DISMISSAL LAW IN THE EDUCATION SECTOR

by

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CHAPTER ONE
INTRODUCTION

1.1 INTRODUCTION AND BACKGROUND CONTEXT

The rights and duties of employers and employees are regulated by multiple sources of law. In the South African context, it comprises a complex body of principles drawn from quarters which include international law, an overarching Constitution, the common-law contract of employment, delict, administrative law and a network of labour statutes. Despite its varied foundations, labour law has increasingly claimed existence as an independent discipline since labour law reforms in the 1980s.

Employer-employee relationships were historically primarily regulated by the principles derived from the law of contract. The requirements for such contracts to have binding effect, rules in respect of the breach of such agreements and remedies were all regulated by common-law principles. A jurisdiction based on fairness, which includes the right to a pre-dismissal hearing, was not recognized under the common law. However, all of this changed with the enactment of labour legislation which firmly entrenches the notion of fairness into the employment relationship.

South Africa recently adopted a supreme Constitution, which introduced a system of constitutional democracy. This system replaced the former undemocratic and discriminatory one and also necessitated the transformation of the former education system into a new democratic system which upholds the democratic norms and values of the Constitution.

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1 In Transnet Ltd v Chirwa (2006) 27 ILJ 2294 (SCA) par 33 the court referred to the overlap of administrative law, the common law and labour law as a “mystifying complexity”. See also Van Eck “Labour Dispute Resolution in the Public Service: The Mystifying Complexity Continues” (2007) 28 ILJ 793.

2 South Africa is a member of the International Labour Organisation and has adopted a number of this organisation’s key conventions.


4 See Brassey, Cameron, Cheadle and Olivier The New Labour Law (1987) 2-5 for a discussion of the shortcomings of the common-law contract of employment.
Education in South Africa takes place at four levels:

1. early childhood development – broadly referred to as pre-primary education;\textsuperscript{5}

2. general education and training – commonly known as school education from Gr 1-9;\textsuperscript{6} further

3. education and training – commencing after nine years of compulsory general education and training and preceding higher education;\textsuperscript{7} and

4. higher education.\textsuperscript{8}

As noted above, education is primarily a public service which the state provides to its people. The Constitution determines the structures, establishes institutions for education and sets out their functions, for example, it stipulates that “education” is a functional area of which the legislative competence is shared (concurrently) by both the national and provincial spheres of government. The government is committed to

“… a South Africa in which all people have access to lifelong education and training opportunities, which will in turn contribute towards improving the quality of life and building a peaceful, prosperous and democratic society”.\textsuperscript{9}

\textsuperscript{5} According to the national Department of Education Policy for early childhood development (ECD), the ECD sector theoretically encompasses programmes for children from birth to the age of nine.

\textsuperscript{6} The General Education and Training (GET) level constitutes the first band on the National Qualifications Framework (NQF) in terms of the South African Qualifications Authority Act 58 of 1995 and leads to a General Education and Training Certificate (GETC). It represents nine years of compulsory schools attendance, usually from age seven to 15: see the South African Schools Act 84 of 1996.

\textsuperscript{7} The Further Education and Training (FET) level consists of various learning and training programmes and constitutes band 2 to 4 on the NQF. FET provides holders of a GETC, or equivalent, access to FET opportunities which allow them access to the workplace or higher education: see the Further Education and Training Act 98 of 1998. In terms of the schooling programme, FET consists of Gr 10-12.

\textsuperscript{8} The Higher Education and Training (HET) level represents the third and last band (5 to 8) on the NQF and includes all learning programmes which lead to qualifications higher than Gr 12. HET is provided at higher education institution (e.g. universities, technikons and colleges): see the Higher Education Act 101 of 1997.

\textsuperscript{9} Department of Education Corporate plan (Jan 2000 - Dec 2004) 3.
It is quite clear that education cannot function outside the socio-economic, cultural and political context of the society it serves and this implies that communities, learners, parents, educators and the government are regarded as “equal” partners in the new democratic education system of South Africa.

In the following paragraphs the legal aspects of the employment relationship are examined with special emphasis on the employment relationship of an educator teaching at a public school. A public school is generally referred to as a primary or secondary school maintained largely through public funds and governed mainly by a particular provincial government.

The employment relationship is a legal relationship between two parties: the employer and the employee. In this case, the employee is an educator teaching at a public school in a post established by the responsible provincial education department; the employer of the educator is the relevant provincial education department, more specifically, the Head of Department (HoD) of provincial education. It must be noted that many educators (and non-educators) are

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10 The employment relationship of educators teaching at independent schools is governed by labour legislation that applies generally in all employment relationships, as discussed in 4 below.

11 A “school” is classified as a public school (eg ordinary and special) and an independent school (private school) which enrolls learners in one or more grades from grade zero to grade twelve; all public schools are juristic persons with a governing body as functionary: see South African Schools Act ss 1, 15 and 16. School legislation adopted by the national legislature (Parliament) provides national and uniform norms and standards for all schools (including independent schools); provincial school legislation governs the day-to-day administration of all schools in a particular province.

12 For this purpose, the term “educator” has to be determined in the context of labour and education legislation. Eg, the Labour Relations Act 66 of 1995 (s 213), the Public Service Act 103 of 1994 (s 1 and 8), the Employment of Educators Act 76 of 1998 (s 1), the South African Schools Act 84 of 1996 (s 1) read with s 1 of the Education Laws Amendment Act 48 of 1999 which changed the description in the former Act. Broadly speaking, an “educator” may be described as any person who teaches, educates or trains other persons or who provides professional educational services … at any public school (or, eg a FET institution, adult basic education and training [ABET] centre or education department), and who is appointed in a post on any educator establishment.

13 The definition of “employer” must be determined in the context of labour and education legislation. Although no definition of “employer” is found in the Labour Relations Act of 1995 and the Public Service Act of 1994, the latter refers to two employers for public service employees: in the case of employees in the national departments, the Minister responsible for that department; in the case of employees in the provincial departments, the Member of the Executive Committee (MEC) of that province. The Employment of Educators Act of 1998 (s 1 and 3) distinguishes between educators in the service of the national education department (Director-General the employer), and educators in the service of provincial departments of education (HoD the employer); it also makes a further distinction with regard to employment issues generally and salaries and conditions of service.
appointed at public schools in additional (non-subsidised or “institutional”) posts and in such cases the individual public school (not the HoD) is the employer.\(^\text{14}\)

Registration with the South African Council for Educators (SACE) is compulsory for all educators, including those teaching at independent schools.\(^\text{15}\) All educators are therefore subject to SACE’s code of professional ethics and an educator’s name may be removed from the register when he/she is found guilty of a breach of the code.\(^\text{16}\) Although the educator’s professional relationship with SACE must be distinguished from his/her employment relationship with the HoD, these relationships mutually influence each other, for example, an educator who is removed from the SACE register may not be employed as an educator by any employer.

The employment relationship is a public-law relationship of authority (a vertical relationship) in which the employer exercises authority over the employee (ie the employee works under the authority of the employer). Different rights and obligations (duties) flow from this relationship, for example: the employee has rights in terms of the services he/she renders (eg a right to remuneration and leave benefits); the employer has rights in terms of the services he/she/it receives (eg a right to have work performed as agreed upon); the employee has a right to strike and the employer the right to lock out.

In South Africa employees’ rights are significantly enhanced by the Constitution\(^\text{17}\) and labour legislation. The Constitution contains core workers’ rights, which are given effect to in labour laws such as the Labour Relations Act (the “LRA”),\(^\text{18}\) the Basic

\(^{14}\) For example the South African Schools Act of 1996 (s 20(4) and (7)) and the Employment of Educators Act of 1998 (s 3(4)) refer to educators in additional (non-subsidised) posts, their employer (the public school) and the registration of these educators with the South African Council for Educators (SACE). The Further Education and Training Act of 1998 has a similar provision for educators in the employ of further education and training institutions: (s 14(6)).

\(^{15}\) The South African Council for Educators, Act 31 of 2000, makes provision for the continued existence of SACE, the professional body for educators, its composition and functions. The Act determines that registration with the SACE is compulsory for all educators in the employment of any employer and that no person may employ an educator unless such a person is registered with the SACE: s 21.

\(^{16}\) The disciplinary committee of SACE must, among other things, ensure that an alleged breach of the code of professional ethics is investigated, ensure a fair hearing in terms of the Act, and recommend a finding and appropriate action to SACE, where necessary: ss 14(2) and 23(1)(c).

\(^{17}\) S 23(1) of the Constitution.

\(^{18}\) 66 of 1995.
Conditions of Employment Act\textsuperscript{19} and the Employment Equity Act.\textsuperscript{20} Policymakers drew heavily on International Labour Organisation (the “ILO”) Convention 158, which regulates termination of employment at the initiative of the employer, when they fashioned Chapter VIII of the LRA. Under the right not to be unfairly dismissed, the onus of proving fair reasons and procedures, have been shifted to the employer.\textsuperscript{21}

Added to this, the LRA established a specialised dispute resolution framework, which includes the Commission for Conciliation, Mediation and Arbitration (the “CCMA”), the Labour Court and Labour Appeal Court, with the view of giving expeditious and affordable finality to labour disputes. The LRA also contains tailor-made remedies for victims of unfair dismissals and unfair labour practices. Whereas the common law does not recognise a damages claim for want of a disciplinary hearing, and specific performance is the exception rather than the rule in respect of wrongful dismissal, the LRA has elevated reinstatement to the primary remedy and is combined with capped compensation for unfair dismissal.\textsuperscript{22}

Arguments are also advanced which favour the position that the civil courts may be misdirected in developing the common law to include the right to a pre-dismissal hearing.

Section 188(1) of the LRA section 188(1) of the LRA of 1995 provides that a dismissal will be unfair if an employer is unable to prove that it was both substantively and procedurally fair. A dismissal will be substantively unfair if the dismissal is not founded on a fair reason, whereas a dismissal will be procedurally unfair if an employer fails to follow a fair procedure in reaching the decision to dismiss. The two requirements are independent of each other and a failure to satisfy either one of them will render the dismissal unfair.

