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 15 June and 2 August 2016 at the CCMA offices, Anton Lembede St, Durban. The applicant represented herself while the respondent was represented by Ms ………………(official of CEO employers’ organisation). The interpreter was Mr ………..on 15 June however his services were dispensed with an hour into the proceedings after the applicant indicated that she did not need the assistance of an interpreter.
3. The respondent handed in a bundle of documents. The writing on pages 1-6 was largely indecipherable. The applicant indicated that she accepted pp 7-21 as being authentic and correct as regards their contents. The applicant handed in her letter of suspension which was similarly not disputed by the respondent. It was incorporated into the respondent’s bundle as p 22.
4. On 2 August 2016 the respondent handed in a further bundle of documents containing the applicant’s contract of employment and the disciplinary code. The applicant did not dispute the former, but indicated that she was not aware of the disciplinary code. The respondent applied to recall a witness to deal with these documents. The application was granted.
5. A pre-arb was conducted on 15 June 2016 to identify the disputed issues and issues on which there was agreement. Both parties were constantly reminded of these issues.
6. At the outset the parties were advised as follows: “*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 – (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*.”

ISSUE TO BE DECIDED

1. Whether the applicant was dismissed unfairly. She sought compensation. She indicated that she was not seeking reinstatement as she feared victimisation.

BACKGROUND TO THE DISPUTE

1. The applicant is ………………(female age 29), slots attendant. She commenced employed as a cleaner in terms of a written indefinite term employment contract (with a 3 month probation) in May 2012. She was subsequently promoted to waitress before working as a slots attendant. She was dismissed on 23 February 2016. She earned R3849pm for working a 5 day / 45 hour week. She remains unemployed despite making attempts at finding alternative employment. She has however obtained casual employment for 2 days a week remunerated at the rate of R13/hour. As breadwinner the applicant supported 4 dependants (1 adult and 3 children). The applicant’s highest standard of education is Gr 11. She is presently registered for Gr 12.
2. The respondent is ………………..(PTY) LTD, a business in the gaming and leisure industry. It employs approximately 97 persons at the branch in question (Argyle) and has 92 branches around the Republic.
3. The applicant’s main tasks were to pay slots winnings; do cash up at the end of the business-day; and contact the call-centre in the event of technical failure of the slot-machines.
4. The applicant was suspended with pay on 4 February 2016. She was given a notice to attend a disciplinary hearing on 10 February 2016. She was charged with: “*Charge 1 Intimidation of your manager on 4 February 2016; alternatively, adopting an insolent attitude in speech / or behaviour towards your manager on 4 February 2016*.” (This award will deal only with the alternative charge as the respondent all but abandoned the main charge.)
5. The applicant attended the hearing on 17 February 2016, choosing to represent herself, and gave evidence in support of her case. She contended that she had not pleaded guilty to the main or alternate charge. (It was the respondent’s case that she had pleaded guilty to the alternate charge.) She was found guilty on her alleged plea of guilty and dismissed. She did not appeal because she submitted that she was not aware of the appeal procedure. (The respondent maintains an appeal procedure.)
6. The applicant referred an alleged unfair dismissal dispute with the CCMA on 7 March 2016. The matter was set down for conciliation on 4 April 2016 but remained unresolved. Hence the arbitration.

