REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

LAC Case No: CA 4/2013

In the matter between:

MEC FOR THE DEPARTMENT OF HEALTH, WESTERN CAPE Appellant

and

M T WEDER Respondent

LAC Case No: CA 5/2013

In the matter between:

MEC FOR THE DEPARTMENT OF HEALTH, WESTERN CAPE Appellant

and

DEMOCRATIC NURSING ORGANIZATION OF SOUTH AFRICA obo N E MANGENA Respondent

Date of hearing: 20 March 2014

Date of judgment: 13 May 2014

JUDGMENT

DAVIS JA

Introduction

[1] This appeal concerns two cases, which, owing to the similarity of their facts were heard together by this Court. Both respondents were employed by the Western Cape Department of Health ('the Department'). I shall refer to the respondents as 'Weder' and 'Mangena', respectively. In both cases their employment with the Department was terminated in accordance with the provisions of s 17 (3) (a) (i) of the Public Service Act, No. 103 of 1994 ('the Act').

[2] Section 17(3)(a)(i) of the Act provides: 'An employee, other than a member of the services or an educator or a member of the Intelligence Services, who absents himself 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.' Insofar as it is relevant subsection(3)(b) provides that if an employee who is deemed to have been dismissed as contemplated in s 17 (3) (a) (i), reports for duty at any time after the expiry of the period referred to in subsection 3(a) (i), 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.

[3] Applications were made to the appellant on behalf of both Mangena and Weder for their reinstatement as contemplated in this section. Appellant

decided not to reinstate both respondents. The court *a quo* then ordered the appellant to reinstate both respondents to former positions retrospectively. In the case of Weder to 31 May 2011, and in the case of Mangena to 14 February 2012. It is against these orders, with the leave of the court *a quo* ,that the appellant approaches this court on appeal.

The factual background

[4] I shall deal first with the facts of Weder and secondly with those of Mangena.

Weder

[5] In December 2009 Weder was diagnosed with pulmonary tuberculosis and was placed on sick leave for the period 29 December 2009 to 1 March 2010. In his founding affidavit, Weder avers that he provided the original medical certificate to his employer, a contention that is not denied in the answering affidavit deposed to by Mr Feizal Rodriques on behalf of the appellant.

[6] On 26 January 2010 Weder received a telegram which requested him to:

'Report for duty immediately at Valkenberg Hospital to discuss unauthorised absence or alternatively to contact Miss S J Isaacs TF 021 4403111 providing reasons as to why (he was) unable to report for duty.'

[7] Weder claimed that he then telephoned Sister Busi and informed her that he was 'off sick', a contention which is denied by appellant. In his affidavit, Rodriques claimed that there was no written record that a telephone call had been made to Busi regarding the content of this telegram. On 5 February 2011, Weder received another telegram from Ms SJ Isaacs which communicated the same information as was contained in the previous telegram. Weder contends that he telephoned Mr Simang and informed the latter that he was 'off sick' and 'gained the impression that ''my explanation was acceptable and that my absence from work was authorized". Again, appellant denies that any telephone conversation took place between Weder

and any "alleged persons during the relevant periods in question". On 11 February 2010 Weder was dismissed retrospectively with effect from 21 January 2010.

The dismissal letter, to the extent that it is relevant, reads as follows:

> 'According to our Departmental records, you have been absent without permission for a period exceeding one calendar month.
>
> As you have failed to report for duty, you are hereby informed that in terms of Section 17 (3) (a)(i) read together with Section 17(2)(d) of the Public Service Act, Act See attachment 3 30 of 2007 (hereafter referred to as the Act) you are deemed to be discharged from the service on account of misconduct, as of 21 January 2010.
>
> Please be informed that 20 January 2010 is considered to be your last working day. Arrangements are presently being made for the withdrawal of your pension benefits and the recovery of any Departmental debts, if applicable.
>
> Furthermore, your attention is drawn to Section 17 (3) (b) of the Act, whereby you are afforded the right to make representations against your discharge within 5 working days. Such representation should be submitted to the relevant executive authority (MEC) via the Chief Director: Metropole Regional Hospitals, APH and EMS.'