Fairness, by its very nature, is a malleable concept that is premised on the individual circumstances of a particular case and the conflicting and evolving rights and

\begin{itemize}
\item \textsuperscript{19} 75 of 1997.
\item \textsuperscript{20} 55 of 1998.
\item \textsuperscript{21} S 188(1)(a)-(b), s 192 and Schedule 8 of the LRA, the Code of Good Practice: Dismissal.
\item \textsuperscript{22} Ss 193 and 194 of the LRA.
\end{itemize}
interests of employers and employees, as well as the interests of society as a whole.\textsuperscript{23} The requirements of procedural fairness in terms of the LRA of 1995 and the Codes of Good Practice were “distilled” \textsuperscript{24} to a large degree from the practices developed by the industrial courts in terms of the previous unfair labour practice regime.

Despite the informal procedures advocated in ILO Convention 158 of 1982\textsuperscript{25} that provides that “the employment of a worker shall not be terminated for reasons related to the worker’s conduct or performance before he is provided with an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity”, the industrial courts favoured a stricter approach to procedural fairness.

These requirements form the basic foundations of the procedural requirements contained in the Codes of Good Practice and have guided the labour courts.

While retaining procedural fairness as an essential prerequisite for a fair dismissal, the current LRA “demands less stringent and formalized compliance than was the case under the unfair labour practice jurisprudence of the Industrial Court”.

Instead, employers are enjoined to dismiss an employee in accordance with a substantially fair process, in the light of the circumstances of the case, and in compliance with the minimum standards of natural justice.

In summary it can be said that educators dealing with learners or colleagues must follow the statutory guidelines and the common law principles to avoid committing acts of misconduct. It is already stated above that the aims of the rules of natural justices are to ensure that justice prevails between two subjects. There must be consistency with the principles of reasonableness and fairness when cases of misconduct involving learners or educators are being handled.

\textsuperscript{23} Cohen 33.

\textsuperscript{24} Ibid.

\textsuperscript{25} Termination of Employment Covention 1982, art 7.
The Labour Relations Act makes provision for circumstances where a dismissal effected for one of the listed reasons is never fair, and should employers dismiss for any one of the listed reasons, irrespective of the circumstances, the Act states that such a dismissal is automatically unfair and the dismissed employee could be awarded up to 24 months salary in compensation. The chairperson of a discipline enquiry must be able to show that the decision to dismiss was a reasonable one based on all the circumstances of the alleged transgression, and the chairperson should be able to commit in writing all the reasons upon which his findings is based. The findings should include the reasons for rejecting sanctions other than dismissal.

The Arbitrator at a CCMA Arbitration hearing will consider the reasons put forward by the employer for deciding upon dismissal, and such consideration will include the reasons why the employer rejected other less harsh reasons. The employer will also be required to show that a fair procedure was followed and that the evidence provided by the employer actually proves guilt of the employee based on a balance of probability, and that the employer was consistent in the past on the application of other instances of similar offences.

Labour relations in education are characterized by dynamic developments. The number of court cases and other settlements of disputes continue to escalate. For example:

- On the issue of gender: *Laerskool Hartswater v Die LUR vir Onderwys, Noord-Kaap*\(^{26}\) and *The Association of Professional Teachers and another v Minister of Education and others*,\(^{27}\)

- on issues of absenteeism: *Ntabeni v MEC for Education, Eastern Cape*\(^{28}\) and

- on issues of dismissal: *SADTU v Minister of Education and others; Fredericks & others v MEC for Education and Training, Eastern Cape & others*\(^{29}\).

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\(^{26}\) Case 864lCC of 3.10.2000 (NC).

\(^{27}\) Case 864lCC of 3.10.2000 (NC).

\(^{28}\) (2001) 22 ILJ 2619 (TK).

\(^{29}\) (2001) 22 ILJ 2325 (LC).
Education in South Africa is so important that it was the focus point even during the negotiations between the different interest groups on the development of the Constitution in the early nineties. Since then dramatic changes have taken place in the field of education by virtue of new national and provincial legislation based on the education clause (section 29) in chapter 2 of the Constitution of South Africa, Act 108 of 1996 (hereafter referred to as the Constitution; SA, 1996a), for example, the National Education Policy Act 146 of 1996.

All education actions should now contribute to the realisation of the ideals of the Constitution for an open and democratic society. Human rights enshrined in the Constitution (SA, 1996a), such as the right to just administrative action and fair procedure, the right to human dignity, and the right to fair practices pertaining to education, are now constantly being amplified in various court rooms throughout South Africa.

Cases involving allegations that employers acted unfairly by dismissing former employees are now brought to trial. Section 43 of the Labour Relations Act 66 of 1995 (SA, 1995b; hereafter referred to as the LRA) provides the court with the power to make interim orders reinstating dismissed employees, while section 46(9) confers upon it the power to determine an alleged unfair labour practice in such manner as it deems fit, including an order for reinstatement or compensation of employees who have been unfairly dismissed.

For example, in the case of Simelela\textsuperscript{30} it was decided that the High Court and the Labour Court have jurisdiction to determine claims of employees such as that a decision to dismiss them, violates their right to fair administrative action.

In cases such as the Clarke case\textsuperscript{31} the court has rendered all dismissals subject to judicial scrutiny and stated that the court is concerned not merely with the legality of the employer’s action in a dismissal case, but also with its fairness. Decisions

\textsuperscript{30} Simelela and others v Members of the Executive Council for Education of the Eastern Cape and others (2002) 23 ILJ 81 (CC).

\textsuperscript{31} Clarke v Ninian & Lester (Pty) Ltd (1988) 9 ILJ 651 (C).
emanating from such cases form a growing body of jurisprudence from which SGBs, Department of Education officials must learn what the prerequisites for valid dismissal of employees are.\textsuperscript{32}

According to Valente\textsuperscript{33} anyone interested in Education Law must be impressed, if not overwhelmed, by the flood of new statutes, regulations and court decisions that constantly affect the operation of schools. This has been caused by the complex demands on schools, which necessitate ever increasing involvement in all phases of education. Valente states that the consequent re-examination of institutional policies and relationships places heavy burdens upon educators. Keeping up with the law and revising practices to satisfy that law promises to be more demanding in future\textsuperscript{34}.

Having looked at the requirements of both procedural and substantive fairness in dismissal law, further consideration will be given to section 14(1) and 17(1) of Employment of Educator’s Act\textsuperscript{35} and section 17(5) of Public Service Act\textsuperscript{36} which specifically deal with exclusive powers for dismissals in the education sector.

The case law section will look at recent case law developments on the question of deemed dismissals. These are important and useful provisions contained in section 17(5) of the Public Service Act of 1994 and section 14 of the Employment of Educators Act of 1998 which allow for the termination of a contract by operation of law after a period of unexplained absence by an employee.

It is submitted that the interpretation and application of these provisions is of particular and material importance to the study at hand. In the latter part of the study recommendations for effective management of dismissals in the education sector shall be discussed.

\textsuperscript{32} Grogan (2002).
\textsuperscript{33} Valente (1980).
\textsuperscript{34} Ibid.
\textsuperscript{35} 76 of 1998.
\textsuperscript{36} 103 of 1996.
This treatise will therefore critically discuss fairness requirements in dismissal law within the context of the education sector from:

i) the perspective of a dismissed employee; and
ii) the perspective of an employer who wishes to dismiss employees fairly; and
iii) the perspective of a deemed dismissal.

It will be proper to flow this discussion from the premises of what should be considered procedural and substantive fairness in dismissals.

Chapter 2 below deals with the legal position in South Africa in relation to dismissals within the context of collective bargaining. Chapter 3 below analyses case law pertaining to dismissals within the context of education. Chapter 4 below looks critically at the implications of the Phenithi case judgment as the latest judgment on deemed dismissal. Chapter 5 deals with conclusions and recommendations.
CHAPTER TWO
THE LEGAL POSITION IN SOUTH AFRICA IN RELATION TO DISMISSALS WITHIN THE EDUCATION SECTOR

2.1 INTRODUCTION

Although not intended when the Labour Relations Act was introduced in 1995, employment law issues in the public sector and the ways in which they are resolved differ from the private sector. While employees in both sectors are covered by labour legislation such as the Labour Relations Act, public sector employment relations are also governed by the Employment of Educators’ Act, Public Service Act and their Regulations as well as a host of collective agreements which recognise and give effect to the unique relationship between the State as employer and public sector employees. As if these challenges are not enough, it appears that administrative law remains reluctant to release its hold over public sector employment law, as is clear from the articles featured in this newsletter. The past ten years have also seen lots of litigation between the State and public sector trade unions on a range of issues. Keeping up with these developments and the way in which they change public sector employment law is obviously critical.

Educators are affected by all aspects of the law, which are not necessarily educational, but which apply to education in some way or other. Their labour rights and obligations are ruled by legislation. The following legislation has an impact on education:

- Labour Relations Act 66 of 1995
- Basic Conditions of Employment Act 75 of 1997
- South African Schools Act 84 of 1996
- Public Service Act 103 of 1994
- Employment of Educators Act 76 of 1998
- South African Council for Educators Act 31 of 2000
It must, however, be kept in mind that legislation is continuously being adopted to transform education with the aim of serving the needs and interests of all the people of South Africa and of upholding their fundamental rights.

Educators in South Africa have also the rights and responsibilities of *in loco parentis* under South African law. Indeed in a country where the physical, emotional and sexual abuse of our children is an ongoing and wide-spread problem *in loco parentis* is increasingly important.

*In loco parentis* provides anybody who is not the parent of the child and has no legal or blood ties to a child with a legal framework on their duties to the child.

A number of legal sources can assist us in defining these duties: Section 28 of the South African Constitution’s Bill of Rights is an excellent source of what we should be protecting our children from and what we need to be providing for them:

“(1) Every child has the right –

(a) to a name and a nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation;

(e) to be protected from exploitative labour practices;

(f) not to be required or permitted to perform work or provide services that –

(i) are inappropriate for a person of that child’s age; or

(ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child’s age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child’s best interests are of paramount importance in every matter concerning the child.

