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1. From the General Secretary's Desk

The ELRC is pleased to provide stakeholders with its June 2016 issue of the *Labour Bulletin*. The *Bulletin* contains articles that are relevant to the education sector.

We hope to both inform and stimulate readers. Some of the issues covered are contentious. It goes without saying that the views are those of the authors alone.

We would encourage an exchange of views on the jurisprudence generated by the courts and by the ELRC because these rulings shape the way the sector operates.

We trust you will find value in these pages.

Ms NO Foca
ELRC, General Secretary

2. Assessing fairness in promotion disputes

1. Introduction

It is noted that many disputes referred to the Education Labour Relations Council relates to section 186 (2) (a) of the Labour Relations Act and in particular "promotion". Ordinarily, employees would like to be promoted by their employers and if that is not happening a lot of grievances are lodged and often such grievances escalate into disputes. It is therefore of vital importance that this issue is dealt with so that educators, employers and the public at large can have access to relevant information which can assist them when dealing with issues of promotion in the education sector or in any sector for that matter. In any unfair labour practice disputes, the burden of proof is on the employer to demonstrate that the information obtained during the selection process was in accordance with prescribed norms and ethical practices and that such information is not prohibited by law. Section 23(1) of the Constitution states that 'everyone has the right to fair labour practices'.

The concept of fairness, whether substantive or procedural, is most of the time if not all the time, a bone of contention in most promotion disputes. It is therefore the intention of this excerpt to deal with or consider the concept of fairness in promotion disputes.

In *NETU v Hulett Aluminium (Pty) Ltd*,¹ it was emphasised that unfairness may either be procedural or substantive. It was further held in *SAMWU obo Damon v Cape Metropolitan Council*,² that a mere unhappiness or a perception of unfairness by the applicant does not in itself establish unfair conduct. It is normal for the process of selection to result in the appointment of a candidate and the unsuccessful candidate(s) being disappointed. This will therefore not be regarded as unfair.

2. Substantive fairness in promotion disputes

2.1. Polygraph tests and promotion. Does it apply?

This question whether polygraph tests can be used in promotion disputes was dealt with in *Sedibeng District Municipality v SALGBC*³. The Labour Court held that failing a polygraph test in itself is not a fair reason for refusal to promote an employee. The facts of the case are that the Municipality had failed to promote two candidates by relying on the outcome of polygraph tests in the promotion process. The court found that for the same reason that polygraph tests were rejected when used alone in disciplinary hearing dismissals, they cannot be relied on where there is no other information impugning the employee's integrity. Relying on polygraph tests alone or exclusively to eliminate employees for appointment, was held to be unfair.

2.2. Adherence to Personnel Administration Measures in the education sector

The Labour Relations Act does not define promotion. In clarifying the concept, *Mokabane, Odeku and Nevondwe* define promotion as "an act of raise in rank or position, while demotion means an act of lowering in rank or position".⁴ Despite the fact that promotion is governed by a number of principles, the bottom line allows for deviation from the ideal. An ideal procedure, according to *Department of Justice v CCMA*⁵ is described as the one in which, when a vacancy arises, there is a call for applications, followed by the screening of those applications, the

compilation of the short list, the invitation to the interview of the short-listed candidates, the conduct of the interview and the ultimate selection.⁶ Possibilities for the employers not to adhere to the strict, fast and hard rules due to time-constraints and time-consuming procedures exists. The most basic rule, which is important to consider when dealing with all the applications, is fairness. The employer must be able to afford the applicants who meet the minimum requirements and criteria an opportunity to promote their candidature.⁷

In the education sector, Personnel Administration Measures (PAM) sets out the procedures to be followed when selecting suitable candidates for teaching posts in public schools. However, it was held in *Observatory Girls Primary School v Head of Department of Education, Gauteng Province*⁸ that strict compliance with PAM is not necessary, that form must not be elevated above substance and that "one does not go digging to find points to stymie the process of appointing candidates to teaching positions".

In situations where there is no substantive unfairness, the courts warn commissioners to not readily find against employers for not having complied with PAM to the letter. Educators can therefore not rely on technical procedural irregularities during a promotion process and think that the decision of the HoD can be set aside, thereby inconveniencing the SGB, provincial education department, school, learners at the school as well as the candidate who had been nominated for appointment or promotion. Otherwise any other dissatisfied educator who is unsuccessful in any vacancy related to promotion would lodge a dispute and derail the whole process by applying for an order that the process must be repeated. These may be done even if that particular educator did not possess any relevant and necessary qualifications and experience to that of the incumbent. This would therefore be regarded as pure absurdity and must be avoided at all costs.

An employee who therefore would like to persuade a court or employment tribunal such as the CCMA or the bargaining council, that there was unfair conduct relating to promotion and that the employer's decision should be interfered with has an onerous task. It has been held in a number of decisions including that of

¹ [1999] 7 BALR 796 (CCMA).

² [1993] 3 BALR 255 (CCMA) par 263.

³ [2012] 9 BLLR 923 (LC) par 34-41.

⁴ Mokabane; Odeku & Nevondwe "Employer's failure to adhere to its promotional policy and procedure: Implications for fair labour practice" 2012 6(46) *African Journal of Business Management* 11437.

⁵ (2004) 4 BLLR 297 (LAC).

⁶ *Department of Justice v CCMA* par 240.

⁷ *Ibid.*

⁸ 2003 (4) SA 246 (W) At H 255B - C and D - D/E.).

*Westrand v SA Police Service*⁹ that an employee has no right to promotion but only to be fairly considered for promotion.

