

Dear clients

Welcome to our first *ENSight* newsletter which focuses exclusively on employment law in the public sector.

Although not intended when the Labour Relations Act was introduced in 1995, employment law issues in the public sector and the ways in which they are resolved differ from the private sector. While employees in both sectors are covered by labour legislation such as the Labour Relations Act, public sector employment relations are also governed by the Public Service Act and its Regulations as well as a host of collective agreements which recognise and give effect to the unique relationship between the State as employer and public sector employees. As if these challenges are not enough, it appears that administrative law remains reluctant to release its hold over public sector employment law, as is clear from the articles featured in this newsletter. The past ten years have also seen lots of litigation between the State and public sector trade unions on a range of issues. Keeping up with these developments and the way in which they change public sector employment law is obviously critical. For this reason we have formed a public sector employment law unit within the ENS employment law department to focus on this area of the law.

Through this newsletter our aim is to provide insight into topical developments in public sector employment law, whether it be through legislation, collective agreements, case law or practice. We hope that you enjoy reading the newsletter and look forward to any comments which you may have. We invite you to share developments which you may feel impact on this interesting area of employment law.

Kind regards



Bradley Conradie
Director and head of the public sector employment law unit



our experience in public sector employment law

Our employment law department has vast experience in public sector employment law and has acted for numerous parastatals and government departments. We have been involved in substantial litigation in public sector employment law disputes on issues ranging from restructuring through to

complex dismissal disputes which require strategic outcomes for government. We have also been involved in several urgent interdicts initiated in both the High Court and Labour Court and have conducted independent investigations in respect of alleged irregularities committed by public sector employees.

We are therefore well placed to assist public sector employers with all aspects of public sector employment law.

For further information please contact Bradley Conradie at 021 410 2500 or e-mail bconradie@problemsolved.co.za.

the transfer of a public sector employee

by bradley conradie

That an employee in the public service has the right to a hearing before being transferred in terms of Section 14 of the Public Service Act is a well established principle in our law. In terms of Section 14 an Executing Authority has the power to transfer an employee from one post to another post. This may be done when the public interest so requires. Prior to the Constitution the right to a pre-transfer hearing was based on administrative rules of natural justice. Under the constitution these rules are now enforced via the fundamental right to fair administrative action. Therefore an employee who is unhappy with a decision to transfer him/her would normally rely on the right to fair administrative action for relief.

However, in a recent decision of the Eastern Cape High Court in the matter of *MEC and Giyose*, the court determined a transfer dispute with reference to the constitutional right to fair labour practices as opposed to the right to fair administrative action. These were the facts.

Giyose had been employed as the Director of Traffic Safety at the head office of the Department of Roads and Transport based in King William's Town. In 2005 she received a letter from the Department informing her that the MEC of the Department intended to transfer her from her current post to that of District Manager based in Aliwal North with immediate effect. She was invited to indicate if she had any objection to the transfer and, if so, to furnish reasons for the objection which would be considered by the MEC along with the operational needs of the Department. Giyose replied to the letter and objected to the transfer on a number of grounds. She was invited to a meeting to discuss the issue of her transfer. She was unable to attend the meeting and was

subsequently informed of the decision to transfer her. In the letter informing her of this decision the Department for the first time set out in detail the grounds on which its decision was taken. Giyose challenged the decision to transfer her on the basis that she was not afforded a fair hearing before the decision was taken. She also disputed the substantive fairness and rationality of the decision.

What did the court say?

The court was of the view that although a decision to transfer a public servant in terms of national legislation such as the Public Service Act amounts to administrative action under the Promotion of Administrative Justice Act (PAJA), this was not the only gateway to challenge the decision to transfer. It was also of the view that the right to a pre-transfer hearing forms part of our common law contract of employment insofar as the common law regulates individual public employment relationships. The development of the common law is required by the Constitution in order to bring it into conformity with the constitutional right to fair labour practices. The development includes not only a recognition of the right to a pre-transfer hearing, but also of the remedy it carries, i.e. reinstatement to the pre-transfer position.

