**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN**

Reportable

Case no: CA 10/2018

In the matter between:

**MEMBER OF THE EXECUTIVE COUNCIL FOR**

**THE DEPARTMENT OF EDUCATION**

**WESTERN CAPE GOVERNMENT** **Appellant**

and

**MUNIMAH JETHRO N.O** **First Respondent**

**EDWIN JOHN PIETERSEN N.O** **Second Respondent**

**Heard: 03 May 2019**

**Delivered: 13 June 2019**

**Summary: Discharge from public service on account of abscondment in terms of the Employment of Educators Act- employer with ill-health related conditions was discharged from employment- his application in terms of 14(2) of the EEA for reinstatement was dismissed because employee had not demonstrated good cause warranting his reinstatement– employee challenging the refusal to reinstatement on the basis of irrationality – employer contending that its conduct does not amount to administrative action and that its decision was rational because employee did not submit sick note evincing his illness**

**Held that: A letter informing an employee of his or her deemed discharge by operation of law under section 14(1) of the EEA involves no decision or exercise of a public power, and thus cannot constitute administrative action; but a decision taken under section 14(2) of the EEA constitutes a decision of an administrative nature … a decision by the Head of Department, charged**

**with the exercise of a statutory discretion to reinstate on good cause shown an employee deemed to have been discharged, constitutes administrative action reviewable in terms of PAJA.**

**Further that various factors are relevant in determining whether good cause exists for reinstatement under section 14(2) of the EEA … Much will depend on the facts and circumstances of the case - In the process, mitigating factors were ignored or not weighed appropriately, including: the employee's lengthy service, clean disciplinary record and proven ill health before 1 March 2013, as well as the fact that his salary had been stopped in January 2013. The failure to assess properly the tolerability or practicability of a continued employment relationship caused the impugned decision to be rationally disconnected to the relevant information and the purpose of section 14(2) of the EEA. Labour Court's judgment upheld and appeal dismissed with costs.**

**Coram: Coppin JA, Murphy and Savage AJJA**

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**JUDGMENT**

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MURPHY AJA

[1] This is an appeal against a decision of the Labour Court (van Niekerk J) setting aside the decision of the appellant taken in terms of section 14(2) of the Employment of Educators Act[1] ("the EEA") and reinstating the late respondent, Mr. Roland Jethro, who passed away shortly before the appeal was heard. Mr. Jethro has been substituted in the appeal by the first and second respondents, the executors of his deceased estate. However, for convenience, I will refer to Mr. Jethro as "the respondent".

The facts

[1] Act 76 of 1998.

[2] The respondent commenced his employment with the Department of Education, Western Cape ("the Department") on 27 March 1995. At the time of his discharge on in early 2013, he was employed as an educator and as a department head at Gugulethu Comprehensive School. He had occupied this post for 17 years.

[3] From August 2012, the respondent suffered from depression, hypertension and acute stress. He applied for normal sick leave from 13 to 17 August 2012, and then from 23 August to 27 August 2012, 28 August 2012, 9 to 19 October 2012, 23 October to 16 November 2012 and from 19 November to 10 December 2012.

[4] On 25 October 2012, he applied for temporary incapacity leave in respect of the period 25 October 2012 until 16 November 2012 – a period of 17 days ("the first application"). In terms of the Policy and Procedure on Incapacity Leave and Ill-Health Retirement ("PILIR") determined by the Minister of Public Service and Administration in terms of s 3(2) of the Public Service Act, an employee who has exhausted his/her normal sick leave and who according to a medical practitioner is required to be absent from work due to a temporary incapacity, may apply for temporary incapacity leave with full pay on the applicable application forms, in respect of each occasion.

[5] On 12 November 2012, the respondent submitted another application for temporary incapacity leave from 25 October 2012 to 11 December 2012, overlapping with the first application ("the second application").