[8] Weder claims, that upon receipt of this letter, his psychiatric condition deteriorated. He had previously been diagnosed with schizophrenia and he began to suffer from major depression. Three weeks later he was admitted to Stikland Hospital for further treatment. He then avers in his founding affidavit as follows:

> '"After being informed by a colleague at Valkenberg Hospital that I had been dismissed unfairly I approached DENOSA for assistance. On 8 February 2011, DENOSA addressed representations on the termination of my service to the respondent".

On the same date DENOSA referred a dispute about my alleged unfair dismissal to the Public Health and Social Development Sectoral Bargaining Council.'

[9] The representations of 8 February 2011, which were written by DENOSA to appellant, read thus:

'It is common cause that our member was dismissed by the employer.

The applicant hereby appeals against the unfair dismissal. The appeal is based on the following grounds.

(a) Procedurally

(b) Substantively

According to the termination letter dated 12/02/2010, our clients services was terminated by the employer on the 20th January 2010. Our member was an employee at the Valkenberg hospital and on TIL at the time, and the diagnosis from the treating doctor was Schizophrenia. The evidence will show as per the doctor's certificate that our client was still on sick leave during his dismissal. The financial loss for the past year had a negative impact on his mental status, and our client became so depressed after his services were terminated, that he went into another depression.

The applicants condition lead to him not being mentally stable to think for himself and, was unable to pursue this case earlier. Our client was still on treatment at the time of his dismissal and not covered by medical aid as all benefits were terminated, which affected his family financially. We therefore request that the employer do a proper investigation into the matter and to respond to us as a matter of urgency. All medical reports were submitted to the institution and will be resubmitted with this application.

We are of the opinion that the employer did not apply its mind to the circumstances and the employees conditions and his personal circumstances when action was taken. We therefore argue that our client was unfairly dismissed by the employer, and that he did not abscond.

It is our submission that the employer should reinstate our client and restore the conditions of employment as it existed before the termination of service.'

[10] To these representations appellant replied on 31 May 2011 in the following terms:

'I, after having considered the evidence presented to me with regards to your deemed dismissal, find that the grounds for your appeal does not justify your reinstatement.

I therefore confirm that your deemed dismissal in terms of section 17 (3) (a) (i) of the Public Service Amendment Act.'

[11] It was against this decision that Weder approached the court *a quo* to have it reviewed and set aside in terms of s 158 (1) (h) of the Labour Relations Act 66 of 1995 ('the LRA'). In the court *a quo*, Steenkamp J found that it was difficult to assess whether the decision of appellant could have been reasonable and rational where no reasons for the decision were offered. Furthermore, as Weder had not committed any misconduct, but was on sick leave, his absence was neither willful nor deliberate. There was therefore no indication that the appellant had taken into account any of these facts in arriving at a decision not to reinstate appellant. Accordingly, the court *a quo* found the decisions stood to be reviewed and set aside.

Mangena

[12] Ms Mangena was initially 'booked off sick' by Dr Bikitsha for the month of February 2010. She was subsequently diagnosed with suffering from major depression and was referred to a psychiatrist, Dr Fortuin. Dr Fortuin issued medical certificates which certified that Mangena was unfit to return to work until 31 May 2010. When the Department of Health, Western Cape failed to pay Mangena's salary for April 2010, she was informed that her services had been terminated in terms of s 17 (3) (a) of the Public Service Act 1994. On 1

December 2010 DENOSA lodged a statement on her behalf with appellant, it reads thus:

'1. Nurse Mangena worked as a nurse at the G F Jooste Hospital until the end of March 2010.

2. She was discharged from public service for allegedly going AWOL for the period starting on or around the 2nd February 2010 to the 19th March 2010.

3. Records suggest that she was booked off sick by the doctor throughout this period as follows:

3.1 Saw Dr Bikitsa on the 8th Feb 2010 and was booked off for the rest of that month. She telephoned the hospital to notify them of her situation.

3.2 The same doctor saw her again on the 16th February and decided to refer her to a psychiatrist as she was showing signs of severe depression.