(3) In this section ‘child’ means a person under the age of 18 years.”
For educators their duties extend to ensuring the educational and general welfare of learners that are in their care, including learner guidance and counselling, meeting with parents and discussing the learners educational progress with them, and ensuring their physical and mental health and safety is protected at all times.

If an educator does not adequately perform their duties under *in loco parentis* the parent would have to prove either negligence or an intention to willfully do harm to the child. The former suggests that the educator did not intend to harm the child but may have not have taken the same amount of care as a good parent. The test that is used is whether another “reasonable person” would have done the same in the same circumstances. If not the educator can be found to be negligent, leading to further legal steps and even dismissal by the Department of Education if deemed necessary.

### 2.2 LEGISLATIVE FRAMEWORK REGARDING DISMISSALS IN THE EDUCATION SECTOR

#### 2.2.1 CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

South African employment (or labour) law has been drastically changed by the Constitution. It contains an explicit labour relations provision (section 23), which stipulates for example:

“(1) Everyone has the right to fair labour practices.

... 

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with s 36(1).”

To give effect to this provision, new labour legislation had to be promulgated and this led to the adoption of a consolidated, democratic labour regime for South Africa. Employment relations of educators (including educators in private education) have

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been incorporated into this broad national labour dispensation, which now prescribes uniform legal norms and standards for labour in South Africa.

Section 23 of the Bill of Rights provides everyone with a right to fair labour practices (e.g., no person may be dismissed unfairly). It also protects employees and employers in their respective individual and collective labour relationships and provides for the adoption of national legislation to recognise and secure collective labour agreements – the Labour Relations Act of 1995 illustrates this point. Section 33 stipulates that every person is entitled to administrative action that is lawful, reasonable and fair in procedure.

For employment relations this implies that the employer (e.g., the HoD, public school and any other employer) in an authoritative position, must act in a lawful, reasonable and procedurally fair manner in the employment relationship (e.g., in disciplining, suspending or dismissing the educator). The educator is also entitled to written reasons when his/her rights have been affected (e.g., when suspended or dismissed).

2.2.2 LABOUR RELATIONS ACT (LRA)

In terms of section 185 of the Labour Relations Act (LRA) every employee has the right not to be unfairly dismissed or subjected to an unfair labour practice. Dismissal in terms of section 186 of the LRA means that –

(a) An employer has terminated a contract of employment with or without notice;

(b) An employee reasonably expected the employer to renew a fixed terms contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;

(c) An employer refused to allow an employee to resume work after she took maternity leave in terms of any law, collective agreement or her contract of employment or;
(d) An employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another or;

(e) An employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee; (constructive dismissal);

(f) An employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.

Dismissal with or without notice can be unfair where the employee has been dismissed without a proper reason (for example proofed misconduct, poor work performance, ill health/incapacity, retrenched) and without the employer complying with the procedural guidelines stipulated in the Code of Good Practice: Dismissal in Schedule 8 of the LRA. The provisions contained in section 17(5) of the Public Service Act of 1994 and section 14 of the Employment of Educators Act of 1998 which allow for the termination of a contract by operation of law after a period of unexplained absence by an employee.

2.2.3 EMPLOYMENT OF EDUCATORS ACT

“(1) In terms of section 11(1)38 of the employer may, having due regard to the applicable provisions of the Labour Relations Act, discharge an educator from service –

(a) on account of continuous ill-health;

(b) on account of the abolition of the educator’s post or any reduction in, or reorganisation or re-adjustment of the post establishments of, departments, schools, institutions, offices or centres;

(c) if, for reasons other than the educator’s own unfitness or incapacity, the educator’s discharge will promote efficiency or economy in the

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department, school, institution, office or centre in which the educator is employed, or will otherwise be in the interest of the State;

(d) on account of unfitness for the duties attached to the educator’s post or incapacity to carry out those duties efficiently;

(e) on account of misconduct;

(f) if the educator was appointed in the post in question on the grounds of a misrepresentation made by the educator relating to any condition of appointment; and

(g) if, in the case of an educator appointed on probation, the educator’s appointment is not confirmed.

(2) If an educator is discharged from service under paragraph (f) of subsection (1), that educator shall be deemed to have been discharged on account of misconduct.”

Section 17 of the Employment of Educators Act (76 of 1998) states the following intentional circumstances which allow for the immediate dismissal of educators who harm a child whilst in a position of in loco parentis.

Serious misconduct:

“17. (1) An educator must be dismissed if he or she is found guilty of –

(a) theft, bribery, fraud or an act of corruption in regard to examinations or promotional reports;

(b) committing an act of sexual assault on a learner, student or other employee;

(c) having a sexual relationship with a learner of the school where he or she is employed;

(d) seriously assaulting, with the intention to cause grievous bodily harm to, a learner, student or other employee;

(e) illegal possession of an intoxicating, illegal or stupefying substance; or

(f) causing a learner or a student to perform any of the acts contemplated in paragraphs (a) to (e).

(2) If it is alleged that an educator committed a serious misconduct contemplated in subsection (1), the employer must institute disciplinary proceedings in accordance with the disciplinary code and procedures provided for in Schedule 2.”
The following is a summary of the descriptions of misconduct. It is misconduct when a staff member:

- contravenes the provisions of the act;
- performs or causes or permits to be performed, or connives at, any act prejudicial to the administration, discipline or efficiency of the department or school;
- prejudices administration;
- disobedys, disregards or makes willful default in carrying out any order given to him or her by any person authorised to do so, by word or conduct shows insubordination;
- is negligent or indolent in the performance of his / her duties;
- undertakes any private occupation;
- misuses his/her position;
- disgracefully conducts himself/herself;
- uses or is under influence of stupefying drugs;
- violates official secrecy policy, misappropriates state property or funds;
- absents himself/herself unnecessarily;
- makes a false statement or incorrect statement; and
- contravenes or fails to comply with any provision relating to his or her employment or conditions of service.
It is important that legislation should be consulted in cases of alleged misconduct. In South Africa, section 18 of the Employment of Educators Act 76 of 1998 (SA, 1998), misconduct is broadly defined as “a breakdown in the employment relationship”. This legislation was in response to the incidences of misconduct among South African educators that was increasing at an alarming rate when this Act was amended in 2000.39

In terms of section 14(1) of the Employment of Educators Act certain educators deemed to be discharged.40 Section 14 reads as follows:

“(1) An educator appointed in a permanent capacity who –

(a) is absent from work for a period exceeding 14 consecutive days without permission of the employer;

(b) while the educator is absent from work without permission of the employer, assumes employment in another position;

(c) while suspended from duty, resigns or without permission of the employer assumes employment in another position; or

(d) while disciplinary steps taken against the educator have not yet been disposed of, resigns or without permission of the employer assumes employment in another position,

shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct, in the circumstances where –

(i) paragraph (a) or (b) is applicable, with effect from the day following immediately after the last day on which the educator was present at work; or

(ii) paragraph (c) or (d) is applicable, with effect from the day on which the educator resigns or assumes employment in another position, as the case may be.

(2) If an educator who is deemed to have been discharged under paragraph (a) or (b) of subsection (1) at any time reports for duty, the employer may, on good cause shown and notwithstanding anything to the contrary contained in this Act, approve the reinstatement of the educator in the educator's former post or in any other post on such conditions relating to the period of the educator's absence from duty or otherwise as the employer may determine.”

40 Employment of Educators Act 76 of 1998.
The termination of applicant’s employment relationship thus was a deemed dismissal on account of misconduct. An apparent anomaly arises as a result of the provisions of section 18(2) of the Act.41

This section provides that, where an educator commits an act of misconduct, the employer must institute disciplinary proceedings in accordance with the disciplinary code and procedures contained in Schedule 2. Clearly although section 14(1)42 deems an employee to be dismissed on account of misconduct, no express provision is made in this section for the application of the LRA nor for the Disciplinary Code and Procedures of Schedule 2 of the Employment of Educators Act.

The question therefore arises as to the status of the deemed dismissal in terms of section 14(1)43 and its relationship to a dismissal on the grounds of misconduct as set out in section 18 (2).

Viewed accordingly, a discharge in terms of section 14(1), being a deemed dismissal on account of misconduct, should be treated in similar fashion to a dismissal on a count of misconduct as in section 18(2).

Thus, those provisions of the Act that govern dismissal due to misconduct ought to apply in similar fashion. Schedule 2 of the Act lists as among its purposes in section 1(a) “to support constructive labour relations in education” (section 1(g)) and “to prevent arbitrary or discriminatory actions by employers towards educators” (section 1(e)). Section 3 of Schedule 2 headed “code of good practice” specifically incorporates section 8 of the LRA by reference insofar as it relates to discipline.

41 Ibid.
42 Ibid.
43 Ibid.
2.2.4 SOUTH AFRICAN COUNCIL FOR EDUCATORS ACT 31 OF 2000 (SACE)

This Act (hereafter referred to as SACE; SA, 2000) applies to educators employed by SGBs who have to register with it in terms of sections 2, 3(b) and 21. Without registration with SACE, an educator may not be appointed by the Department of Education.

SACE is a professional body of educators that regulates the teaching profession regarding professional ethics. It is completely independent of the Department of Education and has links with both departments of education and trade unions on professional matters of mutual interest.

SACE promotes the professional development of educators in section 2 while it sets, maintains and protects ethical and professional standards for educators. It aims at increasing the integrity and prestige of educators and enhancing their professionalism as a whole by drawing up rules and principles to allow the teaching profession to regulate itself in the interest of transparency and greater accountability in the community that it serves.

SACE also provides the following guidelines for educators’ conduct towards their employer in section 8:

- An educator should recognise the employer as a partner in education.
- Educators should acknowledge that certain responsibilities and authorities are vested in the employer through legislation, and serve their employer to the best of their ability.
- Educators should restrain themselves from discussing confidential and official matters with unauthorised persons.

This Council (SACE) advises the Minister on matters relating to the education and training of educators, including minimum requirements for entry into the profession at all levels, standards and programmes of pre-service and in-service education training.
and requirements for promotion within the system. It may even assist with training programmes.\textsuperscript{44}

SACE complies, maintains and reviews a code of professional ethics for educators registered with it. It determines a fair hearing procedure for educators accused of contravening its Code of Conduct.

