IN THE EDUCATION LABOUR RELATIONS COUNCIL

HELD AT CAPE TOWN

Case No PSES 282-05/06WC

In the matter between

M M MTSHEMLA Applicant

and

DEPARTMENT OF EDUCATION WESTERN CAPE Respondent

ARBITRATOR: Adv D P Van Tonder

HEARD: 11 OCTOBER 2005

DELIVERED: 17 OCTOBER 2005

SUMMARY: ***Labour Relations Act 66 of 1995 – Alleged unfair dismissal – Dismissal in dispute – Whether deemed dismissal in terms of section 14(1) of the Employment of Educators Act 76 of 1998 is a dismissal for purposes of section 186 of the Labour Relations Act – Jurisdiction of the ELRC to enquire into the manner in which respondent exercises its discretion in terms of section 14(1) of the Employment of Educators Act 76 of 1998***

ARBITRATION AWARD

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

[1] This is a dispute concerning an alleged unfair dismissal referred to the ELRC in terms of section 191 of the Labour Relations Act No 66 of 1995("LRA") read together with the Constitution of the ELRC.

[2] After the matter was unsuccessfully conciliated on 23 September 2005, the arbitration hearing took place on 11 October 2005 at the offices of the Western Cape Department of Education in Cape Town. The applicant was present and represented by Mr. M Zimbler, a practising advocate, instructed by Greenberg and Associates attorneys. Respondent was represented by Ms. Z Mzosiwe, assisted by Mr. K Petersen who are both employed in the Labour Relations Department of the Western Cape Provincial Department of Education.

[3] During the arbitration hearing, the applicant gave evidence and respondent called two witnesses. The evidence was mechanically recorded on three cassette tapes and the proceedings were conducted in English. For applicant's benefit, the services of a Xhosa interpreter was used.

THE ISSUE IN DISPUTE

[4] I have to decide whether there was a dismissal or not, and if so whether the dismissal was substantively and procedurally fair or not and, if not the appropriate relief.

THE BACKGROUND TO THE DISPUTE

[5] Applicant, who is 36 years old and who has been employed by respondent as an educator since 1995, referred a dispute to this tribunal on 6 June 2005, claiming that he was dismissed. It is common cause that applicant was absent from his work as an educator at Zola Senior Secondary School as from 17 January 2005 when the schools re-opened for the first school quarter of 2005 and that applicant only reported for duty again on 4 April 2005, which was the first day of the second school quarter of 2005. It is also common cause that applicant was advised by respondent that he was deemed to have been dismissed in terms of section 14(1) of the Employment of Educators Act 76 of 1998, by reason of the fact that he allegedly was absent from his work for more than 14 consecutive days without permission. Accordingly, when applicant reported for duty on 4 April 2005, he was advised that he was no longer an employee of respondent .

[6] It is also common cause that applicant is no longer an employee of respondent. It appears as if applicant's last day as an employee, according to respondent, was 28 February 2005. Respondent however denies that it dismissed applicant in terms of section 186 of the LRA. According to Respondent, applicant was dismissed by operation of law in terms of section 14(1) of the Employment of Educators Act 76 of 1998(hereinafter also referred to as "EEA").

[7] At the time of the alleged dismissal applicant's salary was R7682 per month. Applicant asked this tribunal for reinstatement.

IN LIMINE ISSUE: JURISDICTION

[8] At the commencement of the proceedings, Mr. Petersen on behalf of respondent argued that this tribunal has no jurisdiction to hear the dispute since applicant has been dismissed by operation of law in terms of section 14(1) of the Employment of Educators Act 76 of 1998, by reason of the fact that he was absent from his work for more than 14 consecutive days without permission. Respondent argued that it was therefore not respondent who had dismissed applicant but that the dismissal automatically occurred and that a dismissal in terms of section 186 of the LRA did not take place. Accordingly, Mr. Petersen argued, this tribunal had no jurisdiction to deal with the matter.

[9] Mr. Zimbler argued that for section 14(1) to operate, it must *inter alia* be shown that applicant stayed away from work for more than 14 consecutive days without permission. He said that although it was common cause that applicant had indeed been absent from work for more than 14 consecutive days, there was a factual dispute as to whether applicant actually had permission to be absent from work for that period or not.

[10] In the circumstances, I was satisfied that one of the jurisdictional facts required for section 14(1) of the EEA to operate, being absence without permission, was in dispute. Accordingly I ruled that I first needed to hear evidence to determine whether applicant indeed had the necessary permission to be absent from work, before I would be able to rule on the effect of section 14(1) on the jurisdiction of this tribunal. I furthermore ruled that since respondent did not admit the dismissal of applicant, applicant would need to prove that he was actually dismissed in terms of section 186 of the LRA.

SUMMARY OF EVIDENCE AND ARGUMENT

Evidence on behalf of applicant

[11] *Malusi MacMillan Mtshemla* (the Applicant) testified that he had been employed as an educator by the respondent since 1995. At the time of his alleged dismissal in 2005 he was employed at Zola Senior Secondary School in Khayelitsha, teaching economics.

