# JURISDICTION, DETAILS OF THE HEARING AND REPRESENTATION

1. I satisfied myself that the ……………..had jurisdiction to hear this matter: the dispute falls within the ambit of s 186(1)(a) of the Labour Relations Act 66 of 1995.
2. The arbitration hearings were held on 2 February, 1 June and 12 August 2015 at the offices of the SALGBC in Durban. The proceedings were recorded. The applicant was initially represented by Mr …………..(……… official) while the respondent was represented by senior manager of operations Mr …………. The interpreters were Mr N Ntuli and Ms Mshengu respectively.
3. Union official Mr …………..represented the applicant from 13 April 2015 when it was learned that Mr ………….had passed away.
4. The proceedings were postponed as follows:
   1. On 2 March 2015 due to the illness of Mr ………;
   2. On 13 April 2015 due to the respondent being unable to obtain its witnesses.
5. The respondent handed in a bundle of documents. The applicant was given time to peruse the bundle. Thereafter he indicated that none of the documents were being disputed as regards their accuracy or authenticity. The applicant did not hand in any documents.
6. At the request of the parties a pre-arb was conducted on 2 February 2015. A typed minute thereof was prepared and distributed to both parties on 4 February 2015. On 13 April 2015 both parties indicated, after an examination of the said minutes, that it correctly reflected the pre-arb proceedings on 2 February 2015. After a minor amendment was effected, it was read into the record. The parties were asked to keep the minute handy and make regular reference to it to remind themselves of the issues on which there was an agreement or dispute as the case may be.

# ISSUE TO BE DECIDED

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

# BACKGROUND TO THE DISPUTE

1. The applicant is …………………, commander of the Gillitts fire station. He commenced employment with the respondent on 1 November 2000 and was dismissed on 25 November 2014. He rose through the ranks over the years. He earned R21 000 per month for working a 48 hour week. He remains unemployed but is not seeking alternative employment pending the outcome of the arbitration. He has not earned anything from any type of casual work. The applicant is 42 years of age, has a matric certificate and supports 5 persons including 3 children.
2. It was agreed that as the highest ranking officer at that fire station he had the duty to manage staff, ensure that equipment is maintained, that drills were conducted and that his staff respond to any emergency in his area of jurisdiction. It was further agreed that as a member of management the applicant had the power to discipline his subordinates.
3. The respondent is ……………………, a local government body with 21 000 employees. The applicant worked in its fire and emergency unit which employs approximately 800 persons.
4. The applicant was suspended on full pay on 12 September 2014.
5. He was handed a notice to attend a disciplinary hearing on 29 September 2014. It contained the following charge: “*On or about February 2014 and at Durban North Fire Station it is alleged that you have contravened the ……………. disciplinary procedure and code collective agreement in particular clause 1.2.5 – conduct themselves with honesty and integrity – in that during your day off, you, together with 2 accomplices, went to Durban North Fire Station and on leaving the fire station you had instructed your accomplices to remove a battery charger from the fire station and place it in your private vehicle. You then left the fire station with the battery charger.*”
6. The passage preceding paragraph 1.2.5 of the collective agreement and the paragraph itself provides as follows: “*1.1 Employees are expected to comply in every respect with the conditions of employment and collective agreements and any related regulation, order, policy and practice and to refrain from any conduct which would give just cause for discipline. In particular, employees should ... conduct themselves with honesty and integrity.*” (The rule.)
7. The collective agreement provides in para 2.7 for an employee to be dismissed on the first occasion for theft or any act of gross dishonesty.
8. Hearings into the applicant’s alleged misconduct were held on 8, 16 and 20 October; 17 and 25 November 2014. The applicant did not attend on 8 October 2014 due to illness. The matter was postponed on that day. The applicant pleaded not guilty but did not himself give evidence in support of his case. He was found guilty and dismissed. He chose not to appeal.
9. The applicant referred an unfair dismissal dispute with the SALGBC on 26 November 2014. The matter was set down for conciliation on 15 December 2014 but remained unresolved. Hence the referral to arbitration.
