JURISDICTION, DETAILS OF THE HEARING AND REPRESENTATION

1. I satisfied myself that the DRC had jurisdiction to hear this matter.
2. The arbitration hearings were held on 11 June, 17 September and 19 November 2018; and 2 September 2019 at the …………. The applicant was represented by Mr (……….official) while the respondent was represented by Mr …………… (service manager). The former had 5 years of experience in representing parties at arbitration while the latter had 8 years. Having regard to the experience of the parties’ representatives the proceedings were conducted largely in an adversarial manner. The interpreters were Messrs……………..
3. Both parties occasioned postponements in this matter.
4. The respondent handed in documents on 11 June, 17 September and 19 November 2018. The applicant did not hand in any. On 11 June 2018 the applicant perused the respondent’s bundle and did not dispute their authenticity or the correctness of their contents. On the latter occasions the applicant indicated that he could not verify the documents or their contents.
5. With the consent of the parties a pre-arb was conducted on 11 June 2018. For this purpose a checklist containing the issues that one normally encounters in alleged misconduct related arbitrations was distributed to both parties. A typed minute of the pre-arb was distributed to both parties. After both parties confirmed its correctness, it was read into the record on 17 September 2018. The parties were informed that no evidence need be led on the issues on which there was agreement, but they must ensure that their witnesses deal with the disputed issues. The parties were advised to keep the minute handy to remind them constantly of the disputed issues and to guide their witnesses accordingly.
6. On 2 September 2019 para (nn) of the pre-arb minute was deleted by consent because it was incorrect – it recorded that the applicant had received a final written warning when in fact he had not.
7. On 19 November 2018 an inspection-in-loco was conducted of the respondent’s factory. Unfortunately the machine in question was undergoing repairs and hence could not be viewed while in production mode.
8. At the commencement of the arbitration, and on each new hearing day, the parties were advised as follows: “*Witnesses will be subjected to cross-examination. The purpose of cross-examination is, amongst other things, to test the reliability, credibility and relevance of evidence, and to show that your version is more probable than that of the other side. It is important to bear 3 things in mind when cross-examining – You must put your version to the opposing witness; If an opposing witness has left out an important fact then that should be put to the witness; If you consider that any evidence of the witness to be false or incorrect then that should also be put to the witness. The purpose of all this is to give the opposing witness an opportunity of commenting on your version. It is very important to contest evidence that you disagree with because evidence that is left uncontested is likely to be accepted as being true. An adverse inference may be drawn if you do not put your version or put a new version ie a version that was not part and parcel of your case previously*.”

ISSUE TO BE DECIDED

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

BACKGROUND TO THE DISPUTE

1. The applicant is ………………….. (a male age 42), a roving quality inspector. He commenced full-time employment with the respondent in terms of a written contract of employment on 19 July 1999 (having served a 3 month’s probation). He has been a quality inspector for the entire duration of his employment. The applicant was dismissed on 14 February 2018. He earned R1416 per week (or R6135.52pm) and worked a 5 day / 40 week. The applicant has not secured alternative employment despite making attempts, nor has he earned anything from casual work. His highest standard of education is Std 10 (or Gr 12). As breadwinner he has 14 dependants (4 adults and 10 children).
2. It was agreed that the applicant’s principal duty was to inspect the components being produced and ensure that they conform to quality standards and specifications. He did so by roving around on foot in the factory and checking products being produced in the large & small injection moulding department.
3. The respondent is …………………(PTY) LTD T/A …………... It is a manufacturer of components for the automotive industry – mainly for ……………; and manufacturer of supermarket trolleys for …………... It has approximately 206 employees.
4. The applicant was given a notice to attend a disciplinary hearing on 9 February 2018 containing the following charge: “*Gross negligence in that 55 baby-seats of a run of 124 was rejected for warping. You did not identify these as rejects, nor did you stop production*.”
5. The respondent has a unilaterally imposed disciplinary code which provides for dismissal for the first instance of gross negligence.
6. The applicant attended the disciplinary hearing on 12 February 2018; was represented by a trained and experienced …………..shop steward; pleaded not guilty; heard the evidence given by the respondent’s witnesses; gave evidence in support of his case and did not call any witnesses. He was found guilty and dismissed. The applicant’s appeal was refused on 22 February 2018. He lodged an alleged unfair dismissal dispute with the ………… on 1 March 2018. The matter was set down for conciliation on 11 April 2018 but remained unresolved. Hence the arbitration.
7. Both parties submitted written closing statements.

