TERMINATION OF EMPLOYMENT

ABSCONDMENT

This article is about the termination of employment through abscondment which is regulated by section 17(3)(a) and 17(3)(b) of the Public Service Act, 1994 as amended. Section 17(3)(a) stipulates that *an employee, other than a member of the service or an educator or a member of the Intelligence Service, who absents 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 the date immediately succeeding his or her last day of attendance at his or her place of duty*. Abscondment is deemed to have occurred when the employee is absent from work for a time that warrants the inference that the employee does not intend to return to work [Mthethwa and Capital Caterers (2007) ILJ 1859 (CCMA)]. In this regard, the employer must be certain that abscondment has occurred, by establishing the following facts; that the person:

- Is the employee,
- He or she absents 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 (PAWUSA & Another v Department of Education, Free State Province & Others (2008) 29 ILJ 3031 (LC).

Desertion, on the other hand, is deemed to have taken place when the employee has actually intimated expressly or by implication that (s)he does not intend to return to work [Mthethwa and Capital Caterers (2007) 28 ILJ 1859 (CCMA)]. Nevertheless, for the purposes of this article, abscondment and desertion will be used interchangeably to mean the same thing.

It is advisable, and constitutes sound human resource management, therefore, to establish the employee's whereabouts at an early stage of his or her unexplained absence and instruct him or her to return to work on a day immediately succeeding the day on which he/ she receives that notice; otherwise he or she will be deemed to have been dismissed 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. This is consistent with the inference in Seema v General Public Services Sectoral Bargaining Council & Others (2005) 26 ILJ 2037 (LC) that "mere absence from work is not conclusive evidence that the applicant did not have the intention to return; applicant ought to have been summoned … and adequately informed about the consequence of his continued absence from work"

The Public Service Act, in section 17(3)(b), further provides that *if an employee who is deemed to have been so dismissed, reports for duty at any time after the expiry of the period referred to in paragraph (a), the relevant executive authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that employee in the public service in his or her former or any other post or position, and in such a 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*. The employee who has absconded is, thus, afforded an opportunity for a hearing, though after the event/incident.

Abscondment has been challenged at the Commission for Conciliation, Mediation and Arbitration (CCMA), Labour Courts, and even the Supreme Court of Appeal (SCA) on the basis that the provision of the Pubic Service Act giving effect to such termination of service is either in conflict with the Constitution or falls foul of a fair procedure.

Sutherland AJ, in the SA Broadcasting Corporation v Commission for Conciliation, Mediation & Arbitration & Others (2001) 22 ILJ 487 (LC) asserted, "what constitutes desertion is of course a matter of fact. In some instances an unexplained absence for a reasonable period, that is to say, reasonable in relation to the employer's operational requirements, will establish that fact of desertion". He further asserted that desertion constitutes a breach since it is an act which is not permitted by the terms of the contract; and that it is not the desertion which terminates the contract of employment, but the act of the employer who elects to exercise its right to terminate the contract in the face of that breach. Although he indicates that convening a disciplinary enquiry before taking a decision to dismiss is dependent on the relevant circumstances and the practicality of doing so. He was of the view that if the employee is within reach of the employer, the employer should have furnished the employee with a notice to appear and show cause why he should not be dismissed. However, he asserts that in the instance where an employee remains away from the workplace and his or her whereabouts are not known and is out of reach of the employer, it is plainly impractical to impose upon an employer the obligation to convene a disciplinary enquiry before reaching the conclusion regarding the fact that the employee has absconded/deserted, in which case the employer is entitled to terminate the employment contract. Therefore, it is submitted that could constitute the exceptional circumstances referred to in item 4(4) of the Code of Good Practice in the Labour Relations Act 66 of 1995 (LRA).

Such termination of service in the Public Service is regarded as 'deemed dismissal on account of misconduct'. It could be easily confused with item 2(1) of Schedule 8 of the LRA which stipulates that a dismissal must be effected for a <u>fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment</u>.