3.3 Accordingly she consulted Dr. Fortuin in Gatesville Medical Centre, who certified that Ms Mangena was unfit to start working until the 31st May 2010.

4. On the 19th of March 2010 she received a letter from the GF Jooste hospital, delivered to her home by a driver, telling her to return to work, or face being discharged from public service.

5. She telephoned the hospital on the 23rd March 2010 informing them that she was still booked off sick by a medical doctor. Accordingly, relevant medical certificates were faxed through for the attention of Sister Baraza, her supervisor.

6. Subsequently, her April salary was not paid, and upon enquiry by her she was told that her services have been terminated.

7. She, accordingly, reported the matter to the union as early as the 9th of June.

8. Subsequently, there was a series of discussions and e-mail exchanges between the union and the Government representative.

9. The last meeting between the union and the employer representatives was held on the 22nd October 2010. It was during this meeting that Advocate Rodrigues advised the union to make this submission.

Our Argument

1. The Public Service Act 17((3)(a) (i) says that an officer … who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for 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

2. It is clear from the records that our member was booked off sick for the entire period that she was away from work.

3. It maybe that the hospital was not aware of the above fact before she telephoned them on the 23rd March 2010.

4. We argue that when the official came back i.e. on the 23rd March 2010, the hospital should have convened a hearing for her to state her side of the story.

5. This did not happen, and thus we submit that her dismissal is unfair.

6. We request the Minister to review this matter, and possibly return the nurse to service.'

[13] On 18 March 2011, appellant responded to these representations and refused the application for reinstatement. The response reads thus:

'I, after having considered the evidence presented to me with regards to your deemed dismissal, find that the grounds for your appeal does not justify your reinstatement.

I therefore confirm that your deemed dismissal in terms of section 17 (3) (a) (i) in terms of the Public Service Amendment Act.' Incomplete sentence

[14] As in the case with Weder, the respondent approached the court *a quo* in terms of s 158 (1) (h) of the LRA to review and set aside the decision of appellant on similar grounds to the court a quo's finding in Weder. The respondent was successful. With the leave of the court *a quo,* the appellant approaches this court on appeal.

The condonation application

[15] In the case of Weder the decision by the appellant not to reinstate respondent was made on 31 May 2011. Weder delivered an application for review on 9 December 2011, some six months and nine days later. According to Weder he was advised by his trade union, as opposed to his attorneys, to refer the dispute to the relevant bargaining council, as opposed to bringing an application to review to the Labour Court. That referral was brought within the prescribed time period. On 29 September 2011 the bargaining council decided that it had no jurisdiction to hear the dispute. This ruling was received by Weder on 28 October 2011. He then referred the dispute to the court *a quo* within six weeks thereof. In dealing with this delay, Steenkamp J said:

'The explanation for the delay is compelling. The applicant took reasonable steps to refer the dispute timeously, albeit initially to the wrong forum. I do not consider the extent of the delay, coupled with the reasons therefore, to be so unreasonable that the applicant should be deprived of a hearing. The application for condonation is granted.'

[16] In Mangena's case, the decision by appellant not to reinstate Mangena was communicated to her on 18 March 2011. The application for review was launched on 16 November 2011, some eight months later. In the founding affidavit deposed to by Mr Bongani Lose, the provincial organizer of DENOSA, he stated that Mangena was advised to refer an unfair dismissal

dispute to the Public Health and Social Development Sectorial Bargaining Council. On 14 September 2011, the Council, by way of an arbitrator decided that it did not have jurisdiction to entertain the dispute. On 3 October 2011 DENOSA sought a legal opinion from its attorneys on the correct procedure to be followed. On 11 October 2011 Denosa's attorneys advised that an opinion from counsel should be sought. It was counsel's advice that the correct procedure was to apply for a review of appellant's decision in terms of s 158 (1) (h) of the LRA. Again, for similar reasons and notwithstanding that he found this delay to be 'open to severe criticism', Steenkamp J granted condonation.

