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 25 January and 28-29 March 2019, at the CCMA offices, Anton Lembede St, Durban. The applicant represented himself while the respondent was represented by its HR manager Ms M………..
3. As regards bundles of documents –
	1. Only the respondent handed in its bundle on 25 January 2019. The applicant examined the respondent’s bundle and questioned p 43 as regards authenticity and/or correctness;
	2. The applicant had not prepared a bundle even though he intended using documents. A ruling was made ordering him to hand his bundle to the respondent on or before 1 February 2019. The applicant was given detailed guidance on how to prepare a bundle of documents;
	3. On 28 March 2019 the applicant handed in his bundle containing 256 pages. He had complied with the order made on 25 January 2019. The respondent disputed a large number of documents contained in the bundle. During the proceedings it emerged that the pagination of the various bundles did not correspond. The proceedings were paused in each case. During the long-break the applicant was requested to ensure that his bundles were put in order. This task was not completed and on resumption the applicant was requested to complete the task overnight in preparation for the hearing the next day;
	4. On the next day 29 January 2019 there remained disparities between the respective bundles.
4. The applicant indicated on 25 January 2019 that his witness would not be able to attend due to other commitments. It was indicated to him that he must ensure that his witness is present when the arbitration next sat. On 28 March 2019 the applicant stated that his witness would not be able to attend due to the illness of the witness’ child, but he had been given an assurance that he would attend the next day. On 29 March 2019 the witness remained absent. The applicant’s application to postpone the matter to enable the witness to attend on the next occasion was refused for the following reasons:
	1. The respondent had already incurred huge expenses for flights and hotels on two occasions for its representative and witness who had arrived from Johannesburg: it would have been unduly burdensome to compel it to incur further expenditure; and
	2. Having regard to the evidence already presented, the applicant’s prospects of success were poor: the witness’ evidence would have made little or no difference to the ultimate outcome.
5. A pre-arb was conducted on 25 January 2019 with the consent of both parties. For this purpose a list of issues that are usually encountered in alleged misconduct cases was distributed to both parties. A typed minute of the pre-arb was distributed to both parties. After being amended at the request of the respondent, the amended minute was read into the record on 28 March 2019. Both parties were requested to ensure that the minute be kept handy and their witnesses deal with the disputed issues as identified in the minute.
6. At the commencement of the arbitration the parties were advised as follows as regards cross-examination: “*Witnesses will be subjected to cross-examination. The purpose of cross-examination is, amongst other things, to show that your version is more probable than that of the other side. It is important to bear 3 things in mind when cross-examining – You must put your version to the opposing witness; If an opposing witness has left out an important fact then that should be put to the witness; If you consider that any evidence of the witness to be false or incorrect then that should also be put to the witness. The purpose of all this is to give the opposing witness an opportunity of commenting on your version. It is very important to contest evidence that you disagree with because evidence that is left uncontested is likely to be accepted as being true. An adverse inference may be drawn if you do not put your version or put a new version ie a version that was not part and parcel of your case previously*.”
7. Despite the above advice being given on each day of the arbitration, the applicant failed to put significant portions of his version to the respondent’s principal witness Mr P ………...

ISSUE TO BE DECIDED

1. Whether the applicant was dismissed unfairly. He sought compensation. No statutory claims were made. He indicated that he did not seek reinstatement because he would be victimised if he resumed his employment.

BACKGROUND TO THE DISPUTE

1. The applicant is ………………….(male age 28), a full-time area marketer. He commenced employment in terms of a written indefinite term contract of employment on 18 January 2012 and was dismissed on 22 August 2018 in writing. He earned R10 164 per month for working a 6 day / 45 hour week. The applicant has not found alternative employment despite making attempts, nor has he earned anything from casual employment since the date of his dismissal. His highest standard of education is Gr 12. As breadwinner the applicant had 2 adult dependants.
2. The respondent is …………………. (PTY) LTD, a merchandising business with ………. as its principal client. It employs approximately 1800 employees at branches around the Republic.
3. The applicant was given a notice to attend a disciplinary hearing on 16 July 2018. The hearing was abandoned before completion on 24 July 2018. A new notice was given to the applicant on 8 August 2018 and a hearing held and completed on 15 August 2018. The applicant attended, pleaded not guilty, heard the evidence being given against him and gave evidence in support of his case. He was found guilty and dismissed. The alleged misconduct charge was: “*Gross negligence and or gross misconduct in that it has come to the Company’s attention that during the periods of May 2018 to July 2018 you have failed to carry out your duties with the required skill and care in that you are tasked to ensure that the field marketers in your stores have carried out their duties, and to ensure that you report in to the stores to ensure that the backup areas are cleared of expired stock however you have failed to do so and have failed to generate trade contact reports for management*.”
4. Gross negligence is defined in the contractually binding disciplinary code as follows: “*Gross negligence or gross non-adherence to, or gross failure to comply with company policy or procedures designed to protect the company, its property, its employees, clients and customers*.” It is classified as a serious / dismissible offence, after a formal disciplinary hearing has been conducted.
5. The respondent maintains an appeal procedure but the applicant chose not to appeal and referred his alleged unfair dismissal dispute to the CCMA on 23 August 2018. The matter was conciliated on 18 September 2018 but remained unresolved. Hence the referral to arbitration.
6. Only the respondent submitted a written closing statement.