SURVEY & ANALYSIS OF EVIDENCE & ARGUMENTS

1. The respondent called the following witnesses in support of its case: ………… (employed as quality and outbound logistics manager for 3.5 years); …………… (quality supervisor from 2016; the applicant’s immediate superior, and employed by the respondent for 13 years). Only the applicant gave evidence in support of his case.
2. During the pre-arb the applicant indicated that he would not be raising any procedural issues.
3. The following was either agreed to, common cause, undisputed or conceded during the arbitration or the pre-arb:
   1. The respondent has ISO9001 / TS16949 certification and is required by its customers to keep to those high standards;
   2. The production of high quality components is critical;
   3. Insofar as the …………… components were concerned, each and every component must be inspected for adherence to quality standard. Insofar as other components are concerned, it is necessary to only inspect a sample of the production on an hourly basis as they come off the machine;
   4. The applicant had signed a document (on unknown date but before the alleged misconduct) which provided for the following duties of roving inspectors:

*Check that the setting sheets in green file matches that of the settings on the machines;*

*The setter / supervisor will call up the program for you to verify;*

*If the settings do not match that of the setting sheet, STOP the process immediately. This needs to be reported to the setter, quality manager / supervisor and production manager / supervisor urgently;*

*Make a note on the first off sheet indicating that settings were verified and / if correct or not.*

*Ensure that supercart parts are fitted for verification, example baby seat and back rest, basket and chassis, handles to basket, inside covers etc* (printed bold in original with 3 stars at the beginning of sentence)*;*

*Verify that the cooling jig process is followed* (printed bold in original)*;*

*Ensure all first offs / last offs / hourly samples are done. All first off sheets, SPC, must be filled in for every production run. Ensure PCS is signed ensuring that scrap is recorded correctly;*

*These are direct instructions from ………and ……….;*

*Please adhere to these or fact the implication;*

*Lets work together in producing a good part, on time, every time.*

*Regards, …………….*

* 1. The applicant worked on shift when the alleged misconduct occurred: it being the night shift that commenced at 10pm on 7 February 2018 and was completed at 6am on 8 February 2018;
  2. There are 31 machines but it is not often that all 31 run simultaneously. The usual number of machines running during night-shift is between 6-8 machines;
  3. The applicant performs his duties by visually inspecting the products;
  4. The applicant’s eyesight is in order;
  5. The applicant must perform his duties without negligence;
  6. The machine operator is also trained to, and does indeed, conduct visual inspections of the products as they come off the machine;
  7. The first-offs must be carefully inspected by applicant to ensure that they comply with quality specifications;
  8. The machine in question was a Haitian 800HC, which produces baby seats that are fitted into supermarket trolleys;
  9. The machine was being operated by ……………..;
  10. During night-shift the setter is also the supervisor;
  11. The setter / supervisor during the shift was ………………;
  12. The machine produces approximately 40 components every hour: it is a 2 piece component that fits together;
  13. If the operator had seen something unusual she would have called the setter/supervisor or the applicant. There was no evidence that she had called on either for assistance;
  14. The time of the alleged incident was not known;
  15. The production control sheet (PCS) provides for entries to be made on an hourly basis relating to the production;
  16. The columns of importance for purposes of this case are the columns for “scrap” and “good parts.” Entries must be made in the relevant columns on the quantities of each. There was no entry made in the “scrap” column for 55 pieces of scrap;
  17. The PCS is a complete record of what occurs during a shift;
  18. No issue of inconsistency was being raised by the applicant;
  19. The applicant has long service;
  20. Without admitting that he was negligent or grossly negligent, the applicant admitted that if the alleged misconduct indeed occurred, that it was serious;
  21. The applicant was suspended without pay for 3 shifts during September 2017 for a similar offence;
  22. The applicant had been counselled a number of times on his performance.

