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Insolence and insubordination

The Courts' views on employees gone rogue

by P.A.K. le Roux

Two recent decisions of the Labour Appeal Court (LAC) have dealt with the fairness of dismissals on the grounds of insubordination. Both of these decisions are of interest and will be discussed in this contribution.

Sylvania Metals (Pty) Ltd v Mello N.O. & others

In *Sylvania Metals (Pty) Ltd v Mello N.O. & others* (JA83/2015) 22/11/2016) the dismissed employee, a Mr Mosehle, had been employed as a mechanical fitter. In this capacity he repaired a high pressure valve in the employer's plant without obtaining the necessary permit. He did so in the presence of his supervisor. The plant manager then called a meeting of all the relevant team's members to discuss this incident because repairing the valve without a permit being issued by the plant manager constituted a contravention of a safety rule. Precisely what was said and what occurred during the course of the meeting was the subject of dispute at the subsequent CCMA proceedings but what is not in dispute is that Mosehle walked out of the meeting. He was subjected to a disciplinary hearing in which he faced two charges. The first was described as a serious breach of company safety rules in that he had repaired the valve without obtaining the necessary permit. The second was that he had been grossly insubordinate and insolent during the course of the meeting.

Mosehle was found guilty of these offences and he referred an unfair dismissal dispute to the CCMA. The commissioner found that dismissal for repairing the valve without obtaining the permit was unfair. The employer had not produced a policy

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reflecting this rule. In addition, the fact that the supervisor had been present when the repairs had been carried out, and had not stopped Mosehle from doing so, indicated that he (the supervisor) saw nothing wrong with Mosehle's conduct. The commissioner also found that Mosehle had not been guilty of insubordination when he walked out of the meeting. No specific instruction had been issued to him that he failed to comply with. However, his conduct did constitute insolence. But because the conduct did not constitute gross insolence, dismissal was not merited. The fact that Mosehle was still subject to a valid final written warning for insubordination was irrelevant because insolence and insubordination were distinct offences. Mosehle was reinstated with retrospective effect.

On review, the Labour Court found that the commissioner's findings that Mosehle had not been grossly insubordinate and that there had been no breach of a safety rule, was not unreasonable and could not be overturned. The reinstatement order was also reasonable. The review application was dismissed.

On appeal to the LAC the Court took a different approach. It argued as follows –

- South Africa courts have traditionally viewed respect and obedience as the implied duties of an employee. This refers to the duty to adhere to the lawful and reasonable instructions of the employer. A repudiation of these duties by the employee constitutes 'a fundamental and calculated breach' of the employer's lawful authority -

  '[16] ...given that an appropriate degree of mutual trust, respect and courtesy is to be shown by both employer and employee towards the other in the context of an employment relationship.'

- Insubordination occurs when an employee refuses to accept the authority of a person in a position of authority over him or her. It includes a wilful and serious refusal by an employee to comply with a reasonable instruction issue by the superior. But it extends further – it includes conduct which poses a serious and deliberate challenge to the employer's authority even where no instruction has been given. In support for this proposition the LAC referred to its earlier decision in *Palluci Home Depot (Pty) Ltd v Herskowitz & others (2015) 36* ILJ 1511 (LAC), where the Court pointed out that there is a fine line between insubordination and insolence. Insolence is conduct that is offensive, disrespectful in speech or behaviour, impudent, cheeky, rude, insulting or contemptuous, but that insolence may become insubordination where there is an outright challenge to the employer's authority. Nevertheless acts of insolence and insubordination do not justify dismissal unless they are serious and wilful. The sanction of dismissal is reserved for instances of gross insolence and gross insubordination or the wilful flouting of the instructions of the employer.
- The evidence before the commissioner showed that, during the meeting, Mosehle had indicated that he was unwilling to work with the plant manager. He had been argumentative and hostile towards the plant manager and had shown that he would not work according to the standards laid down by the plant manager. He left the meeting before it had been concluded. His behaviour went well beyond a reasonable or legitimate difference of opinion between employer and employee. He had been aggressive, rude and disrespectful towards the plant

manager. His refusal to explain the circumstances in which he had repaired the valve constituted a serious and wilful refusal to adhere to a reasonable and lawful instruction. He had been not merely insolent but also insubordinate. The commissioner's finding that the Mosehle's conduct was not sufficiently serious to constitute gross insolence or gross insubordination was unreasonable and unsustainable.