It was stressed, in *National Union of Metal Workers of SA v Vetsak Co-operative Limited*,¹⁰ that the underlying concept of the definition of an unfair labour practice is fairness and that the fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee. Fairness to both means the absence of bias in favour of either.¹¹ An employer has the right to appoint or promote employees whom it considers to be the best or most suitable.¹² Arbitrators are therefore reluctant to interfere readily with the employer's choice in the absence of unfairness. Furthermore, in *Woolworths (Pty) Ltd v Whitehead*¹³ the LAC held that fairness requires an evaluation that is multidimensional. One must look at it not only from the perspective of the employee but also employers and the interests of society as a whole. Policy considerations play a vital role in this regard¹⁴

A number of allegations and claims, which arbitrators deal with daily in arbitrations proceedings, include failure to be short-listed and/or interviewed by the employer, allegations by the applicant that s/he was the best candidate for the post, allegations of bad faith practices or irregularities by the employer or its delegated authority, failure by the employer to follow its own employment policies, procedures, criteria or regulations, failure by the employer to appoint the highest scoring candidate, unfair discrimination and acting in the higher post which is a subject matter of the dispute.

The questions which therefore arise are, whose prerogative is it to appoint or promote an employee? The obvious answer to this question is that the employer is the one who makes the decision to appoint the employee. A further question which is asked, is can the arbitrator therefore interfere with such a managerial prerogative? The answer to the question is not a straight forward one, however, where the conduct of the employer in taking the decision to appoint has been found to be unfair, the arbitrators can interfere with such a decision.

Where such decisions are contrary to fairness principles, arbitrary and capricious, the forum with jurisdiction will be able to find against the employer and order an appropriate relief.

2.3. Do employees have a general right to promotion?

According to *Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp* employees have no implicit right to promotion.¹⁵ The Labour Court held in *SAPS v SSSBC*¹⁶ that it lies within the discretion of the employer to decide who she or he wants to promote. The only thing that the employer must do is to give the employee or applicant who qualifies and meets minimum requirements an opportunity to be heard when a vacancy arises. The principles which the court stated are that there is no right to promotion in the ordinary course, but only a right to be given a fair opportunity to compete for a post. The exceptions are when there is a contractual or statutory right to promotion.

Unlike the arbitration of dismissal disputes where both the substantive and procedural fairness is challenged, in which the whole proceedings are started afresh, the arbitration of a promotion dispute does not entail a hearing *de novo*, but a review of the employer's decision. In the case of *Minister of Home Affairs v GPSSBC*,¹⁷ the Labour Court applied the *Sidumo*¹⁸ test to promotion disputes and held that the arbitrator is not given the power to consider afresh what he would have done, but rather decide whether or not the decision of the employer was fair. In *Sidumo*, the court used a reasonableness test to determine the fairness of dismissal as a sanction. The test was whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach? The test further allows the commissioners to scrutinise the reasons behind the employer's decisions to ensure that there is logical connection between the decision and the real reasons for the decision.¹⁹

4. The law on substantive unfairness

In situations where employees lodge disputes and complain about the fact that another employee was promoted, the Labour Court held

⁹ (2003) 24 ILJ 1197 (BCA).

¹⁰ [1996] 6 BLLR 697 (AD).

¹¹ [1996] 6 BLLR 697 (AD) 8-9.

¹² *NEHAWU obo Thomas v Department of Justice* (2001) 22 ILJ 306 (BCA).

¹³ (2000) 21 ILJ 571 (LAC).

¹⁴ *Woolworths (Pty) Ltd v Whitehead* par 127.

¹⁵ Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp *Labour Relations Law* (2014) 548.

¹⁶ [2010] 8 BLLR 892.

¹⁷ [2008] ZALC35 par 14.

¹⁸ *Sidumo v Rustenburg Platinum Mines* (2007) 28 ILJ 2405 (CC).

¹⁹ Du Toit *et al Labour Relations Law* 549.

that the complainant must show that he or she has the necessary skills and that the person who was promoted does not possess the same or same level of skills. It was further held that the mere fact that the candidate who was eventually promoted did not score the highest marks or is not better qualified does not necessarily justify a conclusion that the decision not to promote him was unfair.²⁰

When a vacancy arises, often employers appoint employees to act in that position before a permanent appointment is made. The person who is appointed to act in the higher position expects the employer to consider him/her when the selection is done. However, it must be noted that the mere fact that an employee has acted in a post, does not give him or her an automatic right to a promotion, even if such a position becomes available. The only reasonable thing for the employer to do when it decides to finally appoint, is to afford the acting employee the right to be heard.

In *Ndlovu v CCMA*²¹ the court held that it is not easy for an employee to prove substantive unfairness in a promotions dispute. In this case the LC identified four hurdles that an employee must cross in order to show substantive unfairness in a promotion dispute, namely: compliance with the minimum requirements, sound reasons to interfere with managerial prerogative, the reasonableness of the employer's decision and the causal connection is required. The requirements are dealt with below:

(i) Compliance with the minimum requirements

An applicant who does not comply with the minimum requirements for a job, cannot complain of any unfair conduct relating to promotion because he/she should not have, in the first instance been shortlisted, let alone been appointed. However, while an applicant in a promotion dispute needs to prove that he/she complied with the minimum criteria for the post, it is never sufficient to prove that he/she is qualified by experience, ability and technical qualifications, such as university degrees and the like, for the post. This is merely the first hurdle that needs to be crossed.

(ii) Sound reasons to interfere with the managerial prerogative

In *PAWC (Department of Health & Social Services) v Bikwani*, the Labour Court held that it is a well-established principle that courts and arbitrators should be reluctant, in the absence of good cause clearly shown, to interfere with the managerial prerogative of employers in the employment selection and appointment process.²² It was further held in *George v Liberty Life Association of Africa Ltd*²³ that an employer has a prerogative or wide discretion as to whom he/she will promote. Courts and arbitrators should be careful not to intervene too readily in disputes regarding promotion and should regard this as an area where managerial prerogative should be respected unless, bad faith or improper motive such as discrimination are present.