[12] During 2004 he was found guilty of bad attendance during an internal disciplinary hearing at the school and was given a written warning. Also during 2004, he was found guilty of bad attendance and fined to R3000 after a disciplinary hearing conducted by respondent. The reasons for his absence are as follows. He was raised in a family where his father abused his mother. This caused him to have emotional problems during his adult life and he started abusing liquor and made liquor his priority. He did undergo rehabilitation for his alcohol abuse twice and his employer was aware of this.

[13] When the schools started on 17 January 2005 he was not at work at Zola Senior Secondary School in Khayelitsha. He was in Pretoria at the time. He had been in Pretoria since December 2004, because his girlfriend (with whom he lives as husband and wife) and their two minor children have relocated to Pretoria, because of the fact that his girlfriend was transferred to Pretoria. They also sold their house in Cape Town and it was his intention to arrange for a cross transfer to Pretoria so that he could be with his family. In order to do that he would first need to find an educator in Pretoria who wanted to be transferred to Cape Town. Once he had succeeded in doing that he, the cross transfer could be arranged.

[14] The reason why he did not come back to Cape Town after the December school holidays was because he was sick in the sense that he had emotional problems. He explained that the problems he grew up with, overwhelmed him and he accordingly consulted a psychologist, Mr. Kobus Coetzee in Pretoria on 17 January 2005 and asked him to book him off. Prior to 17 January 2005, he had never met Coetzee. He had however consulted other physiologists previously. The last time he consulted a psychologist prior to his visit to Coetzee, was approximately 6 months before. He only saw Coetzee twice or maybe three times, including his visit of 17 January.

[15] Coetzee gave him a letter, dated 19 January 2005 to give to the school. This letter was handed in as exhibit A and reads as follows:

> "Mr Mtshemla consulted me on the 17th of January 2005 for psychological treatment. It appears that Mr. Mtshemla is suffering from work related stress and some personal problems. Mr. Mtshemla informed me that he has special leave available to use during the time he will be treated for the above-mentioned problems. I therefore recommend a period of eight weeks treatment after which Mr. Mtshemla will be evaluated again and his progress reported to you"

[16] Applicant faxed this letter to the principal of Zola Senior Secondary School and his friend also took the original to the principal when she went to Cape Town. According to applicant, this letter means that he is booked of for eight weeks.

[17] Applicant further testified that during this period of eight weeks as from 17 January 2005, he did receive phone calls from the principal trying to ascertain where he was. The principal advised him that he has exhausted all his sick leave, upon which applicant said that he was not fit to go back to work. On 10 March 2005 the principal advised him that his leave was not approved and that he must come back to work on 14 March 2005. The principal also asked him for his address and he gave his girlfriend's address in Pretoria.

[18] He did not go back to work on 14 March 2005, because he did not feel well. He consulted a medical doctor, Dr. Lubbinge on 16 March 2005 who diagnosed him with high blood pressure and issued a medical certificate, handed in as exhibit B, stating that sick leave is recommended from 16 March 2005 until 24 March 2005 and that work can be resumed on 25 March 2005. At the time the school was also provided with a copy of this certificate. He had not ever been to Dr. Lubbinge prior to 16 March 2005.

[19] The first school quarter ended on 24 March. He went back to Zola Senior Secondary School on 4 April 2005, which was the first day of the second school quarter, to report for duty. He was advised that he was no longer an employee of respondent and that he was deemed to be dismissed because of his absence from work for more than 14 days. It was only on 4 April 2005 that he heard for the first time that he was deemed to be dismissed and no longer an employee of respondent. Accordingly he returned to Pretoria and is at the moment still living in Pretoria.

[20] After his return to Pretoria, his girlfriend on 9 April 2005 handed him two letters. The first letter, handed in as exhibit "C" is from the principal of Zola Senior Secondary School and reads as follows:

> " I write this letter to bring your attention that the expiry of the six weeks you claimed to have as leave. From January 17, 2005 to February 27, 2005 it is six weeks. I have not heard from you since the expiry of the "leave" you claimed to have when I know that it is contrary to the truth. From February 28, 2005 to March 10, 2005 you are considered to be absent without reporting. The 10 days that have expired mean that you risk dismissal. I suggest that you report to the school by Monday March 14, 2005. As I have stated you have exhausted all your leave and I did not recommend the leave you took as I explained in the letter I wrote to your psychologist".

[21] The second letter, written by respondent and handed in as exhibit D, which he received on 9 April 2005 was dated 24 March and reads as follows:

> "Please be advised that according to departmental records you have been absent without permission since 28 February 2005 until present. As you have failed to report for duty, you are hereby informed that in terms of section 14(1)(a) of the Employment of Educators Act, No 76 of 1998..you are deemed to be discharged from the service on account of misconduct, as of 28 February 2005……Your attention is drawn to section 14(2) of the Act.."