[17] On appeal, Mr De Villiers-Jansen on behalf of the appellant, contended that the delay in both cases was sufficiently unacceptable, such that the court *a quo* had erred in granting condonation. In his view, although there was no time limit in order to institute review proceedings pursuant to s 158 (1) (h) of the LRA, the court should have applied the test as laid down in **Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad** 1978 (1) SA 13 (A) and refused to condone these lengthy delays.

[18] In **Gqwetha v Transkei Development Corporation Ltd and others** 2006 (2) SA 603 (SCA) at paras 22 – 23 Nugent JA explained the purpose and function of the delay rule both under s 7 (1) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), which it was common cause was inapplicable to a review brought under s 158 (1) (h) of the LRA , and its common law predecessor as follows:

'It is important for the efficient functioning of public bodies… that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule … is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view, more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in **Wolgroeiers** … "It is desirable and

important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed – *interest reipublicae ut sit finis litium*… Considerations of this kind undoubtedly constitute party of the underlying reason for the existence of this rule…

Underlying the latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body, and to those who rely upon its decisions, in the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight.'

[19] In **Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Limited and Others** [2013] 4 All SA 639 (SCA) Brand JA noted that 'the common law application of the undue delay rule entails a two stage enquiry: First, whether there was an unreasonable delay and second, if so, whether the delay should in all circumstances be condoned.' (para 26) In dealing, as the court was required in **OUTA**, *supra,* with s 7 of PAJA, which prescribes that failure to bring an application within a 180 day period is unreasonable, the court found that it was required only to deal with the second leg of the enquiry, that is whether it should entertain the review application in that the interests of justice dictated an extension in terms of s 9 and 11 of PAJA. In this case, the court refused to condone on the basis that 'the delay rule gives expression to the fact that there are circumstances in which it is contrary to the public interest to attempt to undo history. The clock cannot be turned back to when the toll roads were declared, and I think it would be contrary to the interests of justice to attempt to do so.' (para 41)

[20] The present dispute does not involve a decision which raised questions of polycentricity as did the facts in **OUTA**, *supra.* In the present dispute, the

only major prejudice of "turning the clock back" would relate to whether appellant could reinstate two employees to the same/similar positions to those which they had previously held; that is, whether it is possible, in terms of s 17 (3) (b) of the Act to reinstate Weder and Mangena into any other post or position as the appellant may determine?

[21] The consequences of a successful review application are entirely distinguishable from the dispute in **OUTA**, *supra*. In addition, in both the cases of Weder and Mangena an explanation for the delay has been provided. As Mr Leslie, who appeared on behalf of the respondents, noted, while a trained lawyer might have realized that it was futile to refer an unfair dismissal dispute to the applicable bargaining council, this did not necessarily apply to the case of a union such as DENOSA. Furthermore, in both cases the referral to the bargaining council took place well within a six month period, and there was no undue delay about bringing the application for review subsequent to the adverse decisions which had been made by the bargaining council. In my view, therefore, this is a case in which condonation was correctly granted.

<u>The merits</u>

[22] The implications of a deemed dismissal in terms of s 17 (3) (a) (i) of the Act and the power given to the appellant to reinstate in terms of s 17 (3) (b) of the Act were considered within the context of similar legislation by van Niekerk J in an well considered judgment in **De Villiers v Education, Western Cape Province** (2010) 31 ILJ 1377 (LC). In that case, the court was dealing with s 14 of the Employment of Educators Act 76 of 1998. In similar fashion to s 17 (3) (a) (i) of the Act, s 14 of the Employment of Educators Act provides that where an educator appointed in a permanent capacity is absent from work for a period exceeding 14 consecutive days without permission of the employer he or she shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct. Section 14 (2) of

the Educators Act is couched in the same terms as s 17 (3) (a) of the Act, namely that an employer may, on good cause shown and, notwithstanding anything to the contrary contained in the Act, approve the reinstatement of the employee in the public service in his or her former 'or any other post… on such conditions relating to the period of the absence from duty or otherwise as the employer may determine'.

