed some of its own policies. However he did not have copies of the policies in question. He indicated that if he intended to pursue the point, he would prepare copies of such policies to hand in when the matter resumed. This document was handed in by the respondent on 8 December 2015. It was accepted by the applicant as being authentic;
   4. An extract from a document titled “*Automobile Manufacturing Industry NBF agreement on wage increases and conditions of employment for the period July 1 2013 to June 30 2016*” was handed in by the respondent on 8 December 2015. The parties agreed that this document is a collective agreement and was binding on the parties;
   5. On 27 October 2016 the applicant handed in an extract from a document titled “………………*Pact*.” The document was accepted by the respondent as being authentic;
   6. During the cross-examination of ……………..(a witness of the respondent) the applicant sought to rely on the summary of the evidence contained in the chairperson’s findings (even though he had previously disputed its correctness). The proceedings were paused at that stage – after objection from the respondent – for the applicant to reconsider whether he accepted the correctness of the summary of the chairperson as contained on pp 3-16. At that stage the applicant indicated that he accepted the correctness of the summary of the evidence of the chairperson.
6. With the consent of the parties a pre-arb was conducted on 28 October 2015. A checklist of the usual issues that one encounters in alleged misconduct related cases was distributed to both parties. The parties were informed that they could also raise issues not contained in the checklist. A printed minute of the pre-arb minute was distributed to both parties. On 8 December 2015, after minor corrections / amendments were made to the minute by the parties, it was read into the record. The parties were advised to keep the minute handy and ensure that their witnesses deal with the disputed issues.
7. On 16 March 2017 the respondent’s representative indicated that the applicant had called her on her personal cell-phone a few days ago and had requested that she “go easy” when she cross-examined him in the forthcoming hearing. She objected to the call and handed in a letter dated 3 March 2017 that she had sent to the applicant’s representative documenting her objection. The applicant’s representative agreed that the applicant had made the call but disputed the contents of the call. He stated that the applicant was seeking some documents from the respondent. The applicant’s representative however undertook to ensure that the applicant does not make any further contact outside the proceedings with the respondent or its witnesses.
8. ………………..was subpoenaed to give evidence by the applicant. While he was being cross-examined the applicant decided not to proceed with his evidence. By agreement the parties decided to disregard his evidence in its entirety. No reference will accordingly be made to his evidence in this award.
9. As regards terminology –
   1. Depending on the context, a reference to the applicant may or may not include a reference to his representative; and
   2. The word “grievance” occurs on a number of occasions in this award. That word was used interchangeably by witnesses to refer to the applicant’s concern, complaint or grievance in relation to certain issues.
10. At the commencement of the arbitration and thereafter on each new hearing day the parties were advised as follows: “*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 – (a) You must put your version to the opposing witness; (b) If an opposing witness has left out an important fact then that should be put to the witness; (c) 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 and back-pay.

# BACKGROUND TO THE DISPUTE

1. The applicant is ……………………..(male age 36), a welder and team member in the cross-4 unit. He commenced full-time employment on 1 March 2005 in terms of an indefinite term written employment contract. He was dismissed on 4 August 2015. The applicant earned R14 705.30pm (R84.84 per hour x 40 normal hours per week = R3393.60pw). The applicant remains unemployed despite making attempts to find alternative employment. He has not earned anything from any type of casual work. The applicant supported 6 adults and 2 children in his capacity as a breadwinner. His highest standard of education is Gr 12.
2. The respondent is ………………..(PTY) LTD, a …………….manufacturer. It is a large employer employing approximately 8000 persons.
3. The applicant – and a member of his team (one Xulu) – were suspended on 3 December 2014 on full pay and given a notice to attend a disciplinary hearing on 3 December 2014. The notice contained the following charge: “*Gross insubordination in that on the 3rd of October 2014 you repeatedly refused instructions from your management to go and work in a 3 member process thus resulting in a stoppage of cross-4 for an hour*.”
4. Due to Xulu belonging to a different trade union, there were a number of postponements and their respective hearings separated. Be that as it may the applicant’s hearing was conducted on 28 July 2015. The applicant, represented by a colleague, attended and pleaded not guilty. Both parties gave evidence in support of their respective cases. The applicant was found guilty of misconduct and dismissed. (Xulu was also dismissed at the conclusion of his hearing.)
5. The respondent maintains an appeal process. The applicant chose not to appeal and referred his dispute directly to the CCMA on 12 August 2015. The matter was set down for conciliation on 9 September 2015 but remained unresolved. Hence the referral to arbitration.
6. The parties submitted – at their request – written closing statements.