1. The following findings are made on the probabilities on the disputed issues:
   1. Whether the applicant was performing duties in addition to his normal duties during that shift:
      1. The applicant contended that he had been performing additional duties during the shift as the ……………. job was also running that evening. It was agreed that that job usually runs only during day-shift. It was also agreed that that job had become “delinquent” (ie delayed), hence had to be run during night-shift that week so as to meet the delivery date;
      2. The respondent contended that the ………… job did not constitute extra work or additional work, because if that job had not run, there would have been some other job that would have run;
      3. The applicant did not dispute the latter contention;
      4. I accordingly find that the …………. job was not an extra or additional job. In any event there is no evidence that that job interfered in any way with the applicant’s inspection duties.
   2. Whether the applicant is aware that gross negligence is a dismissible offence: I find that all employees ought to be aware that gross negligence is a very serious and dismissible offence.
   3. Whether 55 pieces of scrap baby-seats were produced: I cannot find that 55 pieces of scrap was produced for the following reasons:
      1. The least I would have expected the respondent’s witnesses to know was the number of scrap pieces produced. But the evidence in this regard was inconsistent and contradictory: the answers were “cannot remember;” “maybe 80;“ and “55 pieces.” The PCS being the only documentary record showed an entry for scrap as being 2 pieces having been produced during that shift. The handover book entry made at the end of the shift indicated “*baby seats ran ok*.” I understand this to mean that there was little or no scrap produced;
      2. Two persons who would have had first-hand knowledge of this issue were not called: ……… (assembly supervisor) had allegedly detected the defects in the assembly section. But even he had failed to document the defects in a document designed for that purpose: the “internal scrap record.” The other person not called was the operator …………. No explanation was given why the “best evidence” of ………… and …………… was not used;
      3. The applicant for his part contended that no scrap was produced;
      4. It is recorded that not one of the defective pieces was brought to the arbitration as an exhibit.
   4. Whether the applicant was shown the 55 pieces of scrap that was produced, ie whether it was brought to his attention that 55 pieces of scrap was produced during the shift: I find that the applicant was not shown the scrap for the following reasons:
      1. The respondent presented two versions of this issue: one where Naidoo (quality supervisor and the applicant’s superior) allegedly showed him the scrap. The other version was that the scrap was allegedly left in the green area (ie meeting room) for the applicant to view. With the respondent presenting two competing versions, I have to find that weight cannot be attached to either;
      2. In relation to the latter version, the applicant was allegedly informed via WhatsApp / handover book that the scrap was left in the green area for him to view. Neither the WhatsApp message nor the handover book was presented at the arbitration. It was alleged that the handover book had gone missing. But Naidoo recalled that the entry made in the book was “*baby seats ran ok*.” If that is the case it means that the production of baby seats was not beset by problems;
      3. The applicant for his part disputed that any scrap was shown to him. He also disputed that he had received any WhatsApp messages or that the handover book contained any directive for him to view the scrap.
   5. Whether the applicant engaged in misconduct by neglecting to perform his inspection duties properly by ensuring that the defective production was stopped timeously: I cannot find the applicant responsible for not stopping production for the following reasons:
      1. I find that there is a duty on all production staff to stop the production of defective components. But that duty applies from the moment one acquires knowledge of such defective production. The first person who logically would have that knowledge would be the operator by virtue of her proximity to the machine. As such that duty would apply to her in the first instance. Since she was not called as a witness there is no evidence why she did not take any steps to stop the machine. Nor was there any evidence of her calling for the assistance of the applicant or the setter/supervisor;
      2. It is not clear to me why the duty would apply to the applicant: he is a roving inspector after all. As such he would be all over the factory away from the machine in question. Obviously, if the defective production was taking place in his presence, he would have the duty to shut off the machine. But there is no such evidence.
