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 16 September 2016, 17-18 November 2016; 11-12 April 2017 and 22-23 June 2017 at the CCMA offices, Anton Lembede St, Durban. The applicant was represented by Mr …………… while the respondent was represented by Mr …………. (HR manager). The former had 30 years of experience in representing applicants at arbitrations while the latter had 16. The proceedings were accordingly conducted largely in an adversarial manner. The interpreters were: Ms …………(September 2016); Ms ………………(November 2016); Mr …………..(April 2017) and Mr ……….(June 2017).
3. The arbitration was postponed on 9 and 10 February 2017 by consent but at the respondent’s instance.
4. The respondent handed in 2 bundles of documents on 16 September 2016. The applicant indicated that he required time to study these documents before he could indicate their status. On 17 November 2016 he indicated that he accepted the authenticity of the documents and the correctness of their contents, except for the transcript of the disciplinary hearing. The applicant failed to indicate the status of the transcript at any stage of the arbitration, even when asked, but did not object to its correctness when reference was made to it by any witness.
5. The applicant did not hand in any documents. Further documents were handed in on 11 April 2017 by the respondent, none of which was disputed by the applicant.
6. A pre-arb was conducted on 16 September 2016 with the consent of the parties. A minute thereof was distributed to both parties, and after minor amendments were effected, was read into the record on 17 November 2016. The parties were advised that they should make reference to the minute regularly to inform themselves of the issues on which there was a dispute and ensure that their witnesses deal with them.
7. An inspection-in-loco was conducted on 17 November 2017 at the request of the parties. A minute thereof was distributed to both parties the next day and after it was approved with amendments, was read into the record.
8. At the outset, and at the commencement of every subsequent 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*.”
9. Despite the above advice, the applicant was reminded from time to time to put his version to the respondent’s witnesses in cross-examination. Insofar as Londiwe Magwenya was concerned (a witness of the respondent) the applicant did not put his version to her.

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 ………………………. (male age 38), warm-mix operator in the kitchen at NID1 (one of the production units). He commenced employment for the respondent on 5 January 2009 in terms of a written indefinite term contract. (The applicant was placed at the respondent’s site in 2005 by ……………………, a temporary employment service provider.) He was dismissed on 14 June 2016. He earned R7500pm for working a 5 day / 40 hour week. He remains unemployed despite making attempts at finding alternative employment. The applicant has not earned anything from any type of casual employment since the date of his dismissal. As breadwinner the applicant supported 5 dependants (1 adult and 4 children). His highest standard of education is Gr 12. The applicant’s main task was to cook.
2. The respondent is ……………………LTD, a manufacturer of confectionary. It employs approximately 1322 persons at 2 branches.
3. The applicant was suspended with pay on 21 April 2016 and given a notice to attend a disciplinary hearing. He was charged with – “*Gross misconduct in that on 20/04/2016 you incited employees to stop working which resulted into an illegal work stoppage*.” The hearings were held over a number of days between 3 May and 13 June 2016 with the outcome being handed down on 14 June 2016. The applicant attended the hearings, pleaded not guilty, gave evidence, and called witnesses in support of his case. He was represented by Mr ………………… He was found guilty and dismissed.
4. The respondent maintains an appeal procedure but the applicant chose to refer the matter to the CCMA on 22 June 2016. The matter was set down for conciliation on 21 July 2016 but remained unresolved. Hence the arbitration.
5. Both parties submitted, at their request, written rather than oral closing statements.

