

INCAPACITY FOR POOR WORK PERFORMANCE IN THE EDUCATION SECTOR

by

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DECLARATION

I, MOGAMAT SALIE FAKER, declare that the work presented in this dissertation has not been submitted before for any degree or examination and that all the sources I have used or quoted have been indicated and acknowledged as complete references. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the Magister Legum Degree in Labour Law.

.....

Mogamat Salie Faker

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“If we are to address all the ills that face our country, education is the key.”

“....this is an issue that we identified as an issue that I think you cannot run away from...”

“If you had not educated your population it means your nation is not empowered to participate in the economic activities or in any other activity. Any nation that looks forward to the development must skill and educate its population..... That’s where you shape a human being.”

“Principals need to do their work and manage appropriately, and need to be held accountable for their schools.”

“If a principal and your school is failing, you can’t stay there, impossible.”¹

President Jacob Zuma.

¹ Clark “Education in the State of the Nation Address” 2009 3 *School Management and Leadership Journal*, 8. All of the quotations provided in this article were based on a transcript of the SABC interview provided by Politicsweb ([http:// www.politicsweb.co.za/](http://www.politicsweb.co.za/)) part of the Moneyweb Network (<http://www.moneyweb.co.za/>).

SUMMARY

According to the latest Education Statistics Report published by the Department of Basic Education in March 2013, there were 12 680 829 learners and students in the basic education system in 2011, who attended 30 992 education institutions and were served by 441 128 educators.²

The vision of the Department of Basic Education is of a South Africa in which all our people have access to lifelong learning and education and training, which will, in turn, contribute towards improving the quality of life. Ultimately this will influence the building of a peaceful, prosperous and democratic South Africa.³

The emphasis is on excellence. Therefore maintaining high standards of performance and professionalism is a national imperative.⁴

However, this has not always been the case in terms of performance. For more than a decade we have witnessed dismal results in literacy and numeracy. This was accompanied by a low throughput rate.

Despite the poor matric, literacy and numeracy results in South Africa as well as the low throughput rate, no teacher has been formally charged for poor performance in the last two decades.

South Africa's education budget is regarded as one of the highest in the developing world. Since 1993 the education budget has also grown substantially. South Africa's education expenditure on education has grown from R30 billion in 1994/05 to R101 billion in 2007/08.⁵

² Department of Basic Education "Education Statistics in South Africa 2011" (March 2013) 5.

³ DBE Website <<http://www.education.gov.za/TheDBE/VisionMission/tabid/80/Default.aspx>> (No date) (Accessed 2013-08-06).

⁴ *Ibid.*

⁵ Taylor, Fleish, and Schindler "Changers in Education Since 1994. A 15 Year Review" (2008) <www.jet.org.za/.../Taylor%20Fleisch%20Shindler%20Changes%20in%20...> (Accessed 2013-08-03).

Spending on education grew even further from R207 billion in 2012/13 to a projected R236 billion in 2014/15. Additional allocations of R18.8 billion over the medium term are accommodated, including equalisation of learner subsidies for no-fee schools and expanded access to grade R.⁶ Over the rest of the medium-term-expenditure framework (MTEF),⁷ spending on education, sport and culture will amount to R233 billion in 2013/14.⁸

The investment in education has not yet yielded the desired results and the outcome of education is not in keeping with the substantial input.

This crisis in education is one of the major challenges facing Government, Administrators, educators, parents and children of today. According to Spaul, ⁹ the South African government spends the equivalent of \$1225 (R12440.26)¹⁰ per child on primary education, yet accomplishes less than the government of Kenya which spends only the equivalent of \$258 (R2620.80)¹¹ per child.¹²

Various reasons such as poverty, management, leadership, imbalances of the past, two unequal education systems, poor management, training and development, non-accountability, role of government and unions, have been identified for the poor state of our education system. However, what is noticeably absent and hardly mentioned in any of the position papers, is that not a single teacher has been held accountable and dismissed for incapacity for the poor performance in the education sector. Unfortunately, there is no record in any of the provincial education departments' annual reports that a teacher has been dismissed or at least placed on a formal programme of incapacity for poor performance. Therefore, we have to ask the question: "Are we getting value for money?"

⁶ Gordhan "Budget Speech 2012" February 2012 <<http://www.treasury.gov.za/documents/national%20budget/2012/speech/speech.pdf>>.(Accessed 2013-08-01).

⁷ Period over which Government budgets.

⁸ Gordhan "Budget Speech 2012" February 2012 <<http://www.treasury.gov.za/documents/national%20budget/2013/speech/speech.pdf>>.(Accessed 2013-08-01).

⁹ Nicholas Spaul is a researcher in the Department of Economics at the University of Stellenbosch.

¹⁰ As per currency rate on 20 November 2013.

¹¹ *Ibid.*

¹² Spaul "South African Education: Unequal, Inefficient and Underperforming" July 2012 <<http://www.unisa.ac.za/cedu/news/index.php/2012/07/cedu-microwave-presentation-south-african-education-unequal-inefficient-and-underperforming/>> (Accessed 2013-02-22).

CHAPTER 1

INTRODUCTION AND CONTEXT

1 1 HISTORICAL BACKGROUND

In order to understand why educators are not charged with incapacity for poor performance, it is important to understand the establishment of the South African Educational System and why no educator was performance evaluated since 1993 to 2003.

In 1994 South Africa formalized the transition from apartheid to a non-racial democracy with national elections that led to the installation of Nelson Mandela as the first president of the Government of National Unity. This post-apartheid government of 1994 inherited one of the most unequal societies in the world. Decades of social and economic discrimination against black South Africans left a legacy of income inequality along racial lines.¹³ The education system was not left untouched.

Since 1994, a succession of discussion documents, green papers, white papers, new legislation, amendments to existing laws and regulatory procedures have accumulated within the education bureaucracy.¹⁴ The Education Labour Relations Act, 146 of 1994 was repealed soon after its promulgation by the Labour Relations Act, 66 of 1995. 1994 saw the promulgation of the Educators Employment Act, 138 of 1994. In 1998 the Employment of Educators Act, 76 of 1998 repealed the 1994 Act. This Act has also been amended on a regular basis. The Education Laws Amendment Act, 53 of 2000, brought about significant amendments regarding educator misconduct and incapacity procedures.¹⁵

Similar developments took place in other education law. The Education Labour Relations Council (ELRC) was established in 1993 with the adoption of its Constitution. The ELRC was primarily established with the aim of maintaining labour peace within public education.¹⁶ The

¹³ Jansen and Taylor "Educational Change in South Africa, 1994-2003" October 2003 <www.jet.org.za/.../Jansen%20and%20Taylor_World%20Bank%20report> (Accessed 2013-08-03).

¹⁴ *Ibid.*

¹⁵ Rossouw *Labour Relations in Education. A South African Perspective* 2ed (2010) 12.

¹⁶ Statutory Sectorial Bargaining Council in the Education Sector. <http://www.elrc.co.za/Display.asp?SectID=2>. (Accessed 2013-08-08).

South African Schools Act, 84 of 1996 was promulgated in 1996.¹⁷ The South African Council of Educators Act, 31 of 2000 was promulgated. The Personnel Administration Measures (PAM) that contains the conditions of service of educators was published in 1999.¹⁸

The creation of a single national department of education out of 19 racially, ethnically and regionally divided departments was a significantly accomplishment in the early years. Recasting the single national department into nine provincial education departments was not as easily achieved, but it created a new political basis for the governance of education that nullified the logic of race in the education system's constitution.¹⁹

1 2 THE EDUCATION SYSTEM

The Ministry of Education sets national policy through the declaration of norms and standards which are developed through its bureaucratic arm, the national department of education, and implemented by the nine provincial departments of education in its schools. Each province has its own legislature headed by the province's Premier who has a cabinet consisting of Members of the Executive Committee (MECs). The MEC for Education is the political head under whom there is a Head of Department (HoD) leading the provincial bureaucracy for education. Each province has a set of education districts (and sometimes smaller units called circuits) with departmental officials responsible for that district's schools. Each school is governed by a legally established school governing body (SGB) composed of parents, teachers and, in the case of secondary schools, also learners.²⁰

South Africa has a quasi-federal system of public spending in which funding is split between the national government (e.g., higher education) and the nine provincial governments (e.g., school education). The amount flowing to the provinces is determined on the basis of a predetermined revenue sharing formula. The provinces therefore decide on the level of financing of school education (in relation to other social sectors) as well as the distribution of education finance across school education, early childhood education and adult education etc.²¹

¹⁷ Joubert and Prinsloo *The Law of Education in South Africa* 2ed (2011) 2.

¹⁸ Rossouw. *Labour Relations in Education. A South African Perspective* 15.

¹⁹ Jansen and Taylor "Educational Change in South Africa, 1994-2003" October 2003 <www.jet.org.za/.../Jansen%20and%20Taylor_World%20Bank%20report> (Accessed 2013-08-03).

²⁰ *Ibid.*

²¹ *Ibid.*

The amalgamation of the education departments can be regarded as one of the biggest achievements of the newly elected government in its role pertaining to education transformation.

Through this achievement of education transformation, the system of performance evaluation of educators was also eradicated. Before 1994, there was a system of evaluation that was rejected by the teacher unions and educators alike. This was the old system of inspection services, which was associated with the apartheid education system.

