

Silence can mean consent



The Labour Relations Act (LRA) gives the Labour Court and Labour Appeal Court numerous and strong powers to make decisions relating to labour disputes. Section 158 of the LRA gives the Labour Court the power to make, amongst others, orders enforcing compliance with the provisions of the LRA and reviewing awards and rulings made by CCMA and bargaining council Arbitrators.

The Labour Appeal Court has higher powers than the Labour Court and can hear appeals against the decisions made by that Court.

Between them, these two courts have very substantial powers. And they are not normally reluctant to exercise their powers strongly even if it results in a very severe financial burden to the party on the receiving end.

For this reason it is crucial that parties are meticulous in the way that they treat employees and in the way that they deal with legal processes. One aspect of this is the legal principle that 'silence can mean consent'. This means that, if a party (first party) receives a legal letter from the other party (second party) it needs to reply thereto, especially if it does not accept the content of the letter. Failure to dispute the second party's claim or to refuse its request can be seen to mean that it accepts the second party's claim.

In the case of MEC: Department of Education, KZN vs Hendrik Cumaio the employer invoked section 14(1)(a) of the Employment of Educators Act that allowed employers to discharge an employee who was absent without leave for more than 14 days. However, the employer counted 14 calendar days of absence

instead of 14 working days, and thus invoked this section erroneously.

The employee later applied to the employer for reinstatement but the employer failed to respond thereto. The employee then applied to the Labour Court to nullify his discharge, and the Court found in his favour. The Labour Appeal Court (LAC) upheld this judgement and held that the employee's discharge was null and void. The LAC ordered the employer to:

Reinstate the employee retrospectively for 6.75 years; and
Pay the employee's legal costs.

This costly outcome could have been avoided if the employer had appreciated the principle of silence means consent and had interpreted the Employment of Educators Act correctly.

This shows how important it is for employers to understand legal principles; which understanding is best achieved via training of those executives responsible for dealing with employment matters.