Furthermore, in *Goliath v Medscheme (Pty) Ltd*²⁴ the Industrial Court highlighted with approval that when evaluating various potential candidates for a certain position, the management of an organisation must exercise discretion and form an impression of those candidates. The court further held that this process is not a mechanical or a mathematical one where a given result automatically and objectively flows from the available pieces of information. It is quite possible that the assessment made of the candidates and the resultant appointment will not always be the correct one. However, in the absence of gross unreasonableness which leads the court to draw an inference of *mala fides*, this court should be hesitant to interfere with the exercise of management's discretion.

In *PAWC (Department of Health & Social Services) v Bikwan*²⁵ the Labour Court indicated that, in deciding whether conduct relating to a promotion was unfair, a court or tribunal has a very limited function and is in a similar position to that of an adjudicator called upon to review a decision made by a functionary or a body vested with a wide statutory discretion.

(iii) The reasonableness of the employer's decision

In deciding on fairness, the emphasis is not on the correctness of the employer's decision, but on the reasonableness of the decision. In

²⁰ *SAPS v SSSBC* [2010] 8 BLLR 892 (LC) par 15.

²¹ (2000) 21 ILJ 1653 (LC).

²² (2002) 23 ILJ 761 (LC) 771.

²³ (1996) 17 ILJ 571 (IC).

²⁴ (1996) 17 ILJ 760 (IC) 768.

²⁵ (2002) 23 ILJ 761 (LC) 771.

*Ndlovu v CCMA*²⁶ the court held where the employer's decision is rational in appointing another candidate, no question of unfairness can arise.²⁷ The court further held that in order to show unfairness relating to promotion, an employee needs to prove that the employer acted in a manner which would ordinarily allow a court of law to interfere with its decision. Some actions by the employer may include acting irrationally, capriciously or arbitrarily, bias, malice or fraud, failure to apply its mind or discrimination.

In *PSA v Badenhorst v Department of Justice*²⁸ the arbitrator accepted the fact that there may be reasons for preferring one employee to another apart from formal qualifications and experience. Furthermore in *Rafferty v Department of Premier*²⁹ the arbitrator found that it is within the prerogative of the employer to attach more weight to one reason than another, and this may take into account subjective considerations such as performance at an interview as in *PSA obo Dalton v Department of Public Works*³⁰ and life skills as in *Badenhorst* case above.

(iv) Causal connection required

According to *Van Tonder*³¹ the mistake encountered most frequently during quality control and assurance of arbitration awards in the ELRC in promotion disputes, is that some arbitrators fail to understand that a causal connection is required in a promotion dispute before any finding of substantive unfairness can be made and before any form of substantive relief can be granted. Even if there was unfair conduct by an employer during a promotion process, this does not mean that substantive unfairness was proved.

As a legal concept substantive unfairness cannot exist in abstraction. In *National Commissioner of the SA Police Service v Safety & Security Sectoral Bargaining Council*³² it was held that in order to prove substantive unfairness that would entitle the applicant to substantive relief, such as the appointment to the post in question, an applicant in a promotion dispute also needs to establish a causal connection between the irregularity or

unfairness and the failure to promote.³³ To do that she needs to show that, but for the irregularity or unfairness, she would have been appointed to the post. This necessarily means that she must show that not only was she better qualified and suited for the post than the successful candidate who was appointed, but also that she was the best of all the candidates who applied for the position.

5. Candidates who obtained higher scores in interviews

During the interviews, candidates are scored. Some receive higher scores while others receive lower scores. Candidates are then ranked according to these scores. The question which arises is whether or not deviating from the hierarchy of marks achieved by candidates in the interview is unfair. Often it is found that the aggrieved employees received higher marks at the interview than other candidates who were ultimately preferred. This defect has been found not to be fatal as long as the employer is able to provide good reasons for doing so. This approach can only be fatal in instances where the employer is bound, in terms of its policy to the ratings achieved at the interview. In *Mbatha and Durban Institute of Technology*³⁴ the commissioner held that the mere fact that an unsuccessful applicant for promotion received a higher rating from a selection committee than the successful applicant does not necessarily render the failure to appoint the former unfair. The employer should be able to clearly prove what those criteria are, and that they are reasonably related to the inherent requirements of the post *in casu*.³⁵

In the education sector, educators must realise that the HoD of education and not the governing body has the final say in appointing suitably qualified educators to teaching posts.³⁶ The HoD has been given powers by legislature to deviate and appoint the second or third nominee instead of the first nominee. When deciding on nominating the second or third nominees the HoD must of course provide compelling, rational and fair reasons. The HoD must not appoint an incompetent person or a person who is significantly weaker than the best candidate.

²⁶ [2000] 12 BLLR 1462 (LC).

²⁷ [2000] 12 BLLR 1462 (LC) 1464.

²⁸ [1998] 10 BALR 1293 (CCMA).

²⁹ [1998] 8 BALR 107 (CCMA).

³⁰ [1998] 9 BALR 1177 (CCMA).

³¹ *Manual for ELRC Arbitrators* 66.

³² (2005) 26 ILJ 903 (LC).

³³ *National Commissioner of the SA Police Service v Safety & Security Sectoral Bargaining Council* par 7.

³⁴ (2005) 26 ILJ 2054 (CCMA).

³⁵ (2005) 26 ILJ 2054 (CCMA) referred to in Grogan Jordaan Maserumula and Stezner *Juta's Annual Labour Law Update* 2006 34.

³⁶ S 6 and 7 of the Employment of Educators Act.

The fact that the candidate was nominated by the SGB as its first choice, can therefore not give that candidate any reasonable expectation that she will necessarily be appointed.

6.1. Promoting a candidate who had not met minimum requirements

The Labour Court in *Manana v Department of Labour*³⁷ reviewed and set aside an arbitration award in which the commissioner did not find the employer to have committed an unfair labour practice, despite promoting a candidate who did not meet the minimum requirements. The facts of the case can be summarised as follows:

Two internal candidates applied for a promotional post of Manager: Bank Reconciliations. The minimum requirements for the post as advertised was “relevant degree or national diploma with no less than 3 years’ experience or matric with no less than 5 years relevant experience at managerial level. Both candidates were shortlisted and interviewed. The distinguishing qualifications between the two candidates was that one candidate had a national diploma with managerial experience while the other candidate had matric and no managerial experience. Despite this distinction the panel was pleased with the candidate with matric qualification and recommended her for the appointment. Indeed the employer promoted the recommended candidate.

