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EDUCATION LABOUR RELATIONS COUNCIL

LABOUR BULLETIN

Education Labour Relations Council
in association with the
Labour and Social Security Law Unit of the
Nelson Mandela Metropolitan University

Nelson Mandela Metropolitan University
for tomorrow

In this Issue:

OCTOBER 2011

1. From the Editor

The ELRC is pleased to provide our stakeholders with this October 2011 Bulletin. It contains notes on recent case law of relevance to our sector as well as some critical commentary upon decided cases. We also provide guidance on questions such as jurisdiction and joinder that tend, from time to time, to complicate the life of parties to disputes before the ELRC.

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 sincerely hope to broaden the range of views that we carry in future and we are happy to print replies in future editions. Indeed, 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. So, get some coffee or tea, sit back and enjoy this 2011 edition of the ELRC's October Labour Bulletin.

Heinrich Böhmke
Editor

2. From the General Secretary's Desk

Does the ELRC ever have jurisdiction over deemed discharge disputes?

It is trite that discharge in terms of section 14 (1) of the Employment of Educators Act 76 of 1998 is not a dismissal. When an employee absents himself without permission for more than 14 consecutive days, the law is engaged to terminate the contract of employment. Although the Act speaks of the reason for such a discharge being 'on account of misconduct', there is no decision-maker executing the termination. It is sufficient only that the educator's absence was without permission and for longer than 14 consecutive days. [***Phenithi v Minister of Education & Others [2006] 9 BLLR 821 SCA***]

This is not the end of the line. There is an opportunity to make representations for reinstatement in terms of section 14 (2). This section mitigates the 'draconian' but necessary nature of section 14 (1).

Should a discharged employee fail to convince his former employer to reinstate him, this too is not a dismissal. The discharged employee is no longer in service. How can the dispute be about dismissal when it concerns a decision that arose after the employee was already discharged? [***Andre Johann De Villiers v Head of Department: Education Western Cape Province, unreported, case number C934/2008 and MEC Public Works, Northern Province v Commission for Conciliation, Mediation and Arbitration & Others (2003) 24*** **ILJ** ***2155 (LC)]***

The effect of section 14 of the E of EA is severe for it means that disputes about deemed discharge must wend their way into the Labour Court as applications to review and set aside the decision not to reinstate in terms of section 158(1) (h) of the LRA. The discharge itself is not subject to review. [***Saga Moses Mahlangu v Minister of Sport and Recreation, unreported, Case No. JR2148/08***]

Bargaining Councils though cannot accept deemed discharge disputes. Bargaining Councils take their jurisdictional cue from section 127 (2) of the Labour Relations Act. They are not given jurisdiction to hear disputes about discharge in terms of section 14 (1) or disputes about the refusal to reinstatement in terms of section 14 (2) of the E of EA. They are creatures of statute, having their work very clearly set out for them, and with no residual dispute resolution powers.

However, there are circumstances in which the ELRC would be obliged to entertain disputes about *alleged dismissals* even when the employer contends these were not dismissals but discharges in terms of section 14 (1) of the Act.

Consider the following set of facts. Ms. Calculate absents herself from work without permission for 7 consecutive days, goes to work for a day, and then absents herself for a further 7 consecutive days. The employer believes that she has been absent for 15 consecutive days and thus invokes section 14 (1) of the E of EA to obtain her discharge.

Ms. Calculate is adamant that she was not absent for 14 *consecutive* days and brings an unfair dismissal dispute to the Bargaining Council. She claims she was dismissed for absenteeism but without a proper hearing having been convened. At conciliation, the employer produces a letter stating that her termination was in terms of section 14 (1) of the E of EA. As such, it disputes the ELRC's jurisdiction to hear the matter.

What is an arbitrator to do?

A significant recent judgment of the Supreme Court of Appeal makes it clear that jurisdiction is conferred upon a court or tribunal not by the facts of the matter but by the pleaded claim. [**SAMA v McKenzie (2010) 5 BLLR 488 SCA**]. Thus, an allegation that the facts claimed in a case result in another claim over which another court has jurisdiction does not constitute a jurisdictional challenge but rather a challenge to the merits of the pleaded claim. Ms. Calculate has characterized the dispute as a dismissal dispute and, accordingly, the Bargaining Council has jurisdiction to hear it. Dismissal disputes are its statutory bread and butter. Should Miss Calculate fail to show that she was in fact dismissed, she loses her case in the ELRC, not for lack of jurisdiction but on the merits.

Based on the employer's contention, the Bargaining Council's first order of business is to determine whether a dismissal actually took place or whether Ms. Calculate's contract was brought to an end by operation of law. If Ms. Calculate fails to prove, on a balance of probability, that she was not absent for 14 consecutive days, then an arbitrator will find that no dismissal took place. Consequently, her dispute stands to be dismissed. Her case would be dealt with in the same way as any other dismissal case where the applicant failed to show that they were fired at all.

