

The disclosure of information in disciplinary enquiries

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OPSOMMING

Die verskaffing van inligting in dissiplinêre verhore

Daar is regterlike gesag dat dit moontlik is om gedurende 'n dissiplinêre verhoor in 'n *res media* in te meng ten einde meer inligting aan die werknemer te verskaf. 'n Werknemer wat gedurende 'n dissiplinêre ondersoek meer inligting wil verkry, het die volgende keuses: (a) Indien die hof die dissiplinêre optrede van die werkgewer as 'n administratiewe handeling beskou, kan die werknemer sy eis op die Promotion of Administrative Justice Act baseer. (b) Indien die werknemer nie die risiko wil loop dat die hof die dissiplinêre optrede dalk nie as administratiewe optrede sal beskou nie, kan hy sy eis op die Wet op Arbeidsverhoudinge baseer. Dis onseker of laasgenoemde toegang tot meer inligting gedurende die dissiplinêre verhoor toelaat. (c) Die werknemer kan ook in sekere omstandighede die inligting ingevolge PAIA, die Promotion of Access to Information Act, verkry.

Die keuse wat die werknemer uitoefen bepaal nie net die forum waar die saak verhoor word nie, maar ook die remedies wat vir die suksesvolle werknemer beskikbaar is. Indien die hof gedurende 'n dissiplinêre verhoor aan 'n werknemer toegang tot verdere inligting verleen, kan dit moontlik die onnodige vertraging en verlenging van die prosedure en 'n verontagsaming van die dispuutbeslegtingsprosedure waarvoor die Wet op Arbeidsverhoudingevoorsiening maak, tot gevolg hê.

1 INTRODUCTION

A refusal by an employer to furnish an employee facing a disciplinary enquiry with certain information could result in an unnecessary delay in the disciplinary process. If the employer refuses an employee facing a disciplinary enquiry access to information, the employee possibly has various legislative grounds upon which to base his right to such information. The choice an employee is permitted to exercise will determine not only the forum where the case is heard, but also the remedies available should the employee be successful in his claim. There is some judicial authority to the effect that intervention in a *res media* in order to grant employees the right of access to further relevant information during the course of a disciplinary enquiry is permissible. An unfortunate consequence of this is that an employee could retard and obstruct a disciplinary enquiry against him by consecutive requests for further information which may or may not be relevant to his ability to defend himself. However, in light of the fact that the Labour Relations Act¹ (LRA) was enacted to give effect to the constitutional right to fair labour

1 Act 66 of 1995.

practices, it is uncertain whether an employee facing a disciplinary enquiry is entitled to rely on other legislation in order to enforce his right to a fair procedure.

2 LEGISLATIVE FRAMEWORK

2.1 Right of access to information

The authoritarian apartheid regime was shrouded in secrecy:² “A web of laws restricted access to information and punished those who revealed information without government sanction.”³ In reaction to apartheid state control of information, the constitutional right of access to information was first enacted in the interim Constitution.⁴ In terms of section 23, “every person” was granted access to “all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights”. The final Constitution not only expands this right to include information held by private persons, but requires the enactment of national legislation in order to “give effect” to this right. Furthermore, the requirement that the information should be required for the exercise or protection of rights is eliminated as far as information that is held by the state is concerned.

Section 32 of the Constitution⁵ provides:

- “(1) Everyone has the right of access to –
 - (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.”

The Promotion of Access to Information Act⁶ (PAIA) is the “national legislation” required by section 32(2) of the Constitution to give effect to the constitutional right of access to information.

Section 11 of PAIA provides:

- “(1) A requester must be given access to a record of a public body⁷ if–
 - (a) that requester complies with all the procedural requirements . . .
 - (b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.”

Section 50 provides:

- “(1) A requester must be given access to any record of a private body⁸ if –

2 The preamble to the Constitution recognises this fact.

3 Currie and Klaaren *The Promotion of Access to Information Act: The commentary* (2002) 3.

4 Act 200 of 1993.

5 Of 1996.

6 Act 2 of 2000.

7 “Public body” is defined in s 1 as “(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or (b) any other functionary or institution when – (i) exercising power or performing a duty in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation”.

8 A “private body” is defined in s 1 as “(a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity; (b) a partnership which carries or has carried on any trade, business or profession; or (c) any former or existing juristic person, but excludes a public body”.

- (a) that record is required for the exercise or protection of any rights;
- (b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and
- (c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.”

Whereas a request to the state for information requires no justification or reason, a request for information held by a private body must be for information required for the exercise or protection of a right. Failure on the part of an employer to furnish the employee facing a disciplinary enquiry with relevant information clearly infringes the employee’s right to a fair procedure,⁹ and his right to his job.