[6] On 16 December 2012, the respondent suffered serious injuries to his upper-arm muscles, a cut in his head and his left hand caused by an attack with a blunt instrument by a gang member at his home in Hanover Park. He received treatment at Groote Schuur Hospital where his left hand was placed in a half cast.

[7] The first application for temporary incapacity leave was declined in late January or early February 2013. The reasons for the refusal were given as: i) the lack of sufficient objective medical information detailing the extent of his symptomatology, treatment received and his response to the treatment to

confirm that he would be significantly vocationally incapacitated from productive employment during his period of absence; ii) the respondent's injudicious utilisation of sick leave over the previous and current sick leave cycles, coupled with excessive leave requests, significantly adjacent to weekends, with many incidents of short duration; iii) generally, an overall impression of, irresponsible sick leave usage; and iv) the absence of conditions which significantly and severely incapacitated him from working.

[8] The second application was approved by default because the Department neither approved nor refused it within the prescribed time limit of 30 working days after receipt of the application. The PILIR provides that if the employer does not respond within the prescribed time-frames, the leave will be approved by default unless there is mutual agreement.

[9] On 28 January 2013, the respondent obtained a further medical certificate stating that he was unfit for work from 17 January 2013 – 11 days prior to him obtaining this medical certificate - until 15 February 2013. However, he failed to apply for leave of absence for this period. This appears to have resulted in the appellant stopping his salary with effect from 25 January 2013.

[10] On 18 February 2013, the respondent obtained another medical certificate recommending sick leave for a further period of two weeks.

[11] Notwithstanding his failure to formally apply for sick leave, the recommended period of two weeks' sick leave in the last medical certificate issued on 18 February 2013, expired on 1 March 2013. The respondent failed to return to work upon the expiry of that recommended sick leave. There is some dispute about the date upon which the sick leave expired – the respondent contends that he should have returned to work on 5 March 2013, but did not, whilst the Department contends that he should have returned to work on 4 March 2013. Nothing turns on this difference in relation to the application of the provisions governing deemed discharge given the number of consecutive days the respondent was absent from work.

[12] Subsequently, Mr Booi, the principal of the school where the respondent worked, addressed a letter to the Department dated 5 March 2013, the relevant part of which read:

> 'This is to confirm that Mr. R B Jethro's …sick leave ended on 01 March 2013. He has not contacted the school or fax a medical certificate up until Tuesday the 5th March 2013…. Mr Jethro has been on leave since 25 October 2012 and he has not been proactive in submitting his medical certificate.'

[13] The letter confirmed that the Human Resources Department had frozen the respondent's salary.

[14] The respondent denied that he had not contacted the school or sent medical certificates. He claimed to have remained in contact with Booi and had submitted two applications for temporary incapacity leave.

[15] In a second letter dated 4 April 2013, Booi confirmed that on 21 February 2013, he had in fact received the medical certificate dated 18 February 2013. He recorded that the respondent had phoned him on 21 February 2013 upon which Booi told him that his two applications were still pending and that his salary was frozen. Booi concluded the letter by stating that he wrote the letter of 5 March 2013, in order for the school to have a substitute teacher in place until 31 March 2013.

[16] On 9 April 2013, the Head of Education in the Department sent a letter to the Director of Labour Relations which read:

> 'Mr Jethro has been absent from duty since 18 January 2013.
>
> He submitted medical certificates covering the periods 17 January 2013 to 15 February 2103 and from 18 February 2013 for another two weeks (to 1 March 2013). Although submitting medical certificates, he has not applied for leave of absence in the prescribed manner.
>
> Since then he has made no further contact with his supervisor'.

[17] The respondent takes issue with this interpretation of events. He believed his applications for temporary leave of absence were adequate and assumed that because his salary had been stopped he did not have to report to work.

[18] On 10 April 2013, a departmental official named “Marna” sent an internal memorandum to Ms Lee Ann Bathgate requesting her to investigate whether any attempts had been made by Booi to contact the respondent. It is common cause that no one contacted the respondent during April 2013.