If Ms. Calculate succeeds in proving that she came to work half way through her 14-day absence, then section 14 (1) of the E of EA was not properly applied. Even if the employer insists that it acted in terms of section 14 (1) when it discharged her, the ELRC is capable of ruling, on the facts, that such a discharge did not, in fact, lawfully happen. The factual requirement for a section 14 (1) discharge, of absence without permission for 14 consecutive days, is not met. Consequently, the employee's termination was, really, an ordinary dismissal. By showing that section 14 (1) does not apply to her conduct, she has proven that what has most likely happened to her is a dismissal for absenteeism. The ELRC is entitled to enquire into the substantive and procedural fairness of such a dismissal. It does not mean she will be reinstated but her dismissal dispute may be

heard by the ELRC in terms of the normal law relating to dismissal for misconduct.

Certain provinces have toyed with drafting polices or procedures on abscondment. Some of these provide that if an employee is absent for a period of three consecutive days without informing their supervisor of the reason, the supervisor *must*, on the fourth day, try to trace the employee's whereabouts. These endeavours must be recorded.

When the fifth day comes to an end the manager *shall* send a registered letter to the employee's last known address informing them to return to work immediately, failing which section 14 (1) will be invoked.

A question is, does it matter if an employer does not comply with these additional requirements to contact the employee, for the provisions in the E or EA to trigger discharge? Or, in other words, do policies that require an employer to first contact an employee prevent section 14 (1) from being triggered? Should an employee be absent for longer than 14 consecutive days, can a failure to observe these policy provisions be used to argue that no lawful section 14 (1) discharge occurred? Surely if the employer elected to create additional obligations upon it before it relied upon section 14 (1) to discharge an absent employee, it is bound by these and the dispute is converted into an ordinary dismissal for absenteeism matter.

There is much to recommend such a line of argument, particularly if the policy was the result of collective agreement. However, it is doubtful whether a policy can override a statute. Certainly workplace policies and agreements may provide for additional rights over and above statutory minima, such as giving additional paid annual leave above that determined by the BCEA.

However, section 14 (1) of the EEA is not a provision setting minimum standards. It is peremptory in nature. Once an educator is away from work without permission for longer than 14 consecutive days, they become an ex-educator by law. These are the only relevant facts. That an abscondment policy was not observed and 'ultimata' not sent or received does not render the discharge unfair for either procedural or substantive reasons. It does not have the effect of converting what amounts to a discharge by operation of law into a dismissal. [***MEC for Education & Culture v Mabika and Others (D547/2003) [2005] ZALC 89 (28 September 2005)].***

Naturally, it makes good HR sense to attempt to contact an absent educator to return to work, but the failure to do so, even if this is an obligation set out in policy, cannot override the statutory trigger for discharge. The failure of the employer to try to contact the employee may be raised as a matter in the employee's review application of the decision not to reinstate her in the Labour Court in due course.

It thus appears that the ELRC has jurisdiction to hear disputes where the employee alleges that her termination was a dismissal and not a true termination in terms of section 14 (1). It may need to hear evidence on this question. If the employee fails to prove that a dismissal occurred, then the matters falls to be dismissed on the merits.

Benita Whitcher
Practising Attorney, Lecturer, Law Faculty, UKZN

Assaulting a learner: A new Defense?

There are certain awards that almost beg to be misused and misread. The ***Edcon v Reddy*** judgment is one such case. It has generated a plethora of wayward and hopeful arguments by employees found guilty of dishonest conduct. They attempt to survive dismissal by pointing out that the Supreme Court of Appeal allowed Reddy, who lied to her employer twice, to survive. It's not that big a thing. Why can't they?

This is, of course, a misunderstanding of the reasoning in ***Reddy***. ***Reddy*** is authority for the principle that an employer must lead evidence that the effect of a dishonest act not directly connected with an employee's core duties was so serious as to cause an irretrievable breakdown in the employment relationship if an employer wishes to establish that dismissal is an appropriate sanction.

Another matter that seems to beg to be misused and misunderstood is ***Stander v ELRC [2011] 4 BLLR 411 (LC).*** In this matter an educator slapped a 17-year old learner. After quite a long delay, he was charged and dismissed. The dismissal was upheld by the ELRC.

On review, the Labour Court set aside the ELRC panelist's award, making the following remarks:

'The applicant is a person who has dedicated his life to teaching for a period in excess of 30 years. There is no evidence that he had in that period committed a similar offence. He has in a scientific manner identified the cause of his reaction to provocation by the learner on that particular day and has subjected himself to medical treatment, which is the only objective basis upon which the commissioner could have determined the possibility of the repeat of the misconduct. The medical report, which as indicated above was rejected by the commissioner, was also important in the assessment of the repeat of the misconduct. The commissioner in failing in his duty rejected the evidence on the basis that it is only required in criminal proceedings.

