

IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL
HELD IN CENTURION

CASE NO: GPBC729/2019

In the matter between

PSA obo Maruatona D

Applicant

AND

Department of Defence

Respondent

JURISDICTIONAL RULING

BACKGROUND

[1] The matter was referred to General Public Service Sectoral Bargaining Council (GPSSBC) on 19 March 2019 for conciliation in terms of Rule 10.

The matter was allocated to me to issue a jurisdiction ruling on papers without convening a formal hearing.

ISSUE TO BE DECIDED

[2] I am required to decide whether the Council has jurisdiction to conciliate the alleged unfair dismissal in terms of section 17(3)(a) of the Public Service Act 103 of 1994 as amended.

PRE-HEARING SCREENING FOR JURISDICTION

[3] The matter was allocated to me to perform a screening for jurisdictional to determine if the Council has jurisdiction to conciliate the matter.

[4] Upon perusal of the said referral it appears that the Applicant is deemed to have been discharged in terms of *Section 17 (3)(a)(i) of the Public Service Act of 1994*.

A Section 17 discharge is not a dismissal as contemplated by Section 186 (a) – (f) of the Labour Relations Act of 1995, as amended in that the applicant was discharged *ex lege* from work i.e. by operation of law, in that he/she was absent from work for 30 consecutive days without authorisation.

The matter of **MG PHENITHI vs. MINISTER OF EDUCATION AND OTHERS** (Supreme Court of Appeal Case Number 18/05) has a direct bearing on this matter.

Your attention is drawn to paragraph 27 of the judgement which reads as follows:

“As a last port of call Mr Khang contended that the provisions s14(1)(a) oust the jurisdiction of the high court. He based his submission on the arbitrator’s finding that the Council had no jurisdiction in the matter since the section was peremptory the contention has no substance. If as was held in Louw’s case, the educator concerned were to allege that he/she had the necessary consent to be absent from work and that at allegation is disputed, the factual dispute is justiciable by a court of law. Similarly, if the employer was to be requested to ‘direct otherwise’ (in terms of the section) and refuses to do so, his/her decision (to refuse) is reviewable. The same would apply in the case of a refusal to reinstate under s14 (2).”

DEEMED DISMISSAL IN THE PUBLIC SERVICE

[5] The state as the employer is immunised against unfair dismissal claims in the realm of deemed dismissal. This is ensured by way of section 14 (1) of the Employment of Educators Act 76 of 1998 (the Act) and section 17(3)(a) of the Public Service Act 103 of 1994 (PSA). **This form of dismissal operates outside of the LRA and PSCBC Resolution 1 of 2003.**

(3) (a) (i) An employee, other than a member of the service or an educator or a member of the Intelligence Services, 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 calender 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.

(ii) If such an employee assumes other employment, he or she shall be deemed to have been dismissed as foresaid irrespective of whether the said period has expired or not .

(b) 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.

[6] John Grogan in his book dismissal second edition says “The only remedy afforded employees discharged under section 17(3) of the Public Service Act is to appeal to the head of the department concerned, showing cause why they should be reinstated.” In this instance the applicant has confirmed in his referral form that the reason for dismissal is “Abscondment” and he was ill and did not make a representation for reinstatement and give reasons for her whereabouts in terms of section 17(3)(b) of the Public Service Act to the Executive Authority.

In the case of **PSA obo Smit v Mphaphuli NO and Others (LC) (unreported case no C742/11, 16-4-2014)** the court referred to **Weder v Member of the Executive Council for the Department of Health, Western Cape [2013] 1 BLLR 94 (LC)**, wherein it was stated: *It is difficult to assess whether a decision could have been reasonable and rational when the decision maker offers no response for the decision ...The court also stated that: ‘The same must hold true of the MEC’s decision. Without him having given any reasons for his decision for his decision, it cannot be said to be reasonable. How can it be ascertained if it was reasonable, if he gave no reasons? The court further stated: “And, a Cora Hoexter notes, “the giving of reasons is commonly regarded as one of the more fundamental requirements of administrative justice and an important component of procedural fairness”*

Section 158 (1)(h) of the LRA empowers the Labour Court to review the actions by the state in its capacity an employer. This was held in both the **De Villiers and Mogale and Another v Head of the Department: The Department of Education NO [2012] 6 BLLR 584 (LC)**.

[7] An arbitrator has no jurisdiction to enquire into the procedural and substantial fairness of the deemed Dismissal of an employee who has been discharged in terms of this type of statutory provision-

[8] RULING

From the above mentioned, I rule that GPSSBC has no jurisdiction to resolve/conciliate the dispute. The only forum clothed with the necessary jurisdiction to determine a matter of this nature is the Labour Court, because deemed discharge dismissal is not a dismissal contemplated by section 186(1) (a) – (f) of the LRA, discharged *ex lege* from work *i.e.* by operation of the law in that she was absent from work for more than a calender month from her place of work.

[9] There is no order relating to cost.



Mr S.M SKWEYIYA
GPSSBC RESIDENT PANELIST
24-04-2019