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 26 January and 15 March 2018 at the CCMA offices, Anton Lembede St, Durban. The applicant was represented by attorney ……….. on 26 January 2018. On 15 March 2018 the applicant represented himself. The respondent was represented by Mr ……………(area manager).
3. Both parties handed in bundles of documents on 26 January 2018. None of the documents was disputed by the parties.
4. At the commencement of each sitting 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*.”

ISSUE TO BE DECIDED

1. Whether the applicant is entitled to severance pay.

BACKGROUND TO THE DISPUTE

1. The applicant is ………………..(male age 37), a grade C security officer. He commenced employment with the respondent in terms of a written indefinite term contract of employment in December 2005. His last day at work was 30 September 2017. The applicant earned R4102pm. The applicant has not yet obtained alternative employment despite making attempts. His highest standard of education is Gr 11. As breadwinner he has 7 dependants (3 adults and 4 children).
2. The respondent is …………………., a private security service provider. It has approximately 4500 employees at sites around the Republic.
3. The applicant lodged a claim for severance pay on 13 October 2017. The matter was set down for conciliation on 3 November 2017 but remained unresolved. Hence the referral to arbitration.
4. The parties made oral closing submissions.

SURVEY & ANALYSIS OF EVIDENCE AND ARGUMENTS

1. The respondent called the following in support of its case: …………….. (petrol attendant employed by the respondent for 4 years); ……………….. (supervisor for 15 years); and ……………. (the respondent’s representative at the arbitration and the area manager for 15 years). The applicant gave evidence in support of his case.
2. The following was agreed to, common cause, undisputed or conceded during the pre-arb and the arbitration:
   1. The respondent provides guarding services to ……………. (EM) at various sites in the city of Durban;
   2. The applicant was placed by the respondent to work at one of these sites;
   3. EM sent a letter to the respondent informing it that the guarding services will not be required from the end of September 2017;
   4. The Respondent then sent a letter dated 31 August 2017 to all its staff who were placed at EM sites informing them that EM will be terminating its contract with the respondent. The letter also informed them of the respondent’s intention to terminate the employment relationship as at 30 September 2017;
   5. The applicant received the letter dated 31 August 2017;
   6. EM then informed the respondent that its services would continue to be used until 30 November 2017;
   7. The respondent then sent a further letter to those same employees on 28 September 2017 informing them that their employment will continue until 30 November 2017. However it also contained a notice of the respondent’s intention to terminate the employment as at 30 November 2017. There is a dispute whether the applicant received this letter on 28 September or 29 September 2017;
   8. The applicant commenced his last shift at 10pm on 30 September 2017. It ended at 6am on 1 October 2017;
   9. The applicant did not return to the site to perform further duties;
   10. The applicant proceeded to the respondent’s offices on 3 October 2017 with the intention to return his uniform (as directed in the letter dated 31 August 2017), but the respondent declined to accept the uniform. The applicant left with his uniform;
   11. The applicant was informed by Dube that he should return to the site and resume duties as normal;
   12. The applicant for his part informed Dube that he will not be returning to the site because the letter dated 31 August 2017 had indicated that his employment would come to an end on 30 September 2017;
   13. As at the date of the arbitration the contract between EM and the respondent continues “until further notice.”
3. Whether the applicant received the letter dated 28 September 2017 was disputed during the pre-arb. Dube for his part stated that he had personally given the letter to the applicant on 29 September 2017 but the applicant had refused to acknowledge receipt. The applicant did not dispute this issue in cross-examination. I therefore find that the applicant received the letter dated 28 September 2017.
4. I find that the letters dated 31 August 2017 and 28 September 2017 brought about a dismissal for operational reasons as contemplated in s 41(2) of the Basic Conditions of Employment Act 1997. As such the applicant would in the normal course of events be entitled to severance pay. But that entitlement is subject to s 41(4) which provides that it cannot be paid if the employee unreasonably refuses to accept the employer’s offer of alternative employment.
5. I find that the direction by Dube for the applicant to return to the site on 3 October 2017 constituted an offer of alternative employment. The applicant submitted that he could not take up that offer because he had given up his accommodation. I find the refusal by the applicant to take up that offer as being unreasonable because he could have obtained alternative accommodation, especially as he claims to be unemployed. In the circumstances I find that the applicant is not entitled to be paid severance pay.
6. It may be mentioned that Dube continued even until the last day of the arbitration, to invite the applicant to resume his duties. The applicant for his part remained steadfast in refusing to return.

AWARD

1. The application is dismissed.

Dated at DURBAN on this the 16th day of MARCH 2018.

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R J PURSHOTAM

*Commissioner*