[23] In analyzing whether a review of a decision taken in terms of s 14 (2), or in this case s 17 (3) (b) of the Act, was permissible, Van Niekerk J held that the appellant's contract of employment had been terminated by operation of law and independent of any action, in this case, of the appellant. The discretion exercised by the appellant, in this case pursuant to s 17 (3) (b) of the Act, did not flow from a contract of employment but directly from statutory powers. Thus,

'On the facts of this case, the court was faced with a straightforward exercise of statutory power vested in the respondent at the time when the applicant's contract of employment was already at an end'. (para 20)

Furthermore,

'if this court were to adopt a hands off' approach to its oversight of functions over the exercise, of a discretion such as established by s 14 of the EEA, the respondent's power would effectively be unchecked, and the applicant would be left without a remedy.' (para 20)

[24] A further question which required judicial attention related to the classification of a decision not to be reinstated by the appellant; that is whether this decision could be classified as administrative action.

[25] The law in this connection is unfortunately, somewhat unclear, notwithstanding three decisions of the Constitutional Court. See **Fredericks and others v MEC for Education and Training, Eastern Cape and others** 2002 (2) SA 693(CC); **Chirwa v Transnet Ltd and others** 2008 (4) SA 367

(CC); **Gcaba v Minister for Safety and Security** 2010 (1) SA 238 (CC); see also Cora Hoexter **Administrative Law in South Africa** (2nd ed) at 214 ff and Halton Cheadle (2009) 30 ILJ 741.

[26] In all three of the Constitutional Court cases, the court was concerned with litigation which had been predicated on an alleged infringement of the right to just administrative action (s 33 of the Republic of South African Constitution Act 108 of 1996) and whether decisions taken by public sector employees, which affected employees in the public sector, were sufficiently 'labour related' so that they stood to be classified as labour disputes as opposed to decisions of an administrative nature; that is, administrative action.

[27] In these three cases, much turned on the question as to whether the dispute could be heard in the High Court as opposed to the Labour Court. This hotly contested jurisdictional problem is not in issue before this Court, which is only concerned with the appropriate classification of the power exercised by appellant and hence the appropriate principle upon which this review application is to be predicated. In this case, it is common cause that a review may be brought in terms of s 158 (1) (h) of the LRA. The court *a quo* and this Court were both clothed with the necessary jurisdiction to decide the matter.

[28] Significantly, in the court *a quo,* when dealing with the question of condonation, Steenkamp J held, on the strength of the judgments of **Chirwa** and **Gcaba**, that PAJA did not apply to the present dispute.

[29] It appears that Steenkamp J based his finding, primarily, on the most recent of three Constitutional Court judgments, that of **Gcaba**, *supra*. In that case, appellant had been appointed as a station commissioner in the South African Police Service. When his position was upgraded, he applied, for the permanent post. He was shortlisted and interviewed. However, he was not appointed. He lodged a grievance with SAPS, but later abandoned this grievance process and elected to refer the dispute to the appropriate bargaining council. Subsequently, he approached the High Court to review

the decision of SAPS not to appoint him as the station commissioner. The court held that this application was 'essentially rooted in the LRA, as it was based on conduct of the employer towards an employee which may have violated the right to fair labour practices. It was not based on administrative action'. (para 76) A key justification for this conclusion was the finding that the failure to promote the appellant meant that the impact of the decision was "felt mainly" by the appellant and 'has little or no direct consequence for any other citizens'. (para 67)

[30] This finding has been considered by commentators to represent the introduction of a new requirement, in that a great deal of administrative action may only have an effect on the individual applicant concerned. If this *dictum* is correct, then proof of an effect on a broader constituency is required to constitute administrative action See, for example, Hoexter at 216.

[31] The reasoning adopted by Van Niekerk J in **De Villiers**, *supra* was predicated upon the notion that the decision stood to be classified as administrative action, because the power enjoyed by the appellant to refuse reinstatement was sourced in a statute. Further, the option of a referral of an unfair dismissal dispute to the bargaining council, was not available to an aggrieved employee.