The Code of Conduct (preamble 2; SA, 2000) requires educators to:

- acknowledge the noble calling of their profession;
- acknowledge that the attitude, dedication, training and conduct of the education profession determine the quality of education;
- acknowledge, uphold and promote basic human rights as embodied in the Constitution;
- commit themselves to do everything within their power in exercising their professional duties, to act in accordance with the ideals of their profession as expressed in the code; and
- act in a proper and becoming way, such that their behaviour does not bring the education profession into disrepute.

\textbf{2.2.5 EDUCATION LAWS AMENDMENT ACT 53 OF 2000}

Section 4(1)(a) of the Education Laws Amendment Act delegates the authority to handle educator misconducts to principals of schools. When the principal is accused of misconduct, he/she is investigated by immediate supervisor. The principal therefore must be fully aware of various legal instruments, such as Labour Relations Act and Employment of Educators Act. They need to be familiar with the procedures required on disciplinary matter that at worst may lead to dismissals. As some forms

\textsuperscript{44} \textit{Ibid.}
of misconduct may eventually lead to the dismissal of educator, principals need to deal with matters of misconduct appropriately.

Since legislation presenting procedures for misconduct is in place, many educators are more likely to be charged with misconduct at school level than before. Cases of misconduct drag for too long if the relevant process is not followed fairly. Knowledge of relevant process and procedural fairness is very important in handling cases of misconduct. The procedures are based on section 18 of the Employment of Educators Act 76 of 1998. Schedule 2 of the Education Laws Amendment Act 53 of 2000 provides a disciplinary code and procedures for educators and stipulates procedure on handling misconduct.

2.2.6 PUBLIC SERVICE ACT 103 OF 1998

“An officer, other than a member of the services or an educator or the Agency or Service who absent himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month shall be deemed to have been dismissed from the public service on account of misconduct with effect from a date immediately succeeding his or her last day of attendance at his or her place of duty”

The interpretation of the provisions of section 17(5)(a) of the PSA has received attention in a number of court cases. There is consensus as to the meaning and consequences of this subsection. In terms of this subsection an employee who absents himself or herself without authorisation for a period exceeding one calendar month is deemed to have been dismissed automatically by operation of the law.

2.2.7 CODE OF CONDUCT FOR EDUCATORS

According to Schedule 8: Code of Good Practice: Dismissal of Educators, even if there are valid substantive reasons for a dismissal, an employer must follow a fair procedure before dismissing the employee. Procedural fairness may in fact be regarded as the “rights” of the worker in respect of the actual procedure to be followed during the process of discipline or dismissal.

45 Public Service Act 103 of 1998.
**Procedural and substantive fairness**

The areas of procedural and substantive fairness most often exist in the minds of employers, HR personnel and even disciplinary or appeal hearing chairpersons as no more than a swirling, gray thick fog. This is not a criticism – it is a fact.

Whether or not a dismissal has been effected in accordance with a fair procedure and for a fair reason is very often not established with any degree of certainty beyond “I think so” or “it looks OK to me”.

What must be realized is that the LRA recognizes only three circumstances under which a dismissal may be considered fair – misconduct, incapacity (including poor performance) and operational requirements (retrenchments).

This, however, *does not mean* that a dismissal effected for misconduct, incapacity or operational requirements will be considered *automatically fair* by the CCMA should the fairness of the dismissal be disputed.

In effecting a dismissal under any of the above headings, it must be further realized that, before imposing a sanction of dismissal, the chairperson of the disciplinary hearing must establish (satisfy himself in his own mind) that a fair procedure has been followed.

When the chairperson has established that a fair procedure has been followed, he must then examine the evidence presented and must decide, on a balance of probability, whether the accused is innocent or guilty.

If the accused is guilty, the chairperson must then decide what sanction to impose. If the chairperson decides to impose a sanction of dismissal, he must decide, after considering all the relevant factors, whether the dismissal is being imposed for a fair reason.
The foregoing must be seen as three distinct procedures that the chairperson must follow, and he/she must not even consider the next step until the preceding step has been established or finalized.

The three distinct steps are:

1. Establish, by an examination of the entire process, from the original complaint to the adjournment of the disciplinary hearing, that a fair procedure has been followed by the employer and that the accused has not been compromised or prejudiced by any unfair actions on the part of the employer. Remember that at the CCMA, the employer must prove that a fair procedure was followed. The chairperson must not even think about “guilty or not guilty” before it has been established that a fair procedure has been followed.

2. If a fair procedure has been followed, then the chairperson can proceed to an examination of the minutes and the evidence presented to establish guilt or innocence.

3. If guilty is the verdict, the chairperson must now decide on a sanction. Here, the chairperson must consider several facts in addition to the evidence.

He/she must consider the accused’s length of service, his previous disciplinary record, his personal circumstances, whether the sanction of dismissal would be consistent with previous similar cases, the circumstances surrounding the breach of the rule, and so on.

The chairperson must consider all the mitigating circumstances (those circumstances in the favor of the employee which may include the age of the employee, length of service, his state of health, how close is he to retirement, his position in the company, his financial position, does he show any remorse and if so to what degree, his level of education, is he prepared to make restitution if this is possible, did he readily plead guilty and confess).
The chairperson must consider all the aggravating circumstances (those circumstances that count against the employee, such as the seriousness of the offense seen in the light of the employee’s length of service, his position in the company, to what degree did any element of trust exist in this employment relationship, etc.)

The chairperson must also consider all the extenuating circumstances (circumstances such as self defense, provocation, coercion – was he “egged on” by others? Lack of intent, necessity etc).

The chairperson must allow the employee to plead in mitigation and must consider whether a lesser penalty would suffice.

Only after careful consideration of all this, can the chairperson arrive at a decision of dismissal and be perfectly satisfied in his own mind that the dismissal is being effected for a fair reason.

For all the above reasons, I submit that any chairperson who adjourns a disciplinary hearing for anything less than 3 days has not done his job and has no right to act as chairperson.

A chairperson who returns a verdict and sanction after adjourning for 10 minutes or one hour quite obviously has pre-judged the issue, has been instructed by superiors to dismiss the hapless employee, and acts accordingly.

Such behaviour by a chairperson is an absolute disgrace, is totally unacceptable, and the chairperson should be the one to be dismissed.

The following is a brief summary of procedural and substantive fairness in cases of misconduct, incapacity and operational requirements dismissals. This is not intended to be exhaustive or complete – employers must still follow what is written in other modules.
The following procedural fairness checklist will apply to all disciplinary hearings, whether for misconduct, incapacity or operational requirements dismissals.

Remember also that procedural fairness applies even if the sanction is only a written warning.

All communications to the accused, such as the verdict, the sanction, advice of his/her rights etc, must be reduced to writing.

**Substantive fairness - misconduct** (is my reason good enough to justify dismissal?)

- Was a company rule, or policy, or behavioral standard broken?

- If so, was the employee aware of the transgressed rule, standard or policy or could the employee be reasonably expected to have been aware of it? (You cannot discipline an employee for breaking a rule if he was never aware of the rule in the first place.)

- Has this rule been consistently applied by the employer?

- Is dismissal an appropriate sanction for this transgression?

- In other cases of transgression of the same rule, what sanction was applied?

- Take the accused's personal circumstances into consideration.

- Consider also the circumstances surrounding the breach of the rule.

- Consider the nature of the job.

- Would the sanction now to be imposed be consistent with previous similar cases?
Substantive fairness - incapacity – poor work performance

Incompetence: lack of skill or knowledge; insufficiently qualified or experienced.

Incompatibility: bad attitude; carelessness; does not “fit in”; inaccuracies - incomplete work; poor social skills; failure to comply with or failure to reach reasonable and attainable standards of quality and output.

Note: deliberate poor performance as a means of retaliation against the employer for whatever reason is misconduct and not poor performance.

- Was there a material breach of specified work standards?
- If so, was the accused aware of the required standard or could he reasonably be expected to have been aware of the standard?
- Was the breached standard a reasonable and attainable standard?
- Was the required standard legitimate and fair?
- Has the standard always been consistently applied?
- What is the degree of sub-standard performance? Minor? Major? Serious? Unacceptable?
- What damage and what degree of damage (loss) has there been to the employer?
- What opportunity has been given to the employee to improve?
- What are the prospects of acceptable improvement in the future?
- Consider training, demotion or transfer before dismissing.
Incapacity – poor work performance – additional notes on procedural fairness

If the employee is a probationer, ensure that sufficient instruction and counseling is given. If there is still no improvement then the probationer may be dismissed without a formal hearing.

If the employee is not a probationer, ensure that appropriate instruction, guidance, training and counseling is given. This will include written warnings.

Make sure that a proper investigation is carried out to establish the reason for the poor work performance, and establish what steps the employer must take to enable the employee to reach the required standard.

Formal disciplinary processes must be followed prior to dismissal.

Substantive fairness – incapacity – ill health

- Establish whether the employee’s state of health allows him to perform the tasks that he was employed to carry out.

- Establish the extent to which he is able to carry out those tasks.

- Establish the extent to which these tasks may be modified or adapted to enable the employee to carry out the tasks and still achieve company standards of quality and quantity.

- Determine the availability of any suitable alternative work.

If nothing can be done in any of the above areas, dismissal on grounds of incapacity – ill health – would be justified.
**Incapacity – ill health – additional notes on procedural fairness**

- With the employee's consent, conduct a full investigation into the nature of and extent of the illness, injury or cause of incapacity.

- Establish the prognosis – this would entail discussions with the employee’s medical advisor.

- Investigate alternative to dismissal – perhaps extended unpaid leave?

- Consider the nature of the job.

- Can the job be done by a temp until the employee’s health improves?

- Remember the employee has the right to be heard and to be represented.

**Operational requirements – retrenchments**

All the steps of section 189 of the LRA must be followed. Quite obviously, the reason for the retrenchments must be based on the restructuring or resizing of a business, the closing of a business, cost reduction, economic reasons – to increase profit, reduce operating expenses, and so on, or technological reasons such as new machinery having replaced three employees and so on.