The lack of an instrument meant no educator was performance evaluated from 1993 to 2003 until an agreement was reached in the Education Labour Relations Council²² on a new system called the Integrated Quality Performance Management System (IQMS), Collective Agreement 8 of 2003. The purpose of this agreement is to appraise individual educators with a view in determining areas of strength and weaknesses with a view to drawing up programmes for individual development. It is also used to evaluate educators for salary and grade progression, affirmation of appointments and for rewards and incentives.²³

In view of the fact that the departmental officials and educators had to be trained in order to be familiar with the new system, its implementation had to be done over a two year period. A National Training Team (NTT) was established which consisted of both employer and employee parties at national level. The NTT trained Provincial Task Teams (PTT). A cascade model was used which involved the PTT training three teachers in each school. The three teachers were responsible for training the rest of the teachers in the school. The PTT also consisted of both employer and employee parties from the provinces. The implementation of the system commenced in 2004 for payment to be made on 01 July 2005. For these two years, educators received their notch increments by default.²⁴ Default by implication refers to a process whereby an educator by no fault of his failed to be evaluated, he would automatically receive a notch increment of 1%.

In a report to the Portfolio Committee on Education on 20 June 2006, the then Minister of Education, Ms Naledi Pandor, stated that for more than two decades teachers in South Africa, especially in black schools, were not subjected to any kind of evaluation. She further opined that the process of development appraisal commenced in the early nineties and after years of research of best practices and consultations with the relevant stakeholders the

²² Statutory Sectorial Bargaining Council in the Education Sector.

²³ ELRC Collective Agreement No 8 of 2003, Procedure Manual s A1.

²⁴ Anonymous "Report to the Portfolio Committee on the Integrated Quality Management System (IQMS)" June 2006 <http://www.pmg.org.za/docs/2006/060620iqms.htm/> (Accessed 2013-08-04).

process was finalized in 2001. There was a need however to integrate teacher development appraisal, the teacher appraisal in terms of the Whole School Policy²⁵ and Personnel Performance Management System.²⁶

She also articulated that it is possible that this situation has contributed towards the unsatisfactory results that were seen in learner achievement. The teacher is central in the process of educating children and therefore a performance-based teacher evaluation system is critical to improving teaching and learning.²⁷

Simply analysing the education profile in the Western Cape, one of the top two provinces in terms of matric results, provides a bleak picture. According to the Human Capital Strategy²⁸ developed by the provincial Department of Education, only 23.4% of the population of learners in the Western Cape complete grade 12. More than a third (36.5%) drop out during the secondary school phase;²⁹ a small proportion completes primary education (7.9%). Fifteen percent (15.2%) of the latter figure drop out during the primary phase. Five (5.7%) of the total learner population have no schooling at all.

In analysing the enrolment patterns of learners in the Western Cape it is found that the enrolment and completion of schooling by the age of 17 years is highest amongst white learners (100%); the enrolment and completion rate is lower amongst the African population; and lowest amongst coloured learners. For those learners currently at school, only 37% of learners at grade 3 level achieve grade-appropriate literacy and numeracy levels. At grade 6 level, numeracy performance drops to 15%, and literacy performance to 35%. These statistics are alarming if we consider that the education sector receives 38.1% of the total provincial budget.³⁰

Whilst the discussion above explains the reasoning behind the absence of evaluation, poor performance has been left unpunished since no teacher was performance evaluated up to 2005. Performance evaluation by default in a country where there is a high investment from a fiscal perspective which does not yield returns in terms of performance is absurd.

²⁵ ELRC Collective Agreement 8 of 2003: Whole School Evaluation is a process to evaluate the overall effectiveness of a school that includes the quality of teaching and learning.

²⁶ Anonymous "Report to the Portfolio Committee on the Integrated Quality Management System (IQMS)" June 2006 <http://www.pmg.org.za/docs/2006/060620iqms.htm/> (Accessed 2013-08-04).

²⁷ *Ibid.*

²⁸ Lewis, Nyalashe, Hartley and Naicker *Reflections on the Human Capital Development Strategy* (2007) 10.

²⁹ Primary School Phase is Grades 1 to 7. Secondary School Phase is Grades 8 to 12.

³⁰ Lewis, Nyalashe, Hartley and Naicker *Reflections on the Human Capital Development Strategy* 10.

1 3 CONCLUSION

In any employment relationship, the employee renders a service to the employer by doing work and in return, the employer remunerates such an employee. In as much as the employee is entitled to a salary for doing work, the employer is equally entitled to a good quality work from an employee, i.e. an employee has a responsibility to provide good performance. As a result, the employer will have to constantly monitor the performance of an employee to ensure that it is of an acceptable standard.

In perusing the available annual reports of nine provincial education departments, including the National Department of Education, it is reported that a number educators have been dismissed for a range of transgressions such as misconduct etc. From the reports it is evident that no educator has been dismissed for incapacity due to poor performance.

In spite of the afore-mentioned, accountability measures have been in existence in the Employment of Educators Act (EEA)³¹ since 1998, and therefore provided the mechanisms to manage poor performance. The challenge remains for management to utilize these mechanisms effectively and efficiently.

As discussed earlier on, South Africa's performance in literacy and numeracy suggests that the substantial fiscal input into education is not yielding the desired results. The throughput rate which is estimated at about 50 percent, also indicates that there is a high level of dysfunctionality in the system. Educationists and policy makers have made several attempts at addressing the challenges which amongst other includes Action Plan 2014,³² Annual National Assessments³³ and other related interventions.

The contention of this treatise is that the lack of accountability of teachers is probably the major contributing factor that questions the dysfunctionality of the system. During this period of poor performance, no teacher has been charged for underperformance. In making this case, the treatise argues that the challenge that the South African Educational System faces is concerned with the inability of the system to remove or act in a punitive fashion with poor performing teachers. It could therefore be decided that the existing legislation protects the interest of the teacher, rather than that of the children they teach.

³¹ 76 of 1998.

³² Department of Education Action Plan to 2014: Towards the Realisation of Schooling 2025. This Action Plan sets out 27 national goals from Grade R to 12 to improve the performance of the education system.

³³ Annual Literacy and Numeracy Exams for Grades 1- 6 & 9. The tests are aimed at improving learner performance in the basic skills of literacy and numeracy.

It is against this background that the rest of the chapters are crafted.

Chapter 2 will contextualise the requirements and regulatory framework within which fairness of dismissals for poor performance is assessed. It sets out the legislative requirements within which an education department must operate and charge an educator for underperformance. It also sets out the requirements that the educator must comply with, when challenging a dismissal and/or sanction. This chapter will provide clarity on the constraints that the legislative system imposes on an education department when faced with poor performance of educators.

Chapter 3 elucidates how the Labour Relations Act³⁴ processes acts as a deterrent to accountability on the part of teachers. It also discusses the distinction between misconduct and poor performance and examines reasons why managers prefer the former, over the latter. The chapter also addresses why managers very often neglect to deal with underperformance of employees.

Chapter 4 will provide an explanation to the processes that are followed to get to the “basket of posts”³⁵ exercise which is undertaken by all education departments. Personnel costs very often amounts to almost 80 percent of the total fiscal budget. The current mechanism does not produce the required accountability. The contention that is raised is that if 80 percent of the budget is spent on personnel cost, every attempt should be made to ensure that the necessary return on the investment is ensured by teachers performing to a set of standards.

Chapter 5 evaluates the initiatives that have been introduced by the Department of Education and will show that the main issue of accountability of teachers are not dealt with adequately. The chapter provides an analysis of the various initiatives that the Department of Education has implemented in its attempt to improve the performance levels of schools and its educators. A case is made that the interventions have failed to yield the desired outcomes, since the key problem has not been identified.

Chapter 6 will deal with the incapacity process for poor performance in terms of the Employment of Educators Act.³⁶ It also provides argument and reasons on why this process

³⁴ 66 of 1995.

³⁵ This is the creation and distribution of posts processes a department would follow in terms of allocating posts to schools.

³⁶ Schedule 1 of the Employment of Educators Act 76 of 1998.

has not been successful and that to date no educator has been dismissed for underperformance.

Chapter 7 will be the concluding chapter. It will contextualise the deliberations of the various chapters of this treatise and provide reasons and recommendations to improve the education system and implementing the poor performance processes where underperformance has been identified.

CHAPTER 2

SOURCES OF LAW IN EDUCATION

2 1 INTRODUCTION

Over the past three decades, the law relating to employment has undergone frequent and dynamic change. The main driving force of change has been constitutional development and the injection of fairness. Employment and labour law consist of a complex set of rules emanating from the common law and statute. The common purpose of these rules is to regulate the relationship between those who hire (employers) and those who accept (employees).³⁷

This chapter contextualises the requirements and regulatory framework within which the fairness of dismissals for poor performance is assessed, sets out the legislative requisites with which an educator must comply with to challenge a dismissal and to address the importance of fairness in the development of fair labour practices.

Furthermore, this chapter will attempt to address the view of the Constitutional Court on the right of children to education and the importance thereof in relation to the rights of educators.

2 2 SOURCES OF LAW IN EDUCATION

2 2 1 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA (THE CONSTITUTION)³⁸

In relation to all sources of law dealing with education, the Constitution³⁹ is the primary source with all other sources considered to be secondary.

In *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the RSA*,⁴⁰ Chaskalson JP observed the following about the interim Constitution (para 45):

³⁷ Grogan *Workplace Law* 10ed (2011) 1.

³⁸ 108 of 1996.

³⁹ *Ibid.*

⁴⁰ 2000 2 SA 674 (CC), 2000 3 BCLR 241 (CC).

“The Constitution of the Republic of South Africa (the interim Constitution)⁴¹ which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law”.⁴²

This observation also holds true for the 1996 (the final) Constitution.⁴³

There are a number of fundamental rights that are enshrined in the Constitution,⁴⁴ more specifically in the Bill of Rights, that has implications for labour relations including education.