The candidate who was not promoted was aggrieved by the decision not to promote her and lodged a grievance which remained unresolved. She subsequently referred a dispute to the bargaining council with jurisdiction and the commissioner who dealt with the matter found that the employer did not commit any act of unfair labour practice relating to promotion. On review, the Labour Court held that the commissioner had committed gross irregularity by failing to apply his mind to the evidence and other material facts before him. The court further held that had the commissioner applied his mind properly he would have found that the employer had breached its own recruitment and selection policy in that it appointed the person who did not meet the minimum requirement of the advertised post. The appointment was found to have been done at the expense of the person who met all the minimum requirements for the advertised post. In this circumstance, the award was reviewed and set aside with costs.

³⁷ [2010] 6 BLLR 664 (LC).

6.2. Promoting candidate based on flawed scores

The Labour Court in *Minister of Safety and Security and Another v Hattingh*³⁸ reviewed and set aside an arbitration award because the commissioner has ordered the department to promote an employee while he had found that the interview panel was improperly constituted. The commissioner proceeded to find that in view of the defect in the composition of the selection committee, the assessment made by the committee was vitiated. The court indicated that instead of the commissioner setting aside the assessment made by the panel, she proceeded to use the same scores of the improperly constituted panel to promote Mr Hattingh. In the circumstances, the reasoning of the commissioner was found to be flawed and illogical. The commissioner was found to have committed gross irregularity which was discernible from the reasoning leading to the conclusion she had reached in this particular matter.³⁹

In conclusion, there is enough case law dealing with promotion as unfair labour practice and the private sector and public sector alike can use the law to craft their recruitment and selection policies so that few disputes can be referred to the CCMA and bargaining councils.

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3. The application of the deeming provision in terms of section 14 of the EEA No. 76 of 1998

Introduction

An educator who is deemed to be dismissed in terms of section 14(1) of the Employment of Educators Act, 76 of 1998, is entitled to apply for reinstatement in terms of section 14 (2) of the same Act. Should the employer fail or refuse to favourably consider this application, the

³⁸(JR 244/07) [2009] ZALC.

³⁹ *Minister of Safety and Security and Another v Hattingh* par 26-27.

aggrieved educator cannot lodge an unfair dismissal dispute at the Education Labour Relations Council ('ELRC'), despite there being a factual dispute between the parties which bears the trademark of a 'classical' dismissal dispute. The courts have held that the deeming provision is triggered automatically by the operation of law and that the employer cannot be held responsible for dismissing the affected educator. The discharged educator is consequentially deprived of access to a speedy, cost free dispute resolution service offered by the ELRC and forced to seek reinstatement through the costly process of litigation at a time when he/she is unemployed.

This article probes whether the courts have given the deeming provision in the EEA⁴⁰ a purposive interpretation in line with the 1996 Constitution, with specific focus on disputes arising from an application for reinstatement /re-employment in terms of section 14(2) of the EEA,⁴¹ and, if not, what are the possible options to ensure that deemed dismissal disputes are dealt with in line with the spirit, purport and objectives of the Constitution?⁴²

The new Dispute Resolution System after the advent of the 1996 Constitution

Post 1994, new labour laws have been promulgated to provide for an expeditious and cost effective labour dispute resolution service and it is in this context which the law on deemed dismissal ought to be assessed. The main pieces of legislation which usher in labour law reform are the 1996 Constitution which is supreme law and the LRA.⁴³ Section 23 of the Bill of Rights⁴⁴ provides the framework for the new industrial relations system, and states that "everyone has a right to fair labour practice", which must be interpreted to provide for a speedy and cost effective labour dispute resolution service.

The LRA⁴⁵ was designed to ensure that the ideals of the Constitution find expression in employment law, one of which is the speedy and effective resolution of disputes. The LRA⁴⁶ provides for *quasi-judicial*⁴⁷ forums in the

CCMA and the Bargaining Councils to expeditiously deal with cases involving unfair labour practice and unfair dismissals using a two-tier dispute resolution process of conciliation / arbitration. These processes are offered free of charge.

After 1994, Education laws too, had undergone significant changes. Whilst the EEA⁴⁸ regulates salient aspects of the employment relationship in the education sector, educators are first and foremost considered as employees defined in terms of the LRA⁴⁹ and are entitled to all its benefits and protection, including the right to access a speedy and cost effective dispute resolution service.

Some important earlier judgments which dealt with deemed dismissal

Minister van Onderwys en Kultuur v Louw en andere 1995 (4) SA 383 (A)

This was the earliest reported judgment on deemed dismissal. The court had to interpret the provisions of a discharge clause in s72 (1) of the repealed Education Affairs Act⁵⁰ in a dispute in which the employer claimed that the educator had been discharged. The wording of this clause was similar to the discharge clauses provided for in sections 14 of the EEA⁵¹ and 17(5) of the PSA⁵². Section 72(1) of the Act stated that a person: "*employed in a permanent capacity at a departmental institution and who – (a) is absent from his service for a period of more than 30 consecutive days without the consent of the Head of Education . . . shall, unless the Minister directs otherwise, be deemed to have been discharged on account of misconduct . . .*".⁵³ The Appellate Division found that the employer had merely given effect to section 72(1) which was an operation of the law. The court found that "*the deeming provision [of s 72(1)] comes into operation if a person in the position of the respondent (i) was absent without the consent of the "Head of Education" Louw had merely been informed of a result which had come about by operation of law. There was in short, nothing to review.*"⁵⁴

⁴⁰ Act 76 of 1998

⁴¹ *ibid*

⁴² 1996 Constitution – Chapter 2 – Bill of Rights, Section 23: Labour Relations

⁴³ Act 66 of 1995.