   6. Whether the applicant performed his quality inspection duties in accordance with the respondent’s requirements: Having regard to the findings already made, I am bound to find, as I do, that the applicant performed his duties in accordance with the respondent’s requirements, ie without negligence.
   7. Whether the alleged misconduct caused any harm, damage, loss or prejudice to the respondent: Even if there was damage or loss I cannot find that it can be attributed to any act or omission on the applicant’s part.
   8. Whether the applicant ought to have foreseen that his alleged failure would have serious consequences: It is not necessary to answer this question.
   9. Whether the alleged misconduct caused delays in the production, assembly and delivery of completed carts to the customer; whether the production in the next shift was delayed because 55 products had to be manufactured again to ensure timeous delivery to the customer: There was a delay. But I cannot find that it can be attributed to the production of 55 pieces of scrap.
   10. Whether the respondent has proper systems, processes and technology in place to avoid the production of defective products: The respondent does appear to have systems in place to avoid the production of defective components but adherence to those systems appears to be erratic having regard to the following evidence:
       1. It was agreed that the PCS is a complete record of what occurs during a shift. But it appears that this important document was not completed properly during the shift: the alleged 55 pieces of scrap appear to have been included in the 122 “good parts” produced. It is beyond my comprehension why this method of keeping records is being followed even though there is a specific dedicated column for “scrap;”
       2. Calvin appears to have detected the distortions in the baby seats while they were being assembled. He however failed to document this failure in the “internal scrap record;”
       3. Important records such as WhatsApp messages and the handover book were not produced – they allegedly having gone missing;
       4. The above findings mean that significant occurrences are not being accurately documented; and even if they are, the records are not being safeguarded;
       5. At least one of the defective items ought to have been preserved as an exhibit, and presented at the arbitration.
   11. Whether the respondent wrongly blamed the applicant for its own failures, ie made him into a scapegoat: There is a suspicion that this occurred. However I cannot make a substantive finding in the absence of evidence. In any event the applicant for his part did not offer a motive for why the respondent would do this to him.
   12. Whether the sanction of dismissal was fair or appropriate: With the finding having been made that the applicant had performed his duties properly, I must find, as I do, that the applicant was dismissed unfairly. I must also record that there appeared to have been confusion on the part of the respondent whether there was a final written warning against the applicant’s name. It was eventually agreed that there was no such warning, but that the applicant had been suspended without pay for a similar offence.
   13. Whether trust has broken down such that the applicant could be trusted anymore to perform his duties without negligence: It is not necessary to deal with this issue having regard to the findings already made.
   14. Whether the employment relationship had become intolerable; whether a good working relationship can be restored; and whether reinstatement would cause an undue level of disruption or financial burden; and whether the position has been filled: The position has been filled, but I find that that should not pose an obstacle to the applicant being given the primary remedy. The remainder of the questions are answered in favour of the applicant as there was no evidence of disruption or financial burden if the applicant was reinstated. The respondent submitted that the relationship had become intolerable but no reason was offered why that would be so. In the absence of a cogent reason I cannot attach any weight to a bald submission.
2. Finally then, to the relief. I am reminded that the applicant was dismissed on 14 February 2018.
3. I find that the applicant is entitled to the relief he seeks: reinstatement with back-pay, both of which I intend affording him. With both parties having delayed the finalisation of this matter after February 2019, the applicant will only be afforded back pay until that month only. That amounts to R73 626.24 (R6135.52 x 12).

AWARD

1. The dismissal of ………………. is unfair.
2. ………………. (PTY) LTD T/A …………….. is ordered to reinstate the applicant ………………….. in its employ from 14 February 2019 on the same terms and conditions as those that prevailed immediately prior to 14 February 2018.
3. …………………. (PTY) LTD T/A …………. is ordered to pay …………….. R73 626.24 within 14 days of being informed of this award.
4. ………………….. is to tender his services to ………………… (PTY) LTD T/A ………… within 48 hours of being informed of this award.

Dated at DURBAN on this the 11th day of SEPTEMBER 2019.

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

R J PURSHOTAM

*Commissioner*