Unlocking labour laws

Public servants are frequently confronted with workplace rules different from those in the private sector. One of the most important is the "deemed dismissal" or "dismissal by operation of law", found in section 17(5) of the Public Service Act and section 14(1) of the Employment of Educators Act. **Reynaud Daniels** and **Peter Mahlangu** answer your questions on this issue.

What is a "deemed dismissal" or a "dismissal by operation of law"?

When a public servant is absent from work without permission for a specified number of days (one month in the Public Service Act, and 14 consecutive days in the Employment of Educators Act), s/he "shall, unless the employer directs otherwise, be deemed to have been discharged from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty". Section 14(2) of the Employment of Educators Act (EEA) states that the employer may reinstate the educator on good cause shown.

According to strict statutory principles, such discharge is "by operation of law" and involves no decision of the employer. It is accordingly not a dismissal by an employer in terms of the Labour Relations Act (LRA). You cannot go to the CCMA or Labour Court and challenge the fairness of the termination of your employment contract if this is by operation of law.

What is the Labour Court's view on this matter?

Cases involving "deemed dismissals" have come before the Labour Court on a number of occasions. The Labour Court takes the view that it is bound by the decision of the Appellate Division in *Minister van Onderwys en Kultuur en Andere v Louw 1995 (4) SA 383 (A)*, where the court held that, in matters governed by section 14, there is no decision by the employer to dismiss, "but merely a notification of a result which occurred by operation of law".

There is one case where the Labour Court took a different approach. In *SADTU obo Nkosi v ELRC & Others*, the Labour Court decided that section 14 must be interpreted in light of the LRA, and that old cases on the issue were outdated (Louw was decided in 1994, two years before the LRA came into effect). In the court's view, "deemed dismissals" are governed by the LRA.

However, the Labour Appeal Court (LAC) recently followed the Louw decision in *SADTU obo Sithole v ELRC & Others*. Does this not suggest that "deemed dismissals" are now settled law?

Since section 14(1) raises important constitutional issues, the word of the LAC cannot be final. The issue can only be resolved by the Constitutional Court.

In our view, the LAC decision was wrong because it failed to observe the constitutional right not to suffer unfair labour practices. Furthermore, the approach adopted by the LAC does not observe the constitutional right to equality and access to a fair and impartial hearing before the courts. The LAC did not pay enough attention to section 210 of the LRA, which requires that a conflict between the EEA and the LRA should favour the LRA.

Section 14(2) does not create enough safeguards for workers since the onus is on the worker to demonstrate good reason for reinstatement.

What is the best way to interpret section 14 of the EEA?

It is clear that if a provision is capable of two meanings, one consistent and the other inconsistent with the Constitution, the courts must adopt an interpretation which is consistent with the Constitution. Section 14(1) of the EEA is capable of an interpretation that is consistent

…the issue can only be resolved by the Constitutional Court

with the Constitution that such a dismissal involves a decision by an employer. This approach avoids the necessity of declaring section 14(1) unconstitutional.

What can shop stewards do when representing a worker discharged in terms of section 14(1)?

The employer will always argue that no dismissal has occurred and the ELRC or CCMA lack jurisdiction because the employee was dismissed "by operation of law". Most arbitrators will rule in favour of the employer when presented with the Louw judgement. However, the shop stewards should do the following:

Firstly, call for a hearing and make representations regarding the absence of the educator. The refusal of a hearing may provide a further basis for the educator to challenge the employer's conduct.

Secondly, make the employer confirm whether it has directed otherwise and seek written reasons for its decision.

Thirdly, provide reasons for the absence of the educator but argue that the employer must prove that there is no reason to direct otherwise or that there is no good cause to reinstate.

Fourthly, if the issue is unresolved and the educator is dismissed, refer the dispute to conciliation, and if unresolved refer it to arbitration. If the facts of the matter are good, consider launching a review of any decision by the arbitrator that there has been no dismissal.

Is there a good reason for section 14(1) of the EEA, such as the importance of education?

Education is important. But so is the right not to be unfairly dismissed. Educators deserve protection against unfair dismissal as much as anyone else. There is insufficient justification for the existence of "deemed dismissal". It is not just to deprive teachers of protection against unfair dismissal in the public service but to recognise this right in the private sector. The fact that the tax payer is responsible for payment of wages and that there are more educators in the public service is not a valid bases to deprive educators in the public service of their constitutional right.

Is it true that because a section 14(1) discharge involves no "act" or "decision" by an employer, it is therefore not a dismissal by the employer?

Although the LAC has determined otherwise, we think this is incorrect.

Section 14(1) is not a self-executing provision. It only comes into effect when an employer decides not to direct otherwise. The employer's failure or refusal to direct otherwise is necessary to bring into effect section 14(1). The employer's omission to consider the issue is as much an act of the employer as the refusal to direct otherwise. This omission by an employer brings the termination within the definition of dismissal in section 186(a) of the LRA.

But what is the state supposed to do with teachers who are absent without leave for more than 14 consecutive days?

The importance of education cannot mean that all other rights, including the protection against dismissal, are of no value. Secondly, there is no reason why teachers who are absent without leave cannot be hauled before disciplinary hearings on charges of desertion or abscondment.

If a "deemed dismissal" cannot be challenged under the LRA, can it be challenged under another law?

As the confusing decision in *Transnet Ltd & others v Chirwa (2006) 27 ILJ 2294 (SCA)* shows, whether a dismissal in the public sector is administrative action is an extremely difficult issue. Even if the employer's conduct under section 14(1) is not a dismissal under the LRA, we believe that the employer's refusal or omission to direct otherwise in terms of section 14(1) of the EEA constitutes administrative action in terms of section 1 of the Promotion of Administrative Justice Act (PAJA).

In brief, PAJA requires that (a) the administrative action must be procedurally fair; (b) the affected person must get a chance to make representations; (c) the administrative action must not be arbitrary; and (d) the administrative action must be rationally connected to the information placed before the administrator as well as the reasons given for the decision. Accordingly, it is arguable that the decision of the employer not to direct otherwise in terms of the EEA must be procedurally fair and reasonable. LB

Reynaud Daniels and Peter Mahlangu are directors of Cheadle Thompson & Haysom Inc