[19] In an e-mail addressed to officials in the Human Resources Department dated 19 April 2013, Ms Bathgate confirmed that no attempts had been made by the school to contact the respondent. The relevant part of the e-mail reads:

> ‘We received the request to abscond and I in turn requested the principal to determine the whereabouts of Mr Jethro since this was not done.
>
> Mr Jethro contends that he stayed absent from work since his salary was frozen for February 2013 without notification. He was under the impression that he no longer had to report for duty.
>
> Upon perusing his file, I noticed that he did submit medical certificates to warrant his absence. Can you please advise as to why his salary was frozen when he substantiated his absence with a medical certificate’”

[20] On 23 April 2013, Mr Paul Adams replied to this e-mail as follows:

> ‘Mr Jethro submitted his medical certificates but not his applications for leave of absence. It must be noted that this may have been true about his absence from 18 February 2013 but surely not for the period from 17 January 2013 to 15 February 2013. His salary was frozen on 25 January 2013, after his pay date for January 2013.’

[21] A few days later, on 26 April 2013, the Head of Education dispatched by registered post, which was received by the respondent on 15 May 2013, a letter in the following terms:

> ‘**ABSCONDMENT: YOURSELF**
>
> The above-mentioned matter refers.

Please be advised that according to departmental records, you have been absent without permission since 02 March 2013.

As you have failed to report for duty, you are hereby informed that in terms of section 14(1)(a) of the Employment of Educators Act, 76 of 1998 (hereinafter referred to as the Act) you are deemed to be discharged from service on account of misconduct.

Please be informed that 01 March 2013 is considered to be your last working day. Arrangements are being made for the withdrawal of your pension benefits and the recovery of any departmental debt, if applicable.

Furthermore, your attention is drawn to section 14(2) of the Act, in terms of which you have the right to make representations against this decision. These representations must be forwarded to the Director: Labour Relations.'

[22] Section 14 of the EEA is headed: "Certain educators deemed to be discharged." It provides 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."

[23] Section 14(2) of the EEA thus confers upon the employer[2] a discretion to reinstate an educator deemed to have been discharged from service as contemplated in s 14(1)(a) of the Act, on good cause shown, on such conditions relating to the period of absence from duty, or otherwise, as the employer may determine.

[24] On 18 June 2013, the respondent's union, SADTU, wrote to the Head of Department a memorandum relating to the subject: "Appeal for reinstatement of Mr Jethro on account of abscondment", as follows:

> 'SADTU Western Cape is registering an appeal against the dismissal of Mr Jethro on account of abscondment. Mr Jethro feels aggrieved by sudden dismissal after he had communicated all his leave applications to WCED via his Principal. There was no communication between him and the employer even an advice that his application for incapacity leave was decline (sic) or his leave was not approved….
>
> Mr Jethro is aggrieved because he had informed the Principal of the School about his absence and submitted all the relevant medical evidence. According to s 14(1)(a) Mr Jethro's discharge on account of abscondment had no basis because he had communicated his absence to the Principal. We therefore humbly requesting (sic) that the WCED relook at its decision and bring back Mr. Jethro to the classroom.'

[25] Further correspondence during 2013 did not resolve the matter. However, there is on record a letter dated 29 November 2013 from the Head of

[2] Defined in the Act as the Head of Department.

Department to the respondent which has not been properly explained by either party. It referred to a request for reinstatement submitted on 15 November 2013 and advised that after careful consideration of the representations, the Department confirmed the dismissal in terms of section 14(1) of the EEA based on the fact that it was not convinced that good cause had been shown for the respondent's unauthorised absence. It did not directly address other issues relevant to the existence of good cause for reinstatement, being the apt enquiry under section 14(2) of the EEA.

