



Abusive racist and sexist conduct

Details	Synopsis
Author: Sean Molony Pages 7 Words 2321	Context: The article discusses abusive, racist and sexist conduct as a form of misconduct. Content: The article combines workplace rules against abuse, racism and sexism and explains the elements common to all forms of misconduct.

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1. Introduction

Aim of the rule

This rule is intended to prohibit a range of conduct, from swearing, to offensive and racist language and includes both verbal and non verbal forms of communication such as signs, gestures as well as written communication directed at co-employees or third parties such as clients and customers. The purpose of the rule is to protect the dignity of persons at the workplace.

Reason for the rule

Wallis in *Labour and Employment Law* in paragraph 25 states “. . . Such incidents (racial abuse), in the frequently highly charged racial or political atmosphere of the workplace can be extremely detrimental to working relationships and disruptive of the employer’s entire business operations . . .”.

When the abuse is directed at a superior of the employee within the organisation, the proper allegation may well be insolence or insubordination; and when the abuse is sexual in nature the proper allegation may be one of sexual harassment.

Attitude

Whether the use of particular abusive language will constitute a justifiable basis for disciplinary action, varies from workplace to workplace and depends to a large extent on the attitude of employers and employees. What may be acceptable banter in a mine or factory may be considered offensive in a shop or office. The employer must therefore determine the standard of conduct it requires of its employees in the workplace, which could range from an absolute prohibition to a graduated system of warnings leading to dismissal. However, racial insults, as a form of abusive language, are regarded as serious misconduct and therefore a dismissible offence in the workplace



Summary: Elements and defences: abusive conduct

What the employer must prove	Employee's defences
What the employee did was racially or sexually abusive	The employee did nothing What the employee did was not racist and /or sexist
The <i>employee</i> committed the misconduct	'It wasn't me'
The abuse was communicated	There was no communication
The employee intended to abuse another	It was done in jest There was no intention to abuse

Each of these will be discussed in turn.

In order to dismiss an employee fairly on the ground of abusive conduct, the employer must show, on a balance of probability, that the employee contravened the workplace rule against abusive conduct. In order to do so, the employer must prove each element.

2. What the employee did was abusive or racist

What does 'abusive' mean?	"Abusive" means rude, obnoxious, insulting, offensive conduct and includes racist and sexist conduct as well as hate speech. The conduct complained of may be verbal or non-verbal.
Conduct in context	Whether the conduct is abusive will depend on the circumstances and practice in the particular workplace. The use of swear words may be acceptable practice in some workplaces but not in others. The context in which the abusive language or conduct takes place will also impact on the seriousness of the misconduct ¹ .
Meaning of 'racist'	'Racist' is defined in The New Shorter Oxford English Dictionary as 'a person believing in, advocating, or practising racism'. 'Racism' in turn is in the same dictionary defined as 'belief in, adherence to, or advocacy of the theory that all members of each race possess characteristics, abilities, qualities, etc, specific to that race, especially distinguishing it as inferior or superior to another race or races; prejudice, discrimination, or antagonism based on this' ² .

¹ In *Edcon Ltd v Grobler NO & Others* (2007) 28 ILJ 2762 (LC), the court quoted the following statement from P A K le Roux & Andre van Niekerk *The SA Law of Dismissal* at 124-5 with approval: 'Whether language is abusive will depend on the circumstances of a given case. The circumstances within which the language was used have to be evaluated in particular against whether the language used was directed at a particular employee or employees. The level of malice, the extent of the abuse and its degree are factors that may aggravate the offence.'

² *SA Chemical Workers Union & Another V NCP Chlorchem (Pty) Ltd & Others* (2007) 28 ILJ 1308 (LC).

Racism in SA

However, racist and sexist comments and or conduct are totally unacceptable; this standard has been set by the Labour Appeal Court ³ where, with regard to the former, Nicholson JA said “Racism is a plague and a cancer in our society which must be rooted out. The use by workers of racial insults in the workplace is anathema to sound industrial relations and a severe and degrading attack on the dignity of the employee in question.” Zondo JP in the same matter stated

“The calling of, or the reference to, an African person in South Africa as a 'kaffir' by a person who is not an African is part of the racial abuse that Africans have been subjected to in this country for over three hundred years. This abuse has been perpetrated against Africans mostly by people who are white. Any one who lives or has lived in South Africa knows this. In fact by now the word 'kaffir' is a term of racial abuse that is known internationally.”