[32] If correct, the approach adopted in **De Villiers**, *supra* would apply equally to these present disputes. But it may not be necessary to determine this specific question in order to resolve these appeals. For this reason, it is instructive to examine the power of review bestowed upon the court a quo and this court in terms of the LRA. This Court has dealt with the nature of the review process in terms of s 158 (1) of the LRA in **Public Servants Association of South Africa obo De Bruin v Minister of Safety and Security and another** (2012) 33 ILJ 822 (LAC). This court examined the law within the context of the wording of s 158 (1) (h) of the LRA, which provides:

'The Labour Court may - …

(h) review any decision taken or any act performed by the state in the capacity as employer on such grounds that are permissible in law. '

The court held, on the strength of the decisions in **Chirwa** and **Gcaba**, that a dismissal of a public servant is not administrative action as defined in PAJA. It is not capable of judicial review in terms of that Act, as a result of which 'the public servant is confined to the other remedies available to him or her'. (at para 28)

[33] In light of the concession by Mr De Villiers-Jansen that the appellant's conduct in terms of s 17(3) (b) of the Act is reviewable in terms of a residual principle of legality, there is no need to parse further the key findings in **Gcaba**. Irrespective of the classification of the decisions of appellant as administrative action, appellant's actions are open to review in terms of s 158 (1) (a) of the LRA on the ground of legality, a principle that has been developed significantly by the courts over the past decade. So much so, that a parallel system of review for action which falls outside of the strict definition of administrative action in terms of the poorly drafted PAJA, has developed. See the observations of Cora Hoexter (2004) 3 Macquarie Law Journal 165; and more recently Lauren Kohn 2013 (130) SALJ 8-10.

[34] This observation can be illustrated by an examination of the content which has been given to the principle of legality within the context of review. Public functionaries are required to act within the powers granted to them by law. See **Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council** 1999 (1) SA 374 (CC) at para 58, furthermore, see the seminal judgment in **Pharmaceutical Manufacturers, Association of South Africa: *In re* Ex Parte President of the Republic of South Africa** 2000 (2) SA 674 (CC) at para 85, where the court laid down the core element of legality as follows:

'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be

rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement.'

[35] In later judgments the court has developed this concept of rationality requiring the executive or public functionaries to exercise their power for the specific purposes for which they were granted so that they cannot act arbitrarily, for no other purpose or an ulterior motive. See **Gauteng Gambling Board and another v MEC for Economic Development** 2013 (5) SA 24 (SCA) at para 47. Furthermore, in **Democratic Alliance v President of the Republic of South Africa and others** 2013 (1) SA 248 (CC) Yacoob ADCJ held:

'If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the *means* to achieve the purpose for which the power was conferred. And if the failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the *process as a whole*.' (Para 39)

A further requirement was added to the principle of legality in **Judicial Service Commission and another v Cape Bar Council and another** 2013 (1) SA 170 (SCA) where Brand JA said at para 44:

'As to rationality, I think it is rather cynical to say to an affected individual: you have a constitutional right to a rational decision but you are not entitled to know the reasons for that decision. How will the individual ever be able to rebut the defence by the decision-maker: 'Trust me, I have good reasons, but I am not prepared to provide them'? Exemption from giving reasons will therefore almost invariably result in immunity from an irrationality challenge.'

[36] In my view, these principles are applicable to the decisions taken by the appellant. Section 17 (3) (1) (i) of the Act legislatively immunizes an employer from an unfair dismissal referral where an employee fails to report for work for a continuous period of at least fourteen days. Save for this

legislation, as Van Niekerk J remarked in **De Villiers**, *supra,* 'no other employer enjoys the right to consider reinstatement of its employees within its sole discretion'. Thus, it followed that the requirement of 'good cause referred to in s 14 (2) (or in the present case s 17 (3) (b)) should be interpreted to mean 'that unless the employer, having regard to the full conspectus of relevant facts and circumstances is satisfied that a continued employment relationship has been rendered intolerable by the employee's conduct, the employer should as a general rule approve the reinstatement of the employee'. (para 30)

[37] Correctly in my view, Van Niekerk J held that a contrary finding would represent a breach of an employee's right to fair labour practices and the right to equality (since the respondent in this case is treated in a manner which grossly departs from the manner in which other employees in a similar position are treated). The requirements of legality as outlined prevent the employee from being helpless pursuant to an employer's arbitrary decision. In particular, given an employee's rights to fair labour practices, the decision must be tested for rationality as outlined.