The Bill protects a number of pivotal labour rights that includes the rights of employees to strike and the right of employers to lock-out.⁴⁵ These rights also forms the basis for the rights of educators and other labour matters as they are applied in education including the Employment of Educators Act, No 76 of 1998 (EEA).⁴⁶

When it comes to the effect of the Constitution on labour law, the Constitutional Court has settled a number of controversies. In what must be one of the most important decisions in recent years,⁴⁷ the precedent set in *Sidumo & Another v Rustenburg Platinum Mines Ltd*⁴⁸ is appropriate to all forms of dismissals in the Labour Relations Act. In *Sidumo* the question that arose and divided the Supreme Court of Appeal and the Labour Appeal Court, related to the decision to dismiss, in other words - the appropriateness of the sanction of dismissal for misconduct. The question asked was, “Whether a Commissioner for Conciliation, Mediation and Arbitration (CCMA)⁴⁹ required to defer to the employer’s decision to dismiss the employee, or was the commissioner required to make up his own mind on whether the dismissal was appropriate under the circumstances?”⁵⁰

The court held that a CCMA commissioner had to decide on the issue of the appropriate sanction independently, without deferring to the employer’s decision.⁵¹ This was only one of the issues dealt with by the court in its judgment.

⁴¹ 200 of 1993.

⁴² Beukes *Administrative Law Study Guide 2013* (2010) 39.

⁴³ *Ibid.*

⁴⁴ 108 of 1996.

⁴⁵ Basson, Christianson, Dekker, Garbers, Le Roux, Mischke and Strydom *Essential Labour Law* 5ed (2010) 11.

⁴⁶ Joubert and Prinsloo *The Law of Education in South Africa* 60.

⁴⁷ Basson *et al Essential Labour Law* 11.

⁴⁸ [2007] 12 BLLR 1097 (CC).

⁴⁹ Commission for Conciliation, Mediation and Arbitration.

⁵⁰ Basson *et al Essential Labour Law* 11.

⁵¹ *Ibid.*

As seen in section 23(5) above, fundamental rights are not absolute rights. They can be limited according to the limitation clause in section 36 (1).

Section 33 represents the over-arching constitutional requirement that all administrative action must comply with if it is to be “just” (constitutionally valid).

Other legislation also regulates or limits certain fundamental rights.⁵² In the Labour Relations Act⁵³ employees are not allowed to participate in a strike if they are dissatisfied with their performance evaluations or have been placed on a programme according to the poor performance procedures in the Act. Employees can only go on strike for specific reasons and need to follow a specified prescribed procedure / process to ensure that the strike is protected.

The Constitution⁵⁴ also protects the rights of children including the right to education. Section 28 contains the majority of rights conferred upon a child and section 29 provides that everyone has a right to education. Besides protecting and balancing the rights of all its citizens which includes the employers and workers, the Constitution accordingly protects certain fundamental rights that relate to children. The Constitution therefore does not only provide for labour rights but also provides for rights relevant to children and education.

The best interests of the child was taken into account in the following judgment in order to determine whether an unfair labour practice was committed by the State:

In *Settlers High School v the HOD Education*⁵⁵ the competing rights of the best interests of the child were considered vis-à-vis the right to equality of a teacher. The Department of Education appointed a black female to address the equity imbalance of the past even though the governing body recommended a white male as its preferred candidate. On review, the court accepted the right to equality and addressing the imbalances of the past are fundamental values of the Constitution. Whilst employment equity is provided for in the Constitution, and it (the Constitution) also provides for a right to proper education, the court held that as important as the rights of educators are, and particularly those belonging to disadvantaged communities, the paramount importance of the child’s rights and interests

⁵² Rossouw *Labour Relations in Education. A South African Perspective* 27.

⁵³ 66 of 1995.

⁵⁴ 108 of 1996.

⁵⁵ [2002] JOL 10167 (T).

must not and cannot be compromised or be overlooked. Therefore, the court set aside the decision of the Education Department to appoint the African female.

The right to basic education⁵⁶ is neither formulated as a right of access nor subject to the same internal qualifiers as section 29(1)(b).⁵⁷

Based on this constitutional right learners have a right to basic education and therefore educators have a duty to protect the right to education but also to ensure effective teaching and learning.⁵⁸

The South African Constitution also plays a significant role in regard to international law in interpreting the relevant constitutional rights and the supporting legislative framework.⁵⁹ Similarly, section 3(c) of the South African Labour Relations Act (LRA)⁶⁰ stipulates that any person applying this Act must interpret its provisions in compliance with the public international law obligations of the Republic.⁶¹ Ancillary to their use of South African labour prescripts, the courts have considered foreign labour law or international law to ensure continuity, development and that worker's (employee) rights are not infringed. A comprehensive treatment of labour law and social protection related issues from a constitutional and international point of view has been interpreted into South African law by the Constitutional Court amongst others in:

⁵⁶ The South African Constitution obliges the state to "respect, protect, promote and fulfil the rights in the Bill of Rights". This was held in *Ex parte Gauteng Provincial Legislature* case no CCT 39/95. The issue here concerned the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995. The court held accordingly:

"[The right to basic education] creates a positive right that basic education be provided for every person and not merely a negative right that such person should not be obstructed in pursuing his or her basic education."

⁵⁷ The Constitutional Court has confirmed that the right to basic education is not subject to progressive realisation. In the *Juma Masjid Primary School* case, the court held the following:

"It is important ... to understand the nature of the right to 'a basic education' under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible'."

⁵⁸ Joubert and Prinsloo *The Law of Education in South Africa* 70.

⁵⁹ Olivier *The Global Labour Market: From Globalization to Flexicurity* (2008) 34.

⁶⁰ 66 of 1995.

⁶¹ Olivier *The Global Labour Market: From Globalization to Flexicurity* 34.

- *The Government of South Africa v Grootboom*,⁶² in this judgment, the context of public and international law would include non-binding as well as binding law; and
- *NUMSA & Others v Bader Bop (Pty) Ltd*,⁶³ the Constitutional Court has expressed its views on the International Labour Organisation (ILO), its Conventions and the views expressed by ILO supervisory organs.⁶⁴

The ILO has a major influence on South African labour law. Its influence within a collective bargaining context can therefore not be ignored. The ILO sets the international standards for labour practices that include dismissals and collective bargaining. These standards are premised on fairness. In terms of the Constitution,⁶⁵ fairness is the driving force for South African labour law. The right to fair labour practices is furthered in the Labour Relations Act and other labour related prescripts.

2 2 2 THE COMMON LAW⁶⁶

With the exception of a general duty of good faith, the common law did not recognise fairness as a constituent element of the contract of employment. Employers and employees were bound only to comply with the terms of the contract they had concluded.⁶⁷

In terms of the common law, employment contracts can be terminated on those terms highlighted therein or upon which they are based. The only basis on which the contract of employment could be terminated unlawfully was by failing to give the required notice. This meant that if such a contract had been unlawfully terminated, the relief afforded the employee was limited to damages equivalent to the amount he would have earned had the required notice been given. The common law imposed virtually no limitation on the power of private sector employers to fire an employee summarily and without due process.⁶⁸

The word “dismissal” is absent in the language of common law. In terms of common law, a dismissal is simply repudiation by the employer to a contract of employment. Where the termination of the contract is not consensual, the employee has a choice of either accepting

⁶² 2000 11 BCLR 1169 (CC).

⁶³ 2003 2 BCLR 182 (CC).

⁶⁴ Olivier *The Global Labour Market: From Globalization to Flexicurity* 35.

⁶⁵ 108 of 1996.

⁶⁶ The common law is the unwritten law of South Africa in the sense that it is not written up in legislation. South African common law test is Roman-Dutch law.

⁶⁷ Grogan *Workplace Law* 5.

⁶⁸ Grogan *Dismissal* 2ed (2010) 2.

the repudiation or sue the employer for breach of contract. If the repudiation is lawful, the employee has no recourse to claim damages against the employer.⁶⁹

Should an educator therefore have performed poorly under the common law, he or she could have been dismissed by the employer by simply giving due notice to terminate the contract of employment.

As case law emanated from tribunals established under the various Labour Relations Acts,⁷⁰ the courts developed an equity-based approach to dismissal which led to the concept of “unfair labour practice” which narrowed the confines of contract law. The question developed by the courts when confronted with a dismissal, was not whether the employer was contractually entitled to terminate the contract, but whether the employer acted fairly in doing so.⁷¹ This led to the right not to be unfairly dismissed being enshrined in statute⁷² and greater protection granted to workers not to be unfairly dismissed. This now includes dismissals for poor performance.

The Supreme Court of Appeal held, in three judgments,⁷³ that every contract of employment contains a right not only to a fair dismissal procedure, but also a general obligation to treat their employees fairly.⁷⁴ In *South African Maritime Safety Association v McKenzie (SCA)*,⁷⁵ the court reconsidered this issue and opined that the Legislature intended the dismissal and unfair labour practice provisions of the Labour Relations Act⁷⁶ to be self-standing. Further, that earlier judgments had purported to develop the common law to include an implied duty of fairness.⁷⁷ In light of this judgment, employees may not approach the civil courts with claims for breach of contract if they have alternate remedies under the Labour Relations Act.⁷⁸

In *Mohlaka v Minister of Finance*⁷⁹ the Labour Court maintained that in situations where an employee has recourse under the Labour Relations Act, there is no need to develop the

⁶⁹ Grogan *Dismissal* 13.