[26] The respondent evidently did not accept this outcome, because on 11 February 2014, Mr Jonavon Rustin, the Provincial Secretary of SADTU, sent a letter to Mr Salie Fakier, the Director of Labour Relations in the Department, confirming that SADTU had been in contact with the Human Resources Department regarding the matter, that discussions had been on-going for some months and the matter remained unresolved. He stated that the deemed dismissal was due to an absence related to illness and pointed out that in terms of the relevant collective agreement, SADTU and the appellant had agreed that no educator would be dismissed based on the operation of law if the case was related to illness. He added that in terms of the collective agreement, the union agreed to assist locate the SADTU member in such cases. Rustin emphasised that the whereabouts of the respondent was known and that he had submitted medical certificates.

[27] At a meeting with the Department on 14 April 2014, in an attempt to resolve the matter, the respondent and Rustin agreed to furnish the Department with medical certificates which would prove that he continued to suffer from depression after 1 March 2013. The respondent, however, has since then not adduced any medical certificates in relation to this period. As will become apparent, the appellant places much in store by this lapse. It submitted that the inference to be drawn is that the respondent was not genuinely or demonstrably ill as he contended, and had simply failed or refused to report for duty.

[28] Eventually, Rustin addressed a letter dated 7 October 2014 to the Department making representations and requesting the respondent's reinstatement.

Unfortunately, there is not a complete copy of this letter on record. However, the Head of Department replied to it on 20 November 2014 as follows:

> 'Your letter dated 7 October 2014 refers.
>
> The WCED has considered your latest representations regarding your request for the reinstatement of Mr Jethro. However, there is nothing compelling or substantively different to warrant the WCED to reconsider his discharge or his reinstatement.
>
> As such the WCED cannot accede to your request. His abscondment in terms of section 14(1)(a) of the Employment Educators Act, 1998, therefore stands.'

[29] On 24 April 2015, the respondent brought a review application in terms of section 158(1)(h) of the Labour Relations Act[3] ("the LRA") read with section 6 of the Promotion of Administrative Justice Act [4]("PAJA"). On 22 April 2016, Rabkin-Naicker J set aside the appellant's decision taken in terms of section 14(2) of the EEA on the grounds of it being arbitrary and capricious. She ordered the appellant to reconsider approving reinstatement.

[30] After some earlier confusion about the implications of the order of Rabkin-Naiker J, the appellant decided on 17 June 2016 not to reinstate the respondent. A letter of that date addressed to the respondent's attorneys sets out the reasons for the decision as being: i) the respondent had not reported for duty since 1 March 2013 (and thus had not satisfied the pre-requisites of section 14(2) of the EEA); ii) he had not submitted medical certificates for the period 1 March 2013 to 26 April 2013; iii) the second PILIR application was granted by default; iv) the agreement with SADTU was not applicable to the respondent because no PILIR application was made for the period 1 March 2013 to 26 April 2013; and v) the respondent had not complied with an undertaking given in meetings that he would supply medical certificates for the period 1 March 2013 to 26 April 2013.

[3] Act 66 on 1995.
[4] Act 3 of 2000.

[31] The essential conclusion of the Head of Department that no good cause for reinstatement existed is set out in the final paragraphs of the letter under the heading: "Continued Employment Relationship" as follows:

> '26. You were no doubt aware that you could not remain absent from work without your employer's permission. This is evident from the fact that you submitted medical certificates to account for your absence.
>
> 27. Despite this knowledge, you have plainly disregarded the Department's procedures to obtain permission for your absence since 1 March 2013, resulting in the aforementioned consequences.
>
> 28. Furthermore, and as you are aware, you had meetings with Departmental officials after the MEC's decision on 29 November 2013 not to reinstate you. During those meetings, it was agreed that you would provide the medical certificates to account for your absence since 1 March 2013. You have not done so, leaving no justification for your absence during the relevant period.
>
> 29. It is in my view therefore not unreasonable to have inferred desertion when the requirements of section 14(1)(a) were fulfilled and is accordingly fair.
>
> 30. In the circumstances, I am of the view that the employment relationship, particularly the trust relationship, has broken down…
>
> 31. In light of the above, I do not approve your request for reinstatement to the post previously occupied by you, or in any other post.'