SURVEY & ANALYSIS OF EVIDENCE AND ARGUMENTS

1. The respondent called the following witnesses in support of its case: …………….. (industrial relations consultant for LabourNet since June 2018); and ………….. (regional manager for respondent from 2015 to September 2018 and key accounts manager Parmalat from September 2018 to the present date. He was the initiator at the disciplinary hearing). Only the applicant gave evidence in support of his case.
2. No procedural issues were raised during the pre-arb process.
3. The following was either agreed to, common cause, undisputed or conceded during the pre-arb or the arbitration:
	1. The two supermarkets in relation to the alleged offence were Game West St and CheckSave Victoria St in Durban (the supermarkets);
	2. The respondent issues “call cycle” rosters from time to time to its area-marketers (such as the applicant). These rosters set out the stores that must be physically visited by the area-marketer on the days indicated;
	3. The applicant was required to visit the designated stores as indicated in the call cycle document;
	4. An example of such roster appears on p 43 of the respondent’s bundle;
	5. The applicant had received rosters in the past;
	6. The applicant was aware that he was under a duty to visit the supermarkets on a weekly basis even though he stated that he had not received the specific roster on p 43;
	7. The applicant is given the use of a motor vehicle so that he can perform his duties. The applicant takes the vehicle home and at the commencement of each business day, departs for the relevant store direct from home;
	8. The applicant had signed all the pages of his employment contract including pages 35, 36 and 39. These pages provided that the applicant had the following duties and functions:
		1. Manage returns; provide feedback regarding store specific issues; ensure all lines are on display merchandise trade sector according to trade sector layout; optimise stock levels, monitor slow / fast sellers; consistent quality checks, respond to poor quality or damaged stock; ensure stock rotation; keep area / shelves clean, tidy and uncluttered; identify opportunities to cross merchandise and implement; communicate and achieve brand objectives; submit weekly feedback reports and TCR reports; communication and upkeep of knowledge of promotions / product knowledge to provide advice on use of products; follow through to ensure that personal quality and productivity standards are consistently and accurately maintained; demonstrate consistent application of internal procedures;
		2. To physically call on the supermarkets and undertake a “floor-walk” which entails the following: check price indicator labels; check stock on hand on the shelves and in the back-up areas; identify stock that is about to be short-dated (ie stock that is reaching its expiry date); give advice to merchandisers and field-marketers on displaying the products to best effect. (It was agreed that the underlined portion contained very important duties and constituted part of the charge.);
		3. If any stock is short-dated, to communicate that issue with the field manager and obtain authority to mark-down the stock or undertake a promotion called the BOGOF (buy-one-get-one-free). (This was also agreed to be very important.);
		4. Check stock; ensure stock rotation; check stock in the back-up areas; and to communicate areas of concern with the field manager (to whom he was accountable) or to the regional manager (who at the relevant time was ……);
		5. Check back-up areas and shelf stock at each visit at each store; to check back and front stock to verify validity and also needs to check uplift book to ensure only normal weekly uplifts are done; staff must check back-up fridges as well when checking for overstocks not selling or stock reaching expiry dates (short dates);
	9. The duties and functions imposed upon the applicant are important, and reasonable;
	10. The applicant was aware that failure to perform these duties is serious and a dismissible offence;
	11. The applicant was provided with a cell-phone and tablet with sufficient air-time and data to undertake communications for business purposes. In addition a quick and effective mode of communication – WhatsApp – was recommended for use by all staff;
	12. The relevant hierarchy was as follows, commencing from the lowest level of responsibility: merchandiser (in store); field marketer (in store); area marketer (roving); field manager (roving);
	13. In the event that a merchandiser was not performing his duties properly then it was the duty of the applicant, as an area-marketer, to report that to the field manager so that disciplinary action may be taken;
	14. There was a measure of overlap between the duties of area marketers and field managers as follows: identify lines for promotion; ensure that backup areas are cleared of expired stock;
	15. The applicant was aware of the problems that were being experienced at the supermarkets;
	16. The applicant was aware that if he failed to address these problems then that would have harmed the respondent;
	17. On 29 June 2081 a “product upliftment note” listing the expired stock was prepared by the respondent to remove stock that had expired since April or May 2018 from the supermarkets;
	18. The expired stock was removed from the supermarkets;
	19. The applicant had not noticed that the expiry dates were imminent (aka “short-dates”) or that the stock had expired;
	20. The trade contact report (TCR) is a key tool used by the respondent to inform itself of issues that are occurring in the stores and to take steps to avoid the problem from escalating and to mitigate any damage that may already have occurred. Even though ……….had devised a format for a TCR, it was not necessary to follow that format, as long as the applicant (and other area-marketers) communicated important issues to management in a timely manner;
	21. A TCR was required to be prepared and submitted by the applicant after each and every visit to any stores to the field and regional managers;