Re-designing of products, reduction of product range and redundancy will all be reasons for retrenchment.

The employer, however, must at all times be ready to produce evidence to justify the reasons on which the dismissals are based.

**Substantive fairness**

In deciding whether to dismiss an employee the employer must take code 8 of the Labour Relations Act into consideration. Schedule 8 is a code of good practice on
dismissing employees and serves as a guideline on when and how an employer may dismiss an employee. An over simplified summary of Schedule 8 would be that the employer may dismiss an employee for a fair reason after following a fair procedure. Failure to do so may render the dismissal procedurally or substantively (or both) unfair and could result in compensation of up to 12 months of the employee’s salary or reinstatement.

Procedural fairness refers to the procedures followed in notifying the employee of the disciplinary hearing and the procedures followed at the hearing itself. Most employers do not have a problem in this regard but normally fails dismally when it comes to substantive fairness. The reason for this is that substantive fairness can be split into two elements namely:

- establishing guilt; and
- deciding on an appropriate sanction.

This seems straight forward but many employers justify a dismissal based solely on the fact that the employee was found guilty of an act of misconduct. This is clearly contrary to the guidelines of Schedule 8.46

Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or willful damage to the property of the employer, willful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of section 188.

When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee’s circumstances (including length of service, previous disciplinary record

46 Code of Good Practice: Dismissal for Educators.
and personal circumstances), the nature of the job and the circumstances of the infringement itself.

Schedule 8 further prescribes that:

“Any person who is determining whether a dismissal for misconduct is unfair should consider –

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(b) if a rule or standard was contravened, whether or not –

(i) the rule was a valid or reasonable rule or standard;

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) dismissal was an appropriate sanction for the contravention.”

Looking at the above it is clear that substantive fairness means that the employer succeeded in proving that the employee is guilty of an offence and that the seriousness of the offence outweighed the employee’s circumstances in mitigation and that terminating the employment relationship was fair.

The disciplinary hearing will not end with a verdict of guilty, the employer will have to in addition to proving guilt, raise circumstances in aggravation for the chairman to consider a more severe sanction. The employee must be on the other hand given the opportunity to raise circumstances in mitigation for a less severe sanction.

Many employers make the mistake and rely on the fact that arbitration after a dismissal will be de novo and focus their case at the CCMA solely on proving that the employee is guilty of misconduct, foolishly believing that the commissioner will agree that a dismissal was fair under circumstances. The Labour Appeal Court in County Fair Foods (Pty) Ltd v CCMA & Others\(^{47}\) said that it was “not for the arbitrator to determine de novo what would be a fair sanction in the circumstances, but rather to

\(^{47}\) (1999) *ILJ* 1701 (LAC) at 1707 (para 11); also reported at (1999) JOL 5274 (LAC).
determine whether the sanction imposed by the appellant (employer) was fair”. The court further explained:

“It remains part of our law that it lies in the first place within the province of the employer to set the standard of conduct to be observed by its employees and determine the sanction with which non-compliance with the standard will be visited, interference therewith is only justified in the case of unreasonableness and unfairness. However, the decision of the arbitrator as to the fairness or unfairness of the employer’s decision is not reached with reference to the evidential material that was before the employer at the time of its decision but on the basis of all the evidential material before the arbitrator. To that extent the proceedings are a hearing de novo.”

In NEHAWU the commissioner indicated that

“the notion that it is not necessary for an employer to call as a witness the person who has taken the ultimate decision to dismiss or to lead evidence about the dismissal procedure, can therefore not be endorsed. The arbitrating commissioner clearly does not conduct a de novo hearing in the true sense of the word and he is enjoined to judge “whether what the employer did was fair”.

The employer carries the onus of proving the fairness of a dismissal and it follows that it is for the employer to place evidence before the commissioner that will enable the latter to properly judge the fairness of his actions.

In this particular case referred to above Mr Motsoagae, a Revenue Admin Officer for SARS, destroyed confiscated cigarettes that were held in the warehouses of the State without the necessary permission. Some of these cigarettes found its way onto the black-market after he allegedly destroyed them and was subsequently charged with theft. Interestingly the commissioner agreed with the employer that the applicant in this matter, Mr Motsoagae, was indeed guilty of the offence but still found that the dismissal was substantively unfair. The commissioner justified his decision referring to an earlier important Labour Court finding, reemphasizing the onus on the employer to prove that the trust relationship has been destroyed and that circumstances in aggravation, combined with the seriousness of the offence, outweighed the circumstances the employee may have raised in mitigation, thus justifying a sanction of dismissal.

48 NEHAWU obo Motsoagae / SARS (2010) 19 CCMA.
“The respondent *in casu* did not bother to lead any evidence to show that dismissal had been the appropriate penalty in the circumstances and it is not known which ‘aggravating’ or ‘mitigating’ factors (if any) might have been taken into consideration. It is also not known whether any evidence had been led to the effect that the employment relationship between the parties had been irreparably damaged – the Labour Court in *SARS v CCMA & Others (2010)*⁴⁹ at 1248 (paragraph 56) [also reported at [2010],⁵⁰ held that a case for irretrievable breakdown should, in fact, have been made out at the disciplinary hearing. The respondent’s failure to lead evidence about the reason why the sanction of dismissal was imposed leaves me with no option but to find that the respondent has not discharged the onus of proving that dismissal had been the appropriate penalty and that the applicant’s dismissal had consequently been substantively unfair. The respondent at this arbitration, in any event, also led no evidence to the effect that the employment relationship had been damaged beyond repair. The Supreme Court of Appeal in *Edcon Ltd v Pillemer NO & Others* (2009),⁵¹ held as follows: ‘In my view, Pillemer’s finding that Edcon had led no evidence showing the alleged breakdown in the trust relationship is beyond reproach. In the absence of evidence showing the damage Edcon asserts in its trust relationship with Reddy, the decision to dismiss her was correctly found to be unfair.”

Employers are advised to consider circumstances in aggravation and mitigation before deciding to recommend a dismissal as appropriate sanction. In addition to this the employer will have to prove that the trust relationship that existed between the parties deteriorated beyond repair or that the employee made continued employment intolerable. Employers should also remember that there are three areas of fairness to prove to the arbitrating commissioners; procedural fairness, substantive fairness – guilt, substantive fairness – appropriateness of sanction.

In summary, it is clear that knowledge of substantive and procedural fairness is very important in managing dismissal matters of educators to avoid such actions being reviewed by higher courts. How then can principals and other officials managing issues of misconduct in the education sector effectively manage misconducts such that affected dismissals or intended dismissals are procedurally and substantively fair?

### 2.2.8 MANAGEMENT OF MISCONDUCT IN EDUCATION

In sections 17 and 18 of Employment of Educators Act⁵² misconduct refers to a

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⁴⁹ *ILJ* 1238 (LC).
⁵⁰ *BLLR* 332 (LC).
⁵² Act 76 of 1998.
breakdown in the employment relationships which are stipulated in the list of 38 possible offences ranging from less serious misconduct to those types of serious misconduct which will inevitably lead to dismissal of educators, should the person be found guilty.

Two lists of different forms of misconduct are presented in sections 17 and 18 of the Act. Section 17 describes eight forms of serious misconduct, and section 18 comprises a list of 38 forms of less serious misconduct. These lists also show varying degrees of misconduct, which justify varying degrees and levels of management as well as disciplinary action.

53 Ibid.
CHAPTER THREE
LEARNINGS FROM CASE LAW
REGARDING DISMISSAL OF EDUCATORS

3.1 INTRODUCTION

Labour law allows employers to discipline and even dismiss employees for misconduct cases and other related offences provided that the proper steps are first taken and dismissal is the only viable solution.

However, employers are too scared to dismiss employees because they have heard of employees winning cases at the CCMA and even at Labour Court, in similar cases due to, at times, differing opinions of courts on these matters.

Employers often lose CCMA cases because the law is confusing. That is, while Schedule 8 implies that employees may be dismissed after having received a series of warnings, the same Schedule says that, “When deciding whether to impose the penalty of dismissal, the employer should, in addition to the gravity of the misconduct consider ... the nature of the job and the circumstances of the infringement itself”.

This chapter will attempt to clear such confusion by providing employers with what they can learn from decided cases ranging from Labour Court to Supreme Court of Appeal for an informed and appropriate application of law to cases warranting dismissals or to be able to defend their dismissal decisions in the workplace.

3.2 LABOUR COURT APPROACH

3.2.1 AUDI ALTERAM PARTEM PRINCIPLE

State employees have always been able to challenge administrative decisions made without consultation and which have, or may have, an adverse effect on the employees. Our highest court has repeatedly reminded the state that as an employer it cannot impose unilateral decisions on state employees without taking cognisance of the rules of natural justice. Before adverse decisions such as
dismissal, transfer or demotion are implemented, the state is obliged to “hear the other side” or follow the rule of *audi alteram partem*. This principle is clearly explained and emphasized in the following cases (*Administrator, Transvaal & Others v Traub & Others*,54 *Administrator, Transvaal & Others v Zenzile & Others*55 and *Fraser v Children’s Court, Pretoria North & Others*).56

Even though imposing disciplinary sanctions may be theoretically distinguishable from making other administrative decisions, the principle of *audi alteram partem* remains pre-eminent in ensuring procedural fairness.

The Public Service Disciplinary Code has deliberately incorporated the LRA’s Code of Good Practice as a yardstick by which to measure procedural fairness in addition to its own prescriptions of how to impose disciplinary sanctions fairly.

In the case of *Ntbeni v MEC for Education*57 the educator was a principal of Hermanus Senior Primary School, Idutywa in the Eastern Cape Province, South Africa. After a quarrel with a colleague that resulted in the principal slapping the colleague, the principal decided to leave the school. She alleged that her life was threatened at that school so she started reporting for duty at the Idutywa district office. The employer decided to deploy the educator to other schools, at one of which it appeared, she ended up with no post. Apparently for some other reasons, the employer had other displaced educators in addition to the educator in question. They decided to have such educators placed back at the schools where they held posts. Necessary meetings with the Hermanus Senior Primary School’s school governing body and educators at the school were held to this effect. The parents and educators stated that the educator had never been removed from the school. However the educator refused to go back to Hermanus Senior Primary School insisting that she was no longer wanted at that school. She continued reporting for duty at the district office until her salary was discontinued. The employer based their decision on section 14(l)(a)(i) of the Employment of Educators Act 76 of 1998 providing that an educator is deemed to be discharged when such an educator

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54 1999 (4) SA 731 (A).
55 1999 (2) SA 21 (A).
56 1997 (2) SA 218 (T).
appointed in a permanent capacity is absent from work for a period exceeding 14 consecutive days without permission of the employer. In addition to the misconduct described above the educator can also be found guilty of the alleged assault on a colleague.

