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EMPLOYMENT

# Can you dismiss an employee for making racist comments in the workplace, which the employee believes to be friendly and inoffensive according to the employee's culture?

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## ISSUE

Is the dismissal of an employee, who compares a fellow employee to a monkey, fair, if the employee doing so alleges the statement was made in a friendly and inoffensive manner, according to the employee's culture?

## SUMMARY

Despite the subjective belief of an employee that her comparison was not racist, the test for determining whether her statement is racist is an objective assessment. If the statement or comparison is found to be objectively racist, the dismissal of the employee will be substantively fair.

## COURT'S DECISION

In the case of *Ward v South African Revenue Services* (2018) 27 CCMA 8.37.14, the Commission for Conciliation, Mediation and Arbitration ("CCMA") was tasked with assessing the fairness of Sumaya Ward's dismissal. She was employed as a team member in debt management by the South African Revenue Services ("SARS"). On 2 March 2017, Ward compared the actions of her fellow employee to that of a monkey, due to her fellow employee's lateness. Ward refused to apologise, stating that she was not a racist and that an apology would be an admission that she was a racist. Following a disciplinary enquiry, Ward was dismissed on 28 July 2017, and referred an unfair dismissal dispute to the CCMA for conciliation. The matter remained unresolved, and was referred for arbitration.

At the arbitration, the assessment of the substantive fairness of Ward's dismissal was the only issue to be considered. SARS called three witnesses to testify. The first and second witness for SARS confirmed the incident. The third witness for SARS submitted that the incident caused animosity between the employees in the department. Ward then testified, submitting that in her culture, people were often compared to animals in a friendly, inoffensive manner. An additional witness, Fayroes Abdulla, testified that in her culture, like that of Ward's, giving people nicknames relating to animals was common and not offensive. The Commissioner noted that Ward's defence amounted to her not knowing that calling a black person a monkey or comparing a black person with a monkey was racist. Further, the Commissioner acknowledged that SARS did not dismiss an employee who wrote an e-mail using words relating to the following example, of "monkey see, monkey do".

The Commissioner went on to assess whether Ward's comment was racist, giving effect to the test that whether words uttered or comparisons made amount to racism is an objective test. The Commissioner held that Ward's defence that she did not know that the comparison was racist was highly improbable, as it was common knowledge through the press that comparing black people with monkeys is racist, as confirmed by the Penny Sparrow incident. The Commissioner held further that objectively seen, and as testified on behalf of SARS,

everybody at SARS with knowledge of the incident was shocked, thus confirming that Ward's comparison was objectively racist. The Commissioner concluded that Ward's dismissal was fair.

## IMPORTANCE OF THIS CASE

An employee's lack of intent or knowledge that comments he or she made are racist is not a defence against a charge of racism. The test for whether comments are racist is objective.

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