IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN **REPORTABLE**

Case No: **D547/2003**

Date Heard: 02/09/2005

In the matter between

MEC FOR EDUCATION & CULTURE **APPLICANT**

and

N B MABIKA **1ST RESPONDENT**

D N DUBAZANA **2ND RESPONDENT**

NATU **3RD RESPONDENT**

S T BALKARAN **4TH RESPONDENT**

EDUCATION LABOUR RELATIONS COUNCIL **5TH RESPONDENT**

JUDGMENT

GUSH AJ

1. The applicant applied to review and have set aside the fourth respondents' award that the dismissal of the first and second respondents was procedurally unfair; constituted an unfair dismissal; and an order the first and second respondents.

2. The first and second respondents were both educators permanently employed by the Applicant and stationed at the Magqana High School.

3. The first and second respondents absented themselves from work from the 12th June 2002 until the 11th November 2002. On that date they were advised by the Applicant that by virtue of the fact that they had been absent from work without permission for a period exceeding 14 consecutive days, in accordance with the provisions of Section 14(1)(a) of the Educators Act 76 of 1998 they were deemed to have been discharged from the employ of the Applicant.

4. The first and second respondents referred a dispute concerning their "dismissal" to the fifth respondent claiming that they had been unfairly dismissed by the Applicant on the 11th November 2002. The reasons given by the first and second respondents as to why they believed their dismissal to be unfair referred to both procedural and substantive unfairness. Procedurally the first and second respondents complained that the Applicant had not conducted a hearing; that they did not know what the nature of their "offence" was; and that no prior notice had been given. Substantively, they averred that the unfairness was due to the fact that they didn't know what the reason for their dismissal was.

5. This was the dispute that the fourth respondent arbitrated.

6. Section 14(1) of the Employment of Educators Act 76 of 1998, (the Act) provides:

14. Certain educators deemed to be discharged -

(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) ……..

c) ……..

d) ……..

shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct, ……..

7. The fourth Respondent found that as a matter of fact the first and second respondents had been absent without permission for the entire period 12th June 2002 to 11 November 2002.

8. It is not necessary for the purposes of this review to consider the circumstances surrounding the reasons for the 1st and 2nd Respondents absence from their place of work. The finding of the 4th Respondent that the 1st and 2nd Respondents absence was without permission was not challenged and I have no reason to question this finding.

9. For the reasons that are set out below the only evidence which may be relevant to this review was the evidence surrounding what was referred to at the arbitration as the "ultimatum".

10. The evidence led at the arbitration established that the principal of the High School where the first and second respondents were stationed had on the advice of the Schools' Governing Body and an employee of the applicant written to the first and second respondents on the 6th August calling on them to return to work by the 12th August 2002 failing which they were to be charged with absconding.

11. It was common cause that the 1st and 2nd Respondents did not report to

work on the 12th August 2002 as required. There was some dispute about whether or not the first and second respondents received this letter. I accept the fourth respondents' finding that they did not receive the letter which was referred to as the "ultimatum".

12. Whilst counsel for the first, second and third respondents argued during the review that the applicants decision to write to the first and second respondents amounted to the "employer directing otherwise" as provided for in section 14(1) of the Act, this point was not argued before the fourth respondent.

13. The fourth respondent found expressly that it was not necessary to consider whether or not the applicant was required to issue an ultimatum. The fourth respondent considered the evidence and found that the letter of 12th August 2002 did not reach the first and second respondents and proceeded to examine, in the light of this, whether the applicant had acted "unprocedurally in terminating the employment of the applicants without affording them a hearing"

14. The fourth respondent concluded that the applicant was obliged to afford the first and second respondents a fair hearing prior to their dismissal. The fourth respondent further states that in the law of contract the act of desertion constitutes a breach of the contract which does not terminate the contract, and that the employer is required to elect to accept the breach in order to terminate the contract. At no stage did the fourth respondent consider the effect of the deeming provision in section 14(1) of the Act and whether the ultimatum was issued in terms of that section as constituting compliance with the proviso or whether it was evidence of the Applicant exercising its discretion.

15. The fourth respondent found that the failure of the applicant to afford the

first and second respondents a hearing rendered the dismissal procedurally unfair.