Normally, the employer in following a fair procedure should among others, according item 4 of Schedule 8 of the Labour Relations Act 66 of 1995, conduct an investigation to determine whether there are grounds for *dismissal*. He or she should notify the *employee* of the allegations using a form and language that the *employee* can reasonably understand. He or she should allow the *employee* the opportunity to state a case in response to the allegations. The *employee* should be entitled to a reasonable time to prepare the response and to the assistance of a *trade union representative* or *fellow employee.* After the enquiry, the employer should communicate the decision taken, and preferably furnish the *employee* of that decision in writing. Item 4(4) further stipulates that in exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures. This implies that there could be circumstances which can render it impossible to hold an enquiry before dismissal, and in that case, the employer can bring the dismissal into effect without holding a disciplinary enquiry. Similarly, in Maila & Others v Hungry Eye Restaurant (1990) 11 ILJ 400 (IC), it was inferred "it seems apparent that applicants can be deemed to have waived their right to a hearing by deserting".

The Arbitrator, Chetty A, in the National Union of Metalworkers of SA on behalf of Magadla and AMT Services (PTY) LTD (2003) 24 ILJ 1769 (BCA), had to decide whether the applicant was dismissed, and if so, whether the dismissal was fair. The applicant (employee) had been in custody from 14 December 2002 to 28 January 2003 for intent to commit grievous bodily harm on his attackers when they mugged him on his way to work (on 14 December 2002). He inflicted on them severe wounds in self defence. The employer did not know where the employee was during this period, and therefore sent two telegrams to the applicant's home address (i.e. employee's home address) conveying an ultimatum to him to return to work. When no response was received, he was regarded as having deserted.

The employer therefore contended at arbitration, when the applicant (employee) was challenging his dismissal, that there was no dismissal which brought about the end of the applicant's services (employee's services), but it is the applicant (employee) who deserted his employment causing the termination of his own services. The Arbitrator indicated that the respondent (employer) would have been entitled to regard the applicant as having terminated his contract of service by reason of his unexplained absence from work since 14 December 2002. He further indicated that the respondent had also acted fairly and reasonably in addressing the two telegrams to the applicant, and when no response was received from the applicant, the employer was entitled to regard the applicant as having deserted his employment. However, when the applicant (employee) returned to work on 29 January 2003, it was incumbent upon the respondent (employer) to enquire into the reasons for the applicant's prolonged and as

yet unexplained absence. Instead the employer, when the employee returned to work, told him to change into his civilian dress as he had already been dismissed. Such dismissal was declared unfair based on the fact that had the employer enquired as to the reasons for the employee not to come to work during that prolonged period of absence, it would have realised that he was in a situation beyond his control. Hence he would have revisited and rethought the decision to terminate the employee's services.

The preceding case law favours a notion of holding a pre-dismissal hearing when dealing with the issue of abscondment/desertion. However, the current position with regard to abscondments does not require a pre-dismissal hearing to be held as will be demonstrated below by the prevailing case law.

The Public Service has, on occasions, dealt with desertion (abscondment) cases. For instance, in Phethini v Minister of Education and others (2006) 27 ILJ 477 (SCA), the issues placed by the employee party were (1) whether the discharge of the appellant (employee) from duty constituted administrative action and, if so, whether it was fair; and (2) the constitutionality of s 14(1)(a) of the Employment of Educators Act 76 of 1998. Section 14(1)(a) of the Employment of Educators Act provides that *an educator appointed in a permanent capacity who … is absent from work for a period exceeding 14 consecutive days without permission of the employer; … shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct, in the circumstances where- … 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*;. Section 14(2) reads: '*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 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 regard to whether the discharge of the appellant from duty constituted administrative action and, if so, whether it was fair. MPATI DP asserted that the relevant section of the Employment of Educators Act does not require any decision to be made for its provisions to come into operation and for that reason no hearing is contemplated prior to its coming into operation. And it is difficult to fathom how the employer could suspend the operation of the provisions of the section so as to afford an educator an opportunity to be heard. As such, with respect to the constitutionality of s 14(1)(a), he concluded that "the provisions of section 14(1)(a), read with section 14(2) of the Employment of Educators Act 76 of 1998 do not offend against the Constitution". It can be held in the same light that section 17(3)(a) read with section 17(3)(b) of the Public Service Act, 1994, as amended, do not offend against the Constitution. It is intended, in consistence with the Phethini v Minister of Education and others (2006) 27 ILJ 477