Superficially, these remarks may be relied upon to argue that length of service, a clean record, the existence of some provocation by the learner and the remoteness of a repeat offence are profitable lines of defense for others in the educator's predicament to pursue.

This is not the case. The commissioner's misdirections were two-fold. First, he had relied on a dated test in evaluating the fairness of the sanction. Instead of considering whether dismissal was objectively an appropriate sanction, he had accepted that the employer had a *bona fide* belief that the educator should be dismissed. This approach to sanction was not in accordance with the plain language of the Code of Good Practice.

Second, the commissioner had improperly rejected as evidence a psychiatrist's report that showed that the slap was, so to say, an automatic reflex to intense provocation. As such the element of intention in the educator's conduct was placed in issue. This is a crucial element whether an act of assault occurred. In other words it bears on the question of guilt, before one even gets to sanction.

By excluding this report as evidence shedding light on the educator's conduct, the commissioner had misdirected himself, the Labour Court found. It may well have been that the report provided information exonerating the educator or it may well have been that the report's conclusions would have been exposed as flimsy under cross-examination. Whatever the case, it deserved to be interrogated.

The award was set aside and remitted to the ELRC to be heard by another panelist.

Crucially, this award is not authority for the idea that provocation, length of service or the unlikelihood that the offence will be repeated are profitable lines of defense for serious charges stemming from section 17 of the Employment of Educator's Act. The learned judge did muse on these matters and expressed the obiter opinion that they might make a difference in deciding sanction. However the crisp reason for setting aside the award was that panelists must use the correct and objective test in deciding to uphold dismissal and must not exclude relevant evidentiary material. Stander is authority that confirms settled law on these issues alone.

Heinrich Böhmke

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3. Recent Developments in Labour Law

SAOU and Others v HOD, Gauteng Department of Education

(J2468/10) [2010] ZALC 199

During 2010 many public servants including educators, embarked on a protected strike from July to September. It has become standard practice for government to keep on paying the salaries of striking employees during strikes, but to recover the overpayment at a later stage by monthly instalments. This same procedure was followed in the 2010 strike. On 26 July 2010 the Gauteng Department of Education issued Circular 25 of 2010 to all its employees. This circular dealt with issues relating to strike management for the 2010 strike and made it clear that the no work no pay rule will be applied.

Arising from the strike, a collective agreement, Resolution 4 of 2010 was concluded in the PSCBC on 19 October 2010. This agreement binds the Gauteng Department of Education and all educators and records that deductions in accordance with the "no work no pay" principle for educators who took part in the strike would

be staggered over three months and that the deduction would be based on working hours lost.

On 4 October 2010 there was a meeting of the Provincial Education Labour Relations Council in Gauteng at which the Gauteng Department of Education indicated that it wanted to commence deductions at the end of November 2010. In order to commence deductions, a database had to be compiled, recording which employees in fact participated in the strike and recording the correct number of days that the participated in the strike. It is here where problems arose, because it soon became clear that a factually correct database was not compiled.

An urgent chamber meeting of the ELRC was convened on 11 November 2010 attended by all the trade unions as well as Gauteng Department of Education. During this meeting the Gauteng Department of Education claimed that the strike had lasted for 31 days, that a deduction equal to 10 days' salary would be made from the employees' remuneration at the end of November 2010, which period of 10 days would represent one third of the period of 31 days. It also stated that the Persal system had already been programmed to deduct an amount equal to 10 days' remuneration from each educator at the end of November. Later during the same meeting on 11 November 2010, the Gauteng Department of Education advised that it has received a message informing it that National Treasury had been requested to "reverse" five of the 10 days that would be deducted and that Treasury had agreed thereto. It appeared, therefore, that only five days' salary would be deducted at the end of November 2010.

On 17 November 2010 the Gauteng Department of Education issued Circular 34 of 2010 to all its employees. This circular concerns the appeal process related to strike deductions for 2010 and enables educators to appeal against the decision of the employer to deduct salary if the educator could show that salary had been deducted/or will be deducted in respect of days that he/she was not on strike. The Gauteng Department of Education commenced making deductions in November 2010

However, it soon became clear that its database was factually incorrect as in some instances deductions were being made from educators who did not even participate in the strike or who were on maternity leave. In some instances deductions equal to 5 days' remuneration were made whereas in some instances deductions equal to 10 days were made. These facts moved SAOU and NAPTOSA to institute urgent proceedings in the Labour Court against Gauteng Department of Education during December 2010. On 21 December 2010 the Court handed down its judgement. It confirmed that according to the no work no pay rule, employees who did not attend work during the strike, were not entitled to remuneration for the period of their absence. The Courts however granted an urgent interdict ordering the Gauteng Department of Education to refund all monies deducted from the salaries of the members of NAPTOSA and SAOU pertaining to the 2010 public service sector strike by no later than 31 December 2010, pending the compilation of a factually correct database, recording which members of SAOU and NAPTOSA in fact participated in the strike and recording the correct number of days that such members participated in the strike.