2.2 The right to a fair procedure

Section 33 of the Constitution provides for the right to just administrative action. It provides that everyone has the right to “administrative action that is lawful, reasonable and procedurally fair”. It further enjoins the state to enact legislation in order to “give effect to these rights”.¹⁰ The Promotion of Administrative Justice Act¹¹ (PAJA) was enacted for this purpose. For the purposes of this article, the requirement that administrative action be procedurally fair is of most relevance. In order for administrative action to be procedurally fair, the “accused” must be furnished with sufficient information so as to adequately answer to the allegations against him or her.¹² In order to insist on the right to further information on the basis of the right to fair administrative action, the disciplinary action must be considered to constitute administrative action. Section 1 of PAJA defines “administrative action” as follows:

- “[A]ny decision taken, or any failure to take a decision, by –
- (a) an organ of state, when –
 - (i) exercising a power in terms of the Constitution or provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
 - (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.”

This is followed by a list of exclusions from the definition.

Whether or not the dismissal of an employee constitutes administrative action is a moot point.

The Constitution also protects the right to fair labour practices.¹³ The concept of “fair labour practices” is not defined for purposes of this constitutional right. In *National Union of Health and Allied Workers Union v University of Cape Town*¹⁴ the court stated the following with regard to giving content to the constitutional right to fair labour practices:

⁹ The right to a fair procedure is discussed below.

¹⁰ S 33 (3).

¹¹ 3 of 2000.

¹² Precisely what constitutes relevant information for the purpose of defending oneself is beyond the scope of this article.

¹³ S 23(1).

¹⁴ 2003 ILJ 95 (CC).

“The concept of fair labour practice is incapable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept . . . In giving content to this concept the courts and tribunals will have to seek guidance from international experience. Domestic experience is reflected both in the equity based jurisprudence generated by the unfair labour practice provision of the 1956 LRA as well as the codification of unfair labour practice in the LRA.”¹⁵

In terms of the previous LRA¹⁶ an unfair dismissal could constitute an unfair labour practice. The definition of an unfair labour practice in terms of the present LRA includes disciplinary action short of dismissal.¹⁷ In *Fedlife Assurance Ltd v Wolfaardt*¹⁸ the respondent claimed damages for a breach of contract. The respondent claimed that the contract of employment was for a fixed term of five years and that after only two years the employer had repudiated the contract by terminating it. The reason given for such termination was that the respondent’s position had become redundant. The Supreme Court of Appeal concluded that implicit in the constitutional right to fair labour practices is the right not to be unfairly dismissed. This right, on the basis of the Constitution, was read into the contract of employment.¹⁹ Disciplinary action short of dismissal, in light of the definition of an unfair labour practice in terms of the LRA, can also constitute a breach of the constitutional right to fair labour practices.²⁰

The LRA gives content to the constitutional right to fair labour practices. In doing so it *inter alia* prohibits unfair disciplinary action on the part of the employer. This unfair disciplinary action could take the form of a dismissal²¹ or other disciplinary action short of dismissal.²² Disciplinary action on the part of the employer must be procedurally fair.²³ Access to information may be crucial to the procedural fairness or otherwise of disciplinary action taken by an employer against an employee. In terms of the LRA an “employee should *inter alia* be allowed the opportunity to state a case in response to the allegations”.²⁴ In order to do so, the employee must have access to all relevant information. Such failure could constitute not only an infringement on the employee’s right to fair labour practices and fair disciplinary action, but even more fundamentally, an infringement of the employee’s right to his job.

15 Para 33.

16 Act 28 of 1956.

17 S 186(2)(b).

18 [2001] 12 BLLR 1301 (A).

19 S 39(2) of the Constitution provides: “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purpose and object of the Bill of Rights.” See also *Ndara v The Administrator, University of Transkei* Case no 48/2001 (Tk) (unrep); *Gotso v Afrox Oxygen Ltd* [2003] 6 BLLR 605 (Tk) where unfair dismissals were held to constitute a breach of the constitutional right to fair labour practices.

20 *Nelson v MEC Responsible for Education in the Eastern Cape* [2002] 3 BLLR 259 (Tk). See also *Van Dyk v Maithufi NO* 2004 ILJ 220 (T) in this regard.

21 S 185 provides that every employee has the right not to be unfairly dismissed.

22 S 186(2)(b). Examples of disciplinary action short of dismissal are warnings and suspensions.

23 Schedule 8 of the LRA: Code of Good Practice: Dismissal paras 3 and 4.

24 *Idem* para 4.

3 ARE EMPLOYEES FACING A DISCIPLINARY ENQUIRY ENTITLED TO INSIST ON THE RIGHT TO A FAIR PROCEDURE PRIOR TO THE CONCLUSION OF THE ENQUIRY?