Nonetheless the court ordered that the educator should continue to receive her salary. The argument was that the employer failed to do the following:

Exercise discretion to retain the applicant in the employ of the Department in spite of her failure to report for duty for a period in excess of 14 consecutive days without the employer's permission; and afford the applicant the opportunity of being heard. The court decided on another hearing, where oral evidence would be heard. 58

In Kock & Another v Department of Education, Culture & Sport of the Eastern Cape & Others 59 it was found that the principles of natural justice had not been observed. Failure by the Department and the respondents to apply the audi alteram partem rule has constituted a procedural impropriety vitiating the agreement in so far as it affected the applicant.

### 3.2.2 TERMINATION OF EMPLOYMENT BY OPERATION OF LAW

There a number of cases which have considered the effect of section 14(1)(a) of the Act and other similar deeming provisions in legislation governing employees in the education sector. It has been accepted by the courts that the deeming provision brings the employment contract to an end by operation of law and does not constitute a dismissal. 60

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In *Minister van Onderwys en Kultuur & Andere v Louw*\(^{61}\) the court held that deeming provisions take effect if the employee is absent without permission for the specified number of consecutive days where the employer has not directed otherwise. The court considered, but did not decide, whether the employer could “direct otherwise” after the expiry of the legislated period of unauthorised absence. The wording of the section suggests that the deeming provision takes effect after the requisite period of time has elapsed if the employee’s absence is without permission. It does not depend upon the exercise of a discretion nor does it require a decision by the employer. Accordingly, once the period has elapsed the discharge of the employee is deemed to have taken place. Section 14(2) of the Act provides the employer with the opportunity to reconsider the effects of section 14(1)(a) on the employee and specifically addresses the absence which leads to the discharge of the employee.

The employer is only entitled to exercise the discretion to direct otherwise before the deeming provision has taken effect particularly in the light of section 14(2) which expressly provides for the protection of employees’ rights. Section 14(1)(a) takes effect by operation of law. This is particularly so if consideration is had to the facts required to exist in order that section 14(1)(a) apply, viz absence without permission for a continuous period of 14 days. Once this transpires the employee is deemed to be discharged. No decision is necessary. The exercise of the discretion to direct otherwise must therefore take place prior to the deemed discharge.

In terms of section 17(5)(b) of the PSA, the employer has a discretion to reinstate an employee whose employment has been deemed terminated due to absence without authority for a period in excess of one calendar month. Section 17(b) of the PSA reads as follows:

“(b) If an officer who is deemed to have been so discharged, reports for duty at anytime after the expiry of the period referred to in paragraph (a), the relevant executing authority may, on good cause shown and notwithstanding anything to the contrary contained in any law approve the reinstatement of that officer in the public service in his or her former or any other post or position, and in such case the period of his or her absence from official duty shall be deemed to be absence on vacation leave without pay or leave on such other conditions as the said authority may determine.”

\(^{61}\) 1995 (4) SA 383 (A).
In dealing with the provisions of section 17(5)(b) of the PSA this Court in the unreported case of *Grootboom v The National Prosecuting Authority and Another* case number 606/08, held that it was clear from the reading of the section that the deemed dismissal for misconduct relating to absence without authorisation remains even when the provisions of section 17(5)(b) comes into operation and therefore the deeming provision does not change into the decision of the employer when the employee is afforded the opportunity to make representation showing good cause why he or she should be reinstated. The issue of whether refusal to reinstate an employee by the employer should be subjected to scrutiny by the bargaining council or CCMA received attention in the unreported case.\textsuperscript{62} The view that the dismissal remain even when the provisions of section 17(5)(b) comes into operation was stated *De Villiers supra*, when the court quoted with approval what was said in *MEC Public Works, Northern Province supra*. In that case the court is quoted as having said:

“In my view, a decision not to reinstate an employee whose employment has been terminated by operation of law is not a ‘dismissal’ for the purposes of s 186 of the LRA.

In particular, s186 (a), which provides that 'where an employer has terminated a contract of employment with or without notice there is a 'dismissal', does not in my view apply.

If the employer exercises his discretion in terms of s 17(5)(b)(i) not to reinstate, the contract of employment remains terminated by law and is not terminated by the employer.”

There is also authority which this court followed in *Grootboom*,\textsuperscript{63} to the effect that the employer in exercising the discretion in terms of section 17(5)(b) of the PSA performs a statutory function and consequently the decision is administrative in nature.

In *De Villiers*,\textsuperscript{64} the court, at paragraph [21] held that:

“For these reasons, I consider that the respondent’s conduct in deciding in terms of s 14(2) of the EEA to refuse to reinstate the applicant constituted administrative action, and that this Court is entitled to exercise its review jurisdiction on this basis.”

\textsuperscript{62} *Andre Johann De Villiers v Head of Department: Education Western Province case number C934/2008* and *MEC Public Works, Northern Province v Commission for Conciliation, Mediation and Arbitration & Others* (2003) 24 ILJ 2155 (LC).

\textsuperscript{63} *Supra*.

\textsuperscript{64} *Supra*. 
This case has its origins in a decision by the Department of Education, made under section 14(2) of the Employment of Educators Act (EEA), refusing to reinstate the educator after his deemed discharge in terms of section 14(1) of that Act. The educator claims that the conduct of the Department of Education constituted administrative action, and seeks to have the decision reviewed and set aside.

The Department of Education submitted that its decision not to reinstate the educator amounted to a “dismissal” as defined by section 186 of the LRA, and that the application for review was thus premature, at least in the sense that the applicant had available to him remedies including an internal appeal, a referral of any dispute to arbitration and ultimately a right of recourse to this court under section 145 of the LRA. The basis for this submission lies in the wording of section 14(2) of the EEA, which states that if an educator who has been discharged in terms of section 14(1) at any time reports for duty:

“... the employer may, on good cause shown and notwithstanding anything to the contrary contained in this Act, approve the reinstatement of the educator in the educator’s former post or in any other post on such conditions relating to the period of the educator's absence from duty or otherwise as the employer may determine.”

In support of his submission that when an employer decides in terms of section 14(2) that any educator deemed to have been discharged has failed to show good cause for his or her absence and refuses to reinstate the educator, that decision amounts to a dismissal for the purposes of section 186(1)(a) of the LRA.65

In paragraph [20] of the judgment, the court expressed the view that a deemed discharge in terms of section 14(1), being a deemed dismissal on account of misconduct, ought to be treated in the same way as a dismissal on account of misconduct as in section 18(2). That section provides that when an educator commits an act of misconduct, the employer must institute disciplinary proceedings in accordance with the disciplinary code and procedures contained in Schedule 2 to the Act. At paragraph [21], the Court concludes:

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65 See De Villiers v Minister of Education Western Cape Province and Another.
“In our view, therefore the employer’s conduct in exercising his or her discretion in a manner which failed to prevent a sanction of dismissal as provided by section 14(1) 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.”

That may be so, but 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 section 186(1) of the LRA. On the contrary, the prevailing authority is that it is not. In MEC Public Works66 case, Freund AJ held:

“In my view, a decision not to reinstate an employee whose employment has been terminated by operation of law is not a ‘dismissal’ for the purposes of s 186 of the LRA.”

In particular, section 186(a),67 which provides that “where an employer has terminated a contract of employment with or without notice” there is a “dismissal”, does not in my view apply. If the employer exercises his discretion in terms of section 17(5)(b)(i) not to reinstate, the contract of employment remains terminated by law and is not terminated by the employer.68

It does not seem to me that this ruling is either clearly wrong, or that it is at odds, with the SCA’s decision in Phentini.69 The ratio of that judgment is that section 14 of the EEA is constitutionally valid and that a discharge effected in terms of the section is not the consequence of any discretionary decision rather than a statutory result; hence it is not a “dismissal” for the purposes of the LRA nor is it susceptible to review. The Phentini judgment does not address the nature of a refusal to approve the reinstatement of an educator, nor whether that refusal constitutes a “dismissal”. Section 186(1)(a) of the LRA refers to a “termination of a contract of employment by an employer, with or without notice”. An employer who receives an application in terms of section 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

68 2158 H-J.
employer does not terminate the employment contract when electing not to resuscitate it - at that point, the contract has ceased to exist.

In *Grootboom supra*, the court further held that the decision not to reinstate the employee after he or she has made submission showing good cause was reviewable in terms of section 158(1)(h) of the LRA. In relation to the issue of showing good cause the court observed as follows:

“It is clear in my view that the requirement of good cause in terms of section 17(5)(b) of the PSA entails the employee having to provide a reasonable explanation for his or her absence without authority. The duty is thus on the employee to provide the employer with a satisfactory explanation as to what were the reasons for being absent without authorisation.

The employer in considering whether or not to reinstate the employee has to exercise a discretion given by section 17(5)(b) of the PSA. In this respect the decision by the employer has to be influenced by fairness and justice.

In other words the employer does not have unfettered discretion in determining whether or not to reinstate the employee. The functionary responsible for considering whether or not to reinstate the employee has to apply his or her mind to the submission made by the employee for the decision to be said to be reasonable and lawful.”

In my view based on the above analysis it is clear that section 17(5)(b) of the PSA requires the functionary who considers the submissions made by the employee to apply his or her mind before arriving at the conclusion as to whether or not the employee should be reinstated. It is also my view that in considering whether or not to reinstate an employee, one of the key factors to take into account is whether absence without authority on the part of the employee was willful including objectively considering whether or the employment relationship has broken down due to what section 17(5)(a) has already categorised as misconduct on part of the employee.

