JURISDICTION, DETAILS OF THE HEARING AND REPRESENTATION

1. I satisfied myself that the ……………..had jurisdiction to hear this matter.
2. The arbitration hearings were held on 6 February, 10 July and 7 August 2017 at the ……… offices, Pinetown. The applicant was represented by Mr …………….(…….official) while the respondent was represented by Mr ………….(HR officer). The former had 8 years of experience in representing parties at arbitration while the latter had 2 years. Having regard to the experience of the parties the proceedings were conducted largely in an adversarial manner. The interpreters were Mr T Kawula (February & August) and Ms S P Khoza (July).
3. Documents were handed in by the parties as follows:
	1. The respondent handed in a bundle of documents on 6 February 2017. The applicant disputed that he was aware of the respondent’s industrial relations policies and procedures as set out on pages 17-21. He also questioned the relevance of pages 22 – 32 being extracts from the Constitution of the Republic and other labour statutes. All other documents were admitted as being authentic and correct as regards their contents;
	2. The respondent also handed in an example of a payslip which is prepared in such a manner that its contents cannot be read unless opened. It has printed on the outside in bold letters: “CONFIDENTIAL PAYSLIP”;
	3. On 10 July 2017 the respondent handed in a further bundle of documents. None of the documents were questioned by the applicant;
	4. The applicant handed in 3 documents on 7 August 2017 none of which was disputed by the respondent as regards authenticity. However it did dispute that these documents were known as “job awareness documents” as alleged by the applicant.
4. With the consent of the parties a pre-arb was conducted on 6 February 2017. For this purpose a checklist containing the issues that one normally encounters in alleged misconduct related arbitrations was distributed to both parties. On 10 July 2017 a minute of the pre-arb was distributed to both parties. After both parties confirmed its correctness, it was read into the record. The parties were informed that no evidence need be led on the issues on which there was agreement, but that they must ensure that their witnesses deal with the disputed issues. The parties were advised to keep the minute handy to remind them constantly of the disputed issues and to guide their witnesses accordingly.
5. On 10 July 2017 six clips of video footage was viewed jointly by the following together the author of this award: the applicant, his representative, Mr ……….and Mr ……….(one of the respondent’s witnesses. The parties agreed inter alia that video 6 dated 14 August 2016 showed the applicant removing a document from the relevant cupboard and placing it in his pocket. A copy of the minute was distributed to both parties. It was approved with amendments and read into the record on 7 August 2017.
6. At the commencement of the arbitration, and on each new hearing day, 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 test the reliability, credibility and relevance of evidence, and 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*.” The applicant failed to cross-examine the respondent’s witnesses on important issues and was requested to do so.
7. Since a significant part of this case consisted of reliance on circumstantial evidence it was explained to the parties that circumstantial evidence is persuasive if the inference sought to be drawn from it is consistent with all the proved facts and it is the most plausible inference. It need not be the only inference.
8. The applicant was informed on 7 August 2017 that his tendency to give long-winded and rambling answers to straight-forward questions could cause difficulties when his evidence was weighed as to reliability, credibility and relevance.

ISSUE TO BE DECIDED

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

BACKGROUND TO THE DISPUTE

1. The applicant is …………………(male age 39), a quality control inspector. He commenced full-time employment with the respondent in terms of a written three-month fixed term contract of employment on 3 March 2008. His employment was made indefinite at the termination of that contract. He was suspended with pay on 14 September 2016 and dismissed on 23 September 2016. He earned R46.14 per hour and worked a 5 day / 40 week. His weekly and monthly earnings were accordingly R1845.60 and R7996.98 respectively. The applicant has not obtained alternative employment despite making attempts, nor has he earned anything from casual work. His highest standard of education is Gr 12. As breadwinner he has 7 dependants (1 adult and 6 children).
2. The respondent is ………………..(PTY) LTD, a manufacturer of motor components. It is a multi-national company with 6 branches internationally. It employs approximately 43 persons in its workplace in KZN.
3. The applicant was given a notice to attend a disciplinary hearing on 14 September 2016 containing the following charge: “*1. Misconduct in that you removed property (supervisor’s payslip) without permission or authorisation from the cupboard on Sunday the 14th of August 2016. You also accessed confidential information on the payslip without permission, which is detrimental to the business and could cause disharmony in the workplace*.”
4. The charge was based on item 3 of the disciplinary code which provides as follows: “*Removal or attempted removal of material / product or other property from Company premises without permission*.” The recommended sanction is summary dismissal.
5. The applicant attended the disciplinary hearing on 16 and 20 September 2016 and chose to be represented by an untrained and inexperienced shop steward. The applicant pleaded not guilty, led evidence in support of his case, and did not call any witnesses. After considering the evidence the applicant was found guilty and dismissed. The respondent does not maintain an appeal procedure. The applicant referred the alleged unfair dismissal dispute to the DRC on 10 October 2016. The matter was conciliated on 9 November 2016 but remained unresolved. Hence the referral to arbitration.