⁷⁰ 28 of 1956 and 66 of 1995.

⁷¹ Grogan *Dismissal* 2.

⁷² S 185 of the Labour Relations Act 66 of 1995.

⁷³ *Boxer Superstores Mthatha & Another v Mbenya* (2007) 16 (SCA), *Old Mutual Life Assurance Co SA Ltd v Gumbi* (2007) 16 (SCA) and *Murray v Minister of Defence* [2008] 6 BLLR 513 (SCA).

⁷⁴ *Murray v Minister of Defence* [2008] 6 BLLR 513 (SCA).

⁷⁵ (017/09) [2010] (SCA).

⁷⁶ 108 of 1995.

⁷⁷ Grogan *Workplace Law* 6.

⁷⁸ 66 of 1995.

⁷⁹ [2009] 4 BLLR 348 (LC).

common law and further held that common law contractual claims should not be entertained when it overlaps with a remedy provided for in the Labour Relations Act.⁸⁰

2 2 3 THE COMMON LAW AND LABOUR LEGISLATION IN EDUCATION

A number of common law principles are relevant and applicable to education law. In order for a process to be fair these principles of natural justice must be observed. Procedural fairness is provided in terms of the common law via natural justice. In terms of the common law, natural justice is pre-conceived with procedural fairness. The right to procedural fairness has been assured protection and development under the Constitution and the Promotion of Administrative Justice Act (PAJA).⁸¹ Natural Justice comprises of two facets or maxims: the *audi alteram partem* rule and the *nemo iudex in sua causa*.⁸²

In regard to the former and focussing on this rule, due process requires that no person be condemned without having had the opportunity to state their case. In *Du Preez v TRC*⁸³ the court stated of the *audi* rule:

“The audi principle is but one facet, albeit an important one, of the general requirement of natural justice ... The duty to act fairly however, is concerned only with the manner in which the decisions are taken: it does not relate to whether the decision is fair or not.”

Moseneke J in *Schoonbee v MEC for Education*⁸⁴ noted:

“Administrative action has to be procedurally fair and it should not be undermined by an error of law... It is quite settled law that the official who takes the administrative action should not be persuaded by matters other than those which are relevant for purposes of the decision before it; he or she must not have regard to or be persuaded or moved by some ulterior purpose or motive or make considerations which are irrelevant. He or she must be honest; he or she cannot act arbitrarily or capriciously. He or she must act rationally”.

To act rationally implies reasonable administrative action. A decision must be supported by the evidence and the reason for the decision. Reasonableness should therefore be objectively balanced.

⁸⁰ 66 of 1995.

⁸¹ 3 of 2000.

⁸² Translated *audi alteram partem* means simply “to listen to the other side” or “the right to be heard” and *nemo iudex in sua causa* means “no one can be a judge in his / her own case”.

⁸³ 1997 (3) SA 204 (A) 231 par G-H.

⁸⁴ 33750/01 judgment delivered 10 January 2002.

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*⁸⁵ Reagan J considered reasonableness in administrative action to be –

“What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision.... Its task is to ensure that decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.”

Within the notion of reasonableness, fairness is the unwavering factor that must be present throughout. This much is certain. Fair process demands it. In fact, the Constitution provides for it.⁸⁶ The Constitution demands that all administrative action must be performed lawfully, reasonably and in a procedurally fair manner.⁸⁷

In the matter of *Administrator of Transvaal v Traub*⁸⁸ the court held that –

“The audi alteram partem maxim expresses a principle of natural justice which is part of our law. The classic formulation of the principle states that when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken.”

In context, the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the law. This was stated in *Pharmaceutical Manufacturers Association of SA v In Re Ex Parte President of the Republic of South Africa*.⁸⁹

Whatever the case, it is evident that fairness, reasonableness and rationality go hand in hand with fair procedure which includes the right to be heard.

One of the most important principles is that of the “rules of natural justice” that is the *audi alteram partem*: to hear the other side before a decision is taken. This rule entails that an individual be given an opportunity to be heard, be informed of considerations which count against him or her and be given reasons for any decisions taken.⁹⁰ At the heart of this rule is

⁸⁵ 2004 (4) SA 490 (CC).

⁸⁶ S 33 of the Constitution “Just Administrative Action”.

⁸⁷ *Ibid.*

⁸⁸ 1989 (4) All SA 924 (AD) 13. See also *Attorney-General, Eastern Cape v Blom and Others* 1988 (4) SA 645 (A).

⁸⁹ 2000 (2) SA 686 (CC).

⁹⁰ Beukes *Administrative Law Study Guide* 2013 146.

the right to be treated fairly. Thus fairness must be the guiding principle to which every individual is entitled to. Any individual affected by a decision must therefore be given a fair hearing before a decision is made.⁹¹

In instances where most litigation is lost at court, lack of fairness or breach of the *audi* principle is the root of most such losses.⁹² Fairness in any environment is thus to be stressed and it to be regarded as the most basic requirement that has to be adhered to any form of engagement.⁹³

Contrary to the case of *Tseleng*⁹⁴ and *Traub*,⁹⁵ the case of *Bula v Minister of Education*⁹⁶ illustrates how the *audi alteram partem* principle is often not correctly applied. The applicant, an educator was suspended by the Department of Education pending the outcome of investigations into his alleged misconduct. His suspension came about a year after he was first charged with misconduct. After receipt of a second charge he was suspended 6 months later. The suspension was affected without giving the employee a hearing.⁹⁷

The employer argued that the suspension of an educator was not punitive but rather a procedural step to ensure the orderly and proper continuation of the education of learners. Hence the *audi* principle was not applicable. The court disagreed. The case of the applicant did not require a speedy decision, nor were any reasons provided why it was necessary to suspend him summarily and without a hearing.⁹⁸

The court also held that, because Bula had been allowed to remain in office for over a year, the applicant had every reason to assume that the *status quo* would not be altered without him being afforded the opportunity to be heard. The applicant was reinstated on full pay.⁹⁹

The common law principles of employment have therefore been adapted to provide a more modern take on current labour law.¹⁰⁰

⁹¹ *Ibid.*

⁹² Rossouw *Labour Relations in Education. A South African Perspective* 30.

⁹³ See *Administrator, Transvaal v Tseleng* and *Administrator Transvaal v Traub* for the application of the principle of natural justice.

⁹⁴ *S v Tseleng* (578/88) [1989] ZASCA 88.

⁹⁵ *Administrator of Transvaal and Others v Traub and Others* (4/88) [1989] ZASCA 90; [1989] 4 All SA 924 (AD).

⁹⁶ (1993) 2 LCD 109 (Tk).

⁹⁷ Rossouw *Labour Relations in Education. A South African Perspective* 30-31.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ Rossouw *Labour Relations in Education. A South African Perspective* 32.

The process of incapacity for poor performance in Schedule 1 of the Employment of Educators Act¹⁰¹ in education includes both procedural and substantive fairness. The process also allows unions to assist and ensure that their members are treated fairly and that the rules of natural justice are maintained.

2 2 4 ADMINISTRATIVE LAW

Common law and current legislation are closely linked. Common law principles are kept in mind when legislatures formulate new laws.¹⁰² The Constitution entrenches a right to just administrative action to which every person has a right to same. This right does not only mean the right to be heard, but also to be furnished with reasons for a decision. This process is premised on fairness.

2 2 4 1 WHAT IS ADMINISTRATIVE LAW?

Administrative law forms part of public law and regulates the activities of organs of state and natural or juristic persons that exercise public powers or perform public functions. To regulate these functions would mean to ensure their actions to be within the boundaries of the law (*ultra vires vs intra vires*).¹⁰³

2 2 4 2 WHAT IS JUST ADMINISTRATION ACTION?

All administration action must be lawful, reasonable, emanate from fair procedure and should be followed with written reasons why a decision was taken. The latter is derivative where rights of any person has infringed or directly affected.¹⁰⁴

This section 33 of the Constitution protects people against unlawful, unjust and unreasonable decisions from government officials or departments and relates directly to the common law principle of natural justice. In the administrative process in which an educator as a representative of the education department, for example, exercises authority over an educator, there must be clear evidence of justice.¹⁰⁵

¹⁰¹ 76 of 1998.

¹⁰² Rossouw *Labour Relations in Education. A South African Perspective* 34.

¹⁰³ Beukes *Administrative Law Study Guide* 94.

¹⁰⁴ Beukes *Administrative Law Study Guide* 3.

¹⁰⁵ Rossouw *Labour Relations in Education. A South African Perspective* 35.

2 2 4 3 CAN THE HIGH COURT THEREFORE HEAR LABOUR RELATED MATTERS?

In *Fredericks & others v MEC for Education and Training, Eastern Cape*,¹⁰⁶ the Constitutional Court found that the High Court had jurisdiction to hear a claim based on infringement of right or breach of fair administrative action. This is related to an alleged refusal of the MEC to approve applications for voluntary severance packages.¹⁰⁷

In *Gcaba v Minister of Safety & Security*,¹⁰⁸ Gcaba was the station commissioner of the Grahamstown police station. The post was upgraded and advertised. Gcaba applied for the advertised post. His application was unsuccessful and another officer was appointed. Gcaba first lodged an internal grievance. He however referred a dispute to the SSSBC¹⁰⁹ before his grievance could be dealt with internally. The matter was set down for a conciliation meeting but the employer party did not attend. Gcaba then brought an application to the High Court for the decision not to appoint him to the post to be reviewed. The High Court ruled that it did not have jurisdiction. Gcaba then applied to the Constitutional Court for leave to appeal. He submitted that the High Court erred and should have heard his claim because his claim was not based on the Labour Relations Act¹¹⁰ as he was enforcing his constitutional right to lawful and fair administrative action. The Constitutional Court indicated that Gcaba's claim was in effect a claim that his employer committed an unfair labour practice relating to promotion and the court found that the High Court did not have jurisdiction to entertain such claims.¹¹¹

In the employment context, rights arise from statute and contract, and each set of rights has its own role. There is no point to mechanically duplicating statutory rights in contracts. One can therefore interpret that our law does not allow the possibility of two remedies. This much is clear as in the case of *McKenzie*.¹¹²

¹⁰⁶ [2002] 2 BLLR 119 (CC).