The prohibition against racist language and conduct is fundamental and absolute, and goes beyond a mere analysis of the provisions of an employer's disciplinary code. Section 1 of the Constitution declares that this country is a democratic state founded on, among others, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and the supremacy of the Constitution and the rule of law. Zondo was therefore of the view that ‘courts should take a firm stand against acts of racism’.

Case law examples

In *SATAWU obo Collins and Spoornet* ⁴, the employee made the following statements: “Fuck you alright, fuck you”, “You mustn't make me the moer in . . . julle fokken boere se tyd is verby . . . ek is baie jonger as jy, ek sal jou seer maak . . .”, and “julle fokken Boere se tyd is verby . . .” The arbitrator found that the latter constitutes an example of “hate speech” (see 16(2)(c) of the Constitution of the Republic of South Africa, 1996, 16 “Freedom of expression”) “advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm”.

In *Dauth and Brown & Weir's Cash & Carry* ⁵, the employee sent an email containing abusive statements about Jews, calling them “children of the devil”, “the rich greedy un-godly Jews forever and may they all rot in hell!”. The arbitrator stated “One seldom encounters such a gross and sickening example of this sort of racism, and I found it disgusting.” As for the employee's defence that the misconduct was not shown to be serious as no Jews had testified, the arbitrator stated:

“Remarks such as those made by applicant are inherently and gravely wrong - they offend not only Jewish people, but, I would venture to say, they would offend any enlightened or civilized person of whatever cultural or religious persuasion. The grotesque caricatures of Jews which flowed so glibly from applicant's keyboard, are strikingly similar to those which found favour with the Nazi propagandists of the 1930's, and it is well known that it was the use of that form of profoundly shameful racist stereotyping, that facilitated the complicity of German civilians in the ghettoization and transportation of German Jews.”

³ In *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & Others* (2002) 23 ILJ 863 (LAC)

⁴ [2002] 8 BALR 825 (AMSSA)

⁵ (2002) 23 ILJ 1472 (CCMA)

In *Cronje v Toyota Manufacturing*⁶ the employee had received an email with a cartoon depicting an adult and a young gorilla, both with the head of President Mugabe of Zimbabwe superimposed on them. The caption stated 'We want the farms to grow more bananas'. The employee had printed out a few copies to show to his colleagues, but eventually the cartoon was widely circulated among the company's staff. The court was of the view that whether the cartoon was or was not racist and inflammatory had to be judged within the context in which it was used or distributed, i.e. at a factory which employed 3 500 black employees in newly independent South Africa in the year 2000. The fact that the offensive racist stereotype associating black people with apes existed was not disputed. The employee's dismissal was found to be fair.

In *Oerlikon Electodes SA v CCMA & others*⁷ the employee, a laboratory technician, was dismissed for verbally abusing a repairman from a service provider by calling him a "Dutchman". The commissioner said this word had racial overtones, and that dismissal was too severe a penalty because the company's disciplinary code provided for dismissal only after a third incident of using "abusive language". Although the employee's misconduct had racial "overtones", and the company was ordered to reinstate the employee with retrospective effect. On review the Court noted that the employee had conceded that the word had a derogatory connotation. The court found contradictions in the Applicant's defence that he had been provoked when the repairman had called him a "koelie", and rejected the employee's defence. The court concluded that the commissioner was incorrect to override the company's decision to dismiss the employee noting that the Labour Appeal Court in the *Rocklands Poultry* matter had pronounced strongly against the use of any racist epithets⁸.

In *SA Chemical Workers Union & Another v NCP Chlorchem (Pty) Ltd & Others* (2007) 28 ILJ 1308 (LC) an employee accused another of being a racist. In a review of an award in which the arbitrator found that the dismissal was fair, the court had this to say:-

[12] I have no hesitation in concluding that to accuse a person of being a racist or to say to a person that he is displaying a racist attitude is racially offensive. I am equally satisfied that these words, objectively viewed, can be regarded as insulting and abusive. I am also satisfied that such language could be described as 'racial'.