There is authority in favour of allowing court intervention in order to prevent unfairness prior to the conclusion of an internal disciplinary enquiry. However, the general proviso is that the intervention should not be undertaken lightly. It should be limited to rare cases where failure to intervene would result in a grave injustice or where justice cannot otherwise be attained.²⁵

In *Mhlambi v Matjhabeng Municipality*²⁶ the applicant, who was facing a disciplinary enquiry, requested the employer to furnish him with further particulars concerning the charges against him. This request was denied. The applicant approached the court for an order preventing the continuation of the enquiry until the employee was provided with further particulars. The applicant cited the constitutional rights to fair labour practices, just administrative action and access to information in support of his claim. He also cited PAJA and PAIA. It is worth noting that the applicant made no reference to the LRA. Perhaps this is because he wished to avoid the argument that the LRA, in giving effect to the right to fair labour practices, provides sufficient remedies should an employee be dissatisfied with the outcome of a disciplinary enquiry.²⁷ However, these remedies are only applicable once the unfair disciplinary action has been taken. In fact this is precisely what the respondent contended. Musi J was not convinced that the provisions of the LRA provided adequate redress by providing for remedies after the conclusion of the enquiry. He stated:

“The notion that an employee facing a disciplinary inquiry should be precluded from himself or herself taking steps to ensure that he or she gets a fair hearing and thereby avert any potential prejudice to himself or herself is, in my view, illogical and would probably violate provisions of ch 2 of the Constitution, in particular the right to a fair labour practice, the right to access to information . . . and the right to a just administrative action.”²⁸

The court *inter alia* ordered the respondents to furnish the applicant with certain information, the respondents were interdicted from proceeding with the disciplinary enquiry pending the provision of the said information, and they were ordered to pay the costs of the suit.²⁹

In *Oliver v Universiteit van Stellenbosch*³⁰ the employee facing a disciplinary enquiry requested further information from the employer. The employer failed to furnish the employee with the information. The applicant, like the applicant in *Mhlambi*, did not seek to rely on the provisions of the LRA. Instead he relied on the constitutional right to fair labour practices and fair administrative action, PAJA and PAIA. The court held that where an employee was given insufficient information to the extent that he did not know what case he had to meet, a “grave

25 *Walhaus v Additional Magistrate, Johannesburg* 1959 3 SA 113 (A) 119–120; *Moropane v Gilbey's Distillers & Vintners (Pty) Ltd* 1998 ILJ 635 (LC) 638; *Mhlambi v Matjhabeng Municipality* 2003 5 SA 89 (O); *Oliver v Universiteit van Stellenbosch* (unrep 2181/2004 (C)).

26 2003 5 SA 89 (O).

27 S 186 read with s 194 of the LRA.

28 94.

29 The judgment provides little by way of a basis for its conclusion.

30 Unrep 2181/2004 (C).

injustice” would be likely to ensue. Since the court was of the opinion that the charges were vague, it is one of those “rare cases” where failure by a court to intervene would result in a grave injustice. It ordered the respondent to furnish the applicant with certain information.

As was the case in *Mhlambi*, it is difficult to ascertain on what basis the court came to its conclusion. Both these decisions result in a circumvention of the provisions of the LRA and the dispute resolution procedure provided by that Act.³¹ As pointed out by Conradie JA,³² there is ample authority to the effect that the Constitution cannot be relied upon directly if there is a cause of action available in terms of legislation or the common law. To do so would defeat the object of the constitutional imperative requiring the rights in sections 23, 32 and 33 of the Constitution to be given effect to in the form of national legislation.³³ Reliance on the provisions of the Constitution is only permissible in situations where it is alleged that the applicable legislation is deficient in the remedies it provides or that it is invalid.³⁴ Secondly, it is trite that courts or tribunals should only intervene in *res media* in situations where a failure to do so would result in grave injustice or if there are no other remedies. Given the remedies provided for in terms of the LRA, it is difficult to see how a failure to intervene by the courts in these two cases would result in grave injustice.

4 DO THE PROVISIONS OF THE LRA PRECLUDE THE APPLICATION OF OTHER LEGISLATION?

In giving effect to the constitutional right to fair labour practices, the LRA has provided for fair procedures for a valid dismissal decision by the employer on the basis of the misconduct of the employee, incapacity of the employee, and the employer’s operational requirements. According to Conradie JA in *Transnet Limited v Chirwa*, the intention of the legislature was to “subject a dispute about the unfair dismissal of any employee falling within its scope to the dispute resolution mechanisms of the Act”.³⁵ A reliance on the right to fair administrative action in terms of PAJA by employees in order to enforce procedural fairness when facing a disciplinary enquiry for misconduct or incapacity would result in a circumvention of the dispute resolution mechanisms provided by the LRA.³⁶ Consequently, Conradie JA expressed the view that the provisions of PAJA were not intended to be applicable in a case where the employee contests the procedural fairness of a dismissal based on misconduct or incapacity.³⁷ The same line of reasoning can be applied to the situation where an employee facing a disciplinary enquiry seeks to rely on PAJA in order to gain access to information held by a private body.

31 This point is discussed under the next heading.

32 *Transnet Limited v Chirwa* (unrep 024/2005 (SCA)) 25–28.

33 *Minister of Health NO v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) para 96.