¹⁰⁷ CCMA Case Law Monitor 2010 23. <http://www.ccma.org.za/F6B4312F-C521-4E81-80A1-64A6F5024A19/FinalDownload/DownloadId-890A7F1376AF3EA92ADB5CE3534BB00E/F6B4312F-C521-81-80A1-64A6F5024A19/UploadedMedia/2010%20Case%20Law%20Monitor.pdf>. (Accessed 2013-08-15).

¹⁰⁸ (2010) 31 ILJ 296 (CC).

¹⁰⁹ Safety and Security Sector Bargaining Council.

¹¹⁰ 66 of 1995.

¹¹¹ CCMA Case Law Monitor 2010 23. <http://www.ccma.org.za/F6B4312F-C521-4E81-80A1-64A6F5024A19/FinalDownload/DownloadId-890A7F1376AF3EA92ADB5CE3534BB00E/F6B4312F-C521-4E81-80A1-64A6F5024A19/UploadedMedia/2010%20Case%20Law%20Monitor.pdf>. (Accessed 2013-08-15).

¹¹² *South African Maritime Safety Association v McKenzie* (SCA).

If one applies this scenario to a dismissal for incapacity based on poor work performance then the educator would not have an avenue to challenge such dismissal in terms of administrative law. The educator would need to seek recourse under the Labour Relations Act.

2 2 5 THE LABOUR RELATIONS ACT (LRA)¹¹³

The primary purpose of the LRA¹¹⁴ is to advance economic development, social justice, labour peace and the democratisation of the workplace. It furthermore seeks to promote orderly collective bargaining, employee participation in decision-making in the workplace and the effective resolution of labour disputes. In other words the Act gives effect to and regulates the fundamental rights conferred by section 23 of the Constitution,¹¹⁵ whereby amongst others, every person has a right to fair labour practices.¹¹⁶

The implications of the LRA on education are that educators have the fundamental right to fair labour practices as well as to be protected from unfair dismissals that includes dismissals for poor performance.

The LRA lays down a number of guidelines which spell out what is required in order for a dismissal to be both substantively and procedurally fair. These guidelines are a result of the accumulation of a number of principles which were built up by the old Industrial and Labour Appeal Courts over the preceding decades.¹¹⁷

The Labour Relations Act provides for three categories of dismissals, i.e. operational requirements, incapacity (ill health or injury or as a result of poor performance or incompatibility); and misconduct.¹¹⁸ For each of these categories a particular approach is envisaged by the Act and must be followed. It is against these guidelines that the fairness of the dismissal will be judged.¹¹⁹

To simplify matters, the LRA provides unfairly dismissed employees with three forums for challenging their dismissals: Commission for Conciliation Mediation and Arbitration (CCMA),

¹¹³ 66 of 1995.

¹¹⁴ *Ibid.*

¹¹⁵ 108 of 1996.

¹¹⁶ Joubert and Prinsloo *The Law of Education in South Africa* 191.

¹¹⁷ Stelzner and Jordaan *Labour Arbitration* (2002) 1.

¹¹⁸ Stelzner and Jordaan *Labour Arbitration* 2.

¹¹⁹ Stelzner and Jordaan *Labour Arbitration* 17.

bargaining councils authorised by the CCMA and the Labour Court. Employees falling within the registered scope of bargaining councils must refer disputes concerning dismissals or unfair labour practices to the relevant bargaining council.¹²⁰

In education, if an employee is of the opinion that he has been unfairly dismissed for poor performance, he would be required to refer his unfair dismissal dispute to a bargaining council in this instance the Education Labour Relations Council (ELRC).¹²¹

It is generally accepted that only existing employees can be dismissed. However, the courts have held that employees who have concluded a contract of employment which is terminated by the employer before actual employment commences are also covered by the LRA's dismissal provision.¹²² In *Wyeth SA (Pty) Ltd v Manquele*,¹²³ the Labour Appeal Court held that employees who concluded a contract of employment that was terminated by an employer before actual employment commenced are also covered by the LRA's dismissals provisions.¹²⁴

In education, the conditions of employment are governed by the Employment of Educators Act,¹²⁵ except in instances where the appointment is made by the School Governing Body (SGB). The latter appointments are made in terms of the Basic Conditions of Employment Act (BCEA).¹²⁶

In *Phera v Education Labour Relation Council*,¹²⁷ the court had to determine whether the applicant (Phera) was an employee. Phera commenced teaching at a school in the absence of the required permission from the Department of Education confirming his appointment. The Labour Court held that Phera's employment had been subject to an unfulfilled condition. Consequently, he was not an employee and thus could not rely on the unfair dismissal provisions of the LRA.¹²⁸

¹²⁰ Grogan *Dismissal* 8.

¹²¹ Statutory Bargaining Council.

¹²² Jordaan, Kalula and Strydom *Understanding the Labour Relations Act* (2009) 159.

¹²³ (2005) 26 *ILJ* 749 (LAC).

¹²⁴ Van der Walt, Le Roux and Govindjee *Labour Law in Context* (2012) 85.

¹²⁵ 78 of 1998.

¹²⁶ 75 of 1998.

¹²⁷ (2010) 31 *ILJ* 92 (LC).

¹²⁸ Van der Walt, Le Roux and Govindjee *Labour Law in Context* 85-86.

The Code of Good Practice in Chapter 8 of the LRA¹²⁹ distinguishes between incapacity in the form of poor work performance and incapacity as a result of ill health or injury. In both cases the Code sets out guidelines for determining the fairness of a dismissal as well as the procedure to be followed in implementing a dismissal.

In dismissals for incapacity for poor performance, the provisions relating to the concept of who is an employee is not applicable. In order to be placed on a programme of incapacity for poor performance, the employee should already have been an employee in terms of the definition in the LRA¹³⁰ and the Employment of Educators Act (EEA).¹³¹ One's assessment of work performance can only therefore take place if the person is already employed by an employer either in a permanent, contract or temporary capacity. This concept of dismissal therefore differs from that of a termination of contract of employment because it can only commence after the actual employment has taken place.

2 2 6 BASIC CONDITIONS OF EMPLOYMENT ACT (BCEA)¹³²

The BCEA sets the minimum terms and conditions that are generally applicable to all employees except members of the National Defence Force, the National Intelligence Agency, the South African Secret Service and unpaid charity workers.¹³³ These differentiated employees therefore do not have complete contractual freedom. But the basic requirement that has to be met is fairness. The terms or conditions of employment that is more beneficial than those contained in the Act may be negotiated.¹³⁴ It may be altered by a collective agreement between parties. However, the conditions may not be less favourable than those provided in the Act.¹³⁵

This Act applies to educators employed by school governing bodies of public schools in terms of section 4 of the South African Schools Act.¹³⁶ However, there are sections in the Act that are applicable only to educators employed in terms of the Employment of Educators Acts, for example, overtime, hours of work, Sundays and public holidays. In education, the

¹²⁹ 66 of 1995.

¹³⁰ 66 of 1995.

¹³¹ 76 of 1998.

¹³² 75 of 1997.

¹³³ Grogan *Workplace Law* 59.

¹³⁴ Van der Walt, Le Roux and Govindjee *Labour Law in Context* 39.

¹³⁵ Joubert and Prinsloo *The Law of Education in South Africa* 191.

¹³⁶ *Ibid.*

conditions of service and employment are set out in the Personnel Administration Measures (PAM) of the EEA.¹³⁷

2 2 7 THE SKILLS DEVELOPMENT ACT (SDA)¹³⁸

The purpose of the Skills Development Act (SDA) is to develop the skills of the South African workforce in order to improve productivity in the workplace and the competitiveness of employers, to increase the levels of investment in education and training in the labour market and increase the return on investment, to use the workplace as an active learning environment to provide opportunities for new entrants to the labour market to gain work experience and to improve employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education.¹³⁹

Section 5 of the SDA makes provision for the National Skills Authority and consists of a broad range of stakeholders that advises the Minister of Labour on various issues relating to skills development.¹⁴⁰

Sector Education and Training Authorities (SETAs)¹⁴¹ have also been established by the Minister of Labour in specific sectors and are required to develop sector skills plans and learnership programmes in their specific sectors. In education the SETA is known as the Education, Training and Development Practices (ETDP).¹⁴²

In terms of the Act, employers, including government departments, are required to develop, in consultation with unions and their employees, a workplace skills plan (WSP) for their organisations. This is a strategic training plan that articulates how the employer intends training and empowering employees with skills relevant to their workplace and strategic priorities. The plan is based on a skills gap analysis that indicates the organisations training needs. This development plan could and should include training needs of individual employees that has been identified for training and capacity building programmes in terms of the incapacity process for poor performance. The plan needs to be submitted to the ETDP Seta for acceptance and approval.

¹³⁷ 76 of 1998.

¹³⁸ 97 of 1998.

¹³⁹ Rossouw *Labour Relations in Education. A South African Perspective* 70-71.