[13] I can hardly conceive of any place or circumstance or country where, if a person is told that he is a racist, it will not be experienced by such person as him or her being insulted and abused. Therefore, in our country with its history of racial discrimination, it needs hardly be debated, I believe, that employers, generally speaking, are enjoined to do their best to create a working environment free from racism. Apart from employers being statutorily obliged to do so, it is patently the right thing to do. The commissioner commented that 'the employer is trying to make the employees respect each other irrespective of colour and that must be appreciated'.

It is clear from the survey of the above cases that in our delicately balanced multi-cultural society, our courts and arbitrators have and will continue to deal very firmly with the issue of racism, in whatever form it presents itself.

⁶ (2001) 22 ILJ 735 (CCMA)

⁷ [2003] 9 BLLR 900 (LC)

⁸ See also *Solidarity/MWU on behalf of Van Staden v Highveld Steel & Vanadium & another* (2005) 26 ILJ 2045 (LC), and *JAMAFO on behalf of Nero And Pick 'N Pay* (2007) 28 ILJ 688 (CCMA), the employee made the following racist statement: 'You know, these fucking kaffirs. When they are on the senior position act so stupid. Always follow every kak from their seniors.' The arbitrator followed the *Rocklands Poultry* case and found the dismissal to be fair.

3. That the abuse was communicated

Communication It goes without saying that unless the abuse is communicated, it will be difficult to establish that misconduct has taken place. In *Cronje and Dauth* for example, the form of communication was by email. There should be evidence that the abuse was heard, seen or otherwise communicated.

4. The employee was responsible for the abuse

Employee Unless the employer can show that it was the employee who is the subject of the investigation who was abusive, the employer has not proved the allegation. There must be a link between the employee and the abuse.

5. The intention to abuse

Intention In *Myers and SA Police Service*⁹, the arbitrator found that the test for intention in the making of offensive and racist remarks is an objective one – the test is whether the remarks were perceived to be offensive and not whether the person intended to offend.

6. Is the rule valid and reasonable?

Valid + reasonable rule The workplace rule against abusive language is necessary because this form of misconduct negatively affects both the employment relationship and the business of the employer. Where the abusive language is directed at other co-workers “the ill-feeling and even division which this may create has the potential to damage the productive efficiency of the business”.¹⁰

7. When is dismissal appropriate?

Appropriateness of dismissal If misconduct is serious then a single transgression may result in dismissal being the appropriate sanction.
Dismissal was found to be appropriate for a single, though extended, bout of swearing at another employee in *R & C X-Press Freight v Munro*¹¹, because the abuse was accompanied by a marked degree of aggression and malice; the abuse was persisted in; the abuse took place in the presence or investigation of other persons; the abuse took place in a public area of the company with the potential to harm the company’s image and business relationships; the abuse was not followed by a genuine apology to the complainant nor any show of remorse; the adverse impact of the abuse on other employees; and the abuse was directed against a woman was an aggravating

⁹ (2003) 24 ILJ 2212 (BCA)

¹⁰ See *R & C X-Press Freight v Munro* (1998) 19 ILJ 540 (LAC), who quote from Le Roux and Van Niekerk *The Law of Unfair Dismissal – South Africa* (at 124–125) with approval.

¹¹ (1998) 19 ILJ 540 (LAC)1

factor. With regard to the last factor, the court in *Van Rooy v Nedcor Bank Ltd*¹² where the abuse was directed at both male and female employees as well as at black and white employees, was of the opinion that it is inappropriate to take cognisance of either the race or gender of the applicant or the complainant. In *Van Rooy* seven incidents of abusive language over a period of several months were treated as a cumulative instance of misconduct.

In *Chemical Energy Paper Printing Wood & Allied Workers Union obo Evans and Poly Oak*¹³, the employee used the word 'kaffertjie' at a client's premises. The arbitrator found that the company had a policy regarding the use of racist language, which the employee had transgressed. The word was found not to have been used in jest and the allegation of offensive language was upheld. In *Myers and SA Police Service*¹⁴, the employee used the 'K' word while he was off duty, 'half pissed' in a pub and five months earlier. The complaint had been lodged only when he proposed to change the complainants' work arrangement. The sanction of dismissal was held to be too harsh in those circumstances.

¹² [2000] 2 BLLR 225 (LC),

¹³ (2003) 24 ILJ 2204 (BCA)

¹⁴ (2003) 24 ILJ 2212 (BCA)