The Gauteng Department of Education was also interdicted from making any further deductions from the salaries of SAOU and NAPTOSA members pending the compilation of a factually correct database. In March 2011 NATU was successfull in a similar cases against the KZN Department of Education and obtained similar relief. These cases show that although education departments are entitled to reclaim wages paid to striking educators during protected strikes, such deductions may only be made on the basis of a factually correct database of educators that took part in the strike.

Advocate Pierre Van Tonder

Jacobs v Chairman, Governing Body, Rhodes High School and Others

2011 (1) SA 160 (WCC)

It is important that all educators take note of this case as the case confirms that where an educator is negligent and as a result of such negligence another person (learner or colleague) suffers damages, the educator may be personally held liable for such damages.

The facts of this case are briefly the following. K (a learner) was brought to the school principal's office after Ms. Jacobs (an educator at the school) had reported him to the head of

department after noting a death certificate, with her name, written in his journal. The HOD informed the principal that K had made some threats in his journal against Ms Jacobs and had refused to hand over the journal to her. The principal told the HOD to leave K with him. He then asked K to hand the journal over to him, but K refused. He then forcibly wrested the journal from K. The principal read the journal and observed certain 'serious things' in the journal. He placed K in a chair outside his office and asked him to remain there while he instructed his secretary to call the police and K's mother. When he returned to where he had left K, K was gone.

In the meantime K had returned to Ms Jacobs' classroom where he attacked her with a hammer hitting her several times against the head with the hammer. She sustained head wounds, which required five stitches, two fractured bones in her wrist, a fracture of the bone that stretches from the wrist to the elbow, and a swollen left knee. She received medical treatment for these injuries and spent three days in hospital. Besides suffering physical injuries, she also suffered from depression, fear and anxiety and experienced personality changes. She no longer displayed the personality traits of self-confidence, self-assurance and self-discipline. She was afraid to face the outside world alone. She lost pride in herself. She returned to work soon after the incident, but she was not able to cope emotionally and psychologically in the school or in a social environment. She was diagnosed with Depressive Disorder and a delayed onset of Post-Traumatic Stress Disorder (PTSD). She eventually gave up her teaching career and took a job as an administrative clerk.

Ms Jacobs then sued the Western Cape Education Department and the school principal for damages. Judge Essa Moosa found that before the attack, there were several "red flags" that should have been acted upon. He held that the school principal's failure to exercise the necessary supervision over K after K was brought to his office, had contributed significantly to the incident. The Court held that the relationship between the school principal and Ms Jacobs was close enough to give rise to a duty of care towards Jacobs. After K was brought to the principal's office, the principal assumed control over him. Where one was in control of a "potentially dangerous situation, thing or person", one would be under a duty to take care to prevent the risk from materializing, the judge said. In the circumstances the Court ordered the school principal and the WCED (jointly and severally) to pay to Ms Jacobs damages in the amount of R1 114 685,53 as well as her legal costs.

Advocate Pierre Van Tonder

Joinder Parties in Promotion Disputes

The test whether joinder should be ordered is whether a person has a direct and substantial interest in any order the arbitrator might make or whether he has a legal interest (and not merely a financial interest) in the subject matter of the dispute which may be affected prejudicially by the arbitration award or whether the arbitration award cannot be sustained or carried into effect without prejudicing that person (see **Amalgamated Engineering Union v Minister of Labour** 1949 (3) SA 637 (A). In such cases the arbitration proceedings cannot proceed unless the party has been joined or unless the person has waived his right to be joined (see **Public Servants Association v Department of Justice, CCMA** 25 ILJ 692 (LAC) para 27 – 45**)**

It has been held that it is not necessary to join the successful candidate in a promotion dispute unless an order setting aside his appointment is sought (See **Gordon v Department of Health, KwaZulu-Natal** (2008) 29 ILJ 2535 (SCA). However even if no special request is made to set aside the appointment of a successful candidate, it is hardly possible to order that the process must be repeated or that the applicant must be appointed in the post, without also directly or indirectly implying that the appointment must be set aside. It would in any event not be possible to carry the arbitration award directing that the process must be repeated or appointing the applicant to the post without also prejudicing the successful candidate and removing him from the post. Where there is therefore a request that the process must be repeated or that the applicant must be appointed to the post, the successful candidate will have to be joined.