⁴⁴ *ibid*

⁴⁵ Act 66 of 1995

⁴⁶ *ibid*

⁴⁷ These forums are designed to deal and dispense with labour disputes in a speedy, cost effective and

expeditious manner, using the minimum of the legal formalities which are normally associated with litigation in a court of law.

⁴⁸ Act 76 of 1998

⁴⁹ Act 66 of 1995

⁵⁰ Act 70 of 1988 -

⁵¹ Act 76 of 1988

⁵² Act 103 of 1994, as amended

⁵³ 1995 (4) SA 383 (A)

⁵⁴ *ibid*

The Public Servants Association of South Africa and another v The Premier of Gauteng and others (1999) 20 ILJ 2106 (LC) - ('PSA case')

The affected employee was discharged after applying for medical boarding and having taken sick leave whilst awaiting the decision of the employer. The Employer denied receiving a doctor's certificate for two weeks of her leave and discharged her despite knowing of her whereabouts and having kept in communication with her.⁵⁵ The Applicant instituted review proceedings in the Labour Court. Unfortunately, she challenged the right of the employer to invoke the deeming provision.⁵⁶ The court found that section 17(5) of the PSA⁵⁷ brought about the employee's discharge and therefore, no decision had been taken by the employer and that she could not be granted any relief, either, in terms of section 158(1) (h) of the LRA,⁵⁸ or even section 6 of the PAJA⁵⁹ (both sections provide for administrative review).

Had she applied for reinstatement and the employer refused to consider same, it is more than likely that the court would have directed her to seek relief through the CCMA. This contention is supported by the interesting *obiter* remark by Revelas J that, "*I have raised with the parties the question of conciliation and arbitration of this dispute. In my view, it is still open to the second applicant to attempt to... If she is unsuccessful, she may refer her dispute about her dismissal, to have the matter conciliated and arbitrated by the CCMA.*"⁶⁰ The learned judge's comment was one of the earliest indication that a factual dispute arising from the **refusal** of an employer to reinstate a discharged employee, could be classified as an unfair dismissal which ought to be referred to conciliation/arbitration.

In **Nkopo v Public Health and Welfare Bargaining Council and others (2002) 23 ILJ (LC)** the matter had erroneously been dealt with

⁵⁵ It is a widely accepted view that the deeming provision provides for cases of desertion. In order for the employer to prove desertion, intention is an important element. And the employer must be able to prove the employee intended never to return to work and that they had not known of the employees whereabouts.

⁵⁶ By this time, the court had established that the deeming provision itself is triggered by the operation of law and not by the employer. See Louw case supra

⁵⁷ Act 103 of 1994

⁵⁸ Act 66 of 1995

⁵⁹ Act 3 of 2000

⁶⁰ (1999) 20 ILJ 2106 (LC), Par 31

at arbitration and subsequently taken on review. The court set aside the award and found that, "*..neither the applicant nor his representative trade union official, the Department of Health nor the arbitrator appreciated that the applicant had not been dismissed in the sense of that concept as used in the Labour Relations Act 66 of 1995. The court set aside the arbitration award and found that the "discharge of the Applicant took place by operation of law. It was not a dismissal as contemplated in the Labour Relations Act. The arbitrator could, therefore, not validly award any relief..."*

Phenithi v Minister of Education & others (2006) 27 ILJ 477 (SCA)

This judgment played a central role in entrenching deemed dismissal law. Grogan aptly summed up the position in law after this judgment when he asserted that "*Phenithi set the scene for all litigation concerning deemed dismissals to follow. Many statutory arbitrators routinely followed that judgment. They threw out referrals because the CCMA or bargaining councils lacked jurisdiction to entertain disputes over 'deemed dismissals', or because (following the reasoning in Phenithi) there was no dismissal which amounts to the same thing, because the CCMA and councils only have jurisdiction to entertain disputes about terminations of employment which constitutes 186(1)(a) of the LRA*"⁶¹

Ms Phenithi, was an educator who had been discharged in terms of section 14 (1) of the Employment of Educators' Act.⁶² She referred an unfair dismissal dispute to the ELRC. The commissioner found that the ELRC lacked jurisdiction despite expressing the view that "*the section 'seems to be unconstitutional in that the employer is not required . . . to apply the audi alteram partem rule before the dismissal'*".⁶³ The arbitrator recommended that she "take the matter to High Court" or "approach the Constitutional Court directly in order to set aside the provisions of [s14\(1\)\(a\)](#)" of the Act. ⁶⁴ Ms Phenithi approached the Constitutional Court for direct access but was turned down. She then turned to the High Court and sought an order to declare: "*That the decision of the Respondents to dismiss her be set aside and declared an*

⁶¹ Grogan, J 'Deemed dismissals - Fired "by the operation of law"': Feature article in *Employment Law Journal* (ELJ), 29/03/2013.

⁶² Act 76 of 1998

⁶³ At (2006) 27 ILJ 477 (SCA)

⁶⁴ *ibid*

unfair labour practice and unconstitutional,... provisions of [section 14\(1\)\(a\)](#) read with 14(1)(d) and 14(2) of [the Act] (are) unconstitutional and invalid.”⁶⁵ (emphasis added) Her application was dismissed. She then approached the Supreme Court of Appeal (SCA) which found that ‘... Indeed, the coming into operation of the deeming provision is not dependent upon any decision. There is thus no room for reliance on the audi rule which, in its classic formulation, is applicable when an administrative – and discretionary – decision may detrimentally affect the rights, privileges or liberty of a person’” (my translation).