¹⁴⁰ Rossouw *Labour Relations in Education. A South African Perspective* 71.

¹⁴¹ Sector Education and Training Authority.

¹⁴² Rossouw *Labour Relations in Education. A South African Perspective* 71.

2 2 8 THE EMPLOYMENT OF EDUCATORS ACT (EEA)¹⁴³

The purpose of this Act is to provide for the employment of educators by the State, and for the regulation of conditions of service, discipline, retirement and discharge of educators. This Act applies to the employment of educators in public schools, training institutions, education departments and adult education centres.¹⁴⁴

The terms and conditions of employment for educators employed in terms of the EEA are set out in the Personnel Administrative Measures (PAM) which must be read with section 4 of the former prescript. The duties and responsibilities of educators, appointments and the advertising and filling of posts, developmental appraisal, and allowances are part of this document.¹⁴⁵

The EEA unlike the LRA¹⁴⁶ does not define an “employee”. However, in the preamble of this Act, an educator is defined as:

“Educator means any person who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and educational psychological service at any public school, further education and training institutions, departmental office or adult basic education centre and who is appointed in a post on any education establishment under this Act.”

According to Joubert and Prinsloo, all educators are employees in terms of the LRA.¹⁴⁷ In other words, the definition in the LRA includes educators as employees appointed under the EEA.

In section 16 of the EEA¹⁴⁸ reference is made to incapable educators if it is alleged that an educator is unfit for the duties attached to the educator's post, or is incapable of carrying out those duties efficiently. The employer must assess the capacity of the educator and may take action against the educator in accordance with the incapacity code and procedures for poor work performance. Schedules 1 and 2 of the EEA provide for the full procedure that the head of the education department, as employer has to follow in the case of alleged misconduct, incapacity or incompetence.

¹⁴³ 76 of 1998.

¹⁴⁴ Employment of Educators Act, Purpose of the Act.

¹⁴⁵ Joubert and Prinsloo *The Law of Education in South Africa* 192.

¹⁴⁶ 66 of 1996.

¹⁴⁷ Joubert and Prinsloo *The Law of Education in South Africa* 193.

¹⁴⁸ 76 of 1998.

2 2 9 THE SOUTH AFRICAN SCHOOLS ACT (SASA)¹⁴⁹

The purpose of SASA is to provide for school education and in particular within the organisation, governance and funding of all schools. The preamble reiterates the fundamental value of equality of treatment of educators within a democratic education system.¹⁵⁰ SASA distinguishes between governance and professional management.¹⁵¹ Section 16 of the SASA provides that the governance of a public school is vested in the School Governing Body (SGB). The SGB acts as the functionary of the public school which is a juristic person and also an organ of the state. The functions and responsibilities of the principals of public schools are determined in section 16A of the Act. In terms of this section, principal's represent the Head of Department (HoD) on the SGB as an ex officio member.¹⁵²

Confusion can exist between the functioning of the principal on the SGB versus that of his role as principal. The possibility may exist that his role as principal may overlap with his functioning on the SGB. However, this should not be the case. SASA clearly sets out the roles and functions of the SGB and the EEA that of the principal. The existence of the confusion is highlighted in the following case:

In *Schoonbee and Others v MEC for Education, Mpumalanga*,¹⁵³ the assumption was made that the principal is financially the accounting officer of the school. The principal and deputy principal were suspended by the HoD on alleged charges of misusing school funds and the governing body was dissolved.

In this matter the courts stated that:

- The principal has a duty to facilitate, support and assist the governing body in the execution of its statutory functions relating to assets, liabilities, property and financial management of the public school and also as a person to whom specific parts of the governing body's duties can be delegated; and

¹⁴⁹ 84 of 1996.

¹⁵⁰ Preamble of the South African Schools Act 84 of 1996.

¹⁵¹ Joubert and Prinsloo *The Law of Education in South Africa* 297.

¹⁵² *Ibid.*

¹⁵³ 2002 (4) SA 877 (T).

- The principal is accountable to the governing body, and it is the governing body that should hold the principal accountable for financial and property matters that are not specifically entrusted to the principal by the statute.¹⁵⁴

SGB's are also allowed to appoint their own educators.¹⁵⁵ The SGB becomes therefore become the employer and not the education department. These educators' employment conditions of service are governed by the LRA¹⁵⁶ and Basic Conditions of Employment Act (BCEA).¹⁵⁷ In dealing with performance management and incapacity for poor performance, the SGB will be responsible for educators appointed in governing body posts and the education department for educators appointed in terms of the EEA.

2 2 10 THE SOUTH AFRICAN COUNCIL OF EDUCATORS (SACE)¹⁵⁸

SACE is a statutory body that operates in terms of the South African Council of Educators Act No 31 of 2000. It controls access to teaching and administers a code of ethics with which all educators must comply. Its code of ethics describes the expectations and duties of educators in terms of their attitude and loyalty to the profession and their relation with learners, parents, community, colleagues, employer and SACE. An educator who contravenes the code is liable to several sanctions by SACE that could include deregistration¹⁵⁹ and access to the profession.

In summary, it can be said that the primary objective of SACE is to uphold and promote public respect for education and the teaching profession.¹⁶⁰ Where an educator has made him guilty of misconduct or incompetence, an education department is obligated in terms of the EEA¹⁶¹ to report the matter to SACE. SACE will in turn determine whether the educator should be removed from the register or not. This will be done after it has followed due process in terms of the SACE Act.

¹⁵⁴ Rossouw *Labour Relations in Education. A South African Perspective* 76.

¹⁵⁵ S 20 of the South African Schools Act 84 of 1996.

¹⁵⁶ 66 of 1995.

¹⁵⁷ 75 of 1997.

¹⁵⁸ 31 of 2000.

¹⁵⁹ All educators, including those appointed by School Governing Bodies, are required to register with SACE before they are allowed to teach in South Africa.

¹⁶⁰ Joubert and Prinsloo *The Law of Education in South Africa* 179.

¹⁶¹ 76 of 1998.

2 2 11 THE EDUCATION LABOUR RELATIONS COUNCIL (ELRC)

Section 27 of the LRA¹⁶² makes provision for the establishment of bargaining councils for a particular sector, private or public.¹⁶³ Section 35 of the LRA establishes one bargaining council for the public sector, the Public Service Co-ordinating Bargaining Council (PSCBC). The Act also allows for the establishment of sub-councils in various sectors within the public service.¹⁶⁴ In education, the established sectoral bargaining council is called the Education Labour Relations Council (ELRC). The scope of this council is limited to educators employed under the EEA.¹⁶⁵ Educators employed by school governing bodies do not fall under the ELRC.¹⁶⁶ The ELRC administers the dispute resolution processes for education sector.

An educator employed under the EEA¹⁶⁷ and who has been dismissed for incapacity for poor performance and who wishes to challenge the dismissal, will be required to follow the dispute resolution process of the ELRC. Educators employed by school governing bodies will need to follow the dispute resolution process under the LRA.¹⁶⁸ This means that such educators approach the CCMA to resolve any labour issue they may have.

2 3 CONCLUSION

Education does not take place in a vacuum. It is inextricably intertwined with socio-economic, cultural and political character. Any employment contract is unique in its purpose but is subservient to the Constitution as being the supreme law of the country. As stated earlier, education (and the right thereto) exists under the auspices of the Constitution.

Once an employment contract has been signed, the employer's most important duty is to treat the employee fairly. What an employee expects in return is not only wages, but a continuing obligation of service and fairness in the work environment. Labour relations are therefore concerned with the service relationship between the employer and employee. Those fundamental rights enshrined in the Constitution also have implications for labour relations within the context of education. Section 23¹⁶⁹ protects these rights. However, the

¹⁶² 66 of 1995.

¹⁶³ Jordaan, Kalula and Strydom *Understanding the Labour Relations Act* 42.

¹⁶⁴ Jordaan, Kalula and Strydom *Understanding the Labour Relations Act* 56-57.

¹⁶⁵ 76 of 1998.

¹⁶⁶ ELRC Website <<http://www.elrc.co.za/Display.asp?SectID=2>> (Accessed 2013-08-24).

¹⁶⁷ 76 of 1998.

¹⁶⁸ 66 of 1995.

¹⁶⁹ This is the right to fair labour practices.

Constitution also provides a basic right of children to education. This is provided for in terms of sections 28-29.

Where legislation provides protection for employees to be treated fairly, employers must ensure that it follows due process both procedurally and substantively. The same compliance is exacted when dealing with misbehaving or incapacitated employees. The LRA provides a Code of Conduct that employers should follow in dealing with employees who have not performed in their work environment. As employers are required to treat employees fairly, employees are also required to perform at a satisfactory level, as identified by their employers, failing which; it could lead to their dismissals.

Even though labour relations have been largely regulated in South Africa, common law still provides a set of principles that are still applicable to education labour relations.¹⁷⁰

Administrative law is mainly concerned with correct procedures and legality of activities. Labour law is mainly concerned with fairness. Together, a balanced approach to ensure compliance and fairness is applied.

This chapter accordingly covered the regulatory framework when dealing with the fairness of dismissals for poor performance in education and which laws and processes needs to be followed and applied. It also sets out the relevant legislation that an educator should follow in terms of disputing a case of dismissal for poor performance against his or her employer. The chapter also details the notion and importance of fairness in both administrative and labour law and how the common law led to the establishment of fair labour practices.

¹⁷⁰ Rossouw *Labour Relations in Education. A South African Perspective* 44.