34 *Du Toit v Minister of Transport* 2006 1 SA 311 (CC) para 29; *NAPTOSA v Minister of Education, Western Cape* 2001 4 BCLR 388 (CC) para 61.

35 Unrep 024/2005 (SCA) 20. The judgment was delivered on 29 September 2006.

36 According to Conradie JA *ibid* this “does not fit in with the state’s desired comprehensive scheme of labour regulation. The legislative intent evident from the LRA is beyond doubt: it is to subject a dispute about the unfair dismissal of any employee falling within its scope to the dispute resolution mechanisms of that Act”.

37 *Ibid*.

Not everyone prescribes to the view that the provisions of the LRA preclude reliance on PAJA in order to ensure a fair procedure when an employee faces a disciplinary enquiry. In *Chirwa*, Cameron JA, with whom Mpati DP concurred, held that the remedies for unfair disciplinary procedures provided for in terms of the LRA do not preclude a claim for relief based on the employee's right to administrative justice in the ordinary courts.³⁸ He stated:

"So far as I know, no doctrine of constitutional law confines a beneficiary of more than one right to only one remedy, even where a statute provides a remedy of great amplitude. If the legislature sought to deprive dismissed public employees of their administrative justice cause of action in the ordinary courts, because they enjoy rights under the LRA, it could have said so when it enacted PAJA. Far from doing so, PAJA's extensive exclusion from the definition of 'administrative action' refrains from any such mention. That cannot but be a telling feature. It follows in my view that their cause of action remains unscathed."³⁹

In the same case, Mthiyane JA, with whom Jafta JA concurred, shared Cameron JA's view in this regard. Mthiyane JA stated: "If an employment dispute raises an alleged violation of a constitutional right a litigant is not confined to the remedy provided under the LRA and the jurisdiction of the High Court is not ousted."⁴⁰ Both Cameron and Mthiyane JJA referred to *Public Servants Association of South Africa v Digomo NO*⁴¹ in support of their view. In this case Nugent JA said:⁴²

"The remedies that the Labour Relations Act provides against conduct that constitutes an 'unfair labour practice' are not exhaustive of the remedies that might be available to employees in the course of the employment relationship. Particular conduct by an employer might constitute both an 'unfair labour practice' (against which the Act provides a specific remedy) and it also might give rise to other rights of action. The appellant's claim in the present case was not that the conduct complained of constituted an 'unfair labour practice' giving rise to the remedies provided for by the Labour Relations Act, but that it constituted administrative action that was unreasonable, unlawful and procedurally unfair. Its claim was to enforce the right of its members to fair administrative action – a right that has its source in the Constitution and that is protected by s 33 – which is clearly cognisable in the ordinary courts."⁴³

One consequence of allowing reliance on the PAJA where the LRA is applicable, is that employees in the public sector may be placed in a more advantageous position than employees employed in the private sector with regard to their rights arising from the employment relationship. It is difficult to justify such differentiation when the employment contract forms the founding basis of the employment relationship irrespective of whether the employer is the state or not. There is no reason why the resolution of employment disputes in the public sector should not be settled in a different manner to those in the private sector.⁴⁴

38 37.

39 40.

40 6.

41 2005 *ILJ* 1957 (SCA).

42 Para 4.

43 See also in this regard *Mbayeka v MEC for Welfare, Eastern Cape* [2001] 1 All SA 567 (Tk) para 17.

44 See *SAPU v National Commissioner of the South African Police Service* [2006] 1 BLLR 42 (LC) 57.

5 WHAT CONSTITUTES ADMINISTRATIVE ACTION?

Prior to the enactment of the 1996 LRA, civil servants were excluded from the protection provided in terms of the 1956 LRA. In light of this lack of protection for civil servants, it is not surprising that the courts found the common-law principles of administrative justice applicable to disciplinary actions taken against public service employees. In doing so, such disciplinary action had to be found to constitute administrative action.⁴⁵ Most public servants are now covered by the provisions of the LRA.⁴⁶ Another development has been the enactment of PAJA, which defines the concept of administrative action. In order for an employee to rely on the provisions of PAJA the disciplinary action must qualify as administrative action. The definition of “administrative action” in terms of section 1 of PAJA provides certain requirements for conduct to qualify as administrative action. The employer must be

“an organ of state, when –

- (i) exercising a power in terms of the Constitution or provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation; or

a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision”.

Furthermore, the action must “adversely affect the rights of any person” and it must have a “direct, external legal effect”.⁴⁷

From this definition it is clear that the identity of the employer is only of relevance in so far as it relates to the functions and powers of that body. The decisive criterion is the fact that the body (whether an organ of state or not) exercises a public power or performs a public function. The fact that, in terms of the definition of administrative action in PAJA, also “a natural or juristic person other than an organ of state” takes administrative action when exercising a public power or performing a public function makes this clear. The identification of the function performed and the nature of the power that is being exercised (as opposed to the fact that the employer is the state or an organ of state) as constituting the determining factor as to whether action constitutes administrative action, is supported by case law.⁴⁸

45 *Administrator, Transvaal v Zenzile* 1991 1 SA 21 (A).