SURVEY & ANALYSIS OF THE EVIDENCE AND ARGUMENTS

1. As regards witnesses –
   1. The following witnesses were called by the respondent: ……………..(group leader for 10 years and with the respondent for 20 years); ………………. (manager for 10 years and with respondent for 35 years); …………….(senior manager for production in the day shift and plant manager in the night shift since 1990 and employed by the respondent for 36 years) and …………..(HR manager for 9 years and employed by the respondent for 31 years); and
   2. The applicant himself gave evidence and called ……………. (team leader for 11 years and with the respondent for 12 years) in support of his case.
2. The following was either agreed to, common cause, admitted or conceded in the pre-arb or during the arbitration proper:
3. The applicant worked in a team as a welder in the ……………Chassis Plant;
4. Depending on the prevailing circumstances the applicant’s team could either be constituted as a team of 4 or 3 members. The normal constitution is 4 members. If constituted as a team of 4 then it was called a “4-man process” and if constituted as a team of 3 then it was called the “3-man process.” If constituted as a 3-man process, then the team members would perform the functions that would normally be performed by the team of 4. In other words the duties of team members were adjusted;
5. The circumstances that led to the adoption of the 3-man process from time to time were as follows: when production volumes were low or when there was high absenteeism during any particular shift. (The 4-man process was adopted when production volumes were high.);
6. The applicant was capable of working in either a 3 or 4-man process and had done so in the past;
7. The applicant’s immediate superior was the team leader. At all relevant times that was ………………(Mbhele). The hierarchy was as follows:
   * 1. Mbhele’s immediate superior is a group leader who at all relevant times was Pillay;
     2. Pillay’s immediate superior was the manager who at all relevant times was Henry;
     3. Henry’s immediate superior was the senior manager who at all relevant times was Moonsamy;
8. The applicant was under a general duty to comply with all lawful and reasonable instructions issued to him by a superior. The respondent maintains a grievance process. It is also referred to as the “comply and complain” procedure. In other words, production must be maintained as far as possible and where an employee is unhappy about a production related instruction, he must comply with the instruction and thereafter lodge a grievance or complaint. The applicant was aware of this procedure. The instruction in this case was production related;
9. The applicant had attended induction;
10. The applicant was aware of and familiar with the basic policies and procedures of the respondent and aware of his rights as an employee: he had made a referral to the CCMA in 2013 relating to an unfair labour practice and had represented himself. He had on his own version achieved a satisfactory outcome in that case;
11. The disciplinary code is contractually binding on the applicant and it prescribes dismissal as a sanction for gross insubordination;
12. The respondent practiced the *Kaizen* philosophy in the workplace. This rested on 3 elements: respect, team-work and continuous improvement. The applicant had attended *Kaizen* meetings and understood these elements;
13. The applicant worked during the night shift on 3 October 2014. Night shift commences at 8pm and endures until 4.30am the next day;
14. There was a high degree of absenteeism during that shift such that it was considered to be a crisis. Members of management had communicated this difficulty to shop stewards;
15. The applicant understood the need to “pick up the slack” and ensure that work gets done in an emergency;
16. ……………. (shop steward) was kept abreast by Moonsamy via WhatsApp of the high rate of absenteeism in that shift and the need to make changes in staffing different sections of the factory. This information was sent to Zulu early in the shift so that he would be able to address concerns raised by any employee. As for Zulu he did not have a concern with the proposed changes;
17. Due to the absenteeism, Pillay issued an instruction to Mbhele at approximately 10pm that the (applicant’s) team should work in a 3-man process. The team up to that point was constituted as a 4-man process: Mbhele, Xulu, one Mkhize, and the applicant;
18. Mbhele conveyed that instruction to the team;
19. The instruction was lawful and reasonable;
20. Mkhize was assigned new duties after 10.50pm and left the team. In other words the team now consisted of 3 members. However the team did not work as a 3-man process from that time;
21. Tea-time during night shift is between 10.30pm and 10.50pm;
22. The applicant and Xulu raised a concern with Mbhele about working in a 3-man process and asked to discuss the matter with their shop-steward Zulu. That request was acceded to. A meeting then ensued between the Zulu, Xulu, Mbele, Henry and the applicant;
23. During that meeting everyone was made aware of the crisis and the “Corolla issue”;
24. Further meetings and discussions were held during the shift with or amongst the applicant, Xulu, Zulu, Mbhele. Pillay, Henry or Moonsamy;
25. Production came to a standstill while these meetings and discussion were carrying on;