The court said that the right to a pre-transfer hearing requires that the employee should be given an opportunity of meeting the case against her. Further, although the right to a hearing is normally seen as only a procedural right, it is logical and fair that it must have a substantive purpose as well. The purpose of the substantive aspect lies in rational and fair consideration of the submissions of the employee on the employer's reason for the proposed transfer.

On the face of it, relying on the right to fair labour practice appears to have the same effect as relying on the right to fair administrative action. However there is an important difference. If the fair labour practice route is followed then the failure to grant a pre-transfer hearing, or a proper one, gives rise to a substantive claim for breach of the common law contract of employment. This is as opposed to relying on a more limited review of an 'administrative decision' taken by a public official. In review proceedings, a decision against the employer would normally mean that the employee is placed back into the former position and the process has to be repeated in an administratively fair manner. This limitation will not apply with a breach of the common law contract of employment. A court would be able to make a substantive finding in respect of the dispute which may include an order that the employee cannot be transferred for the stated reasons.

The judgment is also important at the level of policy as the court was of the view that even though it may be dealing with the exercise of a public power when a decision to transfer is made, the decision is taken in an employment context as between employer and employee as opposed to public official and citizen. Given the employment context there should be an attempt to deal with the dispute as an employment dispute as opposed to an administrative law dispute in the interest of consistency and uniformity in labour matters.

Based on the judgement, it is suggested that proposals to transfer employees in terms of section 14 be carefully considered and thoroughly discussed with the employee concerned before the final decision is taken.

does the dismissal of a public sector employee constitute administrative action?



by ebrahiem abrahams

One of the aims of the Labour Relations Act (LRA) was to have a single piece of legislation which covered both public and private sector employees with disputes resolved at the CCMA, a Bargaining Council or the Labour Court. However, in practice, public sector employees still routinely rely on administrative law and the High Court to resolve employment disputes instead of using the LRA.

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This practice was recently scrutinized by the Constitutional Court in the case of *Chirwa v Transnet Ltd & others*. The court also looked at the issue of the exclusive jurisdiction of the Labour Court in employment law matters. The facts of the case are as follows:

- Ms Chirwa was employed by Transnet Pension Fund, a business unit of parastatal Transnet Limited.
- In November 2002 she was summoned to attend a hearing to answer allegations of poor performance and incompatibility.
- Chirwa refused to participate in the hearing as she objected to the CEO being the complainant, the witness and the Presiding Officer at the same time.

- The CEO proceeded with the enquiry in her absence and concluded that she should be dismissed.
- Chirwa then referred a dispute to the CCMA alleging an unfair dismissal. The matter was conciliated and a certificate issued indicating that the matter was unresolved and could be referred to arbitration. Instead of proceeding to arbitration, Ms Chirwa approached the High Court for relief.
- Ms Chirwa argued in the High Court that Transnet, via the actions of the CEO, had failed to comply with the fair dismissal requirements of the LRA. That being the case, she argued, the decision of Transnet to dismiss her was reviewable in terms of the Promotion of Administrative Justice Act (PAJA). She contended that she had two courses of action available to her; one under the LRA and the other flowing from the Bill of Rights read with the provisions of PAJA. In the light of these options she had decided for "practical considerations" to approach the High Court in the exercise of her constitutional right of access to court. She contended furthermore that the High Court had concurrent jurisdiction with the Labour Court in respect of her claim.

Ms Chirwa argued in the High Court that Transnet, via the actions of the CEO, had failed to comply with the fair dismissal requirements of the LRA

The decision of the High Court and Supreme Court of Appeal

The High Court found that it had jurisdiction to hear the matter, not based on an alleged violation of the provisions of PAJA, but on the basis of the common law rules of natural justice which it found Transnet had breached. It held that the dismissal of a public sector employee was not simply the termination of a contractual relationship but the exercise of a public power which required the employer to apply the rules of natural justice. Ms Chirwa's dismissal was declared a nullity and Transnet was ordered to reinstate her on terms and conditions no less favourable than when she was dismissed.