	22. There was no evidence that the applicant had prepared a TCR in respect of the expired stock that had been found in the supermarkets;
	23. Having regard to the period in question – May to July 2018 – the applicant ought to have visited the supermarkets at least 12 times and as such 12 TCRs ought to have been submitted;
	24. The applicant had received the a written warning on p 48 on 6 February 2018 valid for 12 months for “*Negligence in that you failed to follow company policy and procedure by not communicating expired stock that was found on 23 November 2017 by …………… (area marketing covering the store) in the back up area which consisted of 76 cases of Everfresh 1 ltr milk that expired on 9 July 2017 at Boxer Ndwedwe*.”
	25. The offence that the applicant had committed in this case was the same as the one contained in the final written warning. The said warning also contained the following further warning: “*Please note that should you commit a similar offence or any other serious offence, you will render yourself liable for further disciplinary action, which may lead to the termination of the employment contract*.”
	26. At the end of the disciplinary hearing the applicant had signed each page of the minutes of the hearing to acknowledge that they were correct.
4. Before findings are made on the disputed issues, I set out the defences that the applicant put forth in his examination-in-chief, but failed to put to …………in cross-examination:
	1. That he had not noticed that there was any expired stock because someone had concealed the expired stock in the freezer. It was common cause that the respondent’s products are not stored in freezers. (If true, this would have been a complete defence to the charge.);
	2. That the template for the TCR had been received by him from his line manager R Singh only on 22 June 2018 hence his failure to submit them. (If true, this would have rescued the applicant from a significant portion of the charge.);
	3. That his managers had abused him by swearing at him from time to time;
	4. That returns is a norm in the perishables industry due to expiry and that he ought not to have been disciplined. (That returns is a norm is true. However the applicant was not charged with causing returns: he was charged with not informing the respondent that stock was reaching expiry; and of not taking steps to mitigate or avoid the loss that may be suffered by its expiry.);
	5. That he had been sending to …………. on a regular basis photographs that he had taken of images of various situations prevailing in the stores. (This submission, if true, was intended by the applicant to convey that he had informed ………..of the goings-on in stores. In other words that the pictures were a form of TCR.)
5. I find all the above “defences” to be fabrications because none of them was contained in his own statement dated 28 June 2018. Nor did the applicant provide evidence of the photographs that he allegedly took. I accordingly find the applicant seriously compromised and damaged his credibility.
6. The following findings are made on the probabilities on the issues that were disputed by the parties:
	1. Whether the applicant had received the specific roster on p 43: Even though the applicant may not have received the roster, it was common cause that he was aware that he was obliged to physically visit the supermarkets on a weekly basis.
	2. With reference to pp 35 and 36: whether he had the following duties: manage stock levels; count stock and determine stock to be merchandised; draw stock according to requirements; unpack stock; management of out of stocks; store service level report; listing monitor reports: It is not necessary to decide this issue as the central issue was the failure of the applicant to notice that stock was short-dated or had expired; and to communicate this to management who could have taken steps to mitigate or avoid the loss that was imminent.
	3. Whether the applicant failed to visit the supermarkets: Had he visited the supermarkets there is no doubt that he would have seen the expired stock. That he did not see it, or know about it, can mean only one thing: that he did not visit the stores. That is the only reasonable inference that one can draw.
	4. The applicant, being aware of the problems at the supermarkets, whether he failed to address those problems: Consequent on the finding made in the previous para, I cannot find any evidence that the applicant took any steps to address the problem (ie of short-dated or expired stock).
	5. Whether the applicant failed to ensure that field marketers carried out their duties diligently: That the stock expired and had to be removed, means that the applicant had not ensured that field marketers carry out their duties diligently.
	6. Whether the applicant failed to generate TCRs: The respondent submitted that the applicant had failed to submit TCRs. The applicant indicated that he had submitted them and pointed to a number of emails that he had submitted. Having regard to the prescribed contents of a TCR (set out in the para dealing with the common cause issues) I find that the applicant’s emails did not constitute a TCR by any measure. I find accordingly that he did not submit TCRs as required. That this problem was long in the making is clear if one has regard to an email from the applicant to his line manager dated 14 February 2018 in which he undertakes to “*Going forward I will provide you with TCR after every call*.” The evidence shows that the applicant failed to keep to his undertaking.
	7. Whether the respondent suffered any loss, damage, harm or prejudice as a result of the applicant’s alleged misconduct: The respondent estimated the loss to it as a result of the applicant’s negligence to be in the region of R10 000. This included not only the cost price of the products themselves but the costs of logistics in delivering the stock in the first place but also in its removal from the supermarkets; and the costs of disposal of the stock. The applicant for his part questioned the estimate of the respondent. He calculated the amount as being less than R3000. It is not necessary to determine which figure is correct: on both versions, the respondent suffered a loss as a direct result of the applicant’s negligence. This question is therefore answered in the affirmative.