SURVEY & ANALYSIS OF EVIDENCE & ARGUMENT

1. The following gave evidence for the respondent: ……………..(holding the substantive post of maintenance co-ordinator for 23 years and with the respondent for 28 years. For purposes of this case he was the chairperson of the disciplinary hearing),……………. (production controller for 6 years and with the respondent for 9 years), ……………… (production controller for 8 months and with the respondent for 30 years),……………. (production controller for 8 months and with the respondent for 9 years), ……………..(production manager for 15 years and with the respondent for 27 years); ………………. (cost analyst holding a BTech degree in cost and management accounting with 3.5 years of experience) and ……………. (HR manager of 10 years).
2. The applicant gave evidence and called the following witnesses: ……………. (operator for 4 years and one of the employees who was suspended by ……………..), …………….. (operator for 22 years) and …………… (forklift driver for 4 years and with the respondent for 8 years).
3. The following was either agreed to, common cause, undisputed or conceded in the pre-arb or the arbitration proper:
   1. It is unacceptable for an employee to incite his fellow employees to embark on an illegal work-stoppage. The rule serves an important purpose, is reasonable and valid. Misconduct of this nature is serious;
   2. The disciplinary code was contractually binding on the applicant;
   3. The relevant events occurred during night-shift that commenced on 19 April and ended at 6am on 20 April 2016;
   4. The respondent’s factory is divided into production units or departments called NID1, NID2, NID3, NID 4 and transit bay;
   5. ……………is the majority union in the workplace;
   6. ………….. was previously the majority union;
   7. ……………and …………..(surname unknown) (both members of …………and hereafter referred to as the 2 employees) worked as operators in NID4;
   8. The supervisor in NID4 was Dlamini;
   9. The supervisor in NID1 (where the applicant’s work-station is situated) was Magwenya;
   10. Dlamini had suspended the 2 employees for running their machines at a slow speed pending a disciplinary hearing;
   11. They were found guilty of insubordination at a disciplinary hearing and dismissed;
   12. The applicant was called, during the shift in question, to assist the 2 employees;
   13. The applicant attempted to intercede on their behalf with Dlamini. His attempts were rebuffed and Dlamini informed the applicant that the matter would be proceeding to a disciplinary hearing;
   14. Having failed to have their suspension lifted, the applicant interacted with employees from transit bay, NID2 and NID1 when he reported to them about the suspension of the 2 employees, and his failed attempts to intercede on their behalf;
   15. On hearing these reports, the employees in these departments left their work-stations and commenced a work-stoppage at approximately 3.30-4.00am;
   16. Other employees who had not received these reports from the applicant directly, also downed their tools and followed their colleagues outside;
   17. The work-stoppage during that shift continued until the end of the shift at 6.00am;
   18. The next shift was also delayed: production only resumed at 9.30am;
   19. Even though Dlamini did not hear what the applicant told employees in his department (ie NID4), he observed that they left their work-stations only after the applicant spoke to them;
   20. It is disputed whether Ndaba heard the conversation that the applicant had with Maphumulo and Chonco: both employees in her department (ie NID2). However it was undisputed that she approached the applicant and asked him to stop interfering with her employees;
   21. Ndaba also observed that employees in her department left their work-stations after the applicant spoke to Maphumulo and Chonco;
   22. The employees in both NID2 and NID4 were working as normal until they received the report from the applicant;
   23. Magwenya received a call from Ndaba complaining that the applicant is stopping her (Ndaba’s) employees from working. Magwenya confronted the applicant about this. The applicant confirmed having been confronted;
   24. The value of lost production was R185 625. This calculation is based on the following undisputed facts: the plant runs 24 hours a day; production on a normal day is 60 tons; hourly production is 2500kg; the work-stoppage endured for 5.5 hours; and the cost of materials is R13.50 / kg. The calculation is therefore 2500kg x 5.5 hours x R13.50 = R185 625);
   25. The applicant had not shown any remorse; and
   26. The following mitigating factors apply: the applicant was a breadwinner in his family, had a clean disciplinary record and had long service.
4. The following issues were raised by the applicant during the arbitration but not at the disciplinary hearing or the pre-arb. He failed to explain why they were only being raised at that stage of the proceedings:
   1. Whether the respondent had applied the rules inconsistently: The applicant gave evidence to the effect that one Solomon had incited a work-stoppage protesting against Dlamini some years ago and that the respondent had failed to take any action against him (ie Solomon). The applicant allegedly took part in that stoppage.
   2. Whether ………………(supervisor) is a whistle-blower, suspends employees, dismisses them, or fabricates evidence against them: The applicant’s evidence was that NID4 employees were “sick and tired” of Dlamini. He allegedly “spied” on them for management so that they can get dismissed. The applicant added: “He has been doing these bad things for many years.”
5. None of these allegations were put to the respondent’s witnesses in cross-examination. I accordingly cannot make a finding on these issues. The allegations against Dlamini will however be taken into account to draw an inference on the probable content of the reports that the applicant gave to employees in various departments.
6. The applicant is a shop steward but allegedly was not aware of the rules of the respondent. By denying knowledge of the rules the applicant damaged his credibility.
7. I find the respondent’s witnesses Magwenya and Dlamini to be credible witnesses because they conceded readily that they did not hear the applicant advising the employees to embark on a work-stoppage. This also indicates that there was probably no collusion between them and Ndaba. (A finding on what Ndaba heard is made below.)
8. The following issues were disputed during the pre-arb. I find, on the probabilities on these issues as follows:
   1. Whether the applicant breached the rule: The findings under this heading will be made under three headings:

Direct Evidence: I find that the applicant did indeed incite employees of the respondent to embark on an illegal work stoppage based on the following direct evidence:

* + 1. Ndaba stated that she had heard the applicant advising employees in NID2 to stop working;
    2. The applicant’s witnesses from NID2 disputed that Ndaba could have heard their conversation with the applicant due the loud noise. The issue of the alleged loud noise was not put to Ndaba in cross-examination. It must be noted that the applicant himself did not give any evidence on the alleged prevailing noise even though it was agreed he was part of that conversation;
    3. That Ndaba complained to Magwenya by telephone about the applicant interfering and disturbing her employees;
    4. Magwenya confronted the applicant about this issue. The applicant confirmed having been confronted;
    5. In the circumstances I find that Ndaba heard the applicant inciting employees in her department to down tools.