46 In terms of s 2 of the LRA only the National Defence Force, the National Intelligence Agency, the South African Secret Service, the South African National Academy of Intelligence and Comsec are excluded from its ambit.

47 S 1 of PAJA.

48 In *President of the RSA v South African Football Union* 2000 1 SA 1 (CC) para 41 the court stated: “What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not.” The same point was made in *Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA) para 24. In *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 3 SA 1013 (SCA) para 17 Streicher JA also emphasised that whether action constitutes administrative action is dependent on “the nature of the power being exercised”. In *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) 865 the court stated: “The question relevant to s 33 of the Constitution is not whether the action is performed by a member of the executive arm of government, but whether the task itself is administrative or not.” See also *SAPU v National Commissioner of the South African Police Service* [2006] 1 BLLR 42 (LC); *Greyvenstein v Kommissaris van die SA Inkomste Diens* 2005 ILJ 1395 (T); *Hlope v Minister of Safety & Security* [2006] 3 BLLR 297 (LC) and *Louw v SA Rail Commuter Corporation Ltd* 2005 ILJ 1960 (W).

This view was expressed by Mthiyane JA (with whom Jafta JA concurred) in *Chirwa*:

“The nature of the power or function is paramount, the identity of the functionary exercising the power or performing the function, secondary. The question requires an analysis of the nature of the power or function exercised. That in turn requires a consideration of, *inter alia*, the source of the power or function exercised, its nature, its subject matter, whether it involves the exercise of a public duty and how closely it is related to legislation.”⁴⁹

Mthiyane JA on this basis expressed the view that earlier decisions that held that dismissals of public sector employees constituted an exercise of public power or administrative action⁵⁰ were distinguishable from cases decided after the promulgation of PAJA. The implication is that the conclusion in those earlier cases that the dismissal of a state employee constituted the exercise of public power, is a consequence of the fact that the employer was the state.⁵¹ In other words, regard to the nature of the power exercised was not necessary: as long as the employer was the state, dismissals constituted administrative action.

Mthiyane JA then concluded⁵² that the dismissal of the employee by Transnet did not constitute an exercise of public power. He continued:

“The nature of the conduct involved here is the termination of a contract of employment. It is based on contract and does not involve the exercise of any public power or performance of a public function in terms of some legislation. Ordinarily the employment contract has no public law element to it and it is not governed by administrative law. The mere fact that Transnet is an organ of state does not impart a public law character to its employment contract with the applicant. The power to dismiss is found, not in legislation, but in the employment contract between Transnet and the applicant. When it dismissed the applicant, Transnet did not act as a public authority but simply in its capacity as employer.”⁵³

In *SAPU v National Commissioner of the South African Police Service*⁵⁴ the applicant police officers alleged that the decision of the Commissioner of Police to change their shift hours from twelve hours to eight hours constituted administrative action. The court held that despite the fact that the power of the Commissioner to determine working hours emanated from statute,⁵⁵ the exercise of this power did not constitute administrative action. The basis of the court’s decision was *inter alia* as follows:

“The powers and functions concerned derive from employment law and are circumscribed by the constitutional rights to fair labour practices and to engage in collective bargaining. One is instinctively drawn to the conclusion that the concept of administrative action is not intended to embrace acts properly regulated by

49 Unrep 024/2005 (SCA) 12.

50 *Administrator, Transvaal v Zenzile* 1991 1 SA 21 (A); *Administrator, Natal v Sibiyi* 1992 4 SA 532 (A).

51 In *Zenzile supra* it was held that the employer’s decision to dismiss, as public authority, involved the exercise of a public power.

52 Jafta JA’s judgment in this case is difficult to reconcile with the judgment in *Mbayeka v MEC for Welfare, Eastern Cape* [2001] 1 All SA 567 (Tk) where Jafta J (as he then was), held that the suspension of the applicants by the MEC constituted the exercise of public power derived from s 22(7) of the Public Service Act of 1994 and therefore constituted administrative action.

53 13.

54 [2006] 1 BLLR 42 (LC).

55 S 24(1) of the South African Police Service Act of 1995.

private law. To render every contractual act of an organ of state as a species of administrative action, carries the risk of imposing burdens upon the state not normally encountered by other actors in the private sphere.”⁵⁶

Despite the definition of administrative action in PAJA, and the fact that most civil servants now fall within the ambit of the protection provided for by the LRA, there is still authority for the view that disciplinary action on the part of the employer of public servants constitutes administrative action and that recourse to PAJA is therefore permissible.⁵⁷ In the recent decision of *POPCRU v Minister of Correctional Services*,⁵⁸ the court held that in order for conduct to qualify as administrative action, it was not necessary for it to “impact on the public at large”,⁵⁹ and continued:

“The exercise of the power to arrest is a good example of an administrative action that would only have a significant impact on the arrestee and, perhaps, the complainant . . . In these circumstances what makes the power involved a public power is the fact that it has been vested in a public functionary who is required to exercise it in the public interest.”