26. The applicant had never lodged a grievance about this concern in the past, even though on his version it was a long standing problem. He was aware of the grievance procedure;
27. The applicant did not submit a statement of his version of events when requested to do so by to Zungu (HR manager);
28. The applicant worked as normal for 2 further months before his suspension. Neither he nor his union lodged a grievance about the issue during this period;
29. This case was not about repeat misconduct;
30. The applicant had long service;
31. The charges were not fabricated against the applicant; and
32. There was no bad blood between the applicant and any of his superiors.
33. On the probabilities, I find as follows on the disputed issues that were identified during the pre-arb:
34. Whether an instruction was issued to the applicant to work in a 3-member process by a superior: On the applicant’s version an instruction was given by Pillay to Mbhele for the team to work a 3-man process after tea-time. The applicant acknowledged that that instruction was conveyed by Mbhele to the team. I find accordingly that an instruction was issued to the applicant. With an instruction needing to be issued only once, it is not necessary to decide whether the other members of management issued an instruction. It was undisputed however that 2 members of management reinforced the instruction by appealing or urging the applicant (and Xulu) to work in a 3-man process.
35. The reason given by the applicant for raising the grievance: The reason given by the applicant for objecting to the 3-man process was that whenever there was absenteeism in the plant, the respondent re-assigned a member of his team to other duties in the plant. I find that the reason given by the applicant is frivolous and vexatious for the following reasons:
36. On the applicant’s own version this was a long standing problem. Despite that he had never lodged a formal grievance. The applicant complained that his shop steward did not advise him to do so. That is not surprising: his shop steward probably had doubts about the legitimacy of the grievance;
37. The applicant’s version was that he had advised Mbhele to raise the issue during “green area” meetings. He attended these meetings but did not see Mbhele raising the issue. After the meetings he did not ask Mbhele why he had failed to raise the issue. This is evidence that the applicant did not see his own grievance as serious;
38. The respondent is entitled to assign and re-assign work having regard to the exigencies of the situation. It was undisputed that during that shift there was a high rate of absenteeism such that it constituted a crisis. Hence Mkhize was re-assigned to another department in the exercise of managerial prerogative;
39. The instruction to work in the 3-man process was lawful and reasonable;
40. The applicant was repeatedly asked during cross-examination to explain his difficulty for raising the grievance. At no stage did he give a comprehensible or coherent answer;
41. The applicant failed to say what prejudice, disadvantage or harm he was suffering as a result of working in a 3-man process; and
42. In support of his submission for reinstatement, the applicant stated that he would work in a 3-man process if reinstated. He did not say why he would work now even though there is no evidence that his “concern” has yet been addressed adequately or at all by the respondent.
43. The outcome of the meeting that took place before tea-time: The instruction to work in a 3-man process was issued at approximately 10pm. However it was not implemented immediately due to the concerns raised by the applicant (and Xulu). A meeting was then called and attended by the applicant, Xulu, Mbele, Zulu and Henry. I find that agreement was probably reached during that meeting that the 3-man process would be implemented after tea-time, ie 10.50pm, for the following reasons: the meeting did not continue after tea-time; Zulu did not return to continue with the meeting; the applicant did not ask Zulu why he had not returned to continue the meeting; Henry’s evidence that there was an agreement that the 3-man process would be carried out after tea-time was unchallenged; and, Mbhele called Pillay after tea-time to report that the 3-man process instruction had not yet been heeded.
44. Whether the applicant refused to work in a 3-man process: I find that the applicant refused to work in a 3-man process thereby making himself guilty of gross insubordination for the following reason:
45. The evidence shows that the applicant failed to work in such process for a period of time. It is undisputed that production in that section came to a stand-still; alternatively that production continued in the 4-man process format even though there were only 3 members in the team. This resulted in the production of defective and / or incomplete components. In either event this constitutes a refusal to obey the 3-man process instruction;
46. The initial failure matured into a refusal through the passage of time because the applicant remained steadfast in his demand that his grievance be addressed even after the interventions at different points in time of Pillay, Henry and Moonsamy; and
47. I find that during these interventions which took place at various points in the evening, Pillay, Henry and Moonsamy probably appealed to the applicant to resume work but their appeals did not have any effect on him. In other words the refusal / defiance was serious, persistent and deliberate, thereby fitting the definition of gross insubordination.