In **Head, Department of Education, Northern Cape v Wessels** (2009) 30 ILJ 2931 (LC) the Labour Court held that where an educator refers a promotion dispute to the ELRC, both the head of the provincial department of education as well as the Member of the Executive Council of the province responsible for education must be

cited/joined as defendants. In this case the labour court set aside the award of the ELRC arbitrator merely because these entities were not all cited. The Court even went further and suggested that the FET College or public school where the disputed promotion post exists also has an interest in the proceedings and that such entity must also be joined as respondent before the arbitrator may proceed with the arbitration in a promotion dispute. While it is debatable whether this interpretation is correct, this judgement appears to be binding on the ELRC.

Advocate Pierre Van Tonder

Jurisdiction Issues in Promotion Disputes

An unfair labour practice can only be perpetrated by an employer against his *own* employee. This necessarily gives rise to jurisdictional limitations. Three such jurisdictional limitations will be discussed in this note.

Challenging the conduct of school governing bodies

As an unfair labour practice can only be committed by an employer against its own employee, it was held in *Reddy v KZN Department of Education & Culture* (2003) 24 ILJ 1358 (LAC) that the Department of Education could not be held responsible for acts of the SGB, at least until such time as an appointment has been made by the Department. In an attempt to negate the effect of the *Reddy* judgement, the parties to the ELRC agreed on clause 14.3 of Annexure B to the ELRC Constitution, which attempts to circumvent the Reddy-decision. However, as school governing bodies are autonomous bodies and not subject to the jurisdiction of the ELRC in terms of the LRA and since school governing bodies were not signatories to the ELRC Constitution, clause 14.3 cannot and does not negate the *Reddy* judgement. It is simply impossible for the ELRC Constitution to give arbitrators jurisdiction over school governing bodies, which they do not have by virtue of the common law or the Labour Relations Act.

This however does not mean that an ELRC arbitrator will never be permitted to scrutinize the unfair conduct of governing bodies. Once the HOD as employer has acted on a nomination of a governing body (by for example making an appointment from the nomination list or indicating that it intends to appoint a certain candidate from the list) this necessarily means that he has by implication ratified all conduct of the governing body leading up to the nomination and therefore any procedural or substantive unfair conduct of the governing body can then be imputed to the HOD as employer and can constitute an unfair labour practice committed by the employer as intended in section 186(2) of the LRA read with the provisions of clause 14.3 of the ELRC Constitution.

Referring a promotion dispute against another education department

Since employees may only refer unfair labour practice disputes against their *own* employers, the question arises as to whether an educator employed by one provincial education department, may refer a promotion dispute against another provincial department of education when he unsuccessfully applies for a promotion post in another department of education. Similarly it can be asked whether a non-educator employed elsewhere in the public service can refer a promotion dispute against an education department.

This issue was decided in *MEC for Transport: Kwa-Zulu Natal v Jele* (2004) 25 ILJ 2179 (LAC). Mr. Jele who was employed by the Department of Health, KZN applied for a higher post in the Department of Transport, KZN. When he was not appointed, he referred and unfair labour practice dispute relating to promotion. Since the unfair labour practice jurisdiction is only available to existing employees it was therefore critical to determine whether Jele could be considered an existing employee of the State in the broad sense or whether he was merely an employee of the Department of Health. If he was only an employee of the Department of Health, he had no right to invoke the unfair labour practice jurisdiction, whereas he would have the right to do so if he was an employee of the State in the broad sense.

After analysing the applicable provisions of the Constitution and the Public Service Act, 1994, the Labour Appeal Court concluded that all public servants are employed by the public service, unless the statute to their employment specifies a particular department as their employer. In Jele's case the applicable statute did not specify a particular department as his

employer. The state in the broad sense was his employer and therefore, the court held, he was applying for a promotional post within the same employer and could accordingly refer an unfair labour practice relating to promotion.

Since section 3 of the Employment of Educators Act specifically provides that the employer of an educator employed by a provincial department of education, is the provincial HOD of that educator, the *Jele* judgement is not applicable in the education sector. That was in fact confirmed by the Labour Appeal Court in the *Jele* judgment when the unique situation in respect of educators as an exception to the general rule was specifically emphasised. This means that an educator employed by one provincial education department cannot refer a promotion dispute against another provincial department of education. It also means that an educator cannot refer a promotion dispute against another state department and neither can a non-educator employed by another state department refer a promotion dispute against a department of education.

Referring a promotion dispute against a former employer

As to whether an employee can after the termination of the employment relationship refer an unfair labour practice dispute, which arose during the course of the employment relationship, there are conflicting views.