The Labour Court decision

[32] The respondent sought a review in terms of section 158(1)(h) of the LRA read with section 6 of PAJA. Section 158(1)(h) provides that the Labour Court may review any decision taken or act performed by the State in its capacity as employer, on such grounds that are permissible in law. Section 6 of PAJA permits any person to institute proceedings in a court or tribunal for the judicial review of an administrative action on various grounds if, *inter alia*, the action was taken irrationally, in bad faith, arbitrarily or capriciously. The respondent relied on various grounds specified in PAJA, but most relevantly:

i) section 6(2)(f)(ii) of PAJA on grounds that the action was not rationally connected to the purpose of the empowering provision, the information before the administrator and the reasons given; and ii) sections 6(2)(e)(v) and (vi) of PAJA on grounds that the action was taken in bad faith, arbitrarily and capriciously.

[33] The Labour Court held that a decision contemplated in section 14(2) of the EEA constitutes administrative action in terms of PAJA, that the respondent was accordingly not precluded from relying on the review grounds specified in PAJA,[5] and upheld the respondent's contention that the action was taken in bad faith, arbitrarily and capriciously. It noted that there is an overlap between the grounds in sections 6(2)(e)(v) and (vi) of PAJA and a legality review under section 1 of the Constitution of the Republic of South Africa, 1996 (Constitution) in that it is a requirement of the rule of law that the exercise of public power should not be arbitrary and thus that decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary.[6]

[34] After considering the appellant's reasons set out in the letter of 17 June 2016 and the fact that the respondent's absence had caused disruption and cost to the school, the learned judge correctly stated the purpose of section 14(2) of the EEA to be the efficient removal of employees who have absconded, and is intended to be used sparingly only in cases where the employer is unaware of the whereabouts of an absent employee or if the employee has evinced a clear intention not to return to work.[7]

[35] In concluding that the impugned decision of 17 June 2016 was irrational and arbitrary, the Labour Court reasoned as follows:

> '[I]t cannot be said that the applicant had absconded. The respondent was throughout aware of the applicant's whereabouts. The applicant had

[5] See *Hendricks v Overstrand Municipality and Another* (2015) 36 ILJ 163 (LAC); and *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 CC.
[6] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC). There is therefore an overlap with the ground in section 6(2)(f)(ii) of PAJA.
[7] *HOSPERSA and Another v MEC for Health* [2003] 12 BLLR 1242 (LC) at para 37.

> communicated with the principal of the school during the course of February 2013 and it is not in dispute that he was at home and contactable after 1 March 2013. Indeed, the internal memorandum written on 10 April 2013 and in particular the request that the attempts made by the principal to contact the applicant be investigated, acknowledge the respondent's understanding of the importance of the requirement that an employee's whereabouts be ascertained, to the extent possible before s14 is invoked. There is no evidence that the principal made enquiries as to the applicant's whereabouts. Had he made the most rudimentary enquiry, he would have ascertained that the applicant was at home. Had he conducted an investigation and reported this information to the respondent, it is unlikely that the respondent would have considered the applicant to have absconded.'

[36] The Labour Court held further that the appellant had failed to take into account all the relevant facts and circumstances when it refused to reinstate the respondent. It found that the decision not to reinstate the respondent was irrational principally because the appellant failed to follow less restrictive procedures such as resorting to its disciplinary code and procedure, or its incapacity procedure, to determine whether the respondent committed any act of misconduct warranting dismissal, or whether he was incapacitated to the extent that his continued employment ought to be reviewed.

The appeal

[37] The appellant's first challenge to the Labour Court decision is that a decision not to reinstate taken under section 14(2) of the EEA is not administrative action and that the respondent is precluded from challenging the rationality (legality) of the decision under section 1 of the Constitution guaranteeing the rule of law because he did not plead that cause of action.