The court concluded that the following facts added strength to its view that the dismissal of the employees constituted administrative action:⁶⁰

“[T]he statutory basis of the power to employ and dismiss correctional officers, the subservience of the respondents to the Constitution generally and section 195 in particular, the public character of the Department and the pre-eminence of the public interest in the proper administration of prisons.”⁶¹

The court therefore only placed secondary relevance on these factors since it stated that they merely “added strength” to its conclusion. The primary basis of its conclusion therefore seems to be the fact that the power vests with a “public functionary”.⁶²

In *Chirwa*⁶³ (Mthiyane and Jafta JJA dissenting), Cameron JA, Mpati DP and Conradie JA⁶⁴ similarly held that the dismissal of a state employee constituted the exercise of public power. According to them the cases decided prior to the promulgation of PAJA that held that dismissal of a state employee constitutes the exercise of public power are still applicable and relevant today. Cameron JA expressed the view that the fact that the employer is a public body “attracts the protections of natural justice because the employer is a public authority whose employment-related decisions involve the exercise of public power”.⁶⁵ However, he conceded that not all actions of a public body constitute administrative action.

56 55–56.

57 *Mbayeka* [2001] All SA 567 (Tk); *Simela v MEC for Education Eastern Cape* [2001] 9 BLLR 1085 (LC).

58 [2006] 4 BLLR 385 (E).

59 Para 53.

60 Para 54.

61 The proposition that an arrest does not have “an impact on the public at large” is questionable. The fact that criminals are arrested contributes to a general state of law and order and consequently has a significant impact on the public in general.

62 See also *Dunn v Minister of Defence* 2005 ILJ 2115 (T); *Nel v Minister of Justice and Constitutional Development* [2006] 7 BLLR 716 (T) and *De Jager v Minister of Labour* [2006] 7 BLLR 654 (LC).

63 *Supra* fn 49.

64 Conradie JA gave no reasons for his view that the dismissal constituted administrative action.

65 34.

He referred to *Cape Metropolitan Council v Metro Inspection Services CC*.⁶⁶ In this case the termination of a contract by the Council, entered into between the Council and a large private enterprise, was held not to constitute administrative action. In reaching this conclusion, the court considered the nature of the power exercised by the Council to be of paramount importance. The facts of this case are as follows: In terms of a contract entered into between the Council and Metro, Metro was to collect arrear levies on behalf of the Council. For this service it was entitled to payment of commissions for all levies collected. On the basis of an alleged breach of contract in the form of fraudulent claims on the part of Metro, the Council summarily terminated the contract. Metro claimed that since the termination constituted administrative action, the Council was not entitled to summarily terminate the contract and was obliged to abide by the procedures applicable to administrative action. Metro *inter alia* claimed a right to full disclosure of the case upon which the Council proposed to act. In arriving at the conclusion that the termination of the contract by the Council did not constitute administrative action, the court put forward the following argument:⁶⁷

“The object of section 33 of the Constitution is not concerned with every administrative act performed by an organ of state. Its objective is to exercise control over administrative acts only when these acts constitute the exercise of public power.”

Therefore the court concluded, the “nature of the power being exercised” would determine whether the action constituted administrative action or not. Other considerations which may be relevant “are the source of the power, the subject-matter, whether it involves the exercise of a public duty and how closely related it is to the implementation of legislation.”

The court concluded:

“The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was therefore not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not, by virtue of its being a public authority, find itself in a stronger position than the position it would have been in had it been a private institution. When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power.”⁶⁸

66 2001 3 SA 1013 (SCA). Incidentally, Cameron JA was one of the concurring judges in this case.

67 1023–1024.

68 In contrast to this decision, the court in *Transnet v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) held that Transnet’s actions in calling for and adjudicating tenders for the supply of watches constituted administrative action. This case, however, is distinguishable since s 217(1) of the Constitution provides that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. See also *Umfolozzi Transport (Edms) Bpk v Minister van Vervoer* [1997] 2 All SA 548 (SCA) in this regard.

The fact that the contractants in this case were on an equal footing when it came to negotiating the terms of the contract was a factor of great relevance to the court's finding. In *Chirwa*⁶⁹ Cameron JA, in finding that the dismissal by the state of an employee constituted administrative action, distinguished the facts before him from the facts in *Cape Metropolitan* on the basis that irrespective of whether or not an employee occupies a management position, the employer is in a position of authority. The implication is that if the applicant in *Chirwa* had been an independent contractor⁷⁰ (either an individual or a juristic person), Cameron JA would probably not have considered cancellation of the contract to constitute administrative action.