In *Sithole v Nogwaza NO and others* (1999) 20 ILJ 2710 (LC) it was held that the remedies in the unfair labour practice jurisdiction are available "only for disputes which arise between employers and employees, that is where there is an existing employment relationship at the time the dispute is referred". However in *NS v SA Mutual Life Assurance Society* (2001) 22 ILJ 1864 (LC) it was held that provided that an alleged unfair labour practice had allegedly been committed before termination of the employment relationship, a former employee may indeed refer an unfair labour practice dispute against his former employer after termination of the employment relationship. It is suggested that the view expressed in the *SA Mutual* judgement is preferable since it is generally accepted that the employment relationship may continue even after termination of the employment contract at least for purposes of instituting claims in terms of the LRA in respect of wrongs committed by the employer prior to the termination of the contract of employment (see *Transport Fleet Maintenance (Pty) Ltd v NUMSA* [2003] 10 BLLR 975 (LAC)).

Advocate Pierre Van Tonder

A Public Service Manager's Duty to Interfere with Bad Promotions

In the significant case of ***MEC Department of Education Kwazulu-Natal v Khumalo and Richie (D749/08) [2010] ZALC 79 (6 July 2010),*** an employee, Mr Khumalo, was appointed to the position of Chief Personnel Officer despite not meeting the minimum requirements for the job. Another candidate, Mr Ritchie, who did meet the minimum requirements, but was not short-listed, launched an unfair promotion dispute. The outcome was that Ritchie was granted protected promotion to the same post through a settlement agreement.

After some time, eleven other employees, some of whom had been shortlisted, also claimed promotion to the same post. Faced with this onslaught but after a long delay, the MEC applied to the Labour Court to fix the situation and remove the irregularities that this case presented. In the first place there was a person in a post who should never have been promoted to it. Second, there was a settlement agreement to grant a protected promotion to one other employee that the department had, according to the MEC, never authorized.

The MEC asked that both appointments be set aside in terms of section 158 (1) (h) of the LRA. She argued that since her officials had exercised a public power in granting the promotions, she was *functus officio* and the only way of undoing the illegality was to approach the Court. She denied circumventing the procedures of the LRA by bringing such an application as she sought no relief in terms of the LRA but rather the Public Service Act. She mentioned that neither Khumalo nor Ritchie could point to any substantive reason why they were entitled to the positions that they held, which were both irregularly obtained.

The employees claimed that the MEC's claim had prescribed after three years. In the event that prescription did not apply, the employer's delay in bringing the application was excessive. Both employees had since acquired vested

rights that could not easily be taken away from them. The employees claimed that the MEC had never been *functus officio*. If at any stage the MEC had qualms about Khumalo's promotion she had the authority to overturn this promotion "domestically" and off her own bat. If she had retracted Khumalo's promotion, he would have had the opportunity to refer a dispute. Now, however, it was too late.

As for the settlement agreement with Ritchie, the employee's stated that this dispute was *res judicata*. Aside from fraud or an error of law, the MEC cannot challenge a settlement agreement.

The employees questioned the MEC's reliance on the constitutional right to just administrative action, arguing that the provisions of PAJA may not be circumvented through a direct appeal to the constitution. Furthermore an organ of state is not owed this constitutional right, only natural persons. Even if PAJA were invoked, it does not apply to contractual disputes in the realm of labour law, they argued.

The Court found that it did enjoy jurisdiction to consider the MEC's claims as set out. It found that although the matter ought to have been brought years before and that no condonation application had been brought by the MEC, it would nevertheless hear the matter on the merits as it was in the public interest that the underlying issues be decided to promote "ethical, accountable and transparent public administration".

On the point of *res judicata* raised in respect of Ritchie's settlement agreement, the Court found that while there is a general rule not to interfere in these agreements, this principle does not apply to agreements concluded unethically, illegally and contrary to the values of openness, accountability and efficiency. Any such agreement would be a nullity and *res judicata* would not apply.

The next notion the Labour Court dispensed with was that of the MEC being *functus officio*. This prevents a public official who, 'having performed her duties or functions' and made up her mind to then change her mind and revoke or revisit decisions. This principle is important to enable certainty in decision-making. The converse is also true, the Court found. If allowing a bad decision to stand would result in injustice, such a decision must be revoked. The Court ruled that case law creates an obligation to reverse an illegal decision at the MEC's own instance. She had a duty, discussed below; to expressly disavow reliance on a wrongfully taken decision and the doctrine of *functus officio* does not bar her undoing manifest irregularities.

Surveying recent case law on the interplay between administrative and labour law in the context of promotion disputes, particularly *Gcaba*, the Court reaffirmed that both the constitutional right to just administrative action and PAJA were not engaged in this dispute. Even though the MEC sought to found her application on the provisions of the PSA and not the LRA, the fact remained that the underlying issue concerned a promotion. The PSA does not compete but operates in tandem with the LRA and it is the machinery of the LRA that must be used to determine promotion disputes that arise within the domain of the PSA.