- As far as sanction was concerned, the LAC referred to the approach adopted by the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd & others* (2007) 28 *ILJ* 2405 (CC), namely that a commissioner considering an unfair dismissal dispute does not have the power to consider afresh what he or she should do; the commissioner must decide whether the employer's decision to dismiss was fair after considering all the relevant circumstances. In this case the relevant circumstances included the nature of the misconduct, the fact that Mosehle still had a final written warning against his name, that he was the sole breadwinner with five dependents, that he was 42 years old, that his superior had indicated in his evidence that he was not prepared to work with him in the future, his limited service with the employer and his lack of remorse. Mosehle's conduct had had a serious impact on the employment relationship and posed 'an appreciable operational risk" to the employer.

The LAC came to the conclusion that, in the circumstances of this case the sanction of dismissal was fair.

> *'[29] I am satisfied in the circumstances of this matter that the sanction of dismissal was fair. There is no merit in the contention that the employee's conduct did not display disrespect of Mr Malema when the facts clearly show otherwise, even in spite of Mr Malema not being the employee's immediate supervisor but the plant manager. The employee refused to accept or respect the authority of his superior and attempted to direct the manner in which he would accept future work instructions. He displayed a lack of remorse for his behaviour, which he had failed to correct even while on a final written warning. Having regard to all of these relevant circumstances, and in spite of mitigating personal considerations, I am satisfied that a continued working relationship was intolerable and that the dismissal of the employee was fair. The Labour Court erred, in my mind, in finding differently.'*

The arbitrator's award was set aside and replaced with a finding that Mosehle's dismissal was fair.

Msunduzi Municipality v Hoskins

The decision in *Msunduzi Municipality v Hoskins* (DA 14/15 2/9/2016) dealt with a claim by a Mr Hoskins that he had been unfairly dismissed. He had been employed as a human resources support services manager. Part of his duties was to advise other managers employed by his employer, the Msunduzi Municipality, on employment related matters, including disciplinary matters. He was a member of the management team.

Whilst making his way up the ranks in the Municipality Hoskins had been a member of various trade unions. In this capacity he had advised and represented co-employees at disciplinary enquiries. When he became a member of the management team he ceased to be a member of a union but continued to represent co-employees at disciplinary enquiries. This became a source of concern for other members

of management; they saw this as creating a conflict of interest. Some managers felt uncomfortable in discussing issues in his presence.

In May 2012 a newly appointed municipal manager addressed a letter to Hoskins instructing him to stop representing fellow employees because of this conflict of interest. He responded in intemperate terms and stated that he would continue to represent employees. He argued that the instruction was not a bona fide rule, that the municipal manager's 'faceless, spineless advisors/managers' needed to advise him that this was the sixth attempt to 'silence' him. The municipal manager's letter was described as intimidation, victimisation and a threat and the municipal manager was invited to take disciplinary steps against him if he dared. The letter ended with the statement that an 'apology is anticipated in this matter'.

The letter was posted on a public notice board and was shown to a number of employees prior to being delivered to the municipal manager. The municipal manager responded in a second letter in which the problems that the Municipality had with his actions were described. Hoskins was requested to provide the municipal manager, within 48 hours, with a list of all labour matters in which he was representing fellow employees and to indicate that he had recused himself from these matters. He failed to comply with this ultimatum. Disciplinary charges involving allegations of gross insubordination, gross insolence and failing to act in good faith were brought against him and he was dismissed.

Hoskins challenged the fairness of his dismissal but the arbitrator found that his dismissal was fair. On review the Labour Court accepted that he had been guilty of serious misconduct but found that dismissal was too harsh a sanction. The Court substituted the finding of the arbitrator with a finding that the dismissal had been unfair and reinstated Hoskins, but not with full retrospective effect. Its view is encapsulated in the following excerpt from the decision -

> *'However, even on the strict review test, I am of the view that if the arbitrator had properly applied his mind to the material before him and truly thought about it, he would have found that the sanction of dismissal was harsh in the circumstances of this case. These circumstances include the fact that the applicant was over 50 years old, there was no evidence of past similar misconduct, the applicant had been in the employ of the respondent for over 25 years (basically all of his life) and his age militated against prospects of future employment. Moreover, there was no evidence that the respondent had lead evidence that reinstatement was not practical. The applicant further did not work directly under the manager- in other words there was no evidence that he works closely with him and receives his daily instructions from the manager. In these circumstances I believe that a reasonable arbitrator would have found that such an employee deserves a second chance, albeit with a serious sanction imposed against him, such as a final written warning or punitive suspension. In determining the extent of the retrospective part of the reinstatement order, I have taken into consideration that considerable time has passed but the reasons for this is the fault of the applicant. If he had pleaded guilty, apologised and not persisted with consuming hearings, this case may not*

have arisen.