[22] During cross-examination it was put to applicant that during 2004, he had asked his HOD not to allocate to him grade 12 subjects for 2005, because he intended not to come back to school during 2005. Applicant denied this. He did however admit that he told a colleague during 2004 that he intended resigning in 2005. On 10 March 2005, for the first time the principal advised him that he will not be approving his leave because he has exhausted his sick leave. He consulted the psychologist on the day when the first school term started, because that was a suitable time for him to consult the psychologist.

Evidence on behalf of respondent

[23] *Malungisa Mlotywa* testified that he is an HOD at Zola Secondary School and has known applicant since 2000. When he had to allocate subjects to teachers for 2005, applicant who was supposed to teach grade 12 in 2005, advised him that he will be leaving the school during 2005 because of his family relocating to Pretoria round about April 2005.

[24] Accordingly he did not allocate grade 12 to applicant for 2005. Instead, during 2004 already, the witness approached another teacher and told her that she must teach grade 12 in 2005 because of the fact that applicant has indicated that he would not be available during 2005. Applicant also mentioned the possibility of resignation and said that he has made up his mind that he will be leaving Cape Town and get a job in Pretoria.

[25] *Xolela Mjonondwana* testified that he has been the principal of Zola Senior Secondary School since 1998. Applicant does not have a clean disciplinary record. He has had many disciplinary meetings with applicant for absenteeism, late coming, dereliction of duty, leaving the school without permission, and being drunk at work. Applicant has received verbal and written warnings. Last year a fine was also imposed after a disciplinary hearing.

[26] Towards the end of 2004 applicant told him that he wanted to resign because he would be relocating to Pretoria. The witness denied that he ever told applicant to resign. Applicant mentioned resignation and he told applicant that if he wanted to resign, that would be his decision. He did however suggest that instead of resigning applicant must rather attempt to get a transfer to Pretoria. He was aware of applicant's problem with alcohol abuse as well as the fact that applicant attended rehabilitation twice.

[27] After receiving exhibit A from the physiologist, Mr. Coetzee, he send a fax to Coetzee on 31 January 2005, handed in as exhibit F, the relevant parts of which reads as follows:

> "…Mr. Mtshemla does not have any leave credit as far as I am concerned. If he takes his capped leave, I am not approving as I know why he is taking leave for. This is one of the many reasons, Mr. Mtshemla told me last year he wants to resign as he will be going to Pretoria…He is insensitive to the suffering he is inflicting on innocent learners….Mr. Mtshemla was absent for 55 days in 2004 he took unauthorized leave…I think this is evidence enough for you to make a judgment as the initial recommendation was based on his testimony alone…"

[28] He also spoke to Coetzee telephonically on 31 January and objected to applicant taking leave because he did not have any leave. He indicated that he would not be approving applicant's leave. Coetzee then said that he will recommend to applicant to return to Cape Town, resume his duties and undergo psychological treatment in Cape Town. The department of education would have arranged for and have paid for such treatment.

[29] He also spoke to applicant on 31 January 2005 and told applicant that since he does not have any sick leave he will not be approving his leave. Applicant's reply was that he (the witness) can just do whatever he wants to do. He cannot remember if it was him who called applicant or whether it was applicant who called him. On 10 March 2005 he again phoned applicant to tell him to come back to school.

[30] The date on exhibit C is actually 11 March 2005 and not 11 May. The document therefore contains a typographical error. The six weeks leave mentioned in exhibit C, is supposed to be the period mentioned by Coetzee in exhibit A. The witness conceded that he made a mistake by mentioning six weeks in exhibit C because Coetzee actually mentioned eight weeks. Nevertheless, no leave was recommended or approved in respect of applicant for 2005. Applicant's claim that he had eight weeks leave was not the truth. Applicant had no leave whatsoever and no leave whatsoever was approved, be it six weeks or eight weeks.

CLOSING ARGUMENTS

[31] On behalf of applicant, Mr. Zimbler conceded that the evidence has shown that applicant was absent from work for more than 14 consecutive days and that he did not have permission for such absence. He however argued that respondent had a discretion in terms of section 14(1) of the EEA to direct that the dismissal would not be effected and by not doing so, there was indeed a dismissal. In the process the *audi alteram partem* rule had to be applied before applicant could exercise its discretion in terms of section 14(1) of the Act. Accordingly he submitted that applicant should have been given an opportunity to present his case before being dismissed and that applicant had accordingly been dismissed unfairly.