SURVEY & ANALYSIS OF EVIDENCE & ARGUMENT

1. The following gave evidence for the respondent: ……………….(branch manager for 2 years and employed by the respondent for 13 years); ………………(the chairperson of the disciplinary hearing). Only the applicant gave evidence in support of her case.
2. The following was either common cause, agreed to, undisputed or conceded in the pre-arb or the evidence-in-chief or in cross-examination:
   1. That the relevant rule that employees must conduct themselves properly and with respect towards their colleagues and senior personnel;
   2. That the disciplinary code provides for a final written warning for the first instance of any breach and a hearing for a subsequent breach;
   3. That the applicant was not inducted nor was she given a copy of the disciplinary code. There was no evidence that any senior staff member brought the contents of the code to the applicant’s express attention. However the respondent has pasted the disciplinary code on a wall on its premises;
   4. That Frank did not have any personal knowledge of the circumstances that prevailed at the time that the applicant commenced employment;
   5. That the applicant had a number of warnings during 2013-14. During 2015 she was given a verbal warning, a written warning and a final written warning for poor time-keeping; and a written warning for negligence;
   6. That the applicant worked as usual on 31 January 2016. A robbery took place at the respondent’s premises on that day;
   7. That the applicant was on leave between 1-3 February 2016;
   8. That the SAPS had visited the applicant’s house while she was on leave and conducted a search there. It was not disputed that they did not have a search warrant and that they may have conducted themselves inappropriately, thereby traumatising the applicant’s family consisting of an elderly person and children. The police requested the applicant to remove her jewellery as she was “going to jail.” The applicant’s neighbours watched the goings-on thereby causing her embarrassment. (The applicant was not imprisoned.);
   9. The applicant was forced to accompany the SAPS to the respondent’s premises for purposes of undergoing polygraph tests. She was left to her own devices to find her own way home at 7.30pm even though the SAPS was aware that she did not have any money;
   10. The SAPS seized the applicant’s mobile phone and retained possession for 3 days;
   11. Neither the respondent nor the SAPS found any evidence linking the applicant to the robbery;
   12. That the applicant had undergone 2 polygraph tests. She passed the first but was not informed of the result of the second;
   13. That the procedure for the drawing of cash floats was revised while the applicant was on leave. That the old procedure required them to draw their cash float from the administration office. In terms of the new procedure access to the administration office by certain staff including the applicant was barred;
   14. It was the duty of team-leaders to inform their team-members of the new procedure;
   15. There is no evidence that the applicant’s team-leader informed her of the new procedure;
   16. On 4 February 2016 when she returned to work she followed the old procedure by going to the administration office to draw the float;
   17. Frank (as branch manager) questioned the applicant about why she was in the administration office. The applicant did not respond. Frank then explained the new procedure to the applicant and asked her 3 times whether she understood. There was no response from the applicant. Frank then told the applicant that she (ie Frank) did not have time for people with attitude this early in the morning;
   18. The applicant responded. Her response was that she also did not have time for people with attitude. The applicant then said that Frank must bear in mind that she (ie the applicant) was not the cause of Frank’s mother’s death but that she (ie Frank) will be the cause of the applicant’s granny’s death. (This was a reference to the trauma that the granny had endured while the SAPS had conducted a search of the applicant’s home. It was further common cause that Frank’s mother has passed away recently.). Applicant advised that she will not let the matter rest there;
   19. Frank retreated to her office without responding. She called the operations manager Clifton Pillay and advised him what had transpired. He advised her to call HR who then commenced the disciplinary proceedings which led to the applicant’s suspension and ultimate dismissal;
   20. That the use of swear words is commonplace in the workplace. Such words are used by employees in their interactions with one another and by patrons of the establishment. No steps have been taken against either;
   21. That the workplace is under constant CCTV surveillance but no footage was produced at the arbitration;
   22. A day after the disciplinary hearing but before the outcome of the disciplinary hearing, the applicant and Frank had correspondence via WhatsApp text. When the subject of the WhatsApp messages was broached in cross-examination, Frank appeared to indicate that she did not know about these messages. The correspondence on 18 February 2016 was as follows:

Applicant (at 15.46pm): *I would like to apologize for putting your Mom into this whole issue of Hollywood. Since you said you had nothing to do with it. I really thought it was you, because I was told that you had asked for my home address. And I mean that I am saying – from the bottom of my heart – although I am still hurt about what happened to me and my family. I don’t hold grudges – once I speak out. I feel better. I am really sorry.*

Frank: *I understand Sma and I can only imagine what you had gone through. I am just very hurt that you could think of me in that way. I … forgive you but you know it will take time to re-build the communication level we on. I am only human.*