48. Whether the applicant’s alleged misconduct had resulted in the production of defective components: It was undisputed that there was a period of time when the applicant (and possibly Xulu) persisted in working as if the team was constituted as a 4-man process despite it consisting only of 3 team members. This means that they were omitting to do certain welds. I find accordingly that defective components were produced. (These defects were rectified at a later stage and the corrected components were thereafter sent to the main assembly line.)
49. Whether there was a loss of production time: I have already found that the applicant failed to comply with the instruction given at 10pm and that he had no justifiable reason not to comply. I have also found that there was agreement to implement the 3-man process at 10.50pm but there is no evidence that it was. There is a dispute between the parties about the length of the delay. It is not necessary to decide on the length of the delay because it is undisputed that the instruction was not implemented immediately or without delay. I find that there was a loss of production time due to the following time-consuming events: there were a number of interventions from members of management to persuade the applicant to resume work in a 3-man process; the persistence of the applicant in working in the incorrect 4-man format even though the team constituted 3 members; the applicant spent time speaking his shop-steward Zulu; the applicant spent time going to and fro to fetch Zulu; and, the time spent rectifying the defective components.
50. Whether the applicant worked in a 3-man process towards the latter part of the shift: The applicant submitted that he did whereas the respondent’s witnesses had no direct knowledge thereof. The applicant did not state why he decided to resume work because there was no evidence that his grievance had been addressed to his satisfaction. It is noted that Moonsamy had resigned himself to production halting in that section for the remainder of the shift and said so as he walked away in frustration. If indeed production had resumed, then the applicant ought to have, as a responsible and accountable employee, notified Moonsamy without delay so as to allay his fears about production being lost. There is no evidence that he did so. I am however prepared to assume in favour of the applicant that production resumed in the early hours of 4 October 2014.
51. Whether team members were allowed to meet with Zulu: I find that the applicant was given permission to meet with Zulu. Whether it was a meeting or consultation is not relevant. The applicant for his part blamed this permission as the reason for his failure and refusal to execute the instruction. I find this suggestion to be disingenuous because the permission was given as an attempt on the part of the respondent to reasonably accommodate the applicant’s concerns. This accommodation cannot, I find, be used as a justification for the refusal to execute this production related instruction without delay. If the applicant had any concern, he ought to have followed the “comply and complain” procedure.
52. The following further findings are made –
    * 1. Whether the applicant’s conduct was serious: I find that gross insubordination always constitutes serious misconduct.
      2. Whether the applicant was aware – or ought to be reasonably aware – that gross insubordination attracted the sanction of dismissal; and whether the contents of the disciplinary code was brought to his attention: The applicant submitted that he was not aware of the contents of the disciplinary code providing for dismissal in case of gross insubordination. I find that he ought to have been reasonably aware of this sanction.
      3. Whether the respondent was inconsistent in the meting out of discipline. The applicant contended that Mbhele also ought to have been disciplined together with the applicant and Xulu. The applicant contended in the pre-arb that Mbhele could have continued with his work regardless of whether the applicant and Xulu worked or not: The applicant raised this issue in the pre-arb but failed to give evidence on this issue. I accordingly refrain from making a finding.
      4. Whether the matter ought to have been dealt with by way of progressive or corrective discipline: There is no room for progressive or corrective discipline in cases of gross insubordination.
      5. Whether there were any aggravating features: I find that the applicant’s conduct had the following aggravating features (and described in Moonsamy’s unchallenged evidence): the applicant repeatedly refused a lawful and reasonable instruction; his grievance had no merit; the applicant disregarded his contractual obligation to work; he did not care whether production was brought to a halt despite being aware that the respondent had made changes in the production process due to the crisis of absenteeism; absent the buffer stock, the standstill could have had adverse financial consequences for the respondent; even though the applicant has had 31 months to reflect, the applicant refuses to accept any responsibility, or see the error of his ways, or express any remorse.
