JURISDICTION, DETAILS OF THE HEARING AND REPRESENTATION

1. I satisfied myself that the CCMA had jurisdiction to hear this matter.
2. The arbitration hearing was held on 1 March 2018 at the CCMA offices, Anton Lembede St, Durban. The applicant was represented by Mr …………… official) while the respondent was represented by Mr ……………(IR manager). The former had 7 while the latter had 2.5 years of experience in representing parties at arbitration. Having regard to the experience of the parties the proceedings were conducted largely in an adversarial manner. An interpreter was on standby at all times and the applicant indicated whenever he needed anything to be interpreted.
3. The respondent handed in 2 bundles of documents. The applicant was afforded an opportunity of perusing the documents. He did not dispute any document. The applicant for his part handed in a document which was likewise not disputed by the respondent.
4. 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*.”
5. The applicant failed to inform his representative of certain issues, resulting in such issues not being put to the respondent’s witnesses in cross-examination. (This issue is revisited below when an assessment is made of the applicant’s credibility.)

ISSUE TO BE DECIDED

1. Whether the applicant was dismissed unfairly. He sought reinstatement and back-pay. He did not make any statutory claims.

BACKGROUND TO THE DISPUTE

1. The applicant is …………………….(male age 31), chauffeur. He was placed by a temporary employment service at the respondent’s site in 2014. In January 2016 the applicant commenced his formal employment with the respondent in terms of a written indefinite term contract of employment (with a probation period of 3 months). He was dismissed on 7 December 2017 after being suspended with pay on 6 November 2017. The applicant earned R6300pm and worked 6 days or 45 normal hours in a week. The applicant remains unemployed despite making attempts to gain employment. He has not earned any money from casual employment since his dismissal. His highest standard of education is Gr 12. As breadwinner he has 6 dependants (1 adult and 5 children).
2. The respondent is …………………..(PTY) LTD, a car rental and chauffeur service. The applicant worked in the chauffeur division. The respondent has approximately 800 employees at branches countrywide.
3. The applicant was given a notice to attend a disciplinary hearing on 23 November 2017 containing the following charges: “*Charge 1: Being under the influence of alcohol whilst on duty: in that on 5 November 2017 at 21h48 you were found to be under the influence of alcohol whilst on duty, upon testing your blood alcohol level showed 0.11%. Charge 2: Leave the workplace without authorisation. In that on 4 November 2017 you left the workplace at 23h46 and only returned to the workplace on 5 November 2017 at 03h32*.”
4. By agreement only charge 1 was dealt with at the arbitration, it being a dismissible offence in terms of the respondent’s disciplinary code (DC). The DC is contractually binding on the applicant.
5. A disciplinary hearing was held on 27 and 28 November 2017. The applicant attended; was represented by a shop steward; pleaded guilty to both charges; gave evidence in his own defence and in mitigation. He was found guilty of both charges and dismissed.
6. The applicant lodged an alleged unfair dismissal dispute with the CCMA on 19 December 2017. The matter was set down for conciliation on 11 January 2018 but remained unresolved. Hence the referral to arbitration.
7. The parties made oral closing submissions.