SURVEY & ANALYSIS OF EVIDENCE AND ARGUMENTS

1. The respondent called the following witnesses in support of its case: …………..(HR officer with 10 months of service); ……………. (production team leader of 3.5 years and with the respondent for 10 years); ………….. (quality supervisor of 6 years and with the respondent for 10 years. He was the applicant’s immediate superior); ………………. (managing director for 11 years and with the respondent for 14 years).
2. Only the applicant gave evidence and support of his case.
3. Both parties submitted written closing statements.
4. The following was agreed to, common cause, undisputed or conceded during the pre-arb, or the arbitration proper:
	1. The incident, described in para 5 above, occurred on 14 August 2016. Undistributed payslips had been left in the cupboard on Friday 12 August 2016;
	2. Payslips are distributed to staff members every Friday. Where a payslip is not handed out, due to absence of the employee, it and other undistributed payslips are left in the supervisor’s cupboard. The relevant employees may then retrieve his payslips on his return to work;
	3. A day after the removal of the document in question, the pay structure of Naidoo became general knowledge and Nabie heard staff members discussing on the shop-floor the remuneration being paid to Naidoo;
	4. Nabie was aware that Naidoo was on study leave, hence had not received or collected his payslip;
	5. Nabie conducted a search for Naidoo’s payslip in the cupboard, to no avail;
	6. Nabie reported to Seaward that Naidoo’s payslip was missing and that he had heard staff members discussing Naidoo’s remuneration;
	7. The contents of payslips are confidential;
	8. The disciplinary hearing commenced on 16 September and concluded on 20 September 2016;
	9. The applicant removed a document from the cupboard on 14 August 2016 and placed it in his pocket;
	10. At the disciplinary hearing the applicant could not remember what document he had removed from the cupboard on 14 August 2016;
	11. At the arbitration hearing the applicant remembered that the document that he had removed was a “job awareness document;”
	12. The term “job awareness document” (JAD) was the applicant’s own name for this document which consisted of 3 parts. In other words the term “job awareness document” was not known to others in the workplace;
	13. When asked during cross-examination Naidoo (for the respondent) indicated that he was not aware of the JAD and that it did not exist. It was not put to Naidoo how and why this document was used;
	14. That …………….. and ……………… (employees) had had their payslips removed some time back but there was no evidence that they brought this issue to the attention of the respondent.
5. Before making a finding on the disputed issues, I pause here to make some observations on the credibility of the applicant’s version. At the disciplinary hearing the chairperson made the following remark (conceded by the applicant to be correct): “*Zulu (ie the applicant) has acknowledged that he had removed something from the cupboard on 14 August 2016 but cannot remember what he removed*.” It must be kept in mind that the disciplinary hearing was held 4 weeks after the incident. But 51 weeks after the incident at the arbitration, the applicant remembered in minute detail that he removed the JAD from the cupboard. I find this somewhat surprising because one’s memory generally fades with the passage of time. As such the applicant’s memory ought to have been fresh at the disciplinary hearing. At the arbitration the applicant could not explain how it was that he could not remember then but could remember now. In the absence of an explanation I have to conclude, as I do, that the applicant’s version is a recent fabrication.
6. The following issues were recorded as being disputed during the pre-arb. I find, on the probabilities, on these issues as follows:
	1. Whether the applicant was aware of or trained in the contents of the disciplinary code which contained the following offence: “Removal or attempted removal of material / product or other property from company premises without permission.” It prescribed summary dismissal as the sanction: The applicant disputed that he was aware of the contents of the disciplinary code. He however acknowledged that payslips are confidential documents and that it would constitute misconduct if anyone other than the relevant employee had access to his or her own payslip.
	2. Whether the applicant was aware that the offence was dismissible: There is no evidence that the applicant was aware that this offence was dismissible. He however ought to have been reasonably aware that engaging in dishonesty in the workplace is a dismissible offence.
	3. Whether the applicant removed Naidoo’s payslip: It was common cause that the applicant had removed a document from the cupboard on 14 August 2016. The dispute was about the identity of the document: the applicant contended that it was a JAD while the respondent’s contention was that it was Naidoo’s payslip. I have already found that the applicant’s version was a recent fabrication. The following is the undisputed circumstantial evidence:
		1. Naidoo’s payslip was in the cupboard on 14 August 2016 because he was on study leave;
		2. Immediately after removing the document from the cupboard the applicant placed it in his pocket;
		3. Details of Naidoo’s pay became the subject of conversation among staff the very next day ie 15 August 2016;
		4. There is no explanation how details of Naidoo’s pay became general knowledge among staff the next day;
		5. A search was conducted for Naidoo’s payslip and it was missing even though he had not collected his payslip.