(SCA) judgment, to limit the potential harm that the recipients of public services and service delivery could suffer because of the absence of an employee without leave, while still allowing for a period of one calendar month before the right of the employee is affected by operation of law. Such limitation is reasonable and justified in an open and democratic society based on human dignity, equality and freedom (s 36(1) of the Constitution).

In the matter of the Free State Provincial Government (Department of Agriculture) v Make, the issue of desertion was dealt with when the provisions of the old Public Service Act were still in operation. Section 17(5)(a)(i) stipulated that *an officer, other than a member of the services or an educator or a member of the Agency or the Service, who absents 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 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*. Francis J made reference to the matter of Phethini v Minister of Education and others (2006) 27 ILJ 477 (SCA), and ruled that the respondent's termination of employment was by operation of law.

The fact of the matter is that the employee is given the opportunity to be heard, though after the implementation of the provision that gives rise to the termination of the employment relationship. Grogan, J. (2008:86), in acknowledgement of the prevailing case law, asserts that although the Labour Court has warned that statutory employers are entitled to rely on such provisions only in exceptional circumstances (i.e. where the employee has well and truly disappeared), such deeming provisions have been upheld by the Supreme Court of Appeal and may only be attacked on the basis that the employee was not in fact absent.

In terms of the decision of the Supreme Court of Appeal, the termination of the services of the employee who has absconded/deserted is lawful and occurs by operation of law (section 17(3)(a) of the Public Service Act). The employer, therefore, does not have to hold a disciplinary enquiry before implementing the relevant provision of the Public Service Act, especially since the employee is, afterwards, provided with the opportunity in terms of section 17(3)(b) of the Public Service Act, 1994, as amended to show good cause why his or her services should not have been terminated.

It is particularly significant that section 188 of the Labour Relations Act 66 of 1995 recognises three grounds for dismissal, namely, the conduct of the employee, the capacity of the employee, and the operational requirement of the employer's business. However, in implementing section 17(3)(a) to (b) of the Public Service Act, the public service employer does not, and does not have to rely on section 188 of the Labour Relations Act because he is not expected to make a decision or discretion in the matter

since the provisions of section 17(3)(a) to (b) of the Public Service Act immediately come into operation once the existence of abscondment has been established. These provisions, in consistence with the view of the SCA in Phethini v Minister of Education and others (2006) 27 ILJ 477 (SCA), create the essential and reasonable mechanism for the employer to infer 'desertion' when the statutory prerequisites are fulfilled. Therefore, there can be no unfairness, as the officer's absence is taken by the statute to amount to a 'desertion', furthermore, the very same statute provides ample means to rectify or reverse the outcome upon good cause shown by the affected employee.

If the executive authority, after considering the representations as 'on good cause shown' of the affected employee, still cannot reinstate him or her; he or she (the employee) "can only take the decision not to reinstate him or her on review in terms of s 158(1)(h) of the LRA if he or she believes that the decision can be reviewed on any of the grounds permissible in law" PAWUSA and another v Department of Education, Free State Province & Other (2008) 29 ILJ 3013 (LC).

The emphasis, therefore, is that abscondment in the Public Service is the termination of employment by operation of law, and; according to Grogan, J. (2008:86), "does not constitute a dismissal", despite the Act stipulating it to be a deemed dismissal from the public service on account of misconduct. The employer merely notifies an employee about his or her discharge which occurs by operation of law.

An Opinion from the Labour Desk