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Transnet was unhappy with the decision and appealed to the Supreme Court of Appeal (SCA) where two Judges came to the conclusion that a decision by a public sector employer to dismiss an employee does not constitute administrative action as defined in PAJA. Two other Judges came to the conclusion that it did constitute administrative action. The fifth Judge was prepared to accept that the dismissal of the employee could constitute administrative action but that unfair dismissal disputes should fall within the scope of the LRA and not PAJA.

The majority of the SCA found that public sector employees could not rely on PAJA to challenge employment related decisions of the employer. Ms Chirwa then approached the Constitutional Court.

The decision of the Constitutional Court

In the Constitutional Court Ms Chirwa persisted with her argument that the High Court had concurrent jurisdiction with the Labour Court in respect of her claim and that her dismissal as an employee of an organ of State amounted to administrative action because it constituted the exercise of public power.

The Constitutional Court found that the High Court did not have concurrent jurisdiction with the Labour Court to hear Ms Chirwa's claim

The Constitutional Court found that the High Court did not have concurrent jurisdiction with the Labour Court to hear Ms Chirwa's claim. According to the Constitutional Court, the jurisdiction of the High Court is ousted in respect of matters that in terms of the LRA are to be determined by the Labour Court. The court accordingly found that because Ms Chirwa had phrased her complaint to say that Transnet had failed to comply with fair dismissal procedures in terms of the LRA, she had made it clear that she was relying on the provisions of the LRA. That being the case she had to follow the dispute resolution mechanism of the LRA and was not at liberty to bypass 'the finely tuned dispute resolution structures created by the LRA'. She could not be placed in a preferential position simply because of her status as a public sector employee.

Accordingly, the High Court did not have jurisdiction to hear the matter.

Did Ms Chirwa's dismissal amount to administrative action?

Because the court found that Ms Chirwa should have used the dispute resolution mechanisms of the LRA, it found it unnecessary to answer the question of whether Ms Chirwa's dismissal amounted to administrative action. One of the Judges did, however, express a view on this issue with which the majority of the other judges seemed to concur. The Judge's view can be summarised as follows:

- When a public official performs a function in relation to his or her duties, the public official exercises public power.
- Transnet's decision to dismiss Ms Chirwa involved the exercise of public power.
- However, the question is whether the particular conduct constitutes administrative action which would bring PAJA into play.
- Not all conduct of state functionaries entrusted with public power will constitute administrative action.
- What must be looked at is not the functionary performing the function but the function which is being performed to determine whether it is administrative action. Factors to be taken into consideration include:
 - the source of the power;
 - the nature of the power;
 - the subject matter;
 - whether the function is related to policy matters or the implementation of legislation.
- Based on the above factors the judge found that:
 - the subject matter of the power involved the termination of a contract of employment for poor work performance;

- the source of the power was the employment contract between Chirwa and Transnet;
- the nature of the power was contractual;
- the exercise of the power did not involve the implementation of legislation which constitutes administrative action.

The Judge therefore concluded that the termination of Ms Chirwa's contract of employment did not constitute administrative action. It was more concerned with labour and employment relations.

It must be noted, however, that the above view forms part of a separate judgement from that of the majority and therefore it cannot be said that the Constitutional Court has answered this question definitively. It is nevertheless an important indication of what its view would be if it should in the future become necessary to decide this issue.

The judgement does not therefore mean the end of employment disputes in the High Court. These will in any event exist as there are quite a few instances in the public service where issues arise which can be characterised as employment related issues but which are not dealt with by the LRA. As discussed in the previous article, one such example is the decision of an executing authority to transfer a public service employee. If the employee is unhappy with the transfer, there are no remedies or dispute resolution mechanisms available in terms of the LRA. Such an employee could still approach the High Court for relief.

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