16. What was ignored by the parties at the arbitration was the nature, effect and impact of the letter addressed to the first and second respondents on the 11th November 2002 by the Applicant and the effect of the provisions of section 14(1)(a) of the Act. In this letter the applicant stated:

> *"The principal's letter dated 06/08/2002 has reference.*
>
> *The letter referred to above was calling upon you to report at your school not later than 12th August 2002, but you did not respond.*
>
> *The Department now confirms that you have been absent from work for a period exceeding 14 consecutive days without the permission of the employer. You are deemed to have been discharged from service on account of misconduct in terms of Section 14(1)(a) of the Employment of Educators Act, 76 of 1998 with close of duty on 28/06/2002. Any overpayment thus far will be recovered from your pension benefits.*
> *Kindly note that you have a right to make representation if you are not satisfied with the decision of the Department, to show cause why the Department should reinstate you should you later return to work (place of employment)"*

17. This letter simply advised the first and second respondents that they had been discharged for the reason that they had been absent without permission for a period in excess of 14 days, as provided for in the deeming provision in section 14(1)(a) of the Act, and offered the first and second respondents an opportunity to make representations as to why

they should be reinstated.

18. 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 public service. 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.

    See:
    NKOPO v Public Health & Welfare Bargaining Council & Others (2002) 23 ILJ 520 (LC)

Public Servants Association of SA & Another v Premier of Gauteng & Others (1999) 20 ILJ 2106 (LC)
YANTA v Minister of Education & Culture KwaZulu Natal & Another 1992 (3) SA 54 (NPD)

19. In *Minister van Onderwysers en Kulture en Andere v Louw* 1995 (4) SA 383 (AA) the court held that deeming provisions takes effect if the employee is absent without permission for the specified number of consecutive days where the employer has not directed otherwise. [at p388 G]

    "Trouens, die al of nie inwerkingtreding van die beskouingsbepaling is nie van enige besluit afhanklik nie. Daar is dus geen ruimte nie vir 'n beroep op die audi-reël wat in sy klassieke formulering van toepassing is wanneer 'n administratiewe – en diskresionêre – beslissing die regte, voorregte of vryheid van 'n persoon nadelig kan raak."

20. 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 address the absence which lead to the discharge of the employee.

21. I am therefore of the view that 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.

22. In the matter of *Pheniti v Minister of Education and Others* [2005] 6 BLLR 614 (O) 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 a discretion and for that reason the court concluded, 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. (at page 618)

23. 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 made by the employee in terms of section 14(2), the employer must naturally act fairly, reasonably and justifiably.

24. It is necessary therefore to consider what impact, if any, the letter of the 6th August 2002 (the ultimatum) had on the discharge of the first and second respondents from the employ of the applicant. At the time the letter was written, the 1st and 2nd Respondents had already been absent without permission for 14 consecutive days. The letter could serve no real purpose other than to evidence a possible indication of the applicants attitude to an enquiry to be held in accordance with section 14(2) of the Act which provides:-

Section 14(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 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 or otherwise as the employer may determine."*

25. Even if the letter amounted to or constituted an act complying with the proviso that "unless the employer directs otherwise" , which I do not believe to be the case, it could be no more than a suspension of the operation of the deeming provision for the period 8 August to 12 August 2002. It certainly does not suggest in any way whatsoever, that the applicant was irrevocably abandoning the provisions of the deeming provision in section 14 nor for that matter that the Applicant was directing

otherwise.

26. 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 section14(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.

27. The so-called ultimatum, whether or not it was received by the first and second respondents, is irrelevant to consequences which flow from the provisions of section 14(1)(a). That it was not received by the first and second respondents does not render their discharge unfair for either procedural or substantive reasons. It does not have the effect of converting what amounts to a discharge by operation of law into a dismissal by the Applicant.

28. It follows that the first and second respondents were not dismissed. Their discharge occurred by operation of law. It also follows that the first and second respondents may yet invoke the provisions of section 14(2).

29. The fourth and fifth Respondents accordingly did not have jurisdiction to consider the dispute.

30. The application to review the award of the fourth respondent succeeds and is accordingly set aside.

31. The first, second and third respondents are to pay the applicants costs, the one to pay the others to be absolved.

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Gush AJ
28 September 2005

On Behalf of Applicant:	Adv. M. De Klerk
Instructed By:	State Attorney
On Behalf of Respondents:	Adv. I. Pillay
Instructed By:	Deneys Reitz Attorneys