

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)**

CASE NO: JS 1152/02

In the matter between:

ELLON RIKHOTSO

APPLICANT

and

MEC FOR EDUCATION

RESPONDENT

JUDGMENT

TSHIQI AJ

Introduction

This is an application arising out of the discharge of Applicant in terms of section 14 of the Employment of Educators Act 76 of 1998 as amended.

Facts

The following facts are common cause:

The Applicant was employed by the Gauteng Department of Education as an educator. His employment was subject to the provisions of the Employment of Educators Act No: 76 of 1998 (“the Act”) and the Regulations enacted in terms thereof and also subject to the Labour Relations Act 66 of 1995.

On 1 June 2000 Applicant was granted sick leave until 1 July 2000. On or about 17 July 2000, the Applicant submitted an application for sick leave. Together with that application, the Applicant submitted a medical certificate from a Dr Anton Potgieter a psychiatrist. The medical certificate stated that the Applicant would be unfit for duty for the period 16 June 2000 to 31 August 2000. The Applicant had also been absent from duty prior to 17 July 2000. The application for sick leave was approved. On 14 August 2000, the applicant submitted another sick leave application wherein he applied to be absent from 1 September 2000 until he was discharged for medical reasons

(medical boarding). The above application was also supported by a medical certificate from Dr Anton Potgieter which indicated that the Applicant would be unfit for duty from 1 September 2000 until medical boarding. That application was approved subject to the Applicant being absent until 31 March 2001.

On or about August 2000, the Applicant submitted an application for medical boarding. That application was returned to the Applicant on or about August 2000 due to insufficient information and documentation supplied. A further application was received on 12 December 2000. With this application, the Applicant supplied medical reports from:

- a) A Clinical Psychologist, Johan Benade dated 8 July 2000; and
- b) A Psychiatrist, Dr Anton Potgieter, dated 4 August 2000

The application together with its enclosures was referred to a medical panel of doctors appointed by the Department of Health, Gauteng provincial Government. The Applicant's authorised sick leave expired on 31 March 2001. The Applicant did not submit any further sick leave applications. On 21 June 2001, the Respondent took a decision to stop paying the Applicant's salary because he did not tender his services as expected. From 1 July 2001 the Respondent stopped paying the Applicant's salary. On 25 June 2001 a report was received by the Respondent from the Medical panel – Directorate Medico Legal Services: The Department of Health wherein it was recommended that the Applicant should not be discharged on medical grounds.

On or about 18 July 2001, Ms Thabethe a district Manager, in the employment of the Respondent wrote a letter to the Principal Tiyani Primary School where the Applicant was placed at the time. She requested that the Applicant be informed that his application for medical boarding was not successful. The Applicant failed to report for duty.

On 20 September 2001, Ms Thabethe, on behalf of the Respondent, wrote to the Applicant giving him notice that should he continue to refuse to report for duty he would be deemed to have been discharged from the services of the Respondent in terms of section 14 of the Educators Act. The Applicant failed to report for duty.

FACTS WHICH ARE IN DISPUTE

- 1) Whether the Applicant is entitled to be medically boarded.
- 2) Whether the procedure followed by the Respondent in considering the Applicant's medical boarding application was legal and justified and/or reasonable and/or fair and/or provided for by the Act and its Regulations and the Labour Relations Act 66 of 1995.
- 3) Whether the Respondent was entitled to stop paying the Applicant's salary for failing to render his services. Whether the Applicant is entitled to be paid his salary for the period from 1 July 2001

to the date of the hearing of this application.

4) Whether the Respondent was entitled to deal with the Applicant in terms of section 14 of the Act, namely to deem him to have discharged himself from its service.

CONSIDERATION OF THE FACTS AND THE LAW

Section 14 (1) (a) of Employment of Educators Act 76 of 1998 as amended (Educators Act) 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;*
- b) -----
- c) -----
- d) -----

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;”*

(ii)-----

(2) If an educator who is deemed to have been discharged under paragraph (a) or (b) of subsection (1) at any time reports for duty, the employer may, on good cause shown and notwithstanding anything to the contrary contained in this Act, approve the reinstatement of the educator in the educators former post or in any other post on such conditions relating to the period of the educators absence from duty or otherwise as the employer may determine.”