CHAPTER 3

REQUIREMENTS FOR DISMISSAL FOR POOR PERFORMANCE IN TERMS OF THE LABOUR RELATIONS ACT

3 1 INTRODUCTION

The Labour Relations Act (LRA)¹⁷¹ creates a dispute resolution system in which labour disputes (involving employers and employees/unions), including disputes about dismissals, are to be dealt with. While some disputes must be dealt with through collective bargaining and, if necessary, industrial action such as strikes and lock-outs, so- called disputes of right must be resolved through a procedure of conciliation and adjudication or arbitration. How a dispute is to be resolved depends on the nature of the dispute or, in the case of dismissal disputes, the reason for the dismissal. This chapter focusses on the common form of processes which the LRA specifies are to be determined once a decision has been taken to dismiss an employee. These are dismissal disputes where the reason for dismissal is based on either misconduct or incapacity for poor performance.

The LRA¹⁷² lays down a number of guidelines which spell out what is required in order for a dismissal to be both substantively and procedurally fair. These guidelines provide for the separation of dismissals for various causes and specify three distinct categories¹⁷³ of reasons why a person may be dismissed.

3 2 INCAPACITY FOR POOR PERFORMANCE VERSUS MISCONDUCT

Incapacity is one of the internationally recognised grounds for a fair dismissal. Section 188 of the LRA¹⁷⁴ equally recognises that incapacity can be a valid reason for dismissal provided that the employer can show that the dismissal was for a fair reason and that a fair pre-dismissal procedure was followed.¹⁷⁵

¹⁷¹ 66 of 1995.

¹⁷² *Ibid.*

¹⁷³ Operational requirements, Incapacity (ill health or injury or poor performance) and misconduct.

¹⁷⁴ 66 of 1995.

¹⁷⁵ Basson *et al Essential Labour Law* 135.

Section 188 of the LRA¹⁷⁶ refers to incapacity but it does not distinguish between poor performance, ill health or injury. This distinction is drawn in the Code of Good Practice: Dismissals. The Code sets out two sets of guidelines. There is one for incapacity for poor performance and one for ill health or injury. The Code stresses that each case is unique and that departures from the Code may, at times, be justified since the provisions of the Code serve merely as guidelines for the parties.¹⁷⁷

Schedule 8 of the LRA¹⁷⁸ makes provision for employers to dismiss employees under certain circumstances. According to this schedule employers may address and dismiss employees for conduct, capacity or operational requirements. In other words, dismissals can either be for misconduct or incapacity as a result of the operational requirements of the employer.¹⁷⁹ A dismissal must be for a fair reason after following a fair procedure, a concept that many employers fail to fathom or apply. Although all three of the mentioned reasons for ending the employment relationship will have the same result, different procedures must be followed prior to dismissing the employee. A dismissed employee may challenge his or her dismissal arguing that it was either substantively unfair or procedurally unfair or both.¹⁸⁰

What this means is that even though there may have been very good reasons to dismiss the employee (substantive fairness), the employer failed to follow a fair procedure prior to dismissing the employee (procedural unfairness). Compensation may be awarded to the dismissed employee whose dismissal was procedurally unfair only.¹⁸¹ So how does one ensure that a fair procedure is followed?

In order to answer this question one must first be able to differentiate between misconduct and incapacity.¹⁸²

Misconduct can be best described as the employee's failure to adhere to the policies, rules and regulations of the employer during working hours and sometimes even after hours. Such behaviour is normally intentional and not as a result of circumstances beyond the control of the employee. Some common forms of misconduct are theft, fraud, assault, dishonesty, negligence, and insubordination, absence without permission from work,

¹⁷⁶ 66 of 1995.

¹⁷⁷ Basson *et al Essential Labour Law* 135.

¹⁷⁸ 66 of 1995.

¹⁷⁹ Du Toit "Misconduct vs Incapacity" July 2011 <<http://www.polity.org.za/article/misconduct-vs-incapacity-2011-07-07>> (Accessed 2013-02-21).

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

consistently arriving late for work, refusing to work and using abusive language that is directed at colleagues.

In order to discipline and possibly dismiss an employee for misconduct, the employer will have to be able to prove that the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace and that the rule is a valid or reasonable rule or standard, that the employee was aware or could reasonably be expected to have been aware of the rule or standard and that the rule or standard has been consistently applied by the employer.¹⁸³

Schedule 8 further recommends that employees should not be dismissed for the first offence of misconduct unless serious enough to warrant a dismissal.¹⁸⁴ So how do we deal with misconduct in circumstances where a dismissal is not appropriate?

The answer lies in the disciplinary code of the employer. A disciplinary code should be progressive in nature and not punitive, meaning that measures for less serious transgressions are aimed at correcting the behaviour of the employee and not to punish. Such measures could include informal counselling, verbal warnings, written warnings, final written warnings and accumulative final written warnings for “serial or repeat” offenders.¹⁸⁵ In the public education sector, the Employment of Educators Act (EEA)¹⁸⁶ identifies an extensive list of possible offences ranging from less serious misconduct, to serious types of misconduct that could lead to a dismissal. The Act distinguishes between different forms of misconduct under two different sections. In section 17 of the Act six forms of misconduct are identified, that if found guilty, the presiding officer will have no option but to dismiss the educator. The offences are usually from a serious to a very serious of nature. Section 18 has a wider range of misconduct and provides the presiding officer with a discretion regarding the issuing of sanctions that includes rehabilitation. The afore-mentioned is usually of a lesser degree of misconduct, which may be rectified through a progressive approach.

Incapacity on the other hand relates to the performance of the employee. The employee has failed to perform to the agreed quantity and/or quality of work over an agreed period. The performance level of the employee is lacking and that is normally as a result of

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ 76 of 1998.

circumstances beyond the control of the employee. Dismissals for incapacity (poor performance) are also described as no fault dismissals. Dismissals for misconduct on the other hand are normally as a result of the deliberate actions and/or behaviour of the employee.¹⁸⁷

Case law reveals that there is a very fine line between dismissal for incapacity and dismissing for misconduct. Should the underlying cause of an employee's misbehaviour seem to indicate an unwillingness to comply with employer rules, but should such non-compliance actually vest in the employee's inability to comply, dismissing such an employee for misconduct will be unfair. In *Zililo v Maletswai Municipality*,¹⁸⁸ the court held that it is required and accepted that an employer seeking to dismiss an employee has to fit the dismissal into one of three categories. Section 188 of the LRA requires the employer to show that the reason for dismissal is a fair reason related to the employee's conduct or capacity or based on the employer's operational requirements.¹⁸⁹ Put differently, it is unfair to dismiss an employee for misconduct when the real issue is ill-health or poor work performance.

Incapacitated employees are owed a process of consultation, accommodation and assistance to meet required levels of performance. This flows from an understanding that they are not deliberately at fault. Should an employer, for instance, dismiss an employee for insubordination when they did not understand how to operate a new machine or absenteeism when they were undergoing medical treatment, this categorical mistake would probably lead to the reinstatement of this employee. This does not mean that employees may never be dismissed for ill-health or incompetence but rather that the procedure to be followed is radically different to the procedure followed when misconduct hearings are conducted.¹⁹⁰

In *Paula Gumbi and Gauteng Department of Education*,¹⁹¹ the opposite point has been made. Employees also tread a very fine line between acting in a manner that is justified in terms of their incapacity and acting in a manner that becomes dismissible misconduct.

¹⁸⁷ Du Toit "Misconduct vs Incapacity" July 2011 <<http://www.polity.org.za/article/misconduct-vs-incapacity-2011-07-07>> (Accessed 2013-02-21).

¹⁸⁸ (2008) 17 LC 1.11.95.

¹⁸⁹ Rycroft "Blurring the Lines Between Incapacity, Misconduct and Operational Requirements: *Zililo v Maletswai Municipality*" (no date) <http://0-reference.sabinet.co.za/wam.seals.ac.za/webx/access/electronic_journals/ju_samlj/ju_samlj_v21_n3_a10.pdf> (Accessed 2013-08-31).

¹⁹⁰ Brunton and Osborne "What Is The Role Of Labour Law In Performance Management" December 2002 Up2Speed <<http://www.up2speed.co.za/index.htm>> (Accessed 2013-08-31).

¹⁹¹ PSES 297-07/08.

In this case, the applicant (an educator) lost her voice and her impairment was considered temporary although of an uncertain duration. After extensive occupational therapy, she was assigned duties as an administrative assistant at a school with no diminution of salary. She considered this placement beneath her dignity and insisted that she could be trained as an educator in sign language for the hearing-impaired before she assumed any further duties. Accordingly, she refused to take up her new placement and absented herself without leave from her new post. The educator sought to take advantage of the fact that a labour relations officer had not provided her with the occupational therapy report to justify this conduct.

The arbitrator did not accept the conduct of the applicant. He opined that it was not up to the employee to dictate the terms, nor to signal her disagreement with the employer's attempts to accommodate her temporary illness by refusing her new post. The arbitrator determined that –

“It remained the situation that the Applicant had to be deployed in an alternative position such as the admin assistant position as offered to her. I therefore remain unconvinced that the Applicant had a valid and reasonable explanation for her refusal to accept the placement and it therefore follows that the Respondent was justified in coming to the conclusion that the Applicant had made herself guilty of misconduct.”¹⁹²

As far as the sanction is concerned, the arbitrator concluded that although the applicant's absenteeism was a first offence, it took place in circumstances which signalled her deliberate and severe flouting of an instruction which provided sufficient aggravation to justify dismissal.¹⁹³ Thus it seems for both parties, the employee and the employer, the line between incapacity and misconduct can be easily overstepped leading to an unexpected reinstatement or, as in this case, an unexpected, but perfectly fair, dismissal.¹⁹⁴

The courts have since recognised the difficulty of distinguishing between misconduct and incapacity dismissals. The case of *SABC v CCMA*¹⁹⁵ raised the problem of distinguishing between misconduct and dismissal for poor performance. The employee has been dismissed after being found guilty on various charges of misconduct. The CCMA commissioner ruled the dismissal unfair because the correct reason for the dismissal was poor performance. On review, the Labour Court found the true essence of all the charges against the employee was abuse of power which constituted misconduct.¹⁹⁶ In this case the Labour Court suggested a better approach would be to ask the following questions:

¹⁹² ...