Turning to the effect of the Constitution on this case, the Court noted that the principle of legality in section 2 would be violated should an action not authorized by law and fair procedure be allowed to stand. Similarly, the constitutional imperative to establish a system of democratic government to ensure accountability was also at stake. Section 195 of the Constitution also impacts upon employment issues in public administration in that efficient use of resources, good career management practices and ethical public administration are expected to be achieved.

According to the Court these constitutional imperatives compel public officials to "behave honourably". In the present case, the MEC and all officials of state involved in the promotion of Khumalo and Ritchie "violated every principle of legality and every tenet of ethical, accountable and transparent public administration".

Officials involved in promoting Khumalo must have known he did not meet the minimum requirements and must have known that there were other candidates for the job who did. Persal records alone would have alerted officials that Khumalo's appointment was irregular. Those agreeing to Ritchie's protected promotion must have known that Khumalo's appointment was unsustainable and there was thus no cause to defend it and conceal it.

The MEC became aware of these irregularities in October 2005 when the eleven candidates laid a grievance. At that point she could have invited representations from both employees about why their promotions should not be set aside. The lengthy investigation process was unnecessary and uncalled for. At the end of the

investigation, not a single official was identified as being responsible for the "fiasco". The court found this to be "incredible" as public employment is bureaucratic and rule-driven and decisions are thus traceable. The MEC abdicated her responsibility to hold accountable those officials involved in the irregular appointment of Khumalo.

The Court observed that there was a duty on managers to correct irregularities and that this did not involve asking the Court's assistance to do so. The MEC's understanding that she was *functus officio* is not a valid reason for failing to overturn irregular promotions. Her explanation for her indecisiveness is at best sloppiness and at worst, a cover for official misconduct.

The Court noted that no basis existed for Khumalo's promotion. Interestingly, the Court rejected the evidence of the MEC that no mandate was given to settle with Ritchie. However, even with a mandate, the official who agreed to Ritchie's protected promotion was acting *ultra vires* since Khumalo's promotion should not have been defended.

Khumalo, the Court found, acted unethically by not disclosing that he did not meet the minimum requirements and Ritchie erred in not disclosing to those with whom he agreed a settlement that he had not been shortlisted. As Personnel officers, their behaviour was even more problematic. The Court had harsh words for the cloak of secrecy that had been thrown around the various wrong-doers in the matter, especially those recommending the promotion and then omitting to take steps to remedy it when the irregularity was obvious. The Court stated that once it had been invited by the MEC to intervene, it could not ignore the "shocking lacking of good governance" in her department.

The Application sought by the MEC was granted but without costs. Khumalo and Ritchie's promotions were set aside and the MEC was directed to provide the Court with a report on disciplinary action taken against officials involved in the matter.

This matter makes law left, right and centre and is sure to create waves for all public sector managers who are left in no doubt that they have a constitutional duty to interfere with bad personnel decisions by their sub-ordinates as soon as they become aware of them. A court's intervention is not necessary to reverse an illegal action. An employer not only can – but must do so. An aggrieved employee may always lodge an unfair labour practice dispute and seek to convince an arbitrator that the original decision to promote him or her should be honoured.

The *Khumalo and Ritchie* decision is to be contrasted, though, with the High Court's approach in *Ngqele v King Sabata Dalindyebo Municipality & others (PE 2607/10, unreported*). In an application brought under PAJA, an unlawful appointment by an employer was allowed to stand through the application of the *omnia praesumuntur rite esse acta* maxim.

In *Ngqele*, a municipal council approved a five-year contract with a municipal manager without following prescribed statutory procedures. The High Court found that although the council resolution that authorized the hiring of the employee was invalid, the employment contract concluded pursuant thereto remained valid until set aside by a competent Court. The presumption that administrative acts are valid is necessary to protect the proper functioning of a modern State. If all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question, chaos would ensue. For this reason our law has recognised that even an unlawful *administrative act* is capable of producing legally valid consequences for so long as the unlawful act is not set aside.

In *Khumalo and Ritchie*, the Labour Court expressly rejected the claim that the invalid promotion of the two employees engaged administrative law and there is therefore no direct legal tension between the judgments. An employer exercises is managerial prerogative in dealing with workplace issues and disputes about the exercise of that power fall under the causes of action created by the Labour Relations Act not PAJA.

Heinrich Böhmke

Job Evaluation and Equal Pay for Equal Work

It is an all too familiar situation. An employee is temporarily transferred to a new post. Her grade does not change although her duties do. These duties seem to carry an impressively greater degree of responsibility and skill than what she did before. There is talk of her new

job perhaps being split into two separate posts at some point in time but this never happens.