[38] Section 1 of PAJA defines administrative action as, *inter alia*, a decision of an administrative nature taken by an organ of state when exercising a public power or performing a public function in terms of any legislation, which adversely affects the rights of any person and which has a direct, external legal effect. In *President of the Republic of South Africa and Others v South*

*African Rugby Football Union and Others*,[8] the Constitutional Court held that the determination of whether a decision constitutes administrative action has to be done on a case by case basis. What matters is not so much the functionary as the function. Various considerations may be relevant, such as: the source of the power, the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is.[9]

[39] In *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*,[10] the Supreme Court of Appeal held that at the core of the definition of administrative action is the idea of action (a decision) of an administrative nature taken by a public body or functionary. The qualification that administrative action must, as a fact, adversely affect the rights of any person, and must have a direct external legal effect, was intended to convey that administrative action is action that has the capacity to affect legal rights, i.e. it impacts directly and immediately on individuals.[11]

[40] While labour rights and administrative justice rights should be compartmentalised and are derived from different constitutional and legislative sources, rigid categorisation should be avoided. Decisions and actions taken by the state[12] as an employer may in certain circumstances constitute reviewable administrative action, especially where no remedy of review or appeal against such decision exists under the unfair dismissal or unfair labour jurisdiction in the LRA. As the Constitutional Court stated in *Gcaba v Minister for Safety and Security and Others*,[13] human rights are intrinsically interdependent, indivisible and inseparable and the constitutional and legal order is one coherent system for the protection of rights and the resolution of disputes. Accordingly, legislation must not be interpreted to exclude or unduly

[8] 2000 (1) SA 1 (CC).
[9] At paras 141-143
[10] 2005 (6) SA 313 (SCA)
[11] At paras 22-2
[12] The Department is an organ of state as defined in section 239 of the Constitution.
[13] 2010 (1) SA 238 CC

limit remedies for the enforcement of constitutional rights, including the right in section 23(1) of the Constitution to fair labour practices.[14]

[41] A letter informing an employee of his or her deemed discharge by operation of law under section 14(1) of the EEA involves no decision or exercise of a public power, and thus cannot constitute administrative action;[15] but a decision taken under section 14(2) of the EEA constitutes an exercise of a statutory power and the performance of a public function by the Department. It is a decision of an administrative nature (as opposed to an executive, legislative or judicial nature), which is informed by policy considerations regarding efficiency, and may adversely affect the rights of persons outside the Department, such as the respondent. The decision cannot be challenged under Chapter VIII of the LRA because it does not constitute a dismissal as defined in section 186(1) of the LRA - the dismissal having been deemed and the decision in terms of section 14(2) of the EEA being concerned solely with a request for reinstatement on good cause. The decision likewise cannot constitute an unfair labour practice under section 186(2) of the LRA because it does not relate to the rights and interests protected by that remedy.[16] In the premises, a decision by the Head of Department, charged with the exercise of a statutory discretion to reinstate on good cause shown by an employee deemed to have been discharged, constitutes administrative action reviewable in terms of PAJA. The Labour Court accordingly did not err in its finding in that regard.

[42] The discretion to grant reinstatement under section 14(2) of the EEA can be exercised only if the discharged educator “at any time” reports for duty and on good cause shown. In the letter of 17 June 2016, the appellant maintained that the respondent had not reported for duty. The correspondence shortly after his discharge indicated clearly that the respondent wanted to return to

[14] *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 CC; and *Hendricks v Overstrand Municipality and Another* (2015) 36 ILJ 163 (LAC).
[15] *Grootboom v National Prosecuting Authority and Others* (2014) 35 ILJ 121 (CC) at para 16; *Minister van Onderwys en Kultuur v Louw* 1995 (4) SA 383 (A); *Phenithi v Minister of Education and Others* 2008 (1) SA 420 (SCA)*; and MEC for the Department of Health, Western Cape v Weder* (2014) 35 ILJ 2131 (LAC).
[16] The unfair labour practice remedy only offers protection against unfair employer conduct related to promotion, demotion, probation, training, the provision of benefits, suspension, a failure or refusal to reinstate in terms of an agreement or an occupational detriment.

duty. The fact that he did not arrive at the school after his salary was stopped is not a basis for refusing to exercise the discretion or to exercise it adversely. The Head of Department, in any event, was directed to exercise the discretion by the order of the Labour Court, which he duly did.