¹⁹³ Up2Speed (No date) <<http://www.up2speed.co.za/index.htm>> (Accessed 2013-08-31).

¹⁹⁴ *Ibid.*

¹⁹⁵ [2006] 6 BLLR 587(LC).

¹⁹⁶ Grogan *Dismissal* 83.

- Was there a substantively fair reason for the dismissal? And
- Was a fair and an appropriate procedure followed before dismissing the relevant employee?¹⁹⁷

The difference between misconduct and incapacity can be summarised as follows:

Misconduct involves a situation where an employee, who is able to comply with policies, rules and regulations, refuses or neglects to do so-the employee, is at fault. In the case of poor performance, the employee is willing to do what's required of him or her but is not able to do so.

Since the employee who commits misconduct is able to do what is required, it's normally enough for an employer to put the ball in the employee's court by issuing a warning or series of warnings and then expecting the employee to comply with those, without assistance from the employer.

In the case of poor performance, however, the employee is unable to comply for whatever reason, with the employer's requirements and therefore requires not merely a warning to improve, but active assistance and/or guidance to do so. Poor performance therefore requires a different approach, determined by the cause of the poor performance.

However, even though there may be different approaches in dealing with misconduct (disciplinary processes) and incapacity (counselling), both processes are firstly aimed at corrective behaviour, that may and can eventually lead to dismissal, if the behaviour remains incorrigible.

3 3 DIFFICULTY IN MANAGING UNDERPERFORMANCE

The management of poor performance presents a greater challenge to a manager than managing disciplinary issues. Taking disciplinary action against employees is taken far more frequently than interventions to correct poor performance.

¹⁹⁷ Van der Walt, Le Roux and Govindjee *Labour Law in Context* 124.

One of the most difficult aspects of management is to end an employee's employment with the employer. According to Small,¹⁹⁸ the problem lies directly with management who fails to deal with poor performance. She states that dealing with performance problems is a real challenge for any manager and even experienced managers say that it is one of the toughest challenges of their jobs. She furthermore states that managing people "out of an organisation" starts with "managing people" and that it is important for any employer to show to its employees that it will not tolerate poor performance.¹⁹⁹

3 4 SALIENT REASONS FOR POOR PERFORMANCE

While dealing with poor performance can be time consuming, failing to address poor performance suggests to performing employees that there are unique or different standards for poor performers. If not addressed, poor performance usually gets worse over time. In all probability it will not change unless there is a concerted effort on the part of the manager to address it. It seldom corrects itself without intervention by the manager.

According to Jordaan²⁰⁰ some of the reasons why employees fail to meet expectations are the following:

- Companies have no or poor communication systems in place, they have unfriendly work environments;
- they have no incentive and reward scheme;
- they have poor recruitment and selection methods;
- they do not have a company culture;
- unionised environment;
- employees do not know what are expected of them;

¹⁹⁸ Small "Managing People Out" (No date) <<http://www.insidespin.com/hr-managing-out.php>> (Accessed 2013-09-02).

¹⁹⁹ *Ibid.*

²⁰⁰ Jordaan "Rooting Out Poor Performance" 2013 *Edureach Workbook 5*.

- the goals and standards of the organisation are not clear;
- there is an absence of a coherent performance management approach; and
- there is a lack of, or inappropriate, training.²⁰¹

Poor performance should be dealt with promptly and appropriately by an employer since employees are often unaware that they are underperforming and are unlikely to change their performance. This may have a negative effect on a business as it can affect the productivity, morale and performance of the entire workforce.

3 5 CONSEQUENCES OF POOR PERFORMANCE

Dealing with poor performance can be challenging, but it needs to be addressed. If it is not addressed, it can have detrimental consequences for a company.

Jordaan²⁰² states that poor performance can have the following consequences for a company-poor production, lower morale amongst employees, disruption in work patterns, cost of replacement labour and training, additional overtime, reduced quality, increase in supervision as well as administrative costs, loss of clients and reputation damage.²⁰³

In order to prevent the above-mentioned consequences, it is crucial that poor performance be addressed early. The longer the poor performance is allowed to continue, the more difficult a satisfactory resolution becomes which results in the system losing credibility.

3 6 DEFINING POOR PERFORMANCE

Poor performance is the failure of an employee to do his or her job, or to do it at an acceptable level.²⁰⁴

In essence, incapacity refers to an employee's inability to perform his or her contractual duties, for a reason not attributable to the fault or negligence of the employee concerned.²⁰⁵

²⁰¹ *Ibid.*

²⁰² Jordaan "Rooting Out Poor Performance" 6.

²⁰³ *Ibid.*

²⁰⁴ *PSC Toolkit for the Management of Poor Performance in the Public Sector* (2007) 9.

²⁰⁵ Van der Walt, Le Roux and Govindjee *Labour Law in Context* 123.

Dismissals for incapacity for poor performance are known as “no fault” dismissals because the dismissal generally arises from circumstances for which the employee is not to blame.²⁰⁶

3 7 REQUIREMENTS FOR DISMISSALS FOR INCAPACITY FOR POOR PERFORMANCE

A dismissal for poor performance implies that there must be an objective performance standard against which an employee can be measured before the employee can be dismissed for failing to meet the standard. It is also generally accepted that the setting of performance standards is written within the employer’s prerogative.²⁰⁷

The Code of Good Practice²⁰⁸ provides both general guidelines with regard to the management of employees who are not performing satisfactorily as well as specific guidelines on the dismissal of such employees.²⁰⁹

The issue is whether objective performance standards have been established and whether the employee is aware of these standards or could reasonably be expected to have been aware of them. The next consideration is whether the employee was given an opportunity to meet the standards. Dismissal must also be the most appropriate sanction in the circumstances.²¹⁰

There are various ways in which an employer may establish performance standards and appraise an employee’s ability to do the job to the satisfaction of the employer. The Code of Good Practice²¹¹ itself distinguishes between employees who are dismissed during a probationary period and / or after probation.²¹²

3 7 1 PROBATIONARY EMPLOYEES

In common law, probationary clauses gave employers the absolute power to terminate the contract during the probationary period, provided the stipulated notice was given. In the case

²⁰⁶ Bregman “Guidelines for determining fairness of a dismissal as well as the procedure to be followed in implementing a dismissal” (No date) <<http://www.roylaw.co.za/home/article/dismissal-for-incapacity/pageid/labour-law-articles>> (Accessed 2013-02-26).

²⁰⁷ Basson *et al Essential Labour Law* 136.

²⁰⁸ Schedule 8 of the Labour Relations Act 66 of 1995.

²⁰⁹ Stelzner and Jordaan *Labour Arbitration* 48.

²¹⁰ Basson *et al Essential Labour Law* 136.

²¹¹ Schedule 8 of the Labour Relations Act 66 of 1995.

²¹² Basson *et al Essential Labour Law* 136.

of *Ndamase v Fyfe-King*,²¹³ the court held that a probationary provision did not even give the employee the right to remain in employment for the full duration of the stipulated period.²¹⁴ However, the LRA now protects and distinguishes between dealing with employees for poor performance, appointed on probation, and those appointed permanently.²¹⁵

The provisions of the Code²¹⁶ dealing with newly appointed employees contemplate that such employees may be placed on probation for a period that is reasonable in the circumstances of the job. The period should be determined by the nature of the job and the time it takes to determine the employee's suitability for continued employment.²¹⁷

Item 8(1) of the Code²¹⁸ sets out the basic principles in respect of probationary employees. Item 8(1)(g)-(h)²¹⁹ also makes it clear that there is a difference between a dismissal during probation and after probation. The reason for this is to make the dismissal of probationary employees easier in order to encourage job creation and to relieve employers of the onerous procedures they had to comply with before the amendment of this section.²²⁰ The Code further allows any person making a decision about the fairness of a dismissal of a probationary employee for poor performance to accept reasons for the dismissal that may be less compelling than normally required for a dismissal for poor performance.²²¹

The employer is given a good deal more latitude by the Code²²² in assessing whether the employee has failed to meet the required performance standard during probation (the substantive element of a dismissal for poor work performance), than thereafter, when the arbitrator must decide whether dismissal was an appropriate sanction. Where the dismissal takes place during or on expiry of probation, the Code directs the arbitrator of such a dismissal dispute "to accept reasons for dismissal that may be less compelling than would be the case in dismissals effected after completion of the probationary period" [para 8(1)(j)]. A probationary period also provides the employer with an opportunity to evaluate an employee's performance before confirming the appointment.²²³ Another distinction in favour

²¹³ 1939 EDL 259.

²¹⁴ Grogan *Workplace Law* 10ed (2011) 257.

²¹⁵ Grogan *Workplace Law* 10ed (2011) 257.

²¹⁶ Schedule 8 of the Labour Relations Act 66 of 1995.

²¹⁷ Stelzner and Jordaan *Labour Arbitration* 48.

²¹⁸