Nevertheless, she toils on, happy to meet the new challenges and indeed excelling and winning high job appraisals over the years.

At some point the employee notices that other employees doing precisely the same work as her are on a higher grade, earning more. Or it could be that she notices that posts identical to her own are advertised at a grade higher than hers. The situation does not seem fair. The sense of challenge and newness that the transfer once represented is spoiled, to be replaced with a sense of exploitation. A grievance is sure to follow.

This is what happened to Ms Raubenheimer, a public service employee in the Free State Department of Education. She was transferred from a post of deputy-director HR (grade 11) to a vacant post of Deputy Director: Financial & Supply Chain Management. She was happy with the deal until she found out that other Deputy-Director: Finance posts were on offer at grade 12. When she asked why, she was told that she lacked the minimum requirement of a financial qualification for the substantive grade 12 post and that she was merely being 'carried against the grade 12 post'.

After appeals to the DPSA to assist and clarify failed to yield results, Raubenheimer's dispute found its way to the PSCBC. ***SAOU obo Raubenheimer / Department of Education (FS) [2011] 4 BALR 397 (PSCBC)***

In this forum, the employer relied essentially on two arguments.

The first is that Raubenheimer did not have the necessary financial qualifications and was simply being 'carried' temporarily against a higher post.

Second, Raubenheimer had agreed to the transfer at grade 11. This contractual arrangement was voluntary and should be honoured. There is, in any event, no legally enforceable principle of 'equal pay for equal work' in South African labour law. As long as the unequal pay is not as a result of discrimination on a prohibited ground (such as race or gender), the terms and conditions of employment are a matter of a willing buyer of labour and willing seller thereof.

In assessing the evidence, the arbitrator noted that when Raubenheimer brought to the attention of the department that she was doing the same job at a lower grade than others, she effectively triggered a provincial Job Evaluation Implementation Strategy. Among other things, this policy dealt with the business of upgrading of posts.

The policy gave the department two options when an employee was 'undergraded' for the post that she occupied. The department could either upskill her so that she may properly assume the higher graded position or, with her agreement, restructure her job to take away tasks so that her new job requirements were consistent with her existing grade.

The employer had done neither of these things. Instead, over the years, the department had decided to permanently absorb Raubenheimer into the deputy-director: Finance post. There was no question of her being an interloper or merely acting for a while. She was in the job permanently. The employer had made a firm election in this regard and thus could be said to have condoned or waived her not possessing the minimum requirements. Moreover Raubenheimer was excelling at the job and, as such, the department 'reaped the benefits of her outstanding out-put/performance however on a lower salary than her counterparts'.

The arbitrator thus rejected the argument that her missing qualifications had any bearing on her being upgraded or simply holding the post temporarily.

The employer's back-up argument was, even if Raubenheimer was permanently absorbed into the post of deputy-director despite her not meeting the minimum requirements, there was no requirement in law for equal work for equal pay. She had agreed to perform that work at grade 11 and that was that.

Citing, ***Louw v Golden Arrow Bus Services (Pty) Ltd (2000) 21 ILJ 188 (LC) [also reported at [2000] 3 BLLR 311 (LC)***, the arbitrator noted the Labour Court's view that:

". . . It is not an unfair labour practice to pay different wages for equal work or for work of equal value. It is however an unfair labour practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds of the listed grounds, eg race or ethnic origin."

However, the arbitrator rejected this argument on the basis that Raubenheimer was not so much demanding equal pay for equal work as demanding that her employer observe its own procedures as contained in the governing collective agreements and policies regulating upgrading of posts. The employer had improperly relied on her lack of qualification to deprive her of the opportunity to submit herself for upgrading to level 12. If the department had allowed her to apply for an upgrade, she would have got it.

In essence, if one considers the effect of this award, the employer's job evaluation policy gives employees the right to pursue equal pay for equal work claims but under the guise of seeking fair job evaluation. It comes down to the same thing. Once the impediment of Raubenheimer's lack of qualifications was removed, she was as entitled to seek fair job evaluation (and thus equal pay) as any other deputy-director: Finance.

This is an interesting case, which demonstrates how, in interpreting collective agreements regulating job evaluation; Bargaining Councils can effectively find themselves giving effect to the equal pay for equal work idea. This is despite that fact that this idea does not at present find general application as a principle of our law. Employers without job evaluation policies, on the other hand, may still rely on the freedom to agree unequal pay with the employee and to deal with demands for equal pay not as rights but as interest disputes.

It is also interesting to note that draft amendments to the Employment Equity Act will, if passed, resurrect the equal pay for equal work principle. This will, depending on whether one approaches the amendment as an employer or as a trade unionist, further erode / regulate the freedom to contract that characterises the South African labour market.

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