[43] The remaining question is whether the appellant's decision that there was no good cause for reinstatement is reviewable. Various factors are relevant in determining whether good cause exists for reinstatement under section 14(2) of the EEA. In the interests of flexibility, it is inadvisable for courts to define the requirements of good cause too categorically. There is no *numerus clausus* of factors. Much will depend on the facts and circumstances of the case. Relevant considerations include: i) the reasons for the absence; ii) the duration of the absence; iii) the conduct of the educator prior and subsequent to his or her deemed discharge; iv) the impact of the absence on the employer; v) the whereabouts of the educator during the period of absence; vi) the practicality and tolerability of a continued employment relationship; and vii) the availability of alternative processes and solutions to the problem that led to the educator's absence.

[44] In previous decisions concerning deeming provisions this Court has held that when determining if there is good cause for reinstatement, the employer is obliged to assess whether a continued employment relationship has become intolerable. In *MEC for the Department of Health, Western Cape v Weder,*[17] the court held that it did not suffice for the employer to simply say without more, that the absence of the employee for the requisite period without a subsequent satisfactory explanation rendered the employment relationship intolerable.[18] Noting that the employees, in that case, had indeed been ill - but may have been wrong to not have informed the employer of the reasons for their absence – the court concluded:

> '.. ..On its own [this] did not appear to constitute wilful, nor deliberate conduct on their part. No reason has been provided, even in the answering affidavit with the benefit of hindsight, as to why their continued employment would

[17] (2014) 35 ILJ 2131 (LAC) (Weder).
[18] At para 40.

> have been rendered intolerable. There is, in summary, a stark absence of a plausible reason/s for the decisions taken by the appellant….. [A]pplying the test of legality, insufficient evidence was provided by the appellant as to why the decision to reject the representations made was sufficiently rationally related to the purpose for which that power was given to the appellant. In particular, and critical to these disputes, insufficient evidence was provided as to why a continued employment relationship had been rendered intolerable by the conduct of these employees.'[19]

[45] The appellant submitted that this reasoning does not account for the fact that the conduct which triggers the operation of the deeming provision is by nature intolerable and inimical to a sound employment relationship between educators and their employers, which is why Parliament has passed laws to compel automatic termination. The reasoning in *Weder*, the appellant submitted, places an *onus* on the employer to prove the misconduct and produce evidence of intolerable behaviour. That is not entirely correct. The applicable principle is rather that the employer when exercising the discretion under section 14(2) of the EEA (in the light of the fact that the deemed dismissal often would not have been preceded by any hearing or inquiry in which the educator participated) must evaluate all the circumstances, to determine if the continuation of the employment relationship has indeed become intolerable as a consequence of the educator's absence. Fairness and proportionality require deliberation of the appropriateness of permanently severing the employment relationship. The discretion must be exercised with the benefit of informed hindsight. This obliges the employer to investigate and reflect fully on the reasons for the absence and the alternatives to dismissal, which may not have been considered previously by reason of the operation of the deeming provision.

[46] The Labour Court found the decision not to reinstate the respondent was arbitrary for various related reasons. Most essentially, it held that the appellant acted disproportionately by not resorting to its disciplinary code and procedure, or its incapacity procedure, to determine whether the respondent had committed any serious act of misconduct warranting dismissal, or

[19] At paras 41 to 42.

whether at the time of the deemed dismissal he was incapacitated by ill health. There is merit in that finding.

