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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 986/14

In the matter between:

PSA obo R ROUSSEAU-GEDULD **Applicant**

and

HEAD OF DEPARTMENT: DEPARTMENT OF EDUCATION, NORTHERN CAPE **First Respondent**

MEMBER OF THE EXECUTIVE COUNCIL: EDUCATION, NORTHERN CAPE **Second Respondent**

Heard: 15 March 2017

Delivered: 22 March 2017

Summary: Review – LRA s 158(1)(h) and Employment of Educators Act s 14. Employee informed that she is deemed to be dismissed in terms of s 14 of Educators Act. Union made representations to MEC in terms of s 14(2) to be reinstated. MEC has not taken a decision on four years. MEC ordered to take a decision and to pay applicant's costs.

JUDGMENT

STEENKAMP J

Introduction

[1] This is an application in terms of s 158(1)(h) of the LRA[1] to review and set aside a decision and the refusal or neglect to take a decision, respectively, of the State as employer, in the guise of, respectively, the head of department of education in the Northern Cape; and the Member of the Executive Council for education in that province.

[2] The applicant is the Public Servants Association of South Africa (PSA), representing its member, Ms Raquel Rousseau-Geduld. She is a teacher, or in official parlance, an educator. The Head of Department (the HOD – the first respondent) informed her that she was deemed to have been discharged from service in terms of s 14(1) of the Employment of Educators Act[2], as she had been absent from work for more than 14 days without permission. She made representations to the MEC (the second respondent) to be reinstated. Four years later, the MEC has not responded.

[3] The applicant (i.e. the PSA, representing Ms Geduld) has applied in terms of s 158(1)(h) of the LRA to have the decision of the HOD reviewed and set aside; alternatively, to review and set aside the MEC's failure to consider and determine the employee's representations in accordance with s 14(2) of the Educators Act.

Background facts

[4] Ms Geduld was employed as a teacher in the Northern Cape since 2007. On 16 August 2012 Dr Laurence Oliver booked her off for acute stress disorder and major depression for a period of four months, until 15 December 2012 (i.e. more or less until the end of the school year). She says that her trade union, the PSA, sent that medical certificate to the Head of Department (HOD), Mr G T Pharasi; the Department denies it.

[1] Labour Relations Act 66 of 1995.

[2] Act 76 of 1998.

[5] The certificate attached to the founding affidavit includes a fax transmission sheet dated 26 September 2012 for fax number 086 771 3093. The applicant provides no proof, either in its finding or replying affidavit; whose fax number it is; the respondents deny any knowledge of it.

[6] On 24 October 2012 the District Director – apparently on behalf of the HOD -- informed the employee that she was deemed to be discharged from service as from 18 September 2012 in terms of s 14(1) of the Employment of Educators Act as she had been absent from work for a period of more than 14 consecutive days without permission of the employer.

[7] The PSA made representations to the MEC, on behalf of the employee, in February 2013 in terms of s 14(2) of the Educators Act. It asked the MEC to approve the reinstatement of the employee on the grounds that she was not wilfully absent from work, but because she had been booked off sick. Four years later, the MEC has not taken a decision and has not so much as responded to the union. Even when this matter was heard, after pleadings had closed and after the MEC had had occasion to consider the pleadings, she had still not taken a decision. Instead, she chose to incur further legal costs and to instruct her counsel to argue that the representations made four years ago "are under consideration by her". It is in that context that this matter was heard, with attorneys and counsel briefed by both sides. The legal costs for the respondents are, of course, borne by the Northern Cape Province and ultimately by the taxpayer.

Legal framework

[8] Section 14 of the Employment of Educators Act contains the following provisions:

> "**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) 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."

[9] The employee was informed that she was deemed to be discharged in terms of s 14(1)(a). Through her union, she made representations to be reinstated to the MEC in terms of s 14(2). The MEC has not responded.

[10] The applicant brings this review application in terms of s 158(1)(h) of the LRA, which provides that this Court may "review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law."

[11] Before considering the merits, the Court must decide whether to grant the applicant condonation for the late filing of the review application.

Condonation

[12] The application for condonation must be considered against the trite principles in *Melane v Santam Insurance Co Ltd*[3], together with the overriding consideration of the interests of justice.

Extent of delay

[13] Section 158(1)(h) of the LRA does not prescribe a time period for delivering a review application. It must be done within a reasonable time. As Ms *Ngumbela* argued, this Court has held in *Weder v MEC for the Department of Health, Western Cape*[4] that anything more than six weeks should at least trigger an application for condonation.

[14] In this case, the application for review was brought about two years after the HOD informed the employee about her discharge. It appears to be an excessive delay. But the delay must be weighed up against the reasons for it.

Reasons for delay

[15] The HOD informed the employee about her deemed discharge at the end of 2012. (Although the letter is dated 25 October, she only received it on 3 December 2012). On 5 February 2012 the PSA made representations to the MEC in terms of s 14(2) of the Educators Act to have her reinstated. The MEC did not respond. Months and years passed. A new MEC was elected. Still there was no response.

[16] Eventually, even the eponymous Ms Geduld lost patience. After two years, the MEC had still not responded to her representations. That is when she delivered this application. And despite that, four years after Ms Geduld had made her representations and two years after this application was filed, the MEC[5] has still not responded. Not even after this matter had been set down for hearing and after significant legal costs had been incurred, was the MEC spurred into action.

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[3] 1962 (4) SA 531 (A).

[4] (2013) 34 *ILJ* 1315 (LC).

[5] Currently Ms G Cjiekella-Lecholo.

[17] In my view, the applicant cannot be blamed for waiting – at least for the initial period of two years – for the MEC to consider its representations. On the contrary, the blame for tardiness lies with the MEC. Had the applicant been hasty in bringing this application, it may well have been blamed for being premature, as the MEC needed time to consider its representations.

[18] Given the primary reason for the delay – being a non-responsive MEC – the extent of the delay is understandable.

Prejudice

[19] Ms Rousseau-Geduld is suffering clear prejudice because of the delay occasioned by the MEC. It is that delay that, in turn, led to the PSA delaying in bringing this application. Any prejudice to the respondents is caused primarily by the tardiness and inaction of the second respondent, the MEC. And that could easily have been cured by her taking a simple decision one way or the other. The prejudice to the applicant outweighs that experienced by the respondents.

Prospects of success

[20] As will be seen hereunder, I have concluded that the applicant has good prospects of success on at least one of the review grounds it raises. In order to consider the prospects of success, the Court had to consider the merits of the review application in full.

Conclusion : condonation

[21] Condonation is granted for the late filing of the review application.

Merits on review

[22] I shall consider the attack on the MEC's failure to take a decision in terms of s 14(2) of the Public Service Act first.

[23] The delay is simply unconscionable. The applicant made representations to the MEC on 4 February 2013, properly motivated, more than four years ago. All the MEC had to do was to apply her mind to the fact of the employee's absence and the reasons for it, i.e. the fact that she had been

booked off for medical reasons. If the MEC had any misgivings about the nature of the illness, she could have inquired about it or asked for further details. Instead, the current MEC and her predecessors did nothing. The only vague and unsatisfactory explanation the current MEC offers is that she was not the incumbent at the time. But whoever occupied the position at any given time would and should have been aware of the fact that she or he had to act in terms of s 14(2) of the Employment of Educators Act; and at the very least, should have been prompted to act when this application was delivered.

[24] In *Grootboom*[6] the Constitutional Court, applying a similar provision in the Public Service Act, set aside the "deemed dismissal" of the employee because he had been suspended and was therefore not absent without permission. But the question whether similar considerations apply in this case, where the employee had been booked off sick, does not even arise. The Court need not consider the first aspect of the review application – i.e. the attack on the HOD's decision – because the HOD must, in the first place, take a decision on the applicant's submissions.

[25] In *MEC for Health, Western Cape v Weder*[7] the LAC confirmed the judgment of the court *a quo* that employees are entitled to proper reasons for a refusal to reinstate them. In the absence of proper reasons, the MEC's decision not to reinstate was reviewed and set aside. In this case, the MEC has not only refused to give reasons; she has not even taken a decision one way or the other.

[26] In the absence of any decision by the MEC, there is quite obviously no decision to be reviewed; but it is in the interests of justice that the employee be notified of a decision one way or the other. Once that has happened, she will either return to work or she may decide to take that decision on review, should it be an adverse one and should she not be satisfied with the reasons.

[6] *Grootboom v NPA* [2014] 1 BLLR 1 (CC).

[7] [2014] 7 BLLR 687 (LAC); (2014) 35 *ILJ* 2131 (LAC).

Conclusion

[27] Although the relief that I intend to grant was not couched in these terms in the notice of motion, the applicant also asked in the alternative for "such further and/or alternative relief as this honourable Court may deem just". And in terms of s 158(1)(a)(iii) of the LRA this Court has the power to make any appropriate order, including "an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act".

[28] One of the primary objects of the LRA is to promote the effective resolution of labour disputes.[8] That object is supplemented by s 14(2) of the Employment of Educators Act, which leaves it to the MEC to decide whether an employee had shown good cause to be reinstated. In this case, the MEC has simply refused or neglected to do so, contrary to the aim of effective dispute resolution. I deem it to be in the interests of justice that she be ordered to do so expeditiously.

Costs

[29] The conclusion that the Court has reached was precipitated only by the inaction of the MEC. There is no reason in law or fairness why she should not pay the applicant's costs.[9] As the Constitutional Court remarked only last week, "Accountability is a central value of our Constitution." [10]The MEC must be held accountable for her failure to act.

Order

[30] I therefore make the following order:

30.1 The second respondent (the MEC for Education, Northern Cape) is ordered to consider the applicant's representations of February 2013 in terms of s 14(2) of the Employment of Educators Act and to inform the applicant of her decision by no later than **21 April 2017**.

30.2 The MEC is ordered to pay the applicant's costs.

[8] LRA s 1(d)(iv).

[9] LRA s 162.

[10] *Black Sash Trust v Minister of Social Development and Others* (CCT48/17, 17 March 2017).

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Steenkamp J

APPEARANCES

APPLICANT:	P M Venter Instructed by Adrie Hechter.
RESPONDENTS:	Mandlakazi Ngumbela Instructed by the State Attorney, Kimberley.