In all these circumstances, I find that the sanction of dismissal was not reasonable based on the material before the arbitrator and I thus substitute the award with a reinstatement order. However, for the reasons set out above, I order that it be retrospective only for (6) months'.

The Municipality then appealed to the LAC. It argued that the Labour Court had erred in coming to the decision that dismissal had not been an appropriate sanction, despite having found that Hoskins was guilty of serious misconduct.

In argument before the LAC Hoskins' legal representative tried to argue that the Labour Court had erred in finding that the order given to Hoskins had been a lawful and reasonable one and that Hoskins was therefore guilty of misconduct. The LAC refused to consider this argument because Hoskins had not launched a cross-appeal on this point. However, the LAC did briefly consider and reject this argument in the following terms-

'25. … Be that as it may, there is nothing unlawful or unreasonable about the Municipal Manager's instruction to the respondent who, as part of management, is not expected to represent employees against disciplinary actions taken by management. The reasons why the conduct of the respondent was found to be unacceptable were conveyed to the respondent and are, in my view, valid. The respondent who is not even a union representative or official has no right to be a representative. It is, after all, the employee who is charged with misconduct that can legitimately complain that he/she is denied representation by a representative of his/her choice. That the respondent was bent on acting against his employer is made clear by, inter alia, his evidence that his record against his employer was impeccable such that external attorneys had to be appointed by the municipality to match him. Instead of acknowledging the wrongfulness of his conduct, he is boastful about his "impeccable" record of winning cases against his employer and co-managers.'

The LAC then went on to consider the actual question before it, namely whether dismissal had been an appropriate sanction. It referred to the approach formulated in the *Sidumo* decision and, applying this approach, came to the conclusion that the Labour Court had erred in coming to the decision that dismissal was not an appropriate sanction. It did so in the following terms –

' 29. In my view, the arbitrator correctly applied his mind to all the material that was placed before him. He took into account the seriousness of the insubordination, the respondent's blatant well-publicised challenge to the authority of the Municipal Manager, that he showed no remorse when he appeared at the arbitration and found the dismissal to be an appropriate sanction. The fact that the arbitrator did not make specific reference to Schedule 8 of the LRA does not detract from the fact that factors relevant to sanction were in this matter taken into account. The arbitrator considered progressive discipline and found that given, inter alia, the seriousness of the transgression, lack of remorse and instead being defensive, the complete breakdown in the employment relationship between the respondent and the Municipal Manager, as well as the responsibility of

the municipality to deliver services, it would not be practicable to restore the employment relationship. I also find no merit in the submission made on behalf of the appellant that the respondent was three management levels below the Municipal Manager and, as such, contact between the two in the course of the daily operations of the municipality would be either non-existent or minimal. Contact between the two will not be avoidable because the respondent is part of the management team led by the Municipal Manager. Furthermore, since it is the respondent who published his gross insubordination and insolence to be known by all and sundry towards him, it would send a wrong message to the entire staff to hide the respondent from the Municipal Manager or create a no-go zone or an enclave for him in order to keep the respondent in employment.'

The award on sanction was not one that a reasonable commissioner could not reach and there was no basis on which to interfere with the award. The Labour Court's decision was set aside and Hoskins' application to review the award was dismissed.

P.A.K. le Roux

Employment contracts and medical examinations

When does a refusal to submit justify dismissal?

Although the decision in *EWN v Pharmaco Distribution (Pty) Ltd* (2016) 37 *ILJ* 449 (LC) also deals with the issue of insubordination it deals with it in the context of the provisions of the Employment Equity Act, 55 of 1998 (EEA). It therefore merits a separate discussion.