[47] The probabilities favour the conclusion that at the time of his discharge, the respondent was not well and the appellant did not attempt to reasonably accommodate him temporarily, as it easily could have done. In so far as there was medical evidence showing (at least *prima facie*) that the respondent was suffering from stress, anxiety and depression, it was incumbent on the appellant in terms of Item 10 of Schedule 8 of the LRA to reflect on the extent of the incapacity at the time of the dismissal and to properly investigate all possible alternatives short of dismissal to deal with the problem temporarily. Besides stopping the respondent's salary, none of that was done. Instead, the appellant, despite knowing full well where the respondent was, expediently relied on section 14(1) of the EEA and avoided conducting misconduct or incapacity hearings. This was not an appropriate case for reliance on section 14(1) of the EEA. The respondent had not absconded and his whereabouts were known because he had communicated with the school principal, was at home, and contactable. As the Labour Court correctly held, a simple inquiry by the school principal would have revealed that he had not absconded.

[48] When, in June 2016, the appellant eventually exercised its discretion on the question of reinstatement, in terms of section 14(2) of the EEA, it did not definitively determine the reasons for the respondent's absence. Nor did it appear to review any mitigating factors and decide whether the problem might have been better resolved by corrective or progressive discipline. It again failed to investigate fully the reason for the respondent's incapacity and/or misconduct at the time of the deemed dismissal or the possibility for reasonable accommodation of any temporary incapacity. The appellant focussed rather on the extent of the respondent's absence and his failure to provide medical evidence of his illness for the period after 1 March 2013 until his deemed discharge. In the process, mitigating factors were ignored or not weighed appropriately, including: the respondent's lengthy service, clean disciplinary record and proven ill health before 1 March 2013, as well as the fact that his salary had been stopped in January 2013. The failure to assess

properly the tolerability or practicability of a continued employment relationship caused the impugned decision to not be rationally connected to the relevant information and the purpose of section 14(2) of the EEA.

[49] This failure to take account of the fact that reasonable accommodation was possible at the time of his deemed discharge or that any misconduct related to his absence was mitigated by various factors, including his poor mental health, therefore, renders the impugned decision arbitrary, capricious and irrational. It was capricious in the circumstances for the appellant in effect to invoke section 14(1) of the EEA and thereby avoid its duty to fairly and proportionately investigate the extent of the respondent's incapacity, its impact on any misconduct related to his absence, and alternatives short of dismissal. The Labour Court accordingly did not err in setting aside the impugned decision on the grounds contemplated in sections 6(2)(e)(v) and (vi) of PAJA.

[50] As the decision was challenged as arbitrary and capricious, the relief could equally have been granted in a legality review in terms of section 1 of the Constitution. Considering that the issue was canvassed and no additional evidence is required to determine it, an amendment of the pleadings on appeal, had an application been made, would have been competent.[20] In any event, the failure to plead a legality review does not preclude upholding a review on that basis. Where all the relevant evidence is before the appeal court, as in this case, the court ought to decide the case on the real issues canvassed during the course of the proceedings *a quo* without placing undue emphasis on the pleadings.[21] The decision is arbitrary and thus in contravention of the principle of legality.

[51] There is no basis for interfering with the Labour Court's decision to reinstate the respondent with effect from the date of his deemed discharge.

[52] In the premises, the appeal is dismissed with costs.

[20] *De Villiers v De Villiers* 1947 (1) SA 264 (C)
[21] *Sentrachem Bpk v Wenhold* 1995 (4) SA 312 (A) at 320A-B

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JR Murphy

Acting Judge of Appeal

I agree

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P Coppin

Judge of Appeal

I agree

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K Savage

Acting Judge of Appeal

APPEARANCES:

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|---|---|
| FOR THE APPELLANT: | Adv C Kahanovitz SC and Adv E A De Villiers-Jansen<br><br>Instructed by The state attorney |
| FOR THE RESPONDENTS: | Adv R Nyman<br><br>Instructed by Moosa Waglay & Petersen Inc |