      6. Whether there were any mitigating features: I find that the applicant’s long service and relatively clean record cannot rescue him: his long service ought to have made him act differently.
      7. Whether the employment relationship had become intolerable and whether reinstatement was reasonably practicable: I find that the relationship had become intolerable due to the serious misconduct. It is not clear why the applicant sought reinstatement because on his own version the respondent ruled the workplace by fear and threats, and he felt that he was being forced to work. Having painted the respondent in this light he was asked why he would want to return to such a dreadful workplace. His response: “*There are no jobs in this country. Very few employers employ permanently*.”
53. Whether the applicant had shown remorse: This was not an issue that arose during the pre-arb: it is dealt with here because it arose during the arbitration. The applicant submitted that he did not feel the need to apologize even now – ie 31 months later – because he felt that if he apologized then it would appear that he had committed a wrong. He blamed management because they had given him permission to have a meeting with Zulu. I find that the applicant’s failure to accept even the slightest of responsibility for what occurred on 3-4 October 2014 to be evidence of the irretrievable breakdown of the relationship between the parties.
54. The applicant worked between 3 October (date of alleged incident) and 3 December 2014 (date of suspension). Whether the employment relationship had broken down irretrievably having regard to the period that the applicant was allowed to continue working: The applicant submitted that he worked as normal for 2 months after the incident and experienced no difficulties. On this basis he submitted that the relationship had not suffered and that he should be reinstated. I find that the relationship between the parties remained damaged from 3 October to 3 December 2014 for the following reasons:
    * 1. The applicant did not say why he had not submitted a statement of his version of events when asked to do so by Zungu (HR manager). If he indeed had a valid grievance then that was an opportunity that he ought to have grasped. This reinforces my finding made above that the applicant’s grievance had no substance;
      2. The respondent submitted that the relationship had broken down because the applicant’s conduct was serious and that he had not taken any steps to repair the damage eg by showing remorse. I agree with the respondent because the 2 month period was a golden opportunity for the applicant to repair the damage that his conduct had wrought but he squandered that opportunity. He could have expressed remorse or contrition: by informing the respondent that he had reflected on his conduct and concluded that it was wrong and unacceptable. He ought to have undertaken to comply with lawful and reasonable instructions without hesitation in future;
      3. If the applicant had followed the course outlined in the previous paragraph, he could have turned the delay to his advantage: it is not inconceivable that the respondent may have reconsidered whether it should proceed with steps against the applicant on the basis that he had redeemed himself; and
55. With the applicant not having expressed remorse, Moonsamy stated that reinstatement was not possible as there was “nothing stopping them from doing it again.” (The reference to “them” being to the applicant and Xulu.) The respondent’s risk-averseness, in the light of the applicant’s refusal to accept any blame, is understandable.
56. Whether the disciplinary hearing was convened promptly and without delay: I find that the hearing was not convened promptly and without delay for the following reasons:
57. It is incredible that a large and well-resourced employer such as the respondent only operates its HR office during office hours. No HR services are available to night-shift staff. With staff alternating between day and night-shift every alternate week, Zungu (HR manager) only had access to employees every alternate week during day shift. It took 2 months for the matter to be investigated and for the applicant to be suspended. I find this unacceptable;
58. There were a number of reasons why the hearing itself was not commenced promptly after the suspension. Both parties were responsible for these delays. But the principal delay occurred during the 2 month investigation period for which the respondent is responsible; and
59. Reference has already been made to how the applicant could have turned this delay to his advantage. He failed to do so.
60. Even though the proceedings were not commenced promptly and without delay I am not disposed to grant the applicant any relief. Para 70 of the CCMA Arbitration Guidelines provides inter alia that “*Ordinarily, departures from established policies and procedures, or from the Code, should not result in a finding of procedural unfairness unless there is material prejudice to the employee* …” The applicant failed to lead any evidence of any prejudice that he suffered as a result of the delay.
61. In all the circumstances I find the dismissal of the applicant to be fair.

# AWARD

1. The application is dismissed.

Dated at DURBAN on this 22nd day of AUGUST 2017.

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

R J PURSHOTAM

*Commissioner*