The employee in this matter, referred to as EWN in the decision, had been employed as a pharmaceutical sales representative. Her contract of employment contained an unusually lengthy clause dealing with 'Medical Examinations and Health'. It commenced by noting that the nature of the employee's job required good health and physical and mental fitness. It also recorded that the employee warranted that she was, at the time of signing the agreement, free from any disease or illness which was contagious or which could lead to her incapacity, disability or death. A misrepresentation in this respect would render the contract voidable. The clause also regulated in some detail what would occur if illness prevented her from working.

The most relevant sub-clause for the purposes of the decision was the one dealing with the right of the employer to require an employee to undergo a medical examination. It read as follows-

'17.3 The employee will, whenever the company deems necessary, undergo a specialist medical examination at the expense of the company, by a medical practitioner nominated and appointed by the company. The employee gives his/her irrevocable consent to any such medical practitioner making the results and record of any medical examination available to the company and to discuss same with such medical practitioner. The above

shall include and apply to psychological evaluations.'

During September and October 2009 EWN repeatedly queried the way in which the commission she earned had been calculated. On 20 and 23 August 2009 she visited the employer's head office to address this issue and, during the course of interactions with two employees on this matter, screamed and shouted at them. On 28 August 2009 she lodged a formal grievance concerning the failure to pay the commission she alleged was due to her. On 29 August 2009 she was given notice to attend a disciplinary enquiry at which she would have to answer to six charges She was found guilty of charges alleging: the use of abusive or insulting language towards fellow employees; visiting the head office without permission and damaging the employer's reputation by insisting that the employer had produced incorrect sales figures to deprive her of commission. The sanction of a final written warning was imposed. She lodged an appeal against this decision.

On 20 November 2009 the employer gave EWN a letter suspending her on full pay and instructing her to undergo a medical examination to be conducted by a psychiatrist. The purpose of the examination was to determine whether she was fit to deal with her tasks as employee. She sought advice from an attorney who addressed a letter to the employer in which the employer was requested to uplift the suspension and to withdraw the instruction to undergo a medical examination. This elicited a response from the employer rejecting the request and suggesting that the request was an attempt to divert attention from the issue at hand. The employer alleged that EWN had, for the first time, disclosed at the disciplinary enquiry that she suffered from bipolar disorder. It argued that this, together with the incidents that had led to the disciplinary enquiry, meant that it was in EWN's and the employer's interests that she agree to the examination.

When she refused to do so she was subjected to a further disciplinary enquiry. The essence of the charge against her was her refusal to submit to the medical examination. She was found guilty of this charge and dismissed. She referred an unfair dismissal dispute to the CCMA. After a commissioner had held that the CCMA did not have jurisdiction to arbitrate a dispute, she referred the dispute to the Labour Court. In her referral to the Court she made three allegations. The first was that the instruction to undergo a medical examination contravened section 7 of the Employment Equity Act, 55 of 1998 (EEA). The second was that her dismissal was in contravention of section 187(1)(f) of the Labour Relations Act, 66 of 1995 (LRA) and therefore automatically unfair. The third was that, if it were to be found that her dismissal was not automatically unfair, it was nevertheless still unfair.

In its judgment, the Court first dealt with the question whether the instruction to undergo a medical examination contravened section 7(1) of the EEA. This section reads -

*'**7. Medical testing***

(1) Medical testing of an employee is prohibited, unless —

(a) legislation permits or re quires the testing; or

(b) it is justifiable in the light of medical facts, employment con ditions, social policy, the fair dis

tribution of employee benefits or the inherent requirements of a job.'

The employer argued that the fact that EWN had consented to undergoing medical testing in her contract of employment, together with her conduct and the disclosure of her psychiatric condition justified its request that she undergo a medical examination. The Court rejected this argument. It pointed out that section 7(1) does not make provision for an employee giving consent to undergo medical testing as an exception to the general prohibition on such testing. It also found that EWN's employment conditions did not justify the psychiatric examination.

'[41] Insofar as the respondent might find support in the section that 'employment conditions' justified the psychiatric examination, the respondent made some attempt to try to suggest that the working environment of EWN was very pressurised and stressful. By implication, as I understood the argument, it could not risk employing someone in the position if there was a question mark about their ability to remain mentally stable to cope with the demands of the job. However the balance of evidence did not support the view that conditions of work in the job were inherently stressful, still less that any expressions of anger or frustration would render the person unable to perform their duties.'