The court also found that, “... the Louw judgment is definitive ... There was no suggestion that Louw was wrongly decided.”⁶⁶ The court went on to find that the Employee had not been dismissed in the true sense of the word. Although the main dispute before SCA related to a challenge on the constitutionality of section 14(1) (a) of the EEA,⁶⁷ the court nevertheless used this opportunity to also pronounce on how factual disputes which arise when an employer refuses to favourably consider an application for reinstatement in terms of section 14(2) of the EEA,⁶⁸ ought to be dealt with. The court found that “... Similarly, if the employer were to be requested to ‘direct otherwise’ (in terms of the section) and refuses to do so, his/her decision (to refuse) is reviewable. The same would apply in the case of a refusal to reinstate under s 14(2)”⁶⁹ (emphasis added).

The court in *Phenith*⁷⁰ was clear that the reason for the inclusion of the deeming provision in the EEA⁷¹ was to empower the employer to deal specifically with cases involving desertion. The court held that: “The discharge is by operation of law. In my view, the provision creates an essential and reasonable mechanism for the employer to infer ‘desertion’”⁷²

The use of Administrative law in Labour disputes

From above cases it is evident that the courts have held that an educator cannot claim to be unfairly dismissed whenever he/she had been

discharged in terms of section 14 of the EEA⁷³. In so finding, the courts have held that the only recourse available to an educator who has been discharged, was to institute review proceedings in the court in claiming that the employer had taken unjust administrative action against him/her. Consequently, administrative law as contemplated in PAJA, plays an important role in cases involving deemed dismissals⁷⁴.

Before 1994, state employees relied extensively on administrative law deal with labour disputes. They found it to be more effective and rewarding when deciding to challenge their dismissal by claiming that the employer had taken unjust administrative action. The Constitutional Court in *Chirwa*⁷⁵, recognised this when it stated that “Prior to the enactment of the LRA there were different statutes governing the labour and employment relations... The Education Labour Relations Act, 1993 applied to educators... “These multiple pieces of legislation created inconsistency and unnecessary duplication of resources as well as jurisdictional problems.. including uncertainty and complexity; administration; overlap of private and public sector activities.. problems.”⁷⁶

The court in *Administrator, Transvaal, and others v Zenzile and others*⁷⁷ found that, “the dismissal of a public sector employee was not simply the termination of a contractual relationship but the exercise of a public power which required the employer to apply rules of natural justice” (emphasis added). Over time, more and more employees resorted to seeking relief by relying on administrative law, thus contributing to an ailing labour laws system of the time.

The new LRA⁷⁸ was consequently created to provide a broad and over-arching legislative framework to apply across the South African workplace and to also include educators. Ngobo J made this point in *Chirwa*⁷⁹ that “[t]he clear intention of the legislature was to create specialised forums to deal with labour and employment matters and for which the LRA provides specific resolution procedures.”⁸⁰

⁶⁵ Ibid, 173 supra

⁶⁶ (2006) 27 ILJ 477 (SCA)

⁶⁷ ibid

⁶⁸ ibid

⁶⁹ (2006) 27 ILJ 477 (SCA), par 27

⁷⁰ (2006) 27 ILJ 477 (SCA)

⁷¹ Act 76 of 1998

⁷² (2006) 27 ILJ 477 (SCA)

⁷³ 76 of 1998

⁷⁴ The courts have also found in some later judgments, that section 158(i)(h) of the LRA ought to be used in bringing review applications in deemed dismissals.

⁷⁵ 2008(3) BCLR 251 (CC), par 99

⁷⁶ 2008(3) BCLR 251 (CC) paragraphs 100/101

⁷⁷ 1991 (1) SA 21 A

⁷⁸ ibid

⁷⁹ 1991 (1) SA 21 A

⁸⁰ Par 110 Chirwa ibid

“the present Constitution and Section 185 of the LRA⁸¹ confers the rights not to be unfairly dismissed or subjected to unfair labour practices, both of which extend to employees of the state”⁸² After this judgment, it was a reasonable expectation that the use of administrative law would no longer apply in labour disputes. The reality is that the use of administrative law did not abate overnight. If anything, it encroached on the new dispute resolution system. Some courts continue to recognise and accept the application of administrative law to deal with some categories of labour disputes in the public service. In *de Villiers*, van Niekerk, J expressed the view that *“...employment-related conduct by the state as employer constitutes administrative action and the intersect, if any, between administrative law and labour law is a current controversial topic”⁸³*

The Constitutional Courts finding on the use of Administrative law in Labour disputes - the Gcaba⁸⁴ case

The Applicant lodged an ULP dispute at the bargaining council regarding promotions but withdrew her dispute before arbitration. She instead approached the High Court and claimed that the failure of the employer to promote her was in violation of PAJA.⁸⁵ This dispute eventually landed at the Constitutional Court which found that *“the applicant’s complaint was essentially rooted in the LRA, as it was based on the conduct of an employer towards an employee which may have violated the right to fair labour practices. It was not based on administrative action. Her complaint should have been adjudicated by the Labour Court”⁸⁶*

This judgment ought to have established a decisive legal principle - that all labour disputes henceforth, be referred to exclusive labour dispute forums (CCMA, Bargaining Councils, Labour Court, Labour Appeal Court). One school of thought as supported in this article, interprets the finding of the Constitutional courts to suggest that the way had been paved to enable deemed dismissals disputes to be referred to ELRC as an unfair dismissal dispute. If that had been the approach of the lower courts confronted with review applications in deemed

dismissals, then the debate would have been settled. As it turns out, some lower courts did not interpret this judgment to go as far as changing the law on deemed dismissal to the extent that they could be directly referred to the ELRC for conciliation /arbitration. These cases are discussed hereunder.