10. At the pre-arb the applicant indicated that no procedural issues were being raised.
11. Insofar as the substantive issues were concerned the following issues were either agreed to or disputed as the case may be:
    1. It was agreed that the importance of the rule was self-evident because all employees in all workplaces are required to conduct themselves honestly and with integrity;
    2. The applicant agreed that the rule was reasonable;
    3. The applicant agreed that he was aware of the rule;
    4. The applicant disputed having breached the rule and submitted as follows:
       1. He submitted that he had not given any instruction to those accompanying him and that they had taken battery charger by themselves;
       2. That they had not taken the charger in his presence;
       3. That he was in the gym at the relevant time;
       4. That the charger had been placed in the back of his bakkie but he had not noticed it;
       5. It was agreed that those accompanying him were not municipal staff.
    5. The following was agreed as regards the incident:
       1. That the charger belonged to the respondent and had an approximate value of R5000;
       2. That the SAPS had retrieved the charger from the workshop of a private mechanic in Newlands West and brought it to the Durban North fire station (DNFS);
       3. That the applicant uses the services of the said mechanic to fix his own vehicle;
       4. That the charger had been removed from the premises of the DNFS on the day that the applicant had visited DNFS to use the gym;
       5. That the charger is a rectangular piece of equipment with the following dimensions 600mm (length); 300mm (width); 200mm (depth);
       6. That the DNFS maintains a gym for the use of unit staff-members of which the applicant was one. He was therefore entitled to use the gym even on an off-day and was legally on the premises of the DNFS;
       7. That the applicant had entered the premises of the DNFS on the day in question in June 2013 to use the gym and had in fact used it. It was agreed that insofar as entry onto fire station premises is concerned, all persons doing so, whether staff or civilians, must report to the office of the commander when they arrive on the premises;
       8. That the applicant’s vehicle, a bakkie, was on the premises of the DNFS on the day in question and that it was occupied by those 2 individuals while the applicant used the gym;
    6. The applicant maintained that the charges were fabricated by the respondent against him at the instigation of one Nathi who had a grudge against the applicant. It was agreed that said Nathi was accompanying the applicant on the day in question as a driver;
    7. The applicant indicated that no issue relating to the consistent applicant of the rule was being raised;
    8. The applicant agreed that the offence in question was serious but emphasised that he was innocent;
    9. The applicant agreed that as a manager he was aware that the offence in question merits dismissal but again protested his innocence;
    10. The aggravating factors on page 129-130 of the respondent’s bundle were disputed by the applicant;
    11. The mitigating factors on page 130 of the respondent’s bundle were disputed by the respondent;
    12. It was agreed that the applicant had maintained a clean disciplinary record during his employment;
    13. It was agreed that the applicant had long service. However the parties disagreed about the implications of that long service. The respondent submitted that it should be held against the applicant as he ought to have known better, while the applicant submitted that his long service should be construed in his favour. This issue is accordingly disputed;
    14. It was disputed whether there was a breakdown of trust between the parties;
    15. It was disputed that the employment relationship between the parties had become intolerable;
    16. It was disputed whether reinstatement, which the applicant sought, was reasonably practicable;
    17. It was disputed whether a good working relationship could be restored between the parties;
    18. It was disputed that reinstatement would cause a disproportionate level of disruption to the respondent;
    19. It was agreed that the applicant’s position had not yet been filled however there is a recruitment process underway at present;
    20. The applicant submitted that if reinstatement was not reasonably practicable, then he would opt for re-employment. However he submitted that it should be on a level that was equivalent to the position that he held.
12. The respondent argued in closing that the dismissal was fair and should be upheld. The applicant argued to the contrary.

