

# **A CRITIQUE OF THE LEGAL TECHNIQUE OF MANAGING ABSCONDING EMPLOYEES**

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# Introduction

- Section 23 (1) of the Constitution guarantees everyone the right to fair labour practices ( employees in both the public and private sector)
- The Labour Relations Act 66 of 1995 (the LRA) gives effect to this constitutional right by providing that every employee has the right not to be unfairly dismissed (section 185(a))

- In line with Convention 58 of the International Labour Organisation the LRA provides 3 grounds on which an employee can be fairly dismissed- misconduct, incapacity and operational requirements
- The LRA further requires that a dismissal must be procedurally fair ( the *audi alteram* principle)
- Therefore, even if dismissal is effected for a fair reason, it could still be procedurally unfair if the affected employee was not afforded an opportunity to state his/her case

# Resolution of dismissal disputes

- A dispute relating to an unfair dismissal can be referred to the Commission for Conciliation Mediation & Arbitration (the CCMA) or bargaining council for conciliation
- If conciliation fails the matter may be referred to arbitration or adjudication by the Labour Court

## Public sector

### Deeming provision –s 17(3)(a)

- Section 17 (3)(a)(i) provides that an employee (other than an educator) who absents himself/herself without the permission of the employer for a period exceeding 30 days shall be deemed to have been discharged from the public service on account of misconduct with effect from the date immediately succeeding his last day of attendance at this place of duty

- By virtue of the deeming provision, the employment of the affected employee will be terminated
- There is no dismissal as the termination flows from an operation of the law
- Such an employee does not have recourse to the CCMA/ bargaining council for conciliation and arbitration since there is no dismissal

## Section 17(3)(b)

- Section 17(3)(b) provides that the relevant authority may, upon good cause shown by an employee, approve the reinstatement of the employee who was discharged on account of the deeming provision
- In essence, the section offers the affected employee an opportunity to make representations



# Employment of Educators Act of 1998

- With respect to educators, the deeming provision takes effect after 14 consecutive days of absence from work
- The relevant authority may, upon good cause shown by an educator, order reinstatement



# Local government sector

- The deeming provisions do not apply
- Absenteeism dealt with in line with misconduct processes as envisaged in the LRA

# A comparative analysis (selected countries)

## Namibia

### The Public Service Act 13 of 1995

- Section 24(5) (a) of the Act provides that an employee who absents himself/herself from work for a period exceeding 30 days shall be deemed to be discharged on account of misconduct

## Section 24(5)(b)

- The section provides for the reinstatement of an employee, on the recommendation of the Commission

# Local government sector

- Section 29(4) of the Local Authority Act 23 of 1992 provides that an employee who absents himself/herself for a period exceeding 30 days shall be deemed to have been discharged on account of misconduct
- Unlike in South Africa, the deeming provision apply in the local government sector in Namibia

# Justification for the deeming provision

## Case law

- In *Njathi v The Permanent Secretary, Minister of Home Affairs* 1998 NR 167 the court held:  
*‘The deeming clause terminating the employment comes to the rescue of the employer who was placed in the invidious position of not knowing why and for how long such absence would continue, to again fill in the position so that the work can be done’.*

# UGANDA

## **The Uganda Public Service Standing Orders (2010)**

- Article 17 of the Standing Orders enjoins an employee to inform the employer about his/her absence from duty
- Article 18 empowers an employer to require an employee who is absent from duty for 14 days to return to work immediately and to provide an explanation for the absence

# Article 19 of the Standing Orders

- Article 19 provides that failure by an employee to heed the call to return immediately to work (as per article 18) will result in an automatic termination of employment
- Unlike in South Africa and Namibia, the option of showing good cause and possible reinstatement is not available. This might be harsh for an employee who had good reasons



# An analysis of the deeming provisions

## Constitutionality of the deeming provisions

- Do these measures not limit the constitutional right of public service employees to fair labour practices
- In *Phenithi v Minister of Education [2000] 11 BLLR 1314* (SCA) the court held that the deeming provisions are not unconstitutional since an employee is allowed to show good cause
- Question- the opportunity to make representations arises after the termination has already been taken

- In other misconduct cases (private sector employees), such an opportunity is granted before the termination takes place
- Justification for the availability of the deeming provisions only to the State as the employer and not other employers (private sector and local government)

# Circumvention of the Labour Relations Act

- The LRA provides that a dismissal must be substantively and procedurally fair
- A dispute relating to dismissal can be referred to the CCMA/bargaining council for conciliation
- This option not available to discharged employees since there is no dismissal

# Failure by employer to reinstate upon good cause shown

- No option of referring a dispute relating to refusal to reinstate to the CCMA/ bargaining council for conciliation since there is no dismissal
- The aggrieved employee can take the matter on review

# Recommendations

- Amending the Public Service Act & the Employment of Educators Act to the effect that when an employee whose services were terminated returns, a hearing must be held, not by the relevant executive authority but by the authority that normally exercises discipline or incapacity hearings

- Defining a decision not to approve reinstatement as a dismissal for misconduct or incapacity
- This will eliminate the necessity of launching review applications to the Labour Court
- This will expedite the dispute resolution process

# THANK YOU