De Villiers v Minister of Education Western Cape Province and another (2009) 30 IL 1022(C)

The Applicant was discharged in terms of section 14(1) of the EEA⁸⁷. He applied for reinstatement in terms of section 14(2) of the EEA⁸⁸ but the employer refused to do so. He then approached the High Court and found his cause of action in terms of 6(2) of PAJA.⁸⁹ The Respondent/Employer argued that it acted in the capacity of the Employer and therefore, the present court (High Court) lacked jurisdiction to deal with this dispute. They further claimed that the dispute ought to be dealt with terms of the LRA.⁹⁰ The High Court agreed and found that it lacked jurisdiction to deal with the dispute because the source of power had flowed from the employment contract between the Employer and the employee and that, *“... the employer’s conduct in exercising his or her discretion in a manner which failed to prevent a sanction of dismissal ought to be subjected to the same scrutiny as conduct in terms of section 18(3) (i). Such conduct is therefore capable of being tested against the Code of Good Practice contained in section 8 of the LRA.”⁹¹* Despite this finding, the High court found that it was the labour court which acquired exclusive jurisdiction to deal with the dispute. The High court directed that the dispute be referred to the labour court for a determination instead of the ELRC for conciliation/arbitration.

De Villiers v Head of Department: Education Western Cape Province (2008) C 934 (LC) - 04 December 2009 (‘de Villiers Labour Court judgment’)

In the Labour Court, the Honourable van Niekerk J, was not willing to simply accept that the decision of the Constitutional Court in *Gcaba* and the subsequent finding in the High Court *supra*, had the effect of settling the law on

⁸¹ Act 66 of 1995

⁸² 1991 (1) SA 21 A

⁸³ *De Villiers v Head of Department: Education Western Cape Province* (2008) C 934 (LC) 04 December 2009.

⁸⁴ (CCT 64/08 [2009] ZACC

⁸⁵ Act 3 of 2000

⁸⁶ *ibid*

⁸⁷ 76 of 1998

⁸⁸ *Ibid*

⁸⁹ Act 3 of 2000

⁹⁰ *De Villiers v Minister of Education Western Cape Province and another* (2009) 30 ILJ 1022 (C), par 14

⁹¹ *Ibid*, Par 21

deemed dismissal disputes. The learned judge interpreted the decision in *Gcaba*⁹² to have created a 'general rule', on the use of administrative law in labour disputes and found that, "*It is tempting to read the Gcaba Judgment to suggest that public sector employees may pursue their employment-related grievances only through processes established by the LRA and other labour legislation, and that in this respect at least, the door to administrative review has finally and irrevocably been closed to them...However, I do not understand the judgment in Gcaba to suggest that the conduct of state employer can never be categorised as administrative action....*"⁹³ This court found that deemed dismissal disputes was one such exception to the rule established in the *Gcaba* judgment. He found that "... it does not necessarily follow that a decision to refuse to reinstate an employee whose discharge has been statutorily deemed to have occurred constitutes a 'dismissal' as defined by s 186(1) of the LRA."⁹⁴ On the contrary prevailing authority is not."⁹⁵

In citing the decision in *Phenithi* with approval, the court went on to find that "... An employer who receives an application in terms of s 14(2) is faced with a contract that has terminated by operation of law independently of any act or decision on the part of the employer. Therefore, the employer does not terminate the employment contract when electing not to resuscitate it – at that point, the contract has ceased to exist."⁹⁶ It is unfortunate that the labour court did not go as far as providing cogent reasoning in support of its findings, other than acknowledging that if its decision was wrong, that it could nevertheless be supported on the grounds of legality in terms of the LRA⁹⁷ and that "s 158(1)(h) empowers this court to review any conduct by the state in its capacity as employer, on any grounds that are permissible in law."⁹⁸

Consequentially, it can be argued, that even after the Constitutional Court in *Gcaba*, and two subsequent judgments in the *De Villiers* case (High Court and Labour Court which dealt with deemed dismissal) *supra*, that **the law on**

⁹² *ibid*

⁹³ *Ibid*, Paragraphs 14 and 15

⁹⁴ Act 66 of 1995

⁹⁵ (CCT 64/08 [2009] ZACC 7 October 2009), par 7

⁹⁶ *de Villiers v Head of Department: Education Western Cape Province* (2008) C 934 (LC), par,7

⁹⁷ Act 66 of 1995

⁹⁸ *De Villiers v Head of Department: Education Western Cape Province* (2008) C 934 (LC)

deemed dismissal only developed to the extent that a decision to review the failure of an employer to consider reinstatement in terms of section 14(2) of the EEA,⁹⁹ would no longer be reviewed in the High Court in terms of PAJA but instead be reviewed in the Labour court in terms of section 158(1)(h) of the LRA.¹⁰⁰

This approach was subsequently taken in *Denosa obo Mangena v MEC for Department of Health, Western Cape* [2013] 5 BLLR 479 (LC) ('Mangena case') in a deemed dismissal dispute in which the court found that, "*the dismissal of a public servant was not an 'administrative act' and therefore not reviewable in terms of PAJA*".¹⁰¹ The court found that, "*this is not a dismissal or an unfair labour practice dispute. At the time of the decision under review, there was not even a contractual nexus between the parties... In the present matter, Mangena has no other remedy available under the LRA*"¹⁰². It is precisely this type of situation to which **section 158(1)(h) is properly intended to apply.**"¹⁰³

The Solidarity and Another v Public Health & Welfare Sectoral Bargaining Council and Others (442/13) [2014] ZASCA 70 (28 May 2014) ('The Kotze Case')

The findings in this case could arguably be interpreted as having the most important bearing on the development of the law on deemed dismissal. After the *Phenithi* SCA judgement *supra*, this was only the second time that the SCA dealt with a deemed dismissal dispute. This court found that the earlier courts had been preoccupied with the legal principle concerning the deeming provision at the expense of dealing with merits of each of those cases which were key in making a determination in those disputes. In *casu* the court found that, "*It must follow that the Commissioner's conclusion and also the conclusions by the LC and the LAC that the council lacked jurisdiction cannot be sustained. Accordingly, the appeal must succeed.... The effect of the council's order was to dismiss the employee's claim (that he had been unfairly dismissed) for want of jurisdiction. Having taken the view that it lacked jurisdiction – erroneously as it now turns out – the council did not enter into the merits. Nor could it. ... That it must now do. The matter must thus be*

⁹⁹ Act 76 of 1998

¹⁰⁰ Act 66 of 1995

¹⁰¹ 3 of 2000

¹⁰² Act 66 of 1995

¹⁰³ (C 914/11) [2013] ZALCCT 1

remitted to it"¹⁰⁴ (Bold underling emphasis added). Central to the finding of the SCA in this case was the legal principle – that a factual dispute arising from a deemed dismissal dispute can be dealt with at the bargaining council (obviously referring to conciliation/arbitration) as a species of unfair dismissal. This view is diametrically opposed to that of the SCA *Phenithi*¹⁰⁵ as well as the Labour Court in *De Villiers*,¹⁰⁶ *supra*.

