

Insolence and insubordination – what is the difference?

The workplace is not a democracy. One of the implied terms of the contract of employment is that of subordination – the employee has to submit to the authority of the employer provided this is exercised lawfully and reasonably.

A refusal to carry out a lawful and reasonable instruction of the employer amounts to insubordination. The employer is entitled to dismiss the employee if such refusal is of a deliberate and serious nature ('gross insubordination'). In terms of the common law the duty of subordination also entails that the employee has to behave in a respectful manner towards the employer and superiors. So, does disrespectful behaviour amount to insubordination? The general view adopted by the CCMA and Labour Court thus far has been that insubordination only encapsulates a refusal to carry out the employer's instructions and that disrespectful behaviour should be separately categorised as insolence; generally a less serious transgression.

Unfortunately the concept of insolence is a slippery one – it can become befuddled with conduct that is offensive, disrespectful, impudent, cheeky, rude, insulting, contemptuous, etc. No wonder employers battle to categorise this type of conduct in disciplinary charges, often getting it wrong in the eyes of presiding officers in the CCMA and Labour Court. Fortunately the Labour Appeal Court has taken a step towards bringing about more clarity.

In the case of *Palluci Home Depot (Pty) Ltd vs Herskowitz* the Labour Appeal Court (LAC) found that the perception that insubordination is limited to the refusal to adhere to instructions is incorrect. The LAC stated that insubordination may also be found to be present where disrespectful conduct poses a deliberate (wilful) and serious challenge to, or defiance of the employer's authority, even where there is no indication of the giving of an instruction or defiance of an instruction. It is, therefore, not essential for an instruction to be given or disobeyed to found a challenge to the employer's authority.

What the LAC also stated, though, was that dismissal would only be justified in cases of serious and deliberate acts, irrespective of whether they are categorised as acts of insolence or subordination. According to the court there is a fine line between insubordination and insolence, and insolence may very well become insubordination where there is an outright challenge to the employer's authority. However, an act of insubordination does not justify dismissal unless it is serious and wilful. Likewise, insolent or disrespectful conduct towards an employer will only justify dismissal if it is wilful and serious. Thus, unless the insolence or insubordination is of a particularly gross nature, an employer must issue a prior warning before having recourse to the final act of dismissal.

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In the *Pallucci Home Depot* case the LAC concluded that, while the employee's behaviour had been manifestly insolent, it did not constitute a serious, persistent and deliberate challenge to the employer's authority. What played an important role in the outcome, though, was that the employer had made an illegal deduction from the employee's salary and had acted in a provocative manner when the employee wanted to address the matter. This illustrates the importance of taking into account the particular circumstances of each case.

In summary:

- Insolence and insubordination are different concepts.
- Generally, insolence is regarded as less serious than insubordination.
- A challenge to the employer's authority, such as a refusal to adhere to a lawful and reasonable instruction, amounts to insubordination.
- Insolence may also be regarded as insubordination where it amounts to an outright challenge to the employer's authority.
- Whether an employee has been insolent or insubordinate, dismissal must be reserved for situations where the conduct is both wilful and serious. This will depend on the facts of each case.

In conclusion, while the *Palucci Home Depot* case has provided some clarity on the relationship between insubordination and insolence, the appropriate disciplinary action to take ultimately depends on how wilful and serious the employee's misconduct has been, irrespective of how it is classified.

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