	8. Whether the charges were fabricated against the applicant: The applicant submitted during the pre-arb that …….. fabricated the charges against him as the latter disliked him from the time that he commenced employment. During the arbitration there was no doubt that there was objective and concrete evidence that the applicant had been grossly negligent in the performance of his duties. I accordingly find that the charges were not fabricated against the applicant. For the record ………….disputed that he had fabricated the charges: he submitted this he had a professional working relationship with the applicant.
	9. Whether the respondent has been inconsistent in not taking action against others who had engaged in similar wrongdoing: The applicant raised two types of inconsistency. I find that both have no substance for the following reasons:
		1. Firstly, the applicant submitted that the respondent was being inconsistent in meting out discipline in the workplace as it ought to have dismissed ……….. and …………..(field-marketers) as well. He justified this submission by stating that they were in the supermarkets daily and ought to have noticed that the stock was short-dated or had expired. The respondent submitted that they were given warnings. It is not necessary to deal with this complaint because it was not disputed that it was his duty to visit stores and to guide the field-marketers in the performance of their duties. I have already found that the applicant failed to visit the stores and hence failed to avoid the troubles that ultimately unfolded. In any event it was undisputed that …….. and ……had communicated the fact of stock expiry to their line manager and were awaiting feedback;
		2. Secondly, that his line manager one ………….had not been disciplined after it came to light that there was a problem with the quality of certain items of stock. I find that when inconsistency is raised, that it must be raised in relation to similar incidents. I find that …………’s issue is not comparable to the applicant’s issue because the quality issue had its origin in the respondent’s factory and did not deal with Singh’s failure to notice expiry dates.
	10. Whether the respondent had failed to provide training to the applicant: This issue was not raised by the applicant during the pre-arb. During the arbitration he complained that the respondent had failed in this regard. …………. gave evidence that he had personally provided such training to the applicant during his induction and had accompanied him during visits to stores. Further training was provided when the applicant’s KPIs (key performance indicators) were devised and signed by him. The applicant did not dispute in cross-examination that this training was provided. ….. concluded this portion of his evidence by stating that the applicant’s job was not a complex job and could be performed by anyone with the applicant’s level of education. In any event the applicant had at no stage of his employment complained to anyone that he lacked training in any facet of his job.
	11. Whether the respondent was holding the applicant responsible for issues that occurred while he was on sick leave: It was common cause that the applicant was on sick leave from 19 February to 16 April 2018. The respondent submitted that he was not being held responsible for issues arising during his sick leave: he was being held responsible for not noticing the problem on his return from sick leave.
	12. Whether the sanction of dismissal was fair or whether the appropriate sanction ought to have been a warning: The applicant submitted that a warning would have been a fair sanction in the circumstances. I disagree: the applicant had already been given a final written warning for similar misconduct and there was no evidence of him correcting his behaviour to ensure that he performs his duties in a proper and non-negligent manner.
	13. Whether there were aggravating or mitigating circumstances: The applicant was combative throughout the arbitration and did not show any remorse for his actions. On the last day of the arbitration I asked the applicant whether he was prepared to accept even the smallest degree of blame or responsibility for the problems that had unfolded. His answer was that he was not. He blamed all those around him. Having regard to the findings made, I find that these to be serious aggravating factors.
	14. Whether the applicant had long service: It is not necessary to decide this issue having regard to the finding I intend making regarding the fairness of the dismissal.
	15. Whether there was a breakdown of trust serious enough to warrant dismissal: The respondent submitted that the applicant had repeatedly failed to perform his duties diligently and without negligence and hence could not be trusted. That had caused it and its clients (ie the supermarkets) to view the respondent in a negative light. The applicant for his part insisted that there was no cause for any breakdown of trust. Having regard to the finding already made, I find that the respondent was justified in concluding that the applicant could not be trusted to perform his duties properly and without negligence. The respondent was fortified in this finding because it had given the applicant a final written warning for negligence in the hope that he corrects his behaviour. The latest incident proved that the applicant had failed in his regard.
7. In all the circumstances I find the dismissal to be fair.

AWARD

1. The application is dismissed.

Dated at DURBAN on this the 5th day of APRIL 2019.

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

R J PURSHOTAM

*Commissioner*