It is not denied that the position of a big corporation entering into a commercial contract with the state is in stark contrast to the position of an employee entering into a contract of employment with the employer, even in situations where the employee occupies a management post. However, commercial enterprises and independent contractors that enter into commercial contracts with the state, not unlike ordinary employees, often occupy inferior bargaining positions *vis-à-vis* the state when entering into those contracts. I do not think, therefore, that whether or not the state organ occupies a position of authority *vis-à-vis* the other contractant should be the decisive factor. Whether or not the state organ exercises a public power is what must be ascertained. This is clear from the definition of "administrative action" in section 1 of PAJA. The deciding criterion in terms of this definition is not the identity of the body or person taking the action, but rather the nature of the action taken. It follows that the fact that the state authority occupies a position of superiority *vis-à-vis* the other contractant does not render the action administrative action. Nor is the fact that the state is the employer of relevance, since a natural or a juristic person can also take administrative action. What is decisive is the nature of the power exercised. Whether the power exercised constitutes administrative action or not cannot be determined by the power-play between the parties. Employees of private bodies also occupy a position of inferiority *vis-à-vis* their employers and they do not enjoy the protection of PAJA. I fail to understand why an employee who is employed by an organ of state should have access to more rights than employees employed by a private body, simply because the employer is the state or an organ of state.

Secondly, irrespective of whether the employer is an organ of state or not, the primary source of an employer's right to dismiss or take other disciplinary action and generally administer the employment relationship vests in the contract,⁷¹ which is the founding basis of the employment relationship. Therefore, disciplinary action taken by an employer (irrespective of whether the employer is an organ of state or not) against an employee cannot constitute administrative action. As stated in *SAPU v National Commissioner of the South African Police Service*⁷² with regard to the setting of working hours of police officers:

69 Unrep 024/2005 (SCA).

70 It is uncertain whether Cameron JA would distinguish between a powerful enterprise with some status and permanence and a small company or independent contractor in the form of a private individual.

71 This is the case irrespective of whether the terms of the contract were derived from legislation or not. See *Chirwa* 13.

72 [2006] 1 BLLR 42 (LC) 55.

“There is nothing inherently public about setting the working hours of police officers. Nor is there any public law concern here, the matter falls more readily within the domain of contractual regulation of private employment relationships. The nature of the power exercised and the function performed in the setting or agreeing of shift times does not relate to the government’s conduct in its relationship with its citizenry to which it is accountable in accordance with the precepts of representative democracy and governance.”

The same argument is applicable to disciplinary action taken by the state or an organ of state as employer against its employees.

Finally, the definition of administrative action in PAJA requires that the exercise of a public power or the performance of the public function “affects the rights of any person” and has “a direct, external legal effect”. In order to have external effect an action must have an effect on those outside of government. Internal matters of departmental administration or organisation, such as the setting of working hours of state employees,⁷³ do not affect those outside of that government department and hence do not constitute administrative action in terms of PAJA.⁷⁴ Similarly, although disciplinary action taken against employees of the state will have an effect on those employees, usually such action cannot be said to have “a direct, external legal effect”. Consequently, employing people, administering the employment relationship, taking disciplinary action against them, and ultimately dismissing them are all acts that are incidental to the exercise of public functions. They do not constitute a direct exercise of public power.

Given the definition of administrative action contained in PAJA, the decisive criteria in determining whether or not a certain action constitutes administrative action should simply be whether or not the conduct constitutes an exercise of public power, whether the action adversely affects the rights of a person, and finally whether or not the action has a direct, external legal effect. Whether or not the disciplinary action taken by an employer against an employee constitutes the exercise of a public function or the exercise of a public power is not determined by the identity of the employer as the state or an organ of state, but rather by a determination of the nature of the power or function. If the power or function adversely affects the rights of any person and has a direct, external legal effect in the sense that it affects citizens outside of the government, it probably constitutes administrative action.

6 CONCLUSION

An employee facing a disciplinary enquiry who wishes to obtain further information has the following choices:

- (a) If the court considers the disciplinary action of the employer to constitute administrative action, the employee can base his claim on PAJA.⁷⁵ In this way the employee can ensure his right to administrative justice and protect his right not to be unfairly dismissed.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ According to Conradie JA, in the same case, the fact that the dismissal constituted administrative action was not enough to allow reliance on the provisions of PAJA. According to him the employee had to base her claim on the LRA.

