

Misconduct: When Can an Employer Punish an Employee for Misconduct Outside the Workplace?

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INTRODUCTION

Employers are entitled to expect employees to uphold the employer's reputation both inside and outside the workplace. A breach of such obligation is often a dismissible offence, however, this raises the question: to what extent can an employer discipline an employee for conduct that occurs beyond the scope of employment?

The case of *Edcon Limited v Cantamessa and Others* ("**Edcon Case**") demonstrates the way the court approaches misconduct committed outside the workplace.¹

BACKGROUND

Ms Teresa Cantamessa ("**Cantamessa**") was employed by Edcon Limited ("**Edcon**") as a specialist buyer for ladies' wear. In December 2015, President Jacob Zuma replaced Finance Minister Nhlanhla Nene with Des van Rooyen, a move that reportedly cost South Africa's economy between R250–R500 billion and sparked nationwide protests under the "#ZumaMustFall" campaign.

While on leave, Cantamessa posted on Facebook criticising the government using offensive and racially charged language referring to politicians as "f*cking stupid monkeys."

The post attracted significant public attention and came to the attention of an Edcon customer, who reported Cantamessa's post to Edcon, noting that her Facebook profile listed her as an Edcon employee, thereby linking her comments to the company. The comment went viral on social media, attracting hundreds of tweets and negative publicity. The Sowetan published an article titled "*Racist Monkey Slur Strikes Again.*"

Due to reputational damage and public backlash, Edcon investigated the matter and charged Cantamessa with misconduct for posting racist content that violated company values and damaged the company's reputation.

She was subsequently called to a disciplinary hearing for breaching the trust relationship with her employer and dismissed.

CCMA

Cantamessa referred the matter to the Commission for Conciliation, Mediation and Arbitration ("**CCMA**") where the arbitrator found that the outcome of the disciplinary was substantially unfair as the comment was made when Cantamessa was off duty. Further the arbitrator held that Edcon could not prove that it had suffered any reputational harm based on the comments. The Arbitrator awarded Cantamessa 12 months compensation.

LABOUR COURT

Edcon took the matter on review at the Labour Court ("**the Court**"). As a rule, employers do not have the grounds to discipline employees for off-duty conduct, subject to certain exceptions established in case law, such as where the employee's conduct seriously affects the employment and trust relationship. There must however be a connection between the employer's business and the misconduct, for an employer to discipline the employee.

The Court found that the Commissioner made an error by focusing only on the applicability of the policies and not on the racist nature of the comment or the impact of such posts on the employment relationship.

Applying the above-mentioned principles, the Court found that Edcon could discipline Cantamessa if a link existed between her misconduct and the company's interests. As a fashion buyer in a public-facing retail brand, her racist Facebook remark posed reputational risks for Edcon, whose customer base is largely black. The Court noted that the term "monkey" carries deep historical and racial significance in South Africa and could not be dismissed as a comment about government.

Therefore, her remark was found to be a racist slur that could harm Edcon's image if left unaddressed. Even though no actual damage was proven, Edcon was entitled to act to protect its reputation. The company's prompt suspension and disciplinary action against her were viewed as reasonable and necessary to prevent further harm.

The Court found the dismissal by Edcon to be substantively fair and set aside the order by the CCMA.

CONCLUSION

This case highlights the key legal principle that an employer has the right to discipline an employee for conduct performed off duty only if there is a clear connection between the conduct and the employment relationship. If it is clear that the conduct places a risk on the employer's reputation, or it breaches the trust between the employee and the employer then there is sufficient grounds for the employer to punish an employee for the misconduct.

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¹(JR30/17) [2019] ZALCJHB 273; (2020) 41 ILJ 195 (LC); [2020] 2 BLLR 186 (LC) (11 October 2019)



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