Schedule 1 of the Educators Act deals with the Incapacity Code and Procedures in respect of ill health or injury and provides as follows:

- (1) If the employer is of the view that an educator is not performing in accordance with the post requirements that the educator has been employed to perform, as a result of poor health or injury, or an educator applies for a discharge from service on account of continuous ill health or injury, the employer must investigate the extent of the ill health or injury.*
- (2) In conducting the investigation the employer must give the educator, or the trade union representative of the educator or fellow employee, the opportunity to state the case of the educator and to be heard on all the issues that the employer is investigating.*
- (3) (a) Subject to section 7 of the Employment Equity Act, 1998 (Act 55 of 1998), the employer must appoint at least one registered medical practitioner to examine the educator at the state's expense and to report on the educator's state of health.*
- (b) An educator is entitled to nominate any other registered medical practitioner of his or her choice at the educator's own expense to report on the educator's state of health.*

(c) The record of any medical examination performed in terms of this Act must be kept confidential and may be made available only –

(i) in accordance with the ethics of medical practice;

(ii) if required by law or court order; or

(iii) if required by the employer to determine the extent to which the educator is able to perform in accordance with the job requirements.

(d) (i) The medical practitioner contemplated in paragraph (a) must, on completion of the medical examination, provide the employer with a report on the nature and extent of the educator's ill health or injury and whether it is temporary or permanent, and the expected period of the educator's incapacity.

(ii) The medical practitioner contemplated in paragraph (b) may also submit a report if the educator is dissatisfied with a report contemplated in paragraph (a).

(4) Based on the medical reports the employer must determine whether or not the nature of the educator's ill health or injury is of a temporary or permanent nature and the period of time that the educator is likely to be absent from work.

(5) After the investigation of the extent of the educator's ill health or injury, the employer must provide the educator with a written report setting out the results or findings of the investigation.

It is common cause that the Applicant had applied for discharge from service on account of continuous ill health. He then attached medico legal reports from his medical experts, a Clinical Psychologist and Psychiatrist in support of his application. The recommendation of his medical expert was that he should be discharged from service on account of ill health. The medico legal reports are dated July and August 2000. During this period the Applicant was on sick leave. He was booked off sick from 14 June 2000 to 31 August 2000. This was extended from 1 September 2000 for an indefinite period. He was diagnosed to be suffering from a major depression disorder.

The Respondent referred the application for the discharge to a medical panel at the Department of Health for consideration. The panel considered the application and made the following recommendations:

“After careful consideration of the case of Mr Rikhotso, we recommend that he not be discharged on medical grounds.

Reasons:

He suffers from a Major Depressive Disorder and symptoms of Post Traumatic Stress Disorder for which he has been on treatment since June 2000.

There are precipitators which are directly work related and could be modified; his treatment does not yet fulfil the Criteria of Medical Boarding as set out in the “Guidelines to the Management of Disability Claims on Psychiatric Grounds” is issued by The Life Offices Association of SA and The Society of Psychiatrists of SA (Insert to the SAMJ, June 1996).

The Department should endeavour to find a more suitable position possible in another school or Department for him.

Re-assessment should be done after a year, submitting a full follow-up Psychiatric and Work Report indicating the outcome of the above recommendations.”

It is also common cause that on 18 July 2001 a letter was sent by the District Manager in the employ of the Respondent, Mrs Thabethe to the School in which the Applicant was assigned. Ms Thabethe requested the Principal at Tiyan School to inform the Applicant that his application for a discharge was not successful.

The Applicant did not report for duty.