I draw the following inferences from the above circumstantial evidence:

1. The document in question was the payslip of Naidoo;
2. The applicant removed it;
3. The applicant placed it in his pocket immediately in order to conceal it. If he intended to use the document for some legitimate purpose, he would have carried it openly to his workstation.
	1. Whether the respondent suffered any prejudice or harm as a result of the alleged misconduct: Naidoo gave evidence that he was distraught at his confidential pay details having become general knowledge amongst the staff members. This was undisputed.
	2. Whether the respondent was inconsistent in not disciplining others who may have engaged in similar conduct in the past: The applicant submitted that the payslips of two employees ……………… and ………………… were removed in a similar manner and that the respondent failed to take any action. The respondent submitted that this story is a fabrication and that neither Mandla nor Lionel reported that their payslips had been removed. The applicant could not say whether these 2 employees had reported the issue to the respondent. I therefore cannot find inconsistency in the application of discipline.
	3. Whether the alleged misconduct was serious: I find that conduct of this nature is serious as it has dishonesty as an element. The evidence shows that the applicant devised a scheme to remove Naidoo’s payslip and to let others have access to details therein.
	4. Whether progressive or corrective discipline had any role to play in the event that the applicant was guilty: I cannot find that progressive or corrective discipline has any role to play.
	5. Whether there were any aggravating or mitigating features: I have already found this offence to be serious. I cannot find any mitigating features that would excuse such conduct.
	6. Whether there was a breakdown of trust serious enough to warrant dismissal: The respondent submitted that the applicant could not be trusted anymore. The applicant for his part submitted, when cross-examining the respondent’s witnesses, that he had long service and barring the warning that he had received in February 2016 there was no question that he could not be trusted. I disagree. I find that the applicant’s misconduct to be serious enough to destroy the trust that the respondent reposed in him. Trust is the basis of any employment relationship. (The applicant did not give evidence whether he could be trusted.)
	7. Whether the employment relationship had become intolerable: The respondent submitted that since trust had been eroded, that the employment relationship could not be restored. The respondent indicated that it could not risk such behaviour in the workplace.
	8. Whether reinstatement was reasonably practicable: The respondent submitted that since trust had been destroyed, that reinstatement was not reasonable. I agree.
	9. Whether the applicant was afforded the opportunity to make closing submissions at the disciplinary hearing; Whether the outcome was delivered before the submission of closing submissions; Whether there was an unreasonable delay in commencing the disciplinary process against the applicant; Whether the initiator had unduly influenced the chairperson to impose the sanction of dismissal on the applicant: These are all alleged procedural lapses. Para 70 of the CCMA Arbitration Guidelines provides inter alia that “*Ordinarily, departures from established policies and procedures, or from the Code, should not result in a finding of procedural unfairness unless there is material prejudice to the employee* …” The applicant failed to lead any evidence of any prejudice that he suffered as a result of a lapse, if any. I accordingly refrain from making any finding on the alleged procedural lapses.
4. In all the circumstances I find the dismissal of the applicant to be fair.

AWARD

1. The application is dismissed.

Dated at DURBAN on this the 10th day of AUGUST 2017.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

R J PURSHOTAM

*Commissioner*