**DETAILS OF HEARING AND REPRESENTATION**

1. I satisfied myself that the ……………..had jurisdiction to hear this matter.
2. The arbitration hearings were held on 2 December 2015, 15 March 2016 and 18 April 2017 at the …………….Anton Lembede St, Durban. The applicant was represented by ………….union official Mr …………while the respondent was represented by Mr …………..(official of ………..). The interpreter was Mr S Mkhize throughout.
3. The respondent handed in a bundle of documents on 2 December 2015. The applicant indicated that he would indicate whether he questioned any documents at the next sitting. On 15 March 2016 the applicant admitted the authenticity of the documents and the correctness of their contents except for p38. The respondent handed in further documents and photographs on this date which were likewise admitted by the applicant.
4. A pre-arb was conducted with the consent of the parties on 2 December 2015 to narrow down the issues. A typed minute thereof was distributed to both parties. It recorded the issues on which there was agreement and issues on which there was a dispute. On 15 March 2016 both parties confirmed the correctness of the minute. It was then read into the record. The parties were advised that they must keep the minute handy and ensure that their witnesses deal with the disputed issues as identified in the minute.
5. The following advice was given to the parties at the commencement of each new hearing day: “*The purpose of cross-examination is to test the credibility & reliability of evidence, & to show that your version is more probable. 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 & parcel of your case previously*.” Suffice to say that the applicant did not follow this advice when cross-examining the respondent’s witnesses on certain critical issues.

**THE ISSUE TO BE DECIDED**

1. Whether the applicant was unfairly dismissed. He sought reinstatement with back-pay.

**BACKGROUND**

1. The applicant is ………………..(male age 31), a machine operator. He commenced employment with the respondent on 21 January 2011 in terms of a written contract of employment and was dismissed on 13 October 2015. (The document was not available.) He earned R38.95 per hour and worked a 5 day / 40 hour week. His weekly and monthly remuneration was R1558 and R6750.81 respectively. The applicant remains unemployed despite making attempts at finding alternative employment. He has not earned anything from any type of casual work. The applicant indicated that as breadwinner he supported 8 adults and 5 children. His highest standard of education is Gr 11.
2. The respondent is ………………..(PTY) LTD, a manufacturer of agricultural equipment. It is a medium size enterprise employing approximately 75 person. It has one branch at Howick.
3. The applicant was given a notice to attend a disciplinary hearing on 2 October 2015. He was charged with 2 offences:

“*Charge 1: Refusal to obey a lawful and reasonable work instruction in that after you were asked to remove a painted hull from the overhead frame across to the ground, you refused to do so. This incident happened in the dipping area on 26/09/2015 at +-16.00.*

*Charge 2: Breach of common law obligation, in that you failed to present yourself for service in an acceptable physical condition, due to you smelling of alcohol, not being steady on your feet and then refusing to be tested for the presence of alcohol. This incident happened on the 28/09/2015 at 7.15am.*

1. The applicant attended the disciplinary hearing on 8 and 9 October 2015. He was represented by a colleague and gave evidence in his own defence. He pleaded not guilty to both offences but was found guilty and dismissed. The respondent does not maintain an appeal procedure. The applicant referred an alleged unfair dismissal dispute with the ………..on 15 October 2015. The matter was conciliated on 12 November 2015 but remained unresolved. Hence the referral to arbitration.
2. The parties made written closing submissions by close of business on 26 April 2017.