Applicant: *Yo Ma, I understand and I will give you time. Just feel for saying what I said to you. I am close to your daughter. What will she think of me as well. You can take time, you have the right to be angry Odette. I will be patient and respect your feelings.*

Frank: *Ok girl. You guys are like my kids. And that is how I treat you all. But not to worry, time heals all the pain.*

Applicant (at 8.02pm): *Thank you for understanding Ma. Good night.*

1. Para 1(3) of the Code of Good Practice: Dismissal provides as follows: “*The key principle in this Code is that employers and employees should treat one another with mutual respect*.”
2. Insolence has been defined to mean conduct which is offensive, contemptuous of rightful authority, impertinent, insulting, disrespectful and rude. See [CCAWUSA & another v Wooltru Ltd t/a Woolworths (Randburg) (1989) 10 ILJ 311 (IC.](http://www.worklaw.co.za/SearchDirectory/CaseLaw/C4.ASP#d) The cases are to the effect that dismissal is reserved for serious cases of insolence. The evidence will accordingly be scrutinized to determine whether it shows serious insolence.
3. The findings on the disputed issues are as follows on the probabilities:
   1. Whether the applicant was informed of the change of procedure for the drawing of float at the commencement of the business day on 4 February 2016: It is undisputed that the applicant was not informed before she commenced her normal morning routine. Had she been informed timeously the unfortunate incident would have probably been avoided.
   2. Whether the applicant breached the rule:
      1. The rule is that employees must conduct themselves properly and with respect towards their colleagues and senior personnel. This rule is in accordance with para 1(3) of the Code of Good Practice: Dismissal. The disciplinary code defines the offence as “adopting an insolvent attitude towards any superior or employer;”
      2. Frank’s question to the applicant as soon as she walked into the administration office was “What are you doing here?” This question set the tone for the subsequent unpleasant exchanges. The correct question that ought to have been asked at the outset was “Are you aware that we have changed the procedure for the drawing of float?” Frank’s question demanding to know what the applicant was doing there disrespected the applicant insofar as Frank would have been aware that the applicant was performing her normal morning routine – which is to draw her float;
      3. The applicant’s responses were not helpful but her being dumbstruck at being asked the question is however comprehensible. However I agree with the applicant that Frank’s question was provocative for two reasons: Frank had as branch manager liaised with the police and was aware that the applicant had been subjected to a home visit by them, resulting in the applicant probably being upset; secondly the applicant was simply following her normal daily routine;
      4. Both parties contributed to the unpleasant exchange. But if blame were to be apportioned I would find that Frank precipitated the unnecessary and avoidable exchange by her question;
      5. The eventual response of the applicant whether she was responsible for Frank’s mother’s death appears to have triggered Frank’s assessment that a misconduct had taken place;
      6. Having regard to the exchange as set out in paras 15*(p)* and *(q)*, I cannot find that there was anything offensive, contemptuous of rightful authority, impertinent, insulting, and rude. While there was lack of respect from both parties, the exchange was not conducted at a level where it fell within the ambit of the offence of “adopting an insolent attitude towards any superior or employer.” At most it was unpleasant. I accordingly find that the applicant did not breach the rule.
   3. Whether the respondent suffered any damage / loss / harm / prejudice as a result of the alleged misconduct: No evidence was led on this issue.
   4. Whether the respondent dealt consistently with similar matters: The applicant submitted that one Farzana and one Cherize had both “back-chatted” with Frank and that no steps had been taken against them. This was disputed by the respondent. I cannot make a finding on the probabilities on this issue.
   5. Whether the alleged misconduct was serious: The applicant conceded that insolence is serious but submitted that she was innocent of the offence.
   6. Whether the applicant was aware of the disciplinary code: While the contract of employment makes reference to the disciplinary code, and it appears to have been pasted on the walls in the workplace, there is no evidence that anyone expressly brought it to the applicant’s attention. I accordingly find that the applicant was not aware that insolence may attract the sanction of dismissal.
   7. Whether the applicant expressed remorse:
      1. I find that the WhatsApp correspondence shows that the applicant was remorseful and contrite. She was not comfortable with what had happened between her and Frank. She clearly valued their relationship for a further reason: she and Frank’s daughter were friends;
      2. The correspondence commences with an apology. It ends with the following: Frank: *Ok girl. You guys are like my kids. And that is how I treat you all. But not to worry, time heals all the pain.* Applicant: *Thank you for understanding Ma. Good night;*
      3. The words above clearly shows that Frank accepted the apology of the applicant. Both parties expressed an intention to move on and repair the relationship;
      4. I find that Frank ought to have brought the contents of the WhatsApp correspondence to the attention of the chairperson especially as he had not finalized his decision at that stage. The chairperson may have been laboring under the belief the relationship between the parties was irretrievably damaged. Had Frank done so, the possibility cannot be excluded that the applicant may have not have been dismissed.
   8. Whether progressive or corrective discipline ought to have been implemented in this case / alternatively whether dismissal was a fair and appropriate sanction:
      1. The applicant was not proud of the exchange between herself and Frank and she was aware that it had damaged their relationship somewhat. Hence the WhatsApp correspondence. She attempted to repair that relationship and went quite far in doing so. As such she submitted that if she had done wrong, then her conduct deserved to be sanctioned at most with a warning. I agree. I find that the applicant ought not have been dismissed;
      2. The disciplinary code provides for a final written warning for the first offence and a “hearing” (NB not a dismissal) for the second offence. There was no evidence that the applicant had received a final written warning previously. As such the respondent appears to have ignored its own disciplinary code. This reinforces my finding that dismissal was unfair;
      3. Assessing offences of this nature cannot be done with any precision. If I am wrong in my finding that the applicant did not breach the rule, I find that at most she ought to have been given warning.
   9. Whether there was a breakdown of trust between the parties: The respondent attempted to portray the applicant as being untrustworthy with reference to the various warnings. This is disingenuous because a warning is not the appropriate sanction when an employee breaches trust – dismissal is. The fact that the applicant was not dismissed on those occasions shows that the respondent retained trust in her. In any event none of the warnings related to dishonesty.
   10. Whether a good working relationship could have been restored between the parties: I find that a good working relationship could have been restored between the parties. The WhatsApp correspondence had gone a long way towards restoring that relationship. The remaining obstacles to repairing the working relationship were not formidable.
   11. Whether the applicant pleaded guilty to the alternate charge: It is not necessary to decide this issue as the applicant appears to have been confused about the distinction between a plea of guilty and a finding of guilty. Had she known the distinction she would not have submitted during the pre-arb that she had pleaded guilty to the alternative charge.
4. In all the circumstances I find the dismissal to be unfair. The applicant’s history with the respondent shows that she is a person with drive, determination and initiative. She started as a cleaner, went on to be a waitress and thereafter a slots attendant. She is presently completing Gr 12. Her career was cut short through little or no fault on her part.
5. The applicant sought compensation as she felt that she would be victimised if she returned. Had she sought reinstatement, that remedy would have been afforded to her. Having needlessly lost her job, the applicant must be given substantial compensation. I however take the following factors into account in reducing that compensation:
   1. She contributed to a small degree to the unpleasant exchanges;
   2. The applicant did not have a clean disciplinary record;
   3. She did not have long service;
   4. She has found casual work that is modestly remunerated.
6. I find just and equitable compensation to be an amount that the applicant would have earned in 6 months. That amounts to R23 094 (R3849 x 6).

AWARD

1. The dismissal of the applicant is unfair.
2. …………………(PTY) LTD is ordered to pay ……………..R23 094 within 14 days of being informed of this award.

Dated at DURBAN on this 5th day of AUGUST 2016.

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R J PURSHOTAM

*Commissioner*