Only time will tell if lower courts would accord the same interpretation to this judgment. Even if some lower courts do, it would not decisively settle the law on deemed dismissal because future lower courts would be at liberty to follow the dictum in either of the SCA judgments (*Phenithi* or *Kotze supra*), both of which have taken diametrically opposing legal standpoints as to the referral and resolution of deemed dismissal disputes. What is certain though, is that should the courts persist in interpreting deemed dismissal disputes to be dealt with under review in the labour court, affected educators would remain deprived of a speedy and cost free dispute resolution service of the ELRC thereby continuing to flout the spirit, purport and objects of the 1996 Constitution, a point cogently expressed in *Gcaba* that “ ... *Legislation is based on the Constitution and it is supposed to concretise and enhance the protection of these rights, amongst others, by providing for the speedy resolution of disputes in the workplace*”¹⁰⁷

Finally, it is worth reflecting on the dissatisfaction expressed by some earlier courts which dealt with deemed dismissals despite them being constrained by the then, binding authority in *Phenithi*.¹⁰⁸ In *HOSPERSA and another v MEC for Health (2003)12 BLLR 1242 (LC)*, Pillay J expressed an orbiter view that, “...because the employees are discharged, they are deprived of all rights and protections afforded by the unfair dismissal laws. As a discharge is deemed to be on account of misconduct, the employees are condemned before they have been given a hearing. There may be reasons other than misconduct for their absence...Section 17(5)(a) not merely restricts, but excludes the employees’ right to a fair hearing before being found guilty and dismissed.”

¹⁰⁴ (442/13) [2014] ZASCA 70, par 15

¹⁰⁵ (2006) 27 ILJ 477 (SCA) , par 15

¹⁰⁶ *De Villiers v Head of Department: Education Western Cape Province* (2008) C 934 (LC)

¹⁰⁷ (CCT 64/08 [2009] ZACC

¹⁰⁸ *Ibid* 385

*It deprives the employees of challenging the termination of their services...*¹⁰⁹ (emphasis added).

In *De Villiers*¹¹⁰ (Labour Court), Van Niekerk J, asserted, “*By virtue of being an organ of state, regulated by the EEA, the respondent was in a special position not accorded to an employer in the private sector. The employees of no other employer can be “discharged” ex lege, without a prior hearing. No other employer is legislatively immunised from an unfair dismissal referral in circumstances where an employee fails to report for work for a continuous period of 14 days. No other employer enjoys the right to consider reinstatement of its employees within its sole discretion*”¹¹¹ (emphasis added).

Conclusion / Recommendations

(i) Application of section 14 (1) of the EEA.¹¹²

It is trite that Section 14(1) of the EEA¹¹³ cannot be challenged in its own right. An employee discharged in terms of section 14(1) of the EEA¹¹⁴ cannot dispute the unfairness of his/her discharge from service simply because the employer invoked this section. The affected educator must apply for reinstatement/re-employment in terms of section 14(2)¹¹⁵ and provide reason/s why he/she considers his/her discharge to be unfair. If the employer does not respond favourably, the affected educator will have grounds to challenge the failure of the employer to reinstate him/her.

(ii) Future courts / arbitrators give preference for the authority in *Kotze* ¹¹⁶ over *Phenithi* ¹¹⁷

The findings in the *Kotze* judgment can be interpreted to mean that a factual dispute arising from a deemed discharge, be referred to the Bargaining Council. If future Courts / arbitrators give this judgment the same interpretation, then factual disputes concerning deemed dismissal in the Education sector could be referred directly to the ELRC and dealt with as an unfair dismissal.

¹⁰⁹ *HOSPERSA and another v MEC for Health (2003)12 BLLR 1242 (LC)*

¹¹⁰ *De Villiers v Head of Department: Education Western Cape Province* (2008) C 934 (LC) 04 December 2009

¹¹¹ (2008) C 934 (LC) In this regard, the Applicant has already found himself non-suited in both the relevant Bargaining council and the High Court.

¹¹² Act 76 of 1998

¹¹³ *ibid*

¹¹⁴ *Ibid*

¹¹⁵ *ibid*

¹¹⁶ *ibid*

¹¹⁷ *Ibid*, 402 *supra*

(ii) Amend the deeming clause in the EEA¹¹⁸

In order to provide definitive legal certainty which is in keeping with the spirit, purport and objects of the 1996 Constitution and the LRA¹¹⁹, for providing a speedy and cost effective resolution to labour disputes, it is recommended that section 14 of the EEA¹²⁰ be amended to include a new sub-section 14 (3) to read:

“any dispute arising from the failure or refusal of the employer to re-instate or re-employ an educator contemplated in 14(2) as the case may be, may be referred to the appropriate bargaining council as an unfair dismissal dispute in terms of section 186 of the LRA”.

Mr. Dolin Singh

Provincial Manager (PELRC KZN Chamber)

Dear Readers

We would like to hear your views on education related queries or disputes. We will respond to questions in the next issue of the Labour Bulletin. Please send any questions relating to labour law to the ELRC Research & Media Manager, Ms Bernice Loxton.



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¹¹⁸ Section 14 of Act 76 of 1998

¹¹⁹ 66 of 1995

¹²⁰ Act 76 of 1998