SURVEY & ANALYSIS OF EVIDENCE AND ARGUMENTS

1. The respondent called the following in support of its case: …………… (IR manager for 9 months; and chairperson of the disciplinary hearing); ……………. (branch supervisor for 2 years and employed by the respondent since 2010. He was the applicant immediate superior).
2. Only the applicant gave evidence in support of his case. He intended to call 2 further witnesses but decided against that because their evidence related to issues that were common cause.
3. The applicant agreed that the applicable rule is that an employee may not be under the influence of any substance, alcohol or drugs while in the workplace. But he added that the rule is only applicable if the employee is in the workplace to actually work. He submitted that he was not there to work but merely to inform his superior that he could not work due to his inebriated condition. Whether this is the case is disputed.
4. The following was agreed to, common cause, undisputed or conceded during the arbitration in relation to charge 1:
   1. The chauffeur division (where the applicant worked) provides services to VIP customers who want to be chauffeured in expensive cars;
   2. The applicant had a driving licence and a professional drivers permit;
   3. The chauffeur division is governed by the Road Traffic Act (RTA) insofar as the Department of Transport has granted a licence to the respondent to operate a chauffeur service;
   4. Besides the RTA the respondent is bound by a service level agreement (SLA) with a client (Engen) which provides that the Occupational Health and Safety Act 85 of 1993 will be applicable to the respondent’s workplace. The SLA imposes a zero tolerance requirement on drivers being under the influence of alcohol in the workplace;
   5. Section 65(2)(b) of the RTA provides that a professional driver (such as the applicant) may not have more than 0.02 grams per 100 millilitres of alcohol in any blood sample taken from his body;
   6. The applicant’s contract of employment in para 15.1 provides he must adhere to all safety and security measures required by legislation or as required by the respondent; and that non-compliance will be considered to be serious misconduct;
   7. The applicant drank alcohol on the afternoon of 5 November 2017 in full knowledge that he would be reporting to work later that day;
   8. The applicant’s level of alcohol, according to a laboratory report, was 0.11 grams per 100 millilitres. His speech was slurred;
   9. On 5 November 2017 the applicant clocked in for the night-shift at 20h44, but did not clock out;
   10. The applicant was under the influence of alcohol when he clocked in and was unfit to perform any driving duties;
   11. The applicant was aware that he could not be under the influence of alcohol;
   12. The applicant admitted that he had breached the rule;
   13. The applicant was facing a difficult time in his marriage since his wife was having a relationship with a third party. This had been going on for some time and the applicant had asked Pillay to see whether a transfer to the Johannesburg branch could be arranged. Pillay had made inquiries in this regard;
   14. The applicant had children who were being neglected by his wife;
   15. The respondent subsidizes the applicant’s medical aid. One of the benefits afforded to the applicant is counselling services in cases of domestic strife. The applicant had not used this benefit. Instead he had turned to Life Line for counselling;
   16. The applicant did not perform any chauffeuring or driving duties during the shift;
   17. The applicant is not an alcoholic;
   18. The respondent was required to incur additional expenditure as a result of the applicant not being in a position to perform duties to a destination in the Drakensberg: it was required of another employee (…………….) to work overtime and be paid overtime rates;
   19. No issue of inconsistency was being raised;
   20. That there are many moving vehicles in the respondent’s workplace. As such any person who is under the influence in such workplace poses a serious danger to himself and others;
   21. The offence was serious;
   22. The applicant had a clean disciplinary record;
   23. The respondent had already suffered a loss of R10m in this financial year and was in the process of commencing a s 189 process to reduce staff for operational reasons.
5. Before analysing the disputed issues, I pause here to find that the applicant discredited himself by not informing his own representative Mr ………….of his full and complete version of events. Consequently his representative was hamstrung in cross-examination. I deal only with one example: Pillay gave evidence that he was aware of the applicant’s domestic difficulties and that the applicant had requested that a transfer to the Johannesburg branch be arranged. When he gave evidence the applicant submitted that Pillay was totally unsympathetic to him and allegedly laughed and joked at his domestic plight. But this was not put to Pillay when he was being cross-examined.
6. The following findings are made on the probabilities on the disputed issues:
   1. Whether the applicant had arrived at the workplace on 5 November 2017 to work or not: The applicant submitted that he had not arrived in the workplace to work but merely to inform Pillay that he could not work due to his inebriated state. The respondent for its part submitted that from the moment the applicant clocked in, he was in the workplace and available for work. It further submitted that the fact that he did not work is irrelevant. I agree: there can be no other inference to a clocking-in. I find that if the applicant had no intention to work then he ought to merely have phoned in to say that he will be absent; or avoided clocking-in. (I don’t intend to deal with the applicant’s submission that his phone was not working because there is evidence that he called his wife that same day.)
   2. Whether the applicant ought to have requested leave to deal with his domestic difficulties: The respondent submitted that it was aware of the applicant’s domestic difficulties. It submitted further that if the applicant had asked for leave to resolve such difficulties then that request would have been considered sympathetically.
   3. Whether there was a duty on the respondent to assist the applicant resolve his domestic difficulties: I cannot find that there is any duty on the respondent to assist in this regard. It would in any event it may be considered an unwarranted intrusion into the private life of an employee. I have already found that the applicant had access to the counselling benefit by virtue of the subsidized medical aid. (It was common cause that the applicant was not an alcoholic and hence there was no duty on the respondent’s part to engage in any incapacity process.)
   4. Whether progressive or corrective discipline was appropriate or fair: The applicant submitted that a fair sanction would be a warning valid for 12 months. The respondent submitted that there was no room for this approach because of the risk of death or serious injury. In any event this approach would set a very undesirable and dangerous precedent rendering the rule unworkable. I agree with the respondent.
   5. Whether there was a breakdown of trust serious enough to warrant dismissal: I find in the affirmative because the applicant engaged in serious misconduct in full knowledge that he would be commencing a shift later that day. This is evidence of serious irresponsibility on the part of a person whose sole duty is to operate a vehicle which has the potential to kill or injure.
   6. Whether the applicant had long service: The applicant’s service, whether long or not is not relevant because on his own version he engaged in serious misconduct.
7. Throughout the arbitration the applicant failed to accept any responsibility for his predicament. Instead he blamed everyone else. He submitted that he ought to be given an opportunity to make a fresh start in life. I find that such opportunity can be afforded only to someone who is prepared to accept responsibility for wrongdoing and be remorseful. In all the circumstances I find that the employment was rendered intolerable.
8. I find the dismissal of the applicant to be fair.

AWARD

1. The application is dismissed.

Dated at DURBAN on this the 5th day of MARCH 2018.

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R J PURSHOTAM

*Commissioner*