



**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN**

CASE NO: C524/2017

In the matter between:

ACADEMY BRUSHWARE (PTY) LTD

Applicant

and

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

CM BENNETT N.O.

Second Respondent

JOLEEN GESWENT

Third Respondent

Date of hearing: 4 November 2025

Date of delivery: 12 August 2026

Summary: Employee dismissed for insubordination – CCMA finding that there was no insubordination by employee – review – circumstances not establishing a

deliberate flaunting of an instruction and dismissal would in any event be too harsh
– application for review dismissed.

JUDGMENT

A OOSTHUIZEN AJ

- 1 This is an application for the review of a finding by the Second Respondent, a CCMA Commissioner (*“the Commissioner”*) in an unfair dismissal dispute which was referred by the Third Respondent (*“the Employee”*).
- 2 The Employee commenced working for the Applicant (*“the Employer”*) in September 2002. Since 2013, she held the position of a computer clerk. She was dismissed in 2017 after she had been found guilty, in a workplace disciplinary enquiry, of gross insubordination.
- 3 Although the matter is not opposed, the applicable standard of review remains that highlighted in numerous judgments, including the decision of the LAC in **Fidelity Cash Management Services v CCMA & Others (2008) 3 BLLR 197 (LAC)** at **paras 99 – 100**. A decision of the CCMA will only be set aside on review if the finding reached by the Commissioner is one that a reasonable decision-maker could not reach. The test is a stringent one which will ensure that awards are not lightly overturned.

4 Appellant was charged with gross insubordination, it being alleged that "you posted pictures on social media which are inconsistent with the Company's reputation and level of professionalism in direct defiance of your manager's instructions not to do so".

5 The evidence shows that the Employer utilised pop-up images in its marketing campaigns. One of these, relevant to this review, depicted a blonde woman ("the cutout model") wearing a pair of shorts and high heels, standing against a backdrop which features the name of the Employer and various items of brushware, which is one of the products sold by the Employer. The charge arises from certain photographs posted by the Employer on social media, showing herself standing next to the cutout model. The Employer is also wearing a pair of shorts and high heels and is evidently trying to emulate the pose which the cutout model is striking, in the particular picture.

6 One of the aforesaid photographs was posted by the Employee on 17 March 2017. The Employer's evidence is that, in response to this initial post Mr Kingham, one of the managers, instructed the Employee not to post such pictures on social media. The gravamen of the charge is that, in direct defiance of this instruction, she later that day posted further and similar photographs on social media.

- 7 In her evidence, the Employee disputed that Kingham had told her not to post the pictures on social media. She conceded that there had been a discussion, but was adamant that no such instruction had been given.
- 8 Although the Commissioner did not explicitly indicate which of the two versions he accepted, the onus is clearly on the Employer to establish the facts on which it relies. There appears to be no basis for arguing that the evidence of Kingham was to be preferred above that of the Employee as to the discussion that was held on 17 March 2017.
- 9 The review then revolves around the ultimate conclusion which the Commissioner reached, based on the other evidence before him. That exercise necessitates, firstly, a careful consideration of the circumstances under which insubordination warrants the dismissal of an employee.
- 10 It cannot be disputed that the severity of the conduct alleged to constitute a disciplinary offence is of importance. The following dictum of Sutherland JA in **TMT Services & Suppliers (Pty) Ltd v CCMA & Others (2019) 40 ILJ 150 (LAC)** at **para 21** applies to a workplace transgression of insubordination, as well as workplace transgressions generally:

“Adjudging the severity of misconduct in context, is a power conferred on an arbitrator. It is partly, at least, a value judgment. The choice made by the arbitrator must stand unless it is demonstrable that no reasonable arbitrator could have reached that conclusion.”

- 11 It is well-established that, to constitute insubordination, an employee's refusal to obey an instruction must be deliberate, and the instruction must be reasonable and lawful (**Grogan, "Dismissal", 4th ed, p 224**). Counsel for Applicant correctly submitted that insubordination is not confined to cases where it can be shown that the employer suffered some form of detriment as a result of the employee's refusal to obey the instruction. The requirements are, as already stated, an intentional and deliberate refusal to obey a lawful and reasonable instruction.
- 12 The need to consider the alleged act of insubordination contextually was also highlighted in the cases to which Applicant referred in argument of **Masscash (Pty) Ltd v Mtsotsoyi & Others (2023) 44 ILJ 162 (LAC)** and **Motor Industry Staff Association & Another v Silverton Spraypainters & Panelbeaters & Others (2013) 34 ILJ 144 (LAC)** at para 13.
- 13 The nature of the instruction which was transgressed does, however, play an important role on a separate question, namely whether the act complained of warranted dismissal. Item 7(b) of the Code of Good Practice found in Schedule H of the Labour Relations Act requires a person determining whether dismissal for misconduct is unfair to consider *inter alia* whether dismissal was an appropriate sanction for the contravention complained of. The following approach laid down in **SACCAWU & Another v Shoprite Checkers (1995) 12 BLLR 87 (IC)** at 92I – 93D is, in my view, valuable and persuasive:

“A study of Johan and Ronell Piron’s book entitled Managing Discipline and Dismissal at pages 139 to 142 reveals that not every act of insubordination or disobedience will justify summary dismissal. The refusal must be serious and deliberate. In modern equity terms, insubordination will seldom be dismissible for a first occurrence. Although gross insubordination may justify dismissal for a first occurrence, the dismissal must generally be preceded by warnings.

At pages 41-43, Clive Bennett in A Guide to Law of Unfair Dismissal in South Africa:

‘The degree of seriousness must be assessed in the light of all the circumstances. And much depends on the implications of the refusal.’”

See, too **National Trading Co v Hiazo (1994) 12 BLLR 53 (LAC)**.

- 14 In numerous cases the courts have required that the insubordination must be sufficiently serious and deliberate to warrant the dismissal of the employee. (**Jefferies v President Steyn Mine (1994) 10 BLLR 76 (IC)**;; **CWIU & Another v AECI Paints (1988) 9 ILJ 1046 (LC)**; **Acrylic Products (Pty) Ltd v CWIU & Another (1997) 4 BLLR 370 (LAC)**).

- 15 Furthermore, it is required of the employer to consider alternatives to dismissal such as the issuing of a warning or final warning (**CWIU & Another v SA Polymer Holdings (Pty) Ltd (1996) 8 BLLR 978 (LAC)**). The employee's length of service and disciplinary record may also constitute factors to be taken into account. (**Armitage Shanks SA (Pty) Ltd v Mtisi (1994) 8 BLLR 4 (LAC)**).
- 16 What are the facts relevant to determining the seriousness of the Employee's conduct in the review under consideration? Firstly, there was no evidence of an established workplace code or set of rules relating to posting on social media. Secondly, and as already pointed out, the photographs in which the Employee adopted the various poses detailed above do not appear markedly different, in character or any other respect, from the photograph of the cutout model. Thirdly, there is no evidence that the business of the Employer suffered any actual harm as a result of the posts made by the Employee. There is no suggestion that the posts occasioned any damage in the marketplace, or complaints or concerns from the Employer's customers.
- 17 These factors, viewed cumulatively, militate against any finding that the transgression called for the dismissal of the Employee. They must be viewed in conjunction with the evidence as to the actual instruction given, and the degree to which such instruction was disobeyed.
- 18 In this regard there is, firstly, the dispute concerning whether a conversation with Mr Kingham on the morning of 17 March was a discussion of a general

nature, or amounted to a clear instruction to the Employee to refrain from posting on social media. It therefore cannot be found that there was a specific instruction, either emanating from the conversation with Mr Kingham or from a pre-existing workplace procedure or code.

- 19 The evidence also does not establish a persistent or ongoing refusal by the Employee to obey an instruction. The highwater mark of the Employer's case is that on 20 March 2017, Kingham again instructed the Employee not to post a picture on social media and that, at that stage, she did not alert him to the fact that she had made a post following their discussion on 17 March 2017. The extent to which this is a serious factor would depend on whether, on 17 March 2017, Kingham had expressly and explicitly issued an instruction to her and, as already pointed out, there is a dispute between the parties on that particular aspect.
- 20 More relevantly, when instructed to take the posts down on 20 March 2017, the Employee did so. That militates against any conclusion that she wilfully and persistently defied an instruction.
- 21 To an extent, the Commissioner conflated the questions of whether the employee was guilty of insubordination and the question of whether the act complained of warranted dismissal. That does not, however, detract from the negligent nature of the other conclusions arrived at by the Commissioner, nor does it mean that the ultimate conclusion arrived at was one that a reasonable decision-maker could not have reached.

22 Taking into account all of the foregoing factors, the Commissioner's decision is not in my view one which could not have been reached by a reasonable functionary on the facts and evidence presented. It follows that the application for a review of the Commissioner's decision cannot be upheld.

23 The application is accordingly dismissed, with no order as to costs.



AC OOSTHUIZEN A.J.

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Advocate Lourens O'Connor

Instructed by: Soldatos Cooper Inc.