# SURVEY AND ANALYSIS OF EVIDENCE AND ARGUMENTS

1. The following gave evidence at the arbitration for the respondent: …………….(Principal of Grosvenor Boys High School and a teacher for 29 years; reservist for 29 years in the SAPS and holding rank of Lt Colonel); …………………(detective in the SAPS holding rank of warrant officer for 18 years and with the police service for 26 years); ………..(regional commander in the respondent’s fire department for 5 years and with the fire department for over 20 years).
2. The following gave evidence for the applicant: the applicant himself; ……….(motor mechanic of 16 years); ………………(station commander; shop steward at the relevant time and representative of the applicant at the disciplinary hearing; employed by the respondent for 11 years); …………….(a temporary employee).
3. The following was either common cause, agreed, undisputed or conceded in cross-examination:
   1. That the appicant had gone to the gym at DNFS on the relevant day in June 2013
   2. That the applicant used his Corsa bakkie for that purpose;
   3. That he was accompanied by two individuals: one Nathi and Mzolo;
   4. That either Nathi or Mzolo or both had removed the battery charger from the premises of the DNFS and placed it in the bakkie;
   5. That the battery charger belonged to the respondent and had an approximate value of R5000;
   6. That the battery charger is a large piece of equipment measuring 600mm x 300mm x 200mm;
   7. That the battery charger was retrieved by the SAPS from the workshop of motor mechanic Padayachee and returned to the DNFS;
   8. That the charger was in use when it was found in the workshop;
   9. That the applicant knew Padayachee and used his services to have his vehicle repaired and maintained;
   10. That the battery charger was probably given to Padayachee in lieu of payment for repairs to the applicant’s bakkie;
   11. That the alleged offence relating to dishonesty was serious;
   12. That the applicant as a manager was aware that offences relating to dishonesty merit dismissal;
   13. That the applicant had a clean disciplinary record;
   14. That Mzolo was under the influence of alcohol on the day that the battery charger was stolen.
4. Moodley stated that he had been advised by Padayachee that the battery charger was given in lieu of payment for repairs to the applicant’s vehicle. This evidence was hearsay. However it was not challenged in cross-examination by the applicant. Furthermore there was no reason for Moodley, a senior police detective, to lie about this issue. Hence its admission as evidence.
5. I cannot place any reliance on the evidence of Mzolo as he indicated that he was under the influence of alcohol on the day that the theft was committed.
6. The applicant’s version was a bare denial about the theft of the battery charger. In addition he stated the following:
   1. That he completed his gym training and went back to his vehicle where he found Nathi and Mzolo;
   2. That he did not check his vehicle as he left the premises of the DNFS;
   3. That he had left the vehicle with Nathi later that day;
   4. That Nathi also did driving for him but he dismissed him after Nathi started abusing alcohol. From then on their relationship was bad;
   5. That he was detained and charged with theft but was given bail;
   6. That he did not notify the respondent as he is required to do;
   7. That he used the services of Padayachee for motor repairs.
7. I cannot accept the evidence of the applicant as reliable or credible for the following reasons:
   1. An employee facing a serious charge of misconduct and dismissal and who strongly believes in his innocence will take steps to ensure that evidence exculpating him is presented and considered. This will be even more so when the employee involved is a member of management who understands the consequences of discipline;
   2. The applicant did not give evidence at his disciplinary hearing. His reason for not doing so was that he was not advised by his representative to do so. His representative Zikhali, a trained and experienced shop steward, could not give a cogent reason for not advising the applicant to give evidence in support of his case;
   3. The record of the transcript of the disciplinary hearing shows incriminating evidence being led against the applicant. Why he would remain silent and not defend himself is inexplicable. I find that he would have defended himself, even against the advice of his shop steward, if he truly believed in his innocence;
   4. Zikhali however stated that he wanted to “protect” the applicant and had instead told the applicant’s “story” to the chairperson. He insisted that the chairperson had failed to take heed of anything he had stated. He could not explain how it came to pass that he had given “evidence” on behalf of the applicant.
8. Having regard to the above it is probable that the applicant has fabricated the version that he presented at the arbitration. I find that it is probable that the applicant either did not believe in his innocence or did not want to expose himself to the risk of incrimination.
9. The evidence of Padayachee is unsatisfactory and unreliable for the following reasons:
   1. The pre-arb minute indicated that the applicant knew Padayachee and that he used his services for motor repairs to his own vehicle. This was also the applicant’s evidence. However when he gave evidence Padayachee stated that he did not know the applicant. This is strange because as a businessman he would be expected to remember his customers. The only inference one may draw is that Padayachee was coached to lie on this issue;
   2. There is a further reason for questioning his credibility. With Padayachee being a motor mechanic for 16 years he would probably have been familiar with the value of the battery charger: it being agreed to be valued at approximately R5000. On his version he bought it for R750. On his own version therefore he ought to have been aware that he was receiving property that was probably stolen. As such he has shown himself to be a dishonest person.
10. During the pre-arb the applicant stated that the charges were fabricated against him at the instigation of Nathi who had a grudge against the applicant. However at the arbitration Zikhali offered a further reason for the alleged fabrication: that the respondent wanted to dismiss the applicant and had sent a chairperson who had a “mandate” to “axe my member” ie the applicant. This issue was not mentioned during the pre-arb nor by the applicant when he gave evidence. No reason was offered by Zikhali why the respondent would want to dismiss an employee who from all accounts was a good employee and had a clean disciplinary record. In closing Mr Mdletshe was asked to offer a reason why the respondent would want to victimise the applicant. He could not offer any. I find the allegations against the chairperson to be a recent fabrication.
11. The applicant did not give any evidence of any procedural issues when he gave evidence. None were raised during the pre-arb. However when Zikhali gave evidence he sought to make mention of numerous procedural issues including the alleged bias and partiality of the chairperson. No reason was given why these issues were not raised during the pre-arb. The witness was accordingly advised not to raise any such issues because if indeed they were genuine issues, they would have been raised at the outset.
12. In all the circumstances the only reasonable and probable inference that may be drawn from the evidence is that the applicant was aware that the battery charger had been removed from the DNFS and placed in his vehicle. It is inconceivable that he would not notice a large piece of equipment in his own vehicle when he was leaving the premises of the DNFS, or when he left the vehicle in the custody of Nathi. I find that he probably gave it to Padayachee in lieu of motor repair charges. As such the applicant was dishonest.
13. The disputed issues are accordingly answered as follows:
    1. That the applicant breached the rule relating to honesty;
    2. That the charges against the applicant were not fabricated;
    3. That the applicant’s dishonesty had led to a breakdown of trust between the parties. This rendered the employment relationship intolerable.
14. That the applicant had long service was not disputed. However whether that should be held in his favour or against him was disputed. Neither party dealt with this issue either in evidence or argument. I therefore desist from making any finding on this issue.
15. It was agreed that dismissal is the prescribed sanction for dishonesty. I find the dismissal to be fair. I propose to dismiss the application.

# AWARD

1. The application is dismissed.

Dated at DURBAN on this the 17th day of AUGUST 2015.

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R J PURSHOTAM

*Arbitrator*