Circumstantial evidence: If the above finding is wrong, then the following circumstantial evidence exists to draw the inference that the applicant spoke to the relevant employees in terms that caused them to abandon their work station:

1. The applicant had intervened unsuccessfully in the suspension dispute between the 2 employees and their supervisor Dlamini in NID4 because he believed their suspension to be unfair: he did not believe Dlamini’s complaint as being valid because he (ie Dlamini) was allegedly not familiar with the process because he used to work in the packing department previously;
2. The applicant left NID4 and while returning to his work-station spoke to employees in transit bay and NID2;
3. All employees who were spoken to by the applicant were performing their duties as normal when the applicant approached them;
4. Shortly thereafter these employees abandoned their work-stations. Others (who were not spoken to by the applicant) who saw them leaving also followed;
5. The applicant’s evidence was that the employees were “sick and tired” of Dlamini. He allegedly “spied” on them for management so that they can get dismissed. The applicant believed that he had been doing these bad things for many years;
6. The applicant himself had been part of a work-stoppage some time ago in protest against Dlamini, and allegedly instigated by Hlongwane;
7. Maphumulo stated during the disciplinary hearing that he would not have stopped working had he not been told by the applicant about the suspension of the 2 employees;
8. Nothing else occurred during that shift that would have triggered a work-stoppage.

Employees who left their work-stations but who had not had contact with the applicant: It was common cause that the entire shift ground to a halt but there is no direct evidence that the applicant spoke to every employee who downed tools. The only explanation for that is that those who had had contact with the applicant, were either told to spread the message by applicant or took it upon themselves to spread the message. Ultimately, the applicant must be found responsible for the work-stoppage.

* 1. Whether the applicant advised those who had embarked on the work-stoppage to resume work: The applicant’s submitted repeatedly in evidence that instead of advising the employees to down tools, he had advised them to resume work. The applicant did not raise this issue during the pre-arb, nor did he put this to any of the respondent’s witnesses. I accordingly find this to be a recent fabrication.
  2. Whether the applicant was aware, or ought to have been reasonably aware, that breaching this rule would lead to dismissal: The applicant agreed that the alleged misconduct is serious. I find on that basis that he ought to have been reasonably aware that breaching the rule would lead to dismissal.
  3. Whether the applicant went from department to department as alleged by the respondent: It was common cause that the applicant spoke to employees from various departments.
  4. Whether there was loss of production & financial loss as a result: Mpofana gave detailed evidence on this issue. When asked to comment on this issue, the applicant’s response was: “No comment.” I accordingly find in the affirmative.
  5. Whether the charge against the applicant was fabricated because the supervisors belong to a rival union ………..: The applicant submitted that the supervisors who had laid the complaint were from a rival union……….. The respondent submitted that no member of its staff belongs to ……….. It is not necessary to decide whether any staff member belongs to ………….because it was common cause that ………… is the majority union and that no union dues are deducted by the respondent for …….. In any event this allegation was not put to Dlamini or Ndaba. I therefore cannot find evidence of fabrication on the part of the supervisors.
  6. Whether dismissal was a fair and appropriate sanction: It was agreed that this misconduct is serious. In the circumstances I find in the affirmative.
  7. Whether the following aggravating factors applied: I find that the applicant’s misconduct caused serious financial harm to the respondent.
  8. Whether the applicant had shown remorse: The applicant maintained to the end that there was no need to express remorse because he had done no wrong. This is a further aggravating factor.
  9. Whether the alleged misconduct had led to a breakdown of trust serious enough to warrant dismissal; whether reinstatement was not reasonably practicable and whether the employment relationship had become intolerable: Naidoo gave evidence in support on behalf of the respondent on these issues in the affirmative. She added that the applicant would be disruptive to the business of the respondent and his reinstatement would send out the wrong message to other employees. Having regard to the findings already made, I agree with the submissions of Naidoo. When this was put to the applicant his response was: “No comment.” I accordingly find in the affirmative.
  10. Whether the employment relationship had become intolerable: I find that when an employee engages in this type of misconduct, and causes financial harm on this scale, that the relationship must become intolerable, and I find accordingly.
  11. Whether the chairperson of the disciplinary hearing was biased; whether the chairperson ignored submissions made by the applicant: Even though the applicant raised this issue during the pre-arb, he did not give evidence on this issue. I accordingly do not make any finding.
  12. Whether the respondent failed to consult with the applicant’s trade union before convening the disciplinary hearing having regard to him being a shop steward: It is not clear why the applicant raised this issue because Memela gave evidence that the applicant representative at both the disciplinary hearing and the arbitration Mr ……………. attended the consultation meeting. This was not challenged in cross-examination. I find accordingly for the respondent in this regard.

1. In all the circumstances I find that the applicant was fairly dismissed.

AWARD

1. The application is dismissed.

Dated at DURBAN on this 30th day of JUNE 2017.

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R J PURSHOTAM

*Commissioner*