### 3.2.3 DISMISSAL FOR UNAUTHORIZED LEAVE OF ABSENCE

In *Mabika & Others v MEC for Education*, teachers were informed after they had been absent from work for about five months that they had been deemed discharged in accordance with the provisions of section 14(1)(a) of the Employment of Educators

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*Mabika & Others v MEC for Education* (2006) LC.
Act 76 of 1998. They referred a dispute to the Education Labour Relations Council, claiming that their dismissal was substantively and procedurally unfair. The arbitrator found that they had been unfairly dismissed.

The court noted that the principal of the school had written to the applicants after they had been absent for about six weeks, calling on them to return to work, failing which they would be discharged for absconding. The respondent arbitrator found that they had not received the letter, and that the dismissal was unfair because the applicants had not been granted a hearing. The court noted that the arbitrator had not considered the effect of section 14(1)(a) of the Act, and whether the letter complied with the requirements of that section. The letter informed the applicants that they were absent without leave, and offered them the opportunity to make representations. The court noted further that the effect of section 14(1)(a) of the EEA has been considered in a number of cases, and it has been accepted that in such cases the deeming provision brings the contract to an end by operation of law after an employee has been absent from work without leave for 14 days. A "deemed dismissal" does not therefore constitute a dismissal for purposes of the LRA. However, the question was whether the employer is entitled to "direct otherwise" after the 14-day period of unauthorised absence had expired. The court noted that section 14(2) specifically provides that the employer may reconsider the matter if the employee gives satisfactory reasons for his absence. However, that discretion must be exercised before the expiry of the 14-day period. If no discretion is exercised under section 14(2), the contract continues until the employer ultimately makes its election.

The court held that, considered in this light, the letter sent to the employees did not indicate that the applicant had elected not to rely on the deeming provision. It simply informed the employees that they would be dismissed if they did not resume work. The letter was therefore irrelevant to the consequences that flowed from the provisions of section 14(1)(a), and did not convert a dismissal by operation of law into a dismissal. That being the case, the employees remained free to invoke the provisions of section 14(2).
Supporting this view, the Labour Court in the *Hospersa*\(^{71}\) case found itself confronted with two different legislative approaches to desertion. Section 17(5)(a)(i) of the Public Service Act provides that where an employee absents himself from duty without permission for one calendar month, the employee is deemed to be discharged for misconduct, thus negating the need to hold any sort of enquiry. This the court viewed as termination of employment by operation of the law rather than a dismissal in the normal sense of the word.

The arbitrator had viewed the discharge as procedurally fair and provided no relief to the applicant. The Labour Court, however, concluded that the PSA section 17(5)(a) had to be interpreted purposefully because it was designed to bring finality in situations where an employee had absented himself and his whereabouts were unknown and there was uncertainty about whether or not the employee would ever report for duty in the future. In this case the absent employee’s whereabouts were not unknown. The employee had been seconded to the trade union in terms of a PSCBC Collective Agreement (Resolution 8 of 1998) two years earlier. There had been protracted communication and dispute about when the employee should return from the secondment. For this reason the court held that the employee had not deserted in the sense provided for in section 17(5)(a) of the PSA and that his absence could not amount to a “deemed discharge”. The failure of the Health Department to bring charges against the employee in terms of the Public Service disciplinary code (including the prescriptions of procedural fairness in the LRA) and hold an enquiry made the dismissal procedurally unfair.

The attempt to marry requirements of procedural fairness as set out in the LRA with differing prescriptions reached in collective agreements has led to peculiar compromises. In the case of *Highveld District Council v CCMA & others*\(^{72}\) an engineer was dismissed for misconduct after the employer, the Council, following the LRA’s Code of Good Practice, held a procedurally fair disciplinary enquiry. The employee challenged the dismissal because the Council had failed to follow certain procedural requirements captured in the collective agreement. The CCMA arbitrator

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\(^{71}\) *Hospersa & Another v MEC for Health* (2003) 24 ILJ 2320 (LC).

found that procedural fairness had been sufficiently complied with and pronounced the dismissal to have been procedurally fair.

The Labour Court, in reviewing the arbitrator’s award, disagreed and found that because the Council had ignored certain minor procedural provisions, which were peremptory in the collective agreement the dismissal was procedurally unfair. The Council took the court’s decision on appeal to the Labour Appeal Court.

The LAC held that although the provisions of the collective agreement were very important in determining procedural fairness, they were not in themselves determinative. The court stated that a failure to follow the provisions of the collective agreement to the letter does not necessarily mean that a dismissal is procedurally unfair. Equally, the court stated, that even if the Council had followed the prescriptions of the collective agreement conscientiously, it would not have guaranteed procedural fairness. The court fell back on the old compromise that procedural fairness must be judged in each case by a consideration of fairness based on all the circumstances and concluded that in the light of all the facts, the dismissal had been procedurally fair, thus confirming the arbitrator’s original award.

The court further held that section 17(5)(a) of the Public Service Act is applicable only if the person concerned is an officer or employee as defined, if the employee absents himself from duty without permission for more than a calendar month, and if the Disciplinary Code and Procedure (Resolution 2 of 1999) does not apply. The Court held that the employee had not absented himself without permission because the employer had itself agreed that he could work for the union. That permission had been granted in terms of a tripartite verbal agreement between the union, the employee and the employer.
CHAPTER FOUR
ANALYSING THE EFFECT OF RECENT JUDGMENTS RELATING TO DISMISSALS IN EDUCATION

4.1 INTRODUCTION

From the cases discussed, it appears that when confronted with dismissal within the context of education, the Labour Court was guided by one of the primary objects of the Labour Relations Act 66 of 1995, namely to promote fair labour practice. The decisions of the court were meant to ensure that the sanctity of the individual labour law enduring fairness, procedurally and substantively, was preserved. The court’s intention seems to prevent situations where employers would take wrong decisions in dismissing employee such that their acts are open to review. This chapter will attempt to analyse the effects of recent judgments relating to dismissal in education particularly deeming provision which seems to be always at the centre stage or a challenge in the education sector.

4.2 ANALYSIS OF THE LABOUR COURT APPROACH

4.2.1 THE PROCEDURAL FAIRNESS OF THE DEEMED DISMISSAL

It is true that the rules of natural justice, the most important of which being the *audi alteram partem* rule (hear the other side), are applicable to both dismissals as well as administrative decisions. However, in terms of the decision in *Louw*,\(^{73}\) there is no room for reliance on the *audi alteram partem* rule when respondent exercises its discretion in terms of section 14(1) of the EEA. It may be that in the light of the Bill of Rights contained in the Constitution as well as the Promotion of Administrative Action Act, this view is no longer good law. The court in the *Phenithi* case,\(^{74}\) without referring to the *Louw* case,\(^{75}\) appeared to assume that the *audi alteram partem* was indeed applicable when respondent exercises the discretion it has in terms of section 14(1).

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\(^{73}\) Minister van Onderwys & Kultuur & Andere v Louw 1995 (4) SA 383 (A) at 389.

\(^{74}\) Ibid.

\(^{75}\) Supra.
On the other hand, the court in *Ntabeni v MEC for Education, Eastern* 76 quoted with approval the principles set out in the *Louw* case. Baxter 77 points out that the principles of natural justice are flexible. He goes on to state that if the principles are to serve efficiently the purposes for which they exist, it would be counterproductive to prescribe rigidly the form which the principles should take in all cases.

The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.

Accordingly, when evaluating the procedural fairness of educators’ deemed dismissal, the unique circumstances of the case would to a great extent determine the nature of the procedure which was required, to render the deemed dismissal procedurally fair. In this regard one must firstly bear in mind that the whole purpose of section 14(1) of the EEA, is to enable the employer to get rid of an educator who deserts, without holding a formal disciplinary hearing. If it is to be required that a disciplinary hearing has to be held in respect of a deserting educator, section 14(1) would have no purpose or effect at all and might as well be deleted. When interpreting legislation, it is a well known canon of construction that statutes must be interpreted in such a manner so as to give effect to the particular section which is being interpreted. Put differently, an interpretation rendering the words used in the statute ineffective or obsolete, should be avoided. Bearing in mind that section 14 of the EEA was enacted after 1994, as well as the fact that the Constitutional Court, despite having had the opportunity in *Phenithi* 78 to pronounce on its constitutionality, but declined to do so, I am of the view that it would be wrong to strip section 14(1) of its effectiveness by requiring a full formal disciplinary enquiry, as is normally required before dismissing employees for misconduct. If that were to be the case, section 14(1) would be totally superfluous and not be serving any purpose at all.

76  *Supra* 2625.
77  Baxter *Administrative Law* 541.
78  *Supra.*
4.2.2 ABSCONDMENT / DESERTION

When an employee absconds from the workplace with no intention of returning, this constitutes a breach/repudiation of the contract by the employee. The employer has the choice of accepting the repudiation or enforcing the contract, therefore the termination is as a result of the employer’s conduct.

This was confirmed in the SABC case.\(^79\) On appeal, the Labour Appeal Court held that:

- desertion necessarily entails employee’s intention no longer to return to work;
- \textit{in casu} employee’s failure to return to work did not amount to desertion; and
- consequently that disciplinary hearing was obligatory in terms of disciplinary code and that there was no reason why hearing could not be convened.

In SACWU v Dyasi,\(^80\) the court held that:

“In the case of desertion by an employee, the choice is not always in fact real: For instance, when the employee deserts and cannot be traced, the employer has no practical choice other than to accept the repudiation. Where is no real choice, it can probably be argued that the employer did not terminate the contract.”

Section 17(5)(a)(i) of Public Service Act states:

“An officer … who absents himself or herself from his or her official duties without permission … for a period exceeding one calendar month, shall 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.”

The distinction between dismissal and termination by operation of law must be made. In case of desertion, it is the act of employer that terminates contract and therefore this would constitute dismissal. If the requirements of section 17(5)(a)(i) of Public

\(^{79}\) SABC v CCMA & Others (2001) 22 ILJ 487 (LC).

\(^{80}\) [2001] 7 BLLR 731 (LAC).
Service Act, 1994 (PSA) and section 14(1) of Employment of Educators Act objectively determined are satisfied, the employee services are terminated by operation of law, termination is not based on an employer’s decision.