It also found that it was not an inherent requirement of the job that a pharmaceutical sales representative be certified to be medically fit for work. In addition, the ostensible reason for the medical examination was not to determine if EWN was suffering from some unidentified ailment that was affecting her ability to work, but rather to assess whether her disclosed condition made her unfit to perform her duties. Yet it was common cause between the parties that there had been no complaint about her work performance.

The Court came to the conclusion that the instruction that EWN undergo a medical examination was prohibited by section 7(1) of the EEA and unlawful. It also found that the clause in her contract of employment in terms of which she consented to medical testing was null and void.

The Court then considered whether the dismissal was automatically unfair. EWN argued that the only reason why the instruction to undergo medical testing had been given was because of her bipolar condition; if that had not been the case she would not have been so instructed and she would not have been dismissed. It was her bipolar condition that led to her dismissal. This constituted unfair discrimination in terms of s 6 of the EEA and this also meant that the dismissal was in breach of section 187(1)(f) of the LRA.

This section provides that a dismissal will be automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against the employee on one of a list of 17 grounds, including any 'arbitrary ground'. These grounds include race, sex, gender, sexual orientation and disability. It expressed its conclusion in the following terms –

'[48] Agustoni admitted that he would not have required EWN to undergo testing on account of the conduct for which she was disciplined alone. The knowledge that she was bipolar was therefore decisive. It is

noteworthy also that EWN's performance had been rated as 'exceptional'; she had no history of absenteeism; the company had not considered it necessary to subject any employees to pre-employment medical or psychological examinations; when EWN had an outburst on 23 October 2009 over her commission dispute, none of the staff had felt threatened by her. Consequently, I agree with the applicant that there was no factual basis to doubt her ability to perform her work duties or discharge her functions. Accordingly, the ostensible rationale advanced for the examination, namely to determine if she was fit to do her work, is hard to believe. It seems more probable on the evidence that the predominant reason she was required to undergo the testing was because senior management became aware of her bipolar status. Had she not suffered from that condition she would consequently not have been placed in a situation where she faced dismissal for not acceding to an examination based solely on her condition.

[49] Consequently, I am satisfied that her dismissal in the circumstances was based on her refusal as a person with a bipolar condition to undergo a medical examination, which she would not have been required to undergo, but for her condition. The stigmatising effect of being singled out on the basis of an illness that she was managing, notwithstanding the absence of any objective basis for doubting her ability to perform, is obvious. The act of requiring her to submit to the examination in the circumstances was also an act of unfair discrimination in terms of s 6 of the Employment Equity Act.'(Footnote omitted)

The Court ordered the payment of R15, 000.00 as general damages on the basis that the instruction given to EWN to submit to a medical test constituted unfair discrimination. It also ordered the payment of R222 000.00 (ie an amount equal to 12 months remuneration) as compensation for an automatically unfair dismissal.

Comment

This decision constitutes a timely warning that employers cannot rely on clauses in contracts of employment in terms of which employees consent to being medically tested. Testing is only permitted if this falls within the scope of section 7 of the EEA.

One criticism that can be levelled against the decision is that it does not indicate on what ground the discrimination was found to have occurred. The most obvious answer would be on the grounds of disability. The problem with this is that it was common cause that the employee was capable of doing her job, despite her condition. The Court's argument does not seem to fit into one of the other listed grounds of discrimination, whether in terms of section 6 of the EEA or in terms of section 187(1)(f) of the LRA.

The only possibility is that there was discrimination on an arbitrary ground. If so, given the debate in this regard, some discussion on the test for what constitutes an arbitrary ground would have been useful. The issue of the onus of proof as regulated in section 11 of the EEA should also have been considered.

P A K le Roux

Failure to disclose prior criminal offences to employer

When prolonged concealment does not help mitigate

The decision in *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero N.O. & others* (CA 2/2015 25/11/ 2016) deals with the question of what disciplinary sanction is appropriate when an employee is found guilty of failing to disclose a criminal record when he applies for employment.