- (b) If the employee does not wish to risk a finding that the disciplinary action does not constitute administrative action and the consequent finding of non-applicability of PAJA, or, alternatively, despite a finding that it constitutes administrative action, that only the provisions of the LRA are applicable, he can possibly base his claim on the provisions of the LRA. In such a situation he should approach an accredited bargaining council or the CCMA for relief.⁷⁶ It is uncertain whether the provisions of the LRA entertain a right of access to information in order to enforce procedural fairness prior to the conclusion of the disciplinary enquiry. Landman AJ in *Moropane v Gilbey's Distillers & Vintners (Pty) Ltd*⁷⁷ “expressly refrained” from answering this specific question. If the answer to this question is no, the employee will have to be satisfied with challenging the fairness of the disciplinary action after its outcome in terms of the LRA.
- (c) Alternatively, an employee can simply request the information in terms of PAIA. If the employer is the state, the request need not be accompanied by proof that the information is required for the exercise or protection of a right.⁷⁸ However, if the employer is a private body, such proof is required. The fact that the LRA provides for the remedies of re-instatement, re-employment or compensation in the case of unfair dismissals,⁷⁹ and provides for compensation in the case of unfair disciplinary action short of dismissal,⁸⁰ may be construed to deprive an employee of a right to insist on procedural fairness prior to the conclusion of the disciplinary enquiry. If this is the case, reliance on PAIA where the request for information is to a private body is unlikely. On the other hand, as discussed above, there are decisions where the remedies provided in terms of the LRA for procedural unfairness were not construed as a bar to claim relief on other bases, such as the constitutional right to fair labour practices, the constitutional rights to access to information and administrative justice, PAJA and PAIA.⁸¹

If an employee has already been dismissed and invokes PAJA to challenge the fairness of the dismissal, his remedy is limited to an order of court setting the decision to dismiss aside and remittal for a fresh decision.⁸² In these circumstances it would be preferable to invoke the provisions of the LRA which provide either for re-instatement, re-employment, or the payment of compensation⁸³ in cases of unfair dismissal.⁸⁴ However, if the dismissal is only procedurally

76 The LRA provides the CCMA and accredited bargaining councils with exclusive jurisdiction over dismissals for alleged misconduct and incapacity. The Labour Court has no such jurisdiction. See *Moropane v Gilbey's Distillers & Vintners (Pty) Ltd* (1998) 19 ILJ 635 (LC). Whether the ordinary courts have such jurisdiction is a can of worms which is beyond the scope of this article.

77 1998 ILJ 635 (LC) 638.

78 The Act lists a number of grounds on which a request for access can, or in some cases must, be refused (ss 34–46 deal with public bodies and ss 64–70 deal with private bodies).

79 S 193 of LRA.

80 S 186(2)(b) read with s 194(4).

81 See the judgments of Conradie and Cameron JJA in *Chirwa supra*; *Mhlambi v Matjhabeng Municipality supra*; *Oliver v Universiteit van Stellenbosch supra*.

82 *Chirwa supra*.

83 S 193.

84 S 194.

unfair, although not impossible, it is unlikely that the CCMA or accredited bargaining council would order re-instatement or re-employment.⁸⁵

State employees are more likely to succeed in a claim for access to information than employees employed by a private body. They are favoured in terms of PAIA because they need not show that they need the information in order to protect a right. Secondly, if the view of Cameron JA and Mpati DP in *Chirwa* is followed, public sector employees may be favoured in terms of PAJA. In terms of this view, public sector employees can pursue their rights to procedural fairness either in terms of the LRA or in terms of PAJA.⁸⁶ However, this view was held by a minority: Although Conradie JA considered a dismissal of a public sector employee to constitute disciplinary action, he held that the ordinary courts did not have jurisdiction to hear this matter because the LRA, in giving effect to the constitutional right to fair labour practices, has provided remedies for unfair dismissals based on misconduct and incapacity. Mthiyane and Jafta JJA, on the other hand, were of the view that the dismissal of an employee does not constitute administrative action and consequently held that PAJA was not applicable.

If the courts demonstrate a willingness to assist employees in ensuring a fair procedure during the course of disciplinary enquiries, despite the remedies provided by the LRA, the result will be the potential, possibly unnecessary, lengthy protraction and retardation of disciplinary proceedings and a disregard for the dispute resolution procedures provided by the LRA.

It is well established that the abstract theory for the transfer of ownership applies in our law in relation to movables (see, for instance, Trust Bank Van Afrika Bpk v Western Bank Bpk 1978 (4) SA 281 (AD), Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en 'n ander 1980 (3) SA 917 (AD)). With regard to the transfer of ownership of immovable property, the long-standing uncertainty that prevailed in our law in relation to the question of whether the causal or abstract theory applied would appear to have been finally settled in favour of the latter (Brits and another v Eaton NO and others 1984 (4) SA 728 (T), Klerck NO v Van Zyl and Maritz NNO and Related Cases (supra) at 273G-274C, Radebe v Government of the Republic of South Africa and others 1995 (3) SA 787 (N) at 803E-F, Kriel v Terblanche NO en andere (supra) at 142C-148F). I am satisfied upon a review of the authorities that such uncertainty as previously existed in our law on the question of the applicability of the abstract theory in relation to the transfer of immovable property has been removed.

Motala AJ in Shea v Legator, McKenna Inc [2008] 1 All SA 491 (D) 501f-h.

⁸⁵ *Moropane v Gilbey's Distillers & Vintners (Pty) Ltd* 1998 ILJ 635 (LC) 641.

⁸⁶ See the judgment of Cameron JA in *Chirwa supra*; *Mhlambi v Matjhabeng Municipality supra*; *Oliver v Universiteit van Stellenbosch supra*.