[38] It is common cause that no reasons were provided by appellant in his letter to Weder of 31 May 2011 or in his letter to Mangena of 18 March 2011. It was suggested that reasons were provided in the answering affidavits in the review application before the court *a quo*. I am prepared to assume in favour of appellant in this connection, although it is telling that no reasons were proffered by appellant in the letters of 31 May 2011 and 18 March 2011. Our law eschews the process of ex post facto provision of reasons for a decision taken, whilst no reasons are provided when the decision is made. See **National Lotteries Board v South African Education and Environment** 2012 (4) 504 (SCA) at para 27.

[39] In his answering affidavit in Weder, Mr Rodriques states

'The respondent avers that it properly applied its mind to all the issues and arrived at the conclusion that the applicant's reinstatement, properly considered, is not warranted therein.'

Mr Rodriques emphasised that Weder failed, in circumstances where he could have provided a reasonable explanation for his absence without authority to be absent from work. The appellant avers that it properly applied its mind to all issues and arrived at a conclusion that reinstatement properly considered was not warranted.

[40] In Mangena, Mr Rodriques again emphasises that the employee never obtained permission and/or authority from the head of department and/or for his /her supervisor to be absent from his/her official duties. He continued;

'I am advised that it is instructive to note that in considering whether or not to reinstate, the employer (the Respondent) is not considering termination of the contract of employment. This is so because at this stage the employee's or officer's termination of employment with the employer would have happened by virtue of the automatic operation of law.

I am also advised that the only power an employer has, is to consider whether or not there are good reason for the employee's absence without authorization and to exercise the discretion in accordance with s 17 (3) (b) If the PSA.

Having said this, the respondent avers that Annexure "C" contains no proper and good cause which would have enabled the respondent to reinstate the Applicant. If as is alleged by the applicant that she was booked off sick as from the 8th of February 2010. Why then did she fail to draw that fact to the attention of her supervisor?. More importantly why did the applicant fail to furnish a copy of the medical certificate to her supervisor, in circumstances, when she allegedly made telephonic contact with the hospital.

…

Accordingly the only purpose of Annexure "C" was to place reasons and/or advance grounds of establish good cause. In other words, the legality of the respondent's decision should be assessed in the context of considering whether or not the employee has shown good cause for this or her absence without authority.'

Mr Rodriques concludes, 'I am further advised that the requirements of good cause in terms of s 17(3) (b) of the PSA entails; that the employee having to provide a reasonable explanation for his absence without authority. The duty is thus on the employee to provide the employer with a satisfactory explanation as to what were the reasons for being absent without authorization. I am also advised that the decision to reinstate should be influenced by fairness and justice.'

In both cases, the appellant failed to give any reasons when he initially rejected the representations that were made on behalf of Weder and Mangena. Subsequent, in an answering affidavit, much of the emphasis was placed on the fact that the two employees absented themselves without authorization, and that the employment relationship has been rendered intolerable. No explanation is provided for this latter conclusion that is beyond the assertion.

[41] It is common cause that both employees were ill. They may have been incorrect not to inform appellant of the reasons for their absence but, that on its own, did not appear to constitute willful, nor deliberate conduct on their part. No reason has been provided, even in the answering affidavit with the benefit of hindsight, as to why their continued employment would have been rendered intolerable. There is, in summary, a stark absence of a plausible reason/s for the decisions taken by appellant.

[42] In my view, applying the test of legality, insufficient evidence was provided by the appellant to why the decision to reject the representations made was sufficiently rationally related to the purpose for which that power was given to appellant. In particular, and critical to these disputes, insufficient evidence

was provided as to why a continued employment relationship had been rendered intolerable by the conduct of these employees.

[43] For these reasons, both appeals are dismissed with costs.

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DAVIS JA

Judge of the Labour Appeal Court

I agree

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TLALETSI DJP

I agree

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COPPIN AJA

Appearances

For the Appellant: Adv E.A. De Villiers-Jansen

Instructed by:	The State Attorney
For the Respondent:	Adv G.A. Leslie
Instructed by:	Chenells Albertyn