4.2.3 EMPLOYEE RE-INSTATEMENT

In *MEC, Public Works, Northern Province v CCMA*\(^81\) the court held that the employer’s decision not to reinstate in terms of section 17(5)(b) of PSA not dismissal as contract remains terminated by law as opposed to being terminated by act of the employer.

In *HOSPERSA & Another v MEC for Health*,\(^82\) the Labour Court confirmed what the jurisdictional prerequisites for invoking section 17(5)(a) of PSA are.

In *Motsamai*\(^83\) the arbitrator held that employer’s failure to invoke section 17(5) until employee returned to work after five months and the fact that disciplinary enquiry was held and the right to appeal extended to employee, indicated that disciplinary code had been used by employer rather than section 17(5).

In *Phenithi*\(^84\) the arbitrator was of the view that, although the higher courts have held that the discharge of employees under these provisions cannot be reviewed since such discharge is by operation of law and does not require a decision by any official.

This does not mean that such terminations do not constitute dismissals under the LRA. Employees who have been deemed dismissed under these provisions may still pursue disputes under the LRA. In this case, the arbitrator found that the dismissal was procedurally unfair under the LRA because his employer had not informed him of his right under section 14(1) of the Employment of Educators’ Act to apply for reinstatement.

\(^{81}\) [2003] 10 BLLR 1027 (LC).

\(^{82}\) [2003] 13 BLLR 1242 (LC).

\(^{83}\) *Motsamai v Department of Public Safety, Security And Liaison* [2004] 8 BALR 977 (GPSSBC).

\(^{84}\) *Phenithi v Minister of Education & Others* [2006] 9 BLLR 821 (SCA).
In *Phethini*\(^{85}\) the court in dealing with the provisions of section 14(1)(a)\(^{86}\) of the Employment of Educators Act 76 of 1998, which has similar provisions as those of section 17(5)(a) of the PSA, held that when an employee is dismissed in terms of the deeming provision the employer does not commit an act or take a decision because the discharge is by operation of the law. Thus an employee deemed to be dismissed in terms of section 17(5)(a) has no right to a hearing.

The authorities are also in agreement that the deeming provision as envisaged in terms of section 17(5)(a)(i) of the PSA, do not constitute a decision by the employer which could be reviewed in a court of law. This means that in cases involving termination of employment of a public service employee due to unauthorised absenteeism in excess of one calendar month, the court does not have jurisdiction to review the consequent termination of the employment relationship.

Also in the matter of *Phenithi*\(^{87}\) the applicant sought to challenge the constitutionality of section 14(1)(a) of the Act. The court held that the words “unless the employer directs otherwise” allows the employer discretion and for that reason the court concluded that the section does not flagrantly disregard the right of the employee to fair labour practices and to justifiable administrative action and could not be said to be unconstitutional.

That discretion simply enables the employer either to elect to abide by the deeming provision which will have the effect of bringing the employment contract to an end by operation of law or to elect to follow some other cause of action by directing otherwise. If the employer does not exercise the discretion to “direct otherwise” the employee is protected by section 14(2). In applying its mind to the representations

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\(^{85}\) *Ibid.*

\(^{86}\) S 14(1)(a) of the Employment of Educators Act 76 of 1998 reads as follows “An educator appointed in a permanent capacity who (a) absent from work for a period exceeding 14 consecutive days without permission of the employer”, and s 14(2) reads as follows “if an educator who is deemed to have been discharge under paragraph (a) or (b) of subsection (1) at any time reports for duty, the employer may, on good cause shown and notwithstanding anything to the contrary contained in this Act, approve the re-instatement of the educator in the educator’s former post or in any other post on such conditions relating to the period of the educator’s absence from duty at otherwise as the employer may determine”.

\(^{87}\) *Ibid.*
made by the employee in terms of section 14(2), the employer must naturally act fairly, reasonably and justifiably.

It is worth noting that despite the fact that the deeming provision in section 14 appears possibly draconian, its effect is adequately ameliorated by the employer’s discretion and by the provision of the section 14(2) procedure whereby the rights of employees are protected. The deeming provision serves an important function in protecting the employer by providing certainty in cases of extended absenteeism without permission. The provisions of section 14(2) equally recognise that employees affected by the deeming provision should in specific circumstances be entitled to a hearing and opportunity to explain their absence.

Desertion in the education sector as an automatically dismissible offence is more complicated because education legislation frequently operates alongside the LRA. The Commissioners therefore must always make reference to the decision of Phenithi supra in which the Court noted the following:

- whether, exercise of discretion is obligatory or not, does not alter the position that the statute does not blatantly ignore the right of the employee to be heard;

- the legislative provisions give the employer a discretion whether or not to hold a hearing;

- the exercise of discretion has to be decided on the basis of the facts of the particular case;

- where adequate warning has been given of the consequences of extended absence without explanation, the employer is relieved of the obligation to hold a hearing; and

- the real issue is whether adequate warning has been given in that all efforts have been made to contact the employee.
An employer’s failure to exercise its discretion as to whether to hear the discharged employee after termination or to properly exercise its discretion regarding whether to reinstate the employee may be challenged under the LRA dismissal provisions. The termination itself requires no decision maker as the employee is deemed to have been dismissed by operation by law. However, it seems that the decision not to hear an employee’s reasons for his absence when he reappears or the decision not to take him back into service upon presentation of these reasons may, according to the logic of Ndiki case, be justiciable dismissal disputes.

4.2.4 POST-DISMISSAL AUDI PROCEDURE

The question arises whether turning disputes about the post-termination procedures into dismissal disputes themselves does not undermine a key purpose of the deemed dismissal disputes; that is to allow for a speedy, administrative solution to the problem of abscondment. The deemed dismissal provisions have legislatively codified what the common law allowed in any event in respect of abscondments. However, even at common law employees who reappeared were entitled to some form of post-dismissal audi procedures and the failure to grant them same would constitute a dispute about a dismissal.

Obviously, a post-dismissal hearing would not be as procedurally onerous as convening a pre-dismissal hearing and the decision to reinstate or not would not be decided solely on the basis of the substantive reasons the employee had for his absence but also take into account the length of time he was absent and what steps the employer has taken to fill his post, for example. In other words, a deemed dismissed employee would not be entitled to reinstatement solely because he had a good reason for being absent for the period stipulated but would also look at questions of convenience and fairness to the employer.

All in all, Ndiki supra case is an interesting development in our law and is sure to provide a number of deemed dismissed employees with an avenue to challenge their situation that they may not have thought they had before.

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Ndiki v Department of Agriculture [2008] 6 BALR 505 (GPSSBC).
4.2.5 CONSTITUTIONALITY OF DEEMING PROVISIONS

In *Phenithi*\(^8^9\) the SCA held that court unanimously held that provision did not offend Constitution or LRA, and that section creates reasonable mechanism to infer that the employee had deserted when requirements of the provision are fulfilled and that there was no violation of employee’s right to fair administrative action as there was no decision required by employer to bring provision into operation.

In summary, in applying section 14(1) of the Employment of Educators’ Act:

- Departments must comply with section 14(1) of EEA when employee has been absent without authority for period exceeding 14 days;

- departments should make reasonable efforts to contact employee during 14 day period to ascertain reasons for absence and to inform employee that if he/she fails to obtain authorisation for leave during period of absence, his/her services will terminate in terms of section 14(1) on expiry of 14 day period;

- head of department may not authorise leave retrospectively after period;

- employee must be informed of discharge and of remedy in section 14(2);

- when the employee returns to work at any time after 14 day period, bear in mind that he/she is in actual fact discharged from Public Service;

- however, he/she must be afforded opportunity to approach executing authority for reinstatement in terms of section 14(2) EEA; and

- reinstatement decision is administrative decision and therefore subject to judicial review.

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\(^{8^9}\) *Ibid.*
- However, re-instatement procedure retained.

- Proposed amendment accords with Supreme Court of Appeal judgment in Phenithi case.

- Dismissal by operation of law.

- Not in conflict with LRA and Constitution because hearing not totally.

- Excluded, *ie* re-instatement procedure.

- Objectives of provision are reasonable and justifiable.
CHAPTER FIVE
RECOMMENDATIONS FOR EMPLOYERS IN THE EDUCATION SECTOR

In cases of abscondment/desertion, the best would be for the employer to send the employee a telegram at the employee’s last known address, informing him/her that s/he is overdue at work, and that, unless s/he returns to work within a reasonable period (which must be specified), s/he will be regarded as having deserted and his/her services will be terminated.

When sending the telegram, the employer should ask for proof that the telegram has been delivered. If the employer does not have an address for the employee, they should make every effort to get a written message to the employee.

If the employee returns to work by the specified date, the employer is entitled to enquire as to the reasons why the employee was absent from work and why s/he did not notify the employer earlier about the reasons and circumstances causing the absence.

The employer can then, based on the explanation given, decide on whether or not to take further action against the employee, *eg* disciplinary steps.

If the employee makes contact with the employer within the period given, the employer can enquire as to the reasons why the employee was absent from work and why s/he did not notify the employer earlier about the reasons and circumstances causing the absence. The employer can also agree with the employee when s/he will return to work.

If the employee returns to work after the date given, the employer would be obliged to give the employee an opportunity to explain him/herself. This would include giving reasons why s/he was absent from work, why s/he did not contact the employer and why s/he did not return to work within the period specified.
Where the reason is such that it was clearly not possible for the employee to make contact with the employer or to return earlier (eg been hospitalised), and particularly where there is some proof to support the employee’s claim, or this claim can be verified in some way, the employee should be re-employed. Obviously, this will depend on the reasons given for the absence, and the proof that the employee can provide to support his/her claim.
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<td>Labour Relation Act 66 of 1995</td>
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<td>Labour Relations Amendment Act 12 of 2002</td>
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<td>Promotion of Administrative Justice Act 2 of 2002</td>
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<td>Public Service Act 103 of 1994</td>
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<td>South African Schools Act 84 of 1996</td>
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<td>South African Council for Educators Act 31 of 2000</td>
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