The employee in this matter applied for employment with the employer as a security guard in 1996. The form that he had to complete contained the question whether he had ever been convicted of a criminal offence. He answered the question in the negative. He was taken into employment. Fourteen years later he applied for a promotion within the employer's structures. A criminal record check was undertaken and it came to light that he had, prior to his employment, been convicted of two criminal offences. One was for a rape committed in 1982 when he had been 17 years old. For this, the court had imposed a sentence of 6 lashes. The other was for an assault committed in 1991 for which a fine of R200 had been imposed.

He was then charged with the disciplinary offence described as –

> *'misrepresentation and/or dishonesty concerning an application for employment and/or breach of PRISA Regulations'*

The employer's disciplinary code contained the disciplinary offence of 'dishonesty concerning an application for employment'.

The reference to 'Prisa Regulations' was a reference to section 23(1)(d of the Private Security Industry Regulation Act, 56 of 2001 (PRISA). This provides that a person may be registered as a security service provider provided that he or she has not been found guilty of an offence specified in a schedule to this Act within a period of 10 years immediately prior to the submission of an application for registration.

At the disciplinary hearing the employee raised defences which, in essence, amounted to him arguing that he had not been guilty of the criminal charges brought against him. He was nevertheless found guilty and dismissed.

The employee challenged his dismissal in the CCMA. At the arbitration the employee stated that he was not aware that he had a criminal record because he had been under the impression that all criminal records had been expunged in 1994. He also argued that section 23(1)(d) of PRISA did not apply as his criminal convictions fell outside the 10 year period.

The commissioner held that the dismissal was unfair. He 'was not convinced' that the employee had contravened a rule or that he had made a misrepresentation when he completed the application form; this on the basis of a finding that the employee was unaware that he still had a criminal record. He also found that section 23(1)(d) did not apply because the convictions fell outside the 10 year period. According to the commissioner it would have been more helpful for the employer to have assisted the employee in having his criminal record expunged. The employee was reinstated.

On review the Labour Court found that there had been no contravention of section 23(1)(d) of PRISA. However, it also found that the em-

ployee was aware of his criminal conviction and had committed misconduct in failing to disclose this to the employer, but that dismissal was not an appropriate sanction to impose in this case. The employee had long service and a clean disciplinary record and there were no 'trust issues' involved. The Court stated that, if the employer had led evidence to the effect that the employer could not trust the employee as a result of the misrepresentation, a different conclusion might have been warranted.

The employer then appealed to the Labour Appeal Court (LAC). The LAC agreed with the Labour Court's finding that the employee had been guilty of a disciplinary offence but disagreed with the finding that dismissal was not an appropriate sanction. In its decision it emphasised the fact that the employment relationship imposes an obligation on an employee to act honestly, in good faith, and to protect the interests of the employer. The high premium placed on honesty in the workplace has led our courts to repeatedly find that the presence of dishonesty makes the restoration of trust, which is at the core of the employment relationship, unlikely. A conviction for rape and assault is antithetical to employment in the position of a security guard. The fact that PRISA prevents the employment of a person in the security industry for a period of 10 years after certain criminal convictions illustrates the seriousness with which criminal infractions are viewed in the security industry. An employer is entitled to the full disclosure of all relevant information when considering the appointment of a person as a security guard, given the 'trust involved in the nature of that position'. If an express question is asked of an employee the employer is entitled to expect an honest answer. The Court came to the following conclusion -

> *'[30] Having regard to all of these relevant factors, and in spite of the absence of direct evidence showing the breakdown in the trust relationship and the appellant's misplaced reliance on the provisions of PRISA, I am satisfied that the sanction of dismissal imposed by the appellant on the third respondent was fair. The false misrepresentation made by the third respondent was blatantly dishonest in circumstances in which the appellant is entitled as an operational imperative to rely on honesty and full disclosure by its potential employees. It induced employment and when discovered was met with an absence of remorse on the part of the third respondent. The fact that a lengthy period had elapsed since the misrepresentation, during which time the third respondent had rendered long service without disciplinary infraction, while a relevant consideration, does not compel a different result. This is so in that the fact that dishonesty has been concealed for an extended period does not in itself negate the seriousness of the misconduct or justify its different treatment. To find differently would send the wrong message.*
>
> *[31] In spite of the LRA's emphasis on progressive discipline, given the nature of the misconduct committed and the absence of any remorse shown and having regard to considerations of fairness, the appellant was entitled to cancel the employment contract and dismiss the third respondent.'* ■

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