On 20 September 2001, a letter was addressed to the Applicant by Mrs Thabethe informing him that in the light of the rejection of his application for discharge on medical reasons, his continued absence from work is regarded as unjustifiable. He was instructed to report for duty at Diepdale Secondary School with immediate effect. He was further warned that his failure to do so may lead to a termination of services in terms of section 14 (1) (a) of Employment of Educators Act of 1998.

On 09 November 2001, another instruction was sent to the Applicant to report for duty and there was no compliance with this instruction.

Another instruction was sent to the Applicant on 21 November 2001 and he again failed to report for duty.

The Applicant testified that he did respond to the instruction and stated that he could not report at Diepdale High School as he felt that the atmosphere at the School was intimidating and that it would affect his health. He could not present the said letter during the hearing and testified that he had not thought it was important to bring it to court or include it in his bundle.

It is clear from the evidence that the Respondent dealt with the ill health of the Applicant in terms of schedule 1 item 3 (1) (2) (3) and (4).

The Applicant did not submit any further reports challenging the decision of the panel from the Department of Health.

Even if I accept that he may have written a letter to the Respondent indicating his refusal to report to Diepdale High School, I find that his refusal to go and report to Diepdale High School was unreasonable in that he simply refused to go without trying to demonstrate to the Respondent his willingness to report for duty.

If he had gone and was intimidated again, he would have given such a report to the Respondent.

It is common cause that the Respondent attempted to place the Applicant in three separate schools. He did not continue to work in these schools because of his perception that he is not wanted for various reasons.

It is clear from the circumstances of this matter that the Applicant was not willing to resolve his problem. He was only interested in being discharged. I therefore reject his testimony that he would have considered being placed at a district office. This was never expressed by him at all when he was being persuaded to report for duty nor was it mentioned by him during his examination in chief. This was only mentioned by him during cross examination. As stated above, his conduct throughout the process clearly showed that he was not interested in resolving his issue in any other manner other than being discharged.

He did not co-operate with the Respondent in their attempts to find alternative means as recommended by the panel of the Department of Health.

I am satisfied that the Respondent complied with Schedule 1 of the Educators Act.

The next issue I have to consider is whether the Applicant was discharged in terms of section 14 of the Educators Act.

It is common cause that the Applicant was absent from work for a lengthy period. It is also common cause that his leave of absence was unauthorised from March 2001. He was notified on three occasions in writing that his leave was unauthorised and instructed to report for duty. He failed to do so. He was also notified of the consequences of the provisions of section 14 of the Educators Act. He failed to report for duty.

The Respondent could have elected to inform the Applicant 14 days after 31 March 2001, that he was deemed to be discharged. However the Respondent complied with the provisions of Schedule 1. After such compliance the Respondent went further to notify the Applicant of the wrongfulness of his conduct and the consequences thereof. The Applicant ignored these attempts.

I am satisfied that the procedure followed in considering his application was in compliance with the Educators Act.

As regards the issue whether the Applicant was entitled to be discharged permanently, it is clear that the Respondent made a decision after seeking the opinion of independent experts who made the recommendation after assessing the reports submitted by the Applicant. They agreed with the diagnosis but differed on whether he met the criterion to be discharged. The decision taken by the Respondent to decline the application was based on expert opinion as recommended in Schedule 1 of the Educators Act.

In the circumstances I am satisfied that the Applicant was not entitled to be discharged permanently on medical reasons.

As regards the issue whether the Applicant was entitled to be paid from July 2001, it is common cause that the Applicant did not render services from March 2001 until his services were finally terminated. His leave of absence was unauthorised during that period. He was therefore not entitled to payment of his salary and/ or benefits for the said period.

As regards section 14 of the Educators Act, I am satisfied that it became operational and there was

no good cause shown by the Applicant to enable the Respondent to reinstate him in his former post or in any other post.

The Application is dismissed.

There is no order as to costs.

TSHIQI AJ

Date of hearing:	01 November 2004
Date of Judgment:	11 November 2004
For the applicant:	Ellon Rikhotso (In person)
For the respondent:	Adv T Motau
Instructed by the State Attorney	