**SURVEY & ANALYSIS OF EVIDENCE AND ARGUMENT**

1. The following gave evidence for the respondent: …………..(aka Jock, fabricator shop foreman for 20 years and a superior to the applicant); ………..(supervisor for 10 years and employed by the respondent for 30 years. He was the applicant’s immediate superior). Only the applicant gave evidence in support of his case.
2. The following was either agreed to, common cause, undisputed or conceded in the pre-arb or arbitration proper:
   1. The charges were based on offences that are contained in the disciplinary code (DC) that was contractually binding on the applicant. The applicant indicated that he was aware of the contents of the DC as a copy is affixed to the notice board. It was agreed –
      1. That charge 1 was based on the offence of “*failure to carry out a lawful and reasonable instruction (insubordination)*”;
      2. That charge 2 is based on “*under the influence of alcohol of intoxicating drugs at work*”;
      3. The DC prescribes a final written warning in the first instance and a dismissal for any repeat of such offence.
   2. The following rules applied in the workplace: that the applicant must comply with any reasonable and lawful instruction issued to him by a superior; and that he present himself at work in sound and sober senses ie not under the influence of alcohol or drugs;
   3. The rules are reasonable; that he was aware of them; and that they serve a rational purpose;
   4. The applicant’s duties consist of preparing components for painting as part of the assembly process. He operates an overhead gantry in the dipping section. This section has 6 dipping tanks holding 5000*l* of chemicals – one of them being hydrochloric acid, a dangerous chemical. The applicant operates a gantry crane to dip the relevant components in the various tanks and thereafter removes them from the tanks for drying;
   5. On Saturday 26 September 2015 the applicant was supervised by Dlamini until 12 noon and by Jock thereafter;
   6. At the meeting on that day 6am the staff (or team) were made aware of an urgent job – consisting of the processing of 2 hulls – that required completion up to a certain stage by close of business on that day. That another team was due to paint the hulls the following day Sunday and they were to be assembled and delivered to the customer by Monday 28 September 2016;
   7. Employees including the applicant attended the meeting, had agreed to perform overtime in order to complete the relevant tasks on that day;
   8. One of the hulls was processed earlier in the day;
   9. The second hull was in tank 3 at 3.15pm. At 3.45pm Jock instructed the applicant to remove the hull from the tank and complete its processing. At 3.55pm Jock observed the hull still hanging in storage area. He asked the applicant to bring it down. At 3.57pm – with the hull still hanging – Jock observed the applicant getting ready to go home as he had removed his gloves and ear-plugs. Jock asked him why he had left the hull hanging. The response of the applicant is disputed, but it is agreed that Jock ended the exchange by stating that they will continue the conversation on Monday;
   10. 4pm is the normal time for the shift to end;
   11. The task that remained – bringing the hull down – would have taken between 5 – 10 minutes and was a simple task;
   12. The applicant left for home at 4pm;
   13. That the workplace is dangerous. Leaving the hull (weighing 250kg) hanging was dangerous because if it had slipped it could have caused serious injury;
   14. The applicant was called into Jock’s office on Monday 28 September 2015. Also invited were Dlamini and Dumisani Zondi (the applicant’s shop steward);
   15. Both Jock and Dlamini smelt alcohol on the applicant’s breath. Dlamini is familiar with the smell of alcohol. The applicant was staggering around the office and had to hold onto office furniture for support. His eyes were also bloodshot. He was not fit for work or remain at work as he would have a posed a danger to himself and others. (When he gave evidence the applicant disputed being under the influence. However he failed to cross-examine the respondent’s witnesses on whether he smelt of alcohol; whether he was staggering aroun; whether his eyes were bloodshot.);
   16. Jock asked whether the applicant had had any medicine and he said no;
   17. The applicant was counselled on 20 August 2015 (with Dlamini present) by the manager. The record of counselling is as follows: “*Nature of transgression: Attitudinal offences. Failure to carry out a lawful and reasonable instruction in that Mr B M Shelembe did not want to work in the wash bay. The foreman and supervisor had to beg him and this was unacceptable. This incident happened in the Fab Shop in 20 August 2015. Employee’s explanation: He did not want to work in the wash bay because he had paper work to do in the dipping area and he does not know what is his job description. Consequences should behaviour/conduct/performance not improve: Should his behavior not improve further disciplinary action will be taken*.” Signed by manager and dated 20.8.2015;
   18. The applicant’s brother Gregory works for the respondent and that Jock had appealed previously to him to get the applicant to “calm down.” This appeal was in vain;
   19. That the applicant had received a final written warning on 19 May 2015 in the following terms: “*1. Attitudinal offence: In that you failed to carry out a lawful and reasonable instruction after you were asked to paint components for final assembly. You also said there was no hangers but there were enough on the shelf. This incident happened in the dipping area on 18 May 2015. 2. Attitudinal offence: In that you showed disrespect to your supervisor and foreman when asked why you needed an assistant. You aggressively threw down the component in your hand and walked away while being spoken to. This incident happened in the dipping area on 18 May 2015 at 14.00*.” It was agreed that this warning was valid for 12 months;
   20. The applicant engages in arguments with his superiors regularly;
   21. The applicant had invited Jock to his own wedding;
   22. Jock was friendly with Ruwaida a contract cleaner who had left 4 years ago. He was not aware whether the applicant had had a relationship with her;
   23. The respondent does not have an HR office and the applicant had not requested that the matter – of him being breathalysed – be dealt with by HR;
   24. That the respondent only considers those who have worked for more than 10 years to be in long service;
   25. The applicant had a good working relationship with Dlamini;
   26. No procedural issues were being raised by the applicant;
   27. No issue relating to the consistent application of the rules was being raised.
3. On the probabilities, I find as follows on the following disputed issues:
   1. Whether the applicant was instructed by Jock to bring the hull down: It was common cause that the applicant was given this instruction. It was further undisputed that the task was simple and not time-consuming. At most it would have taken 5 – 10 minutes to complete.
   2. Whether Jock instructed the applicant to leave at 4pm regardless of whether the allocated tasks for that day were completed: Jock denied having given such instruction. I find it improbable that such an instruction was given having regard to the urgency of the job, details of which were given in the morning meeting. Furthermore the applicant was aware of the urgency of the job as he had attended the meeting that morning.
   3. Whether the applicant carried out the allocated task before leaving his workplace: The applicant stated that he had completed the task – ie bringing down the hull before 4pm. If that is the case then it is improbable that Jock would have confronted him about leaving his task incomplete. That Jock indeed confronted him about leaving the job unfinished, and warning him that the conversation would continue on Monday ought to have alerted the applicant to the existence of a problem. It appears that the applicant did not see a problem and proceeded to go home regardless. If he had indeed completed the task, he would probably have asked Jock why there was a need for the conversation to continue on Monday.
   4. Whether the applicant refused to obey a lawful and reasonable instruction: Having regard to the findings made in the previous two paragraphs, I find that the applicant did refuse, and that he was correctly found guilty of charge 1.
   5. Whether the actions of the applicant in leaving the job unfinished posed a danger: It is common cause that the workplace is dangerous. It was furthermore not disputed that leaving a hull suspended in the air was dangerous having regard to its great weight and potential to cause injury if it slipped.
   6. Whether the applicant was under the influence of alcohol on 28 September 2015: The applicant, when he gave evidence disputed being under the influence. But he failed to cross-examine the respondent’s witnesses on important aspects of this issue. This issue was accordingly undisputed. It has already been set out above that the applicant smelt of alcohol and that Dlamini was familiar with the smell of alcohol. It was undisputed that the applicant was staggering around the office and needed to support himself by holding onto office furniture. His eyes were bloodshot. I find that these are the usual signs of someone who is under the influence of alcohol and I find that the applicant was indeed under the influence on 28 September 2015. On his own version he had not had any medication. He was therefore correctly found guilty of charge 2.
   7. Whether the applicant refused to take the Breathalyser test: I find that the applicant’s demand for papers to prove Jock’s qualification to be a ruse to avoid his intoxication from being confirmed. If the demand had any credibility, his shop steward, who was present, would have intervened on his behalf.
   8. Whether the alleged misconduct was serious: It was not disputed that the applicant’s workplace is dangerous and that the applicant’s failure to complete the relevant task posed the risk of danger. The applicant’s intoxication also posed a danger to himself and others in the workplace. I find both offences to be serious.
   9. Whether dismissal was an appropriate and fair sanction: Having regard to the finding made in the previous paragraph, I find that dismissal was an appropriate and fair sanction in respect of charge 1. I am fortified in making this finding because the applicant received counselling less than a month before the incident, and a final written warning in May 2015 for offences similar to charge 1. The DC prescribes dismissal for the second instance of any such offence. That the applicant finds himself dismissed is entirely of his own making.
   10. Whether there was bad blood between the applicant and Jock: Jock stated that they had a good relationship and that the applicant had even invited him to his wedding. Dlamini for his part indicated that he had a good working relationship with the applicant. I find that none of the respondent’s witnesses had any reason to lie. The applicant for his part put to Jock in cross-examination that their relationship was strained because of Jock’s friendship with Ruwaida. It is not clear what he attempted to portray by putting this to Jock. In any event it is not necessary to deal with this issue because the applicant did not himself give evidence thereon.
   11. Whether the charges against the applicant were fabricated: I find that the charges were not fabricated because if they were, Dlamini – with whom he had a good relationship – would probably not have given evidence against him. Dlamini stated that the applicant was an argumentative person. I find it significant that Zondi (the applicant’s shop steward) did not give evidence in support of the applicant’s case.
   12. Whether progressive or corrective discipline ought to have been applied: It is undisputed that the respondent did indeed apply such discipline. It went further by invoking the assistance to the applicant’s brother Gregory. All these efforts were in vain. I therefore find that there was no further room for such discipline.
   13. Whether the misconduct led to a breakdown of trust serious enough to warrant dismissal: Jock stated that the applicant had undermined his authority and that he (ie Jock) had lost the respect of colleagues. This was undisputed. As shown above, all attempts to get the applicant to mend his ways had failed. When all is said and done, one must keep in mind that an employee’s main duty is to tender his services to his employer and to carry out all reasonable and lawful instructions without delay and with due diligence. The applicant failed in this regard repeatedly. The respondent could not rely on him to complete important tasks thereby leading to the erosion of trust. The applicant’s repeated failure led to the relationship becoming intolerable, and I find accordingly. It is significant that the applicant did not cross-examine the respondent’s witnesses on this aspect.
   14. Whether there were any mitigating factors: The applicant indicated during the pre-arb that he would submit such factors when giving evidence. Besides stating that he had a family to support he submitted no such evidence. Being a breadwinner by itself cannot mitigate serious misconduct. The applicant ought to have been aware of his responsibilities as a breadwinner and ensure that his actions did not jeopardize the support that he gave his family.
   15. Whether there were any aggravating factore: Such factors have already been set out above.
   16. Whether the applicant had long service: The applicant did not lead evidence on this issue. The respondent for its part stated that it considers service in excess of 10 years to be long service. This was not disputed by the applicant.
4. I find in all the circumstances that the applicant was fairly dismissed. It is accordingly not necessary to deal with the remaining disputed issues as they relate to the relief that the applicant might have obtained had a finding of unfair dismissal been made. Such finding has not been made. I propose to dismiss the application.

**AWARD**

1. The application is dismissed.

**COUNCIL COMMISSIONER: RANJIT PURSHOTAM**