[32] Ms. Mzosiwe, on behalf of respondent argued that applicant had dismissed himself in terms of section 14(1) of the EEA. She submitted that respondent has proved its case on a balance of probabilities and that I must find for respondent.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

[33] To the extent that a credibility finding in this case may be necessary, I accept the evidence of Mr. Mjonondwana (the principal) and Mr. Mlotywa where applicant's evidence conflicts with their evidence. I was impressed with the evidence of both Mr. Mjonondwana as well Mr. Mlotywa. They both gave their evidence in a clear, consistent and satisfactory manner. On the other hand, I was not impressed with the evidence of applicant. Not with the contents of his evidence and not with the manner in which it was given. Many questions were not answered. Many questions had to be repeated and in many instances, answers were given which had very little to do with the questions. In short, applicant certainly did not make a good impression in the witness box. I am however mindful that demeanor can never be used as an important tool in making a credibility finding. Demeanor should only be allowed to reinforce a conclusion reached by an objective assessment of the probabilities and I am indeed approaching the issue of demeanor in this manner, mindful that demeanor can often be very misleading. My emphasis is therefore on the probabilities.

[34] The relevant parts of section 14(1)(a) of Employment of Educators Act 76 of 1998 as amended provides as follows:

> "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 ……..,
>
> 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; ..."

[35] In my view, the jurisdictional prerequisites which are necessary for the provisions of s 14(1)(a) of the EEA to apply, are the following:

(1) The person concerned must be an educator, appointed in a permanent capacity;

(2) The employee must absent himself from work;

(3) Such absence must be without permission;

(4) Such absence must be for more than 14 consecutive days;

(5) The employer must not have directed otherwise.

[36] It is common cause that applicant is an educator who was appointed in a permanent capacity. It is also common cause that as from 17 January 2005 applicant was absent from work and that the first time he reported for duty, was 4 April 2005, which means that already by 1 February 2005, he was absent from work for more than 14 consecutive days.

[37] The evidence clearly shows that applicant was never granted any leave or permission by his employer to be absent from work. The evidence of Mjonondwana, who is accepted where it conflicts with that of applicant, clearly indicates that he never recommended or approved any leave in respect of applicant for 2005, whether it was six weeks, eight weeks or any other period.

[38] It is true that applicant did provide his employer with a report from his psychologist, Mr. Coetzee, handed in as exhibit A, in which the psychologist recommended treatment of eight weeks. This report does however not mean that applicant automatically had permission to be away from work. In the first place, the report does not say that any sick leave is being recommended. Seen against the background of applicant's evidence that he had specifically asked Coetzee to book him off, it is of significant importance that Coetzee did not recommend sick leave but only recommended treatment. In addition, a psychologist is not a medical practitioner as defined by the Health Professional's Council of South Africa. In terms of section 8.3 of Chapter J of the Personnel Administration Measures for Educators (also known as "PAM") determined by the Minister of Education in terms of section 4 of the EEA, educators who apply for three or more consecutive days sick leave must submit a certificate from a registered and recognized medical practitioner as defined in the Health Professional's Council of South Africa. Applicant had clearly not complied with this provision during January or February 2005 and could already for this reason alone not be granted any sick leave.

[39] Whether applicant did in fact have permission to be absent from work, is to be determined objectively from the evidence. (see *Minister van Onderwys & Kultuur & andere v Louw* 1995 (4) SA 383 (A) 388G). The question as to whether an employee such as applicant reasonably believed that the certificate or report he submitted in support of his sick leave, would suffice, cannot determine whether, objectively speaking, the employee had permission to be absent for purposes of section 14(1) of the EEA (see *Member of the Executive Council, Public Works, Northern Province v CCMA & others* (2003) 24 ILJ 2155 (LC) para 15). On the available evidence, I must therefore conclude that applicant had no permission to be absent from work at any stage during 2005.

[40] In terms of section 3(1) of the EEA, applicant's employer is the Head of the Western Cape Department of Education. The evidence clearly shows that at no stage during 2005 did applicant's employer ever direct that the deeming provision contained in section 14(1)(a) of the EEA should not apply. In the circumstances, all the jurisdictional prerequisites, referred to in paragraph 35, had in my view been complied with by 1 February 2005, which is one day more than 14 consecutive days, calculated as from 17 January 2005. The fact that respondent in its letter dated 24 March 2005, handed in as exhibit D mentioned that applicant was deemed to be dismissed as from 28 February 2005, is clearly wrong. It is clear that the person who wrote this letter, based it on the letter written by the principal handed in as exhibit C. It appears that the person who wrote exhibit D was under the mistaken impression that the principal had in fact approved leave for and during January 2005. That we know is not the case.

[41] It is clear that the message which the principal tried to convey in exhibit C was merely that applicant had no leave, that no leave was approved, recommended or granted and that applicant had basically simply just claimed "leave", without such leave ever having been granted. The person who drafted exhibit D clearly did not understand this and was erroneously under the impression that applicant had been granted leave until 28 February 2005. Objectively speaking applicant was not granted any leave for January or February 2005. Since respondent at no stage during January or February 2005 ordered that the deeming provision of section 14(1) must not apply, I am therefore satisfied that already on 1 February 2005, the deeming provision in section 14(1)(a) came into operation, and applicant was in fact deemed to be dismissed in terms of that section during early December 2004 (on the day after the last day on which he was last actually present at work) and not only on 28 February 2005, as is erroneously stated in exhibit D(see *subsection (i) of section 14(1)(a) of the EEA*).

[42] I now intend to deal with nature of the discretion which respondent has in terms of section 14(1)(a) of the EEA. That section undoubtedly vests a discretion in respondent to order that the section will not operate. Mr. Zimbler argued that for applicant to be dismissed in terms of section 14(1)(a) of the EEA, respondent first had to exercise its discretion in terms of this section. I do not agree with that argument. The exact same argument was raised ,considered and rejected by the Appellate Division in *Minister van Onderwys & Kultuur & andere v Louw 1995 (4) SA 383 (A) at 389*. In that case section 72(1) of the Education Affairs Act No 70 of 1988, which is for all purposes an exact replica of section 14(1) of the EEA (except for the fact that the section required the educator to be absent for more than 30 days and not only 14 days), was considered.

[43] The Appellate Division held that the services of an employee in respect of whom the deeming provision applies comes about by operation of law once such employee absents himself from duty for more than 30 consecutive days without the requisite consent; there is no question of a review of an administrative decision; the coming into operation of the deeming provision is not dependent upon any decision; there is no room for reliance on the *audi alteram partem* rule which in its classic formulation is applicable when the exercise of an administrative discretion may detrimentally affect the rights, privileges or liberty of a person (at 388 – 389, emphasis added).

[44] The case law makes it very clear that an employee in applicant's situation, is dismissed by operation of law and not by any act of the employer(see *Maidi v MEC for Department of Education & others (2003) 24 ILJ 1552 (LC); Nkopo v Public Health & Welfare Bargaining Council & others (2002) 23 ILJ 520 (LC); Public servants association of SA v Premier of Gauteng (1999) 20 ILJ 2106 (LC); Ntabeni v MEC for Education, Eastern Cape (2001) 22 ILJ 2619 (Tk)*). The reason for such approach, is easy to understand. The effect of a deeming provision has been explained as follows by Cave J in *R v Northfolk County Council (1891) 60 LJ (QB) 379 at 380* cited with approval in *Pinkey v Race Classification Board 1966 (2) SA 73 (E) at 77*, namely-

> "Generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is deemed to be. It is rather an admission that it is not what it is deemed to be and that, notwithstanding it is not that particular thing, nevertheless…it is to be deemed to be that thing." (emphasis added)

[45] Viewed from this perspective, it is clear that a deemed dismissal in terms of section 14 of the EEA, is not actually a dismissal in the true sense of the word. Furthermore section 186(1) of the LRA defines 'dismissal' as meaning that -

(a) an employer has terminated a contract of employment with or without notice;
(b) an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;
(c) an employer refused to allow an employee to resume work after she took maternity leave in terms of any law, collective agreement or her contract of employment;
(d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ another; or
(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee

[46] From a practical point of view, only section 186(1)(a) needs to be considered when dealing with a deemed dismissal in terms of section 14 of the EEA. Section 186(1)(a) of the LRA clearly contemplates that the employer undertakes some action that leads to the termination of the contract, in other words the employer undertakes some initiative which has the consequence of terminating the contract of employment or performs some overt act which is the proximate cause of the termination of employment(see *Ouwehand v Hout Bay Fishing Industries* [2004] 8 BLLR 815 (LC) 818B-E). Similarly the Labour Appeal Court has held that the employer must have engaged in an act which brings the contract to an end(see *NULAW v Barnard NO* [2001] 9 BLLR 1002 (LAC) par23-26). In accordance with these principles it has for example been held that where an employee reaches her normal retirement age, there is no dismissal by the employer(see *Schmahmann v Concept Communications Natal (Pty) LTD* (1997) 18 ILJ 1333 (LC)).

[47] Clearly respondent did not initiate any action, resulting in the deemed dismissal of applicant. Section 186(1) does not cater for the deemed type of dismissal, provided for in terms of section14(1) of the EEA. In this regard, the Transkei High Court, in dealing with section 14 of EEA remarked as follows:

> "Having regard to the definition of 'dismissal' as contained in the LRA, it brooks of no argument to the contrary that a deemed dismissal such as that which forms the subject of this application is not dealt with in the LRA" (see *Ntabeni v MEC for Education, Eastern Cape (2001) 22 ILJ 2619 (Tk) at 2625*)

[48] I can therefore find without any reservation that applicant's deemed dismissal in terms of section 14(1)(a) of the EEA, is not regarded as a dismissal for purposes of section 186(1) of the LRA. Accordingly applicant has failed to prove that he was dismissed as contemplated in section 186(1) of the LRA and his claim must accordingly be dismissed.

[49] That applicant's employment contract was indeed terminated, is undoubtedly so, but such termination was by operation of law and not in terms of section 186(1). Being a creature of statute, this tribunal does not have any jurisdiction to enquire into the lawfulness or fairness of any termination of an employment contract, if such termination does not constitute a dismissal in terms of section 186(1) of the LRA. Such jurisdiction has in terms of section 77(3) of the Basic Conditions of Employment Act been granted to the Labour Court and the civil courts.

[50] That the discretion which respondent may exercise in terms of section 14(1) of the EEA is indeed an administrative action, subject to judicial scrutiny and review, in terms of the Promotion of Administrative Justice Act 3 of 2000, is also beyond question. In fact in both the cases *of Ntabeni v MEC for Education, Eastern Cape supra* and *Phenithi v Minister of Education [2005] 6 BLLR 614 (O)* the applicants, who were both educators, approached the High Court in review applications in order to review and set aside their deemed dismissals in terms of section 14(1). This tribunal has however not been granted any jurisdiction to review administrative decisions in terms of the Promotion of Administrative Justice Act 3 of 2000. Accordingly I have no jurisdiction to enquire into the manner, fairness and correctness in which respondent exercises the discretion which it has in terms of section 14(1). If applicant wants to challenge respondent's decision in this regard, a review application will have to be brought in the appropriate forum with jurisdiction. The same would apply with regard to the discretion which is conferred on respondent in terms of section 14(2) of the EEA.

THE FAIRNESS OF APPLICANT'S DEEMED DISMISSAL

[51] Although I have already found that I do not have jurisdiction to enquire into the fairness of applicant's deemed dismissal, I believe that since I have heard all the evidence, and in order to assist the parties for purposes of possible future litigation, the following remarks, regarding applicant's deemed dismissal, would be appropriate. I also believe that it would be appropriate for me to do so in case my finding that I have no jurisdiction to enquire into the fairness of applicant's deemed dismissal, is wrong. In the *Phenithi* case, the High Court, in reviewing the respondent's decision not to direct that the deeming provision in section 14(1) does not come into operation, approached the matter by scrutinizing the substantive and procedural fairness of the deemed dismissal, similar to the manner in which a dismissal is to be scrutinized in terms of the LRA. I will therefore approach the matter on the same basis.

The substantive fairness of the deemed dismissal

[52] The purpose of section 14 of the EEA, is to make it easier for the employer to get rid of an employee who deserts. Desertion, in the employment contexts, is absence with an intention not to return to duty(see *Phenithi v Minister of Education supra* para 6). The evidence as a whole leaves me with the overwhelming impression that applicant's deemed dismissal was indeed substantively fair in that there was more than sufficient reason to terminate his employment as a result of desertion. That applicant had the intention not to return to duty is evident from the following:

52.1 During 2004 applicant advised a colleague that he was contemplating resignation. He also asked his HOD not to allocate grade 12 to him for 2005 because he intended to relocate to Pretoria.

52.2 Applicant's girlfriend, with whom he lives and with whom he has two children, was transferred to Pretoria. As a result applicant and his girlfriend sold their house in Cape Town. Applicant's girlfriend together with the two minor children relocated to Pretoria during 2004 and have no intention to return to Cape Town.

52.3 Applicant admits that his intention was to try and arrange for a cross transfer to Pretoria.

52.4 In December 2004 applicant left Cape Town to join his girlfriend in Pretoria and had been staying there ever since.

[53] Applicant's excuses for not returning to work prior to 4 April 2005, are not convincing at all. Regarding his visit to the psychologist Coetzee on 17 January 2005, it seems strange that applicant, according to his own evidence last saw a physiologist in Cape Town six months prior to 17 January. Then suddenly and coincidently on the day when he is due to be back at work, he decides to see a psychologist and asked the psychologist to book him off. Coetzee then recommends 8 weeks treatment which applicant interprets as having been booked off for 8 weeks. Eight weeks calculated from 17 January 2005 takes us to 14 March 2005. And coincidently once again, shortly after applicant's "leave" which he thought he was granted by Coetzee, expired, applicant suddenly falls ill and gets a medical certificate from a doctor recommending sick leave from 16 March 2005 until 24 March 2005, which coincidentally was the last day of the first school quarter. Once again applicant admits that he had never been to the doctor who issued the sick certificate, prior to 16 March 2005. These facts clearly indicate on a balance of probabilities that applicant was thinking of ways and excuses in which he could avoid going back to work in Cape Town. It is too much of a coincidence that on 17 January when he was due to be back at school and on 16 March when, according to him his 8 weeks "sick leave" has just ended, he approached professionals with the sole purpose of being booked off from work and that he was eventually booked off until 24 March, which coincidentally once again happened to be the day when the school term ended.

[54] In the circumstances I do not believe applicant's version that he was not really fit to return to work during the first quarter of 2005. Support for this is to be found in the statement of Coetzee which he made to the principal, when he said that applicant could come back to Cape Town to return to work and could then undergo treatment in Cape Town. My finding is that applicant did not want to return to work, because he wanted to be with his family who has relocated to Pretoria. I have no doubt that initially, during 2005 applicant had no intention to return to work. For reasons best known to him, he changed his mind at some stage and decided to go back to work on 4 April 2005, probably because he became aware of the reality of the consequences of his actions. Accordingly applicant was clearly guilty of desertion.

[55] In assessing the appropriateness and fairness of dismissal as a sanction, the court or tribunal must ultimately apply a moral or value judgment to the established facts and circumstances of the case (*Boardman Brothers v Chemical Workers' Industrial Union 1998 (3) SA 53 (SCA) 58B-C*). In circumstances where the employer could not reasonably be expected to continue employing the offending employee, dismissal is justified and fair (*South African Commercial Catering and Allied Workers Union and others v Irvin & Johnson Limited (1999) 20 ILJ 2302 (LAC) para 33 per Conradie JA*).

[56] With regard to what exactly constitutes circumstances where the employer cannot reasonably be expected to continue employing the offending employee, guidance is given in the Code of Good Practice on dismissals. The Code suggests that dismissal must be reserved for the most serious forms of misconduct and repeated offences, the test being whether the misconduct renders the continuation of the employment relationship intolerable. (See *Schedule 8 to the LRA, Code of Good Practice on Dismissal, Item 3(2), Item 3(3); Grogan Workplace Law page 154*).

[57] Generally dismissal is an appropriate sanction for desertion. In fact, in most cases it is really the only appropriate sanction. Where an educator is guilty of desertion, there is an even greater reason to terminate the employment relationship. With an educator who deserts, there is an additional factor which needs to be considered, which is not present in any other employment relationship. That is the interests of the learners who are or may potentially be affected by the absence of the educator. Their interests cannot be ignored when assessing the fairness of a dismissal of an educator for desertion.

[58] When an educator is absent from work, the learners invariably suffer, especially if he is absent for extended periods. The appointment of substitute teachers for extended periods or on a frequent basis, for learners in the higher grades, which applicant was teaching, to compensate for absent educators, invariably causes prejudice to such learners because of the lack of continuity in the curriculum. This factor is to be seen as an aggravating factor when an educator absents himself from work in the manner which applicant did.

[59] Viewed against this background, applicant's deemed dismissal was therefore in my view, entirely appropriate. Even if section 14(1) of the EEA did not apply, I would under the circumstances also have found that applicant's misconduct irreparably destroyed the employment relationship to such an extent that the employer could not reasonably have been expected to continue employing the applicant and that the dismissal was accordingly effected for a fair reason and therefore substantively fair. I may just add that one does feel sorry for applicant because of the situation in which applicant finds himself. It certainly evokes sympathy to see how a 36 year old man looses his job as a teacher. On the other hand applicant has basically brought this onto himself. Furthermore the Labour Court as well as the High Court recently held that sympathy is in any event not an ingredient of the test for evaluating the fairness of a dismissal (see *Consani Engineering (Pty) Ltd v CCMA & others* (2004) 25 ILJ 1707 (LC) per Murphy AJ; *Carter v Value Truck Rental (Pty) Ltd* (2005) 26 ILJ 711 (SE) 725 per Grogan AJ).

The procedural fairness of the deemed dismissal

[60] It is true that the rules of natural justice, the most important of which being the *audi alteram partem* rule("hear the other side"), are applicable to both dismissals as well as administrative decisions. However, in terms of the decision in *Minister van Onderwys & Kultuur & andere v Louw 1995 (4) SA 383 (A) at 389*, there is no room for reliance on the *audi alteram partem* rule when respondent exercises its discretion in terms of section 14(1) of the EEA. It may be that in the light of the Bill of Rights contained in the Constitution as well as the Promotion of Administrative Action Act, this view is no longer good law. The court in the *Phenithi case*, without referring to the *Louw case*, appeared to assume that the *audi alteram partem* was indeed applicable when respondent exercises the discretion it has in terms of section 14(1). On the other hand, the Court in *Ntabeni v MEC for Education, Eastern supra* at 2625, quoted with approval the principles set out in the *Louw case*.

[61] Baxter points out that the principles of natural justice are flexible. He goes on to state that if the principles are to serve efficiently the purposes for which they exist, it would be counterproductive to prescribe rigidly the form which the principles should take in all cases(See *Baxter* Administrative Law page 541). The following words of Tucker LJ in *Russell v Duke of Northfolk and Others [1949] 1 All ER 109 (CA) at 118*, have repeatedly been quoted with approval by South African Courts(see for example *Turner v Jockey Club of SA 1974 (3) SA 633 (A) at 646*):

> "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth"

[62] Accordingly, when evaluating the procedural fairness of applicant's deemed dismissal, the unique circumstances of the case would to a great extent determine the nature of the procedure which was required, to render the deemed dismissal procedurally fair. In this regard one must firstly bear in mind that the whole purpose of section 14(1) of the EEA, is to enable the employer to get rid of an educator who deserts, without holding a formal disciplinary hearing. If it is to be required that a disciplinary hearing has to be held in respect of a deserting educator, section 14(1) would have no purpose or effect at all and might as well be deleted. When interpreting legislation, it is a well known canon of construction that statutes must be interpreted in such a manner so as to give effect to the particular section which is being interpreted. Put differently, an interpretation rendering the words used in the statute ineffective or obsolete, should be avoided(see *L C Steyn* Die Uitleg van Wette page 119 and further as well as the authorities quoted by the learned author). Bearing in mind that section 14 of the EEA was enacted after 1994, as well as the fact that the Constitutional Court, despite having had the opportunity in *Phenithi v Minister of Education 2003 (11) BCLR 1217 (CC)* to pronounce on its constitutionality, but declined to do so, I am of the view that it would be wrong to strip section 14(1) of its effectiveness by requiring a full formal disciplinary enquiry, as is normally required before dismissing employees for misconduct. If that were to be the case, section 14(1) would be totally superfluous and not be serving any purpose at all.

[63] Even if the *audi alteram partem rule* is applicable, applicant, in my view, did in fact get a hearing because the principal did speak to him and did advise him that his leave was not approved. According to the principal, he advised both applicant as well as Coetzee of this on 31 January 2005. Applicant, according to the principal, replied that the principal must just do whatever he wants to do.

[64] On 31 January 2005, applicant had not yet been absent for more than 14 days and applicant had an opportunity to present all the relevant facts to the principal, who would have conveyed it to respondent. To this extent, applicant was in my view granted an opportunity to state his side of the case on 31 January prior to the deeming provision of section 14(1) coming into effect on 1 February 2005.

[65] I do not think that the fact that applicant was not specifically informed of the provisions of section 14(1) and/or informed that he must make representations in terms of that section on 31 January 2005, makes much of a difference. The fact is, applicant had an opportunity to state his case and to bring any facts which respondent should have been aware of to the attention of the respondent. He knew that he had been absent from school for a considerable time and I do not believe that he did not realize that he should inform his employer fully of all the reasons for being absent, failing which he might be in serious trouble. Therefore, applicant, in my view, did have an opportunity to state his side of the events and did in fact do so. He submitted a report from Coetzee and he even spoke to the principal. There is nothing more of relevance which he could possibly have placed before respondent. Even after having heard all the evidence, there is nothing more of any relevance which I have heard, which was not already known to the principal and to respondent by 1 February 2005, which could possibly have had the result of respondent making any decision favourable to applicant in terms of section 14(1) of EEA.

[66] Whatever decision respondent therefore took in terms of section 14(1) of EEA would have been based upon facts which would have included the version of applicant. This is really all that the *audi alteram partem* rule requires. It does not require a formal hearing. It does not require the right to cross-examine witnesses of the other side. It does not even always require a hearing where the affected person is present in person. It merely requires that a decision maker grants an opportunity to the person who would be affected by the decision, to state his side of the case so that a decision is not taken irrationally without full consideration of all the relevant facts. In addition, one should also not loose sight of the effect, which section 14(1) of the EEA would have on the contents of the right to a fair hearing in this specific case. It would certainly require less than is normally the case when disciplining employees, in respect of whom section 14 of the EEA or similar legislation is not applicable.

[67] In the circumstances I am of the view that from a procedural point of view, applicant's deemed dismissal was also procedurally fair. In conclusion, it is therefore my view that applicant's deemed dismissal in terms of section 14(1) of the EEA was both substantively as well as procedurally fair.

AWARD

I accordingly make the following order:

1. Applicant was not dismissed in terms of section 186(1) of the LRA;

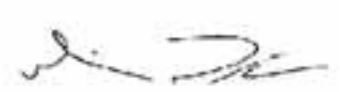
2. Applicant was dismissed by operation of law in terms of section 14(1) of the Employment of Educators Act 76 of 1998, which is not a dismissal for purposes of section 186 of the LRA.

3 This tribunal has no jurisdiction to review and/or enquire into the manner in which respondent exercises the discretion conferred upon respondent in terms of either section 14(1) or section 14(2) of the Employment of Educators Act 76 of 1998.

4 If I am wrong in my finding that this tribunal has no jurisdiction to enquire into the manner in which respondent exercises its discretion in terms of either section 14(1) of the Employment of Educators Act 76 of 1998, my finding is that applicant's deemed dismissal in terms of section 14(1) of the Employment of Educators Act 76 of 1998 was in any event both procedurally as well as substantively fair.

5. The applicant is not entitled to reinstatement, compensation or any other relief in terms of the LRA.

6. No order as to costs is made.



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Adv D P Van Tonder

Conciliator/Arbitrator/Panelist: ELRC

Appearances:

For the applicant:	Adv M Zimbler instructed by attorneys Greenberg and Associates
For the respondent:	Ms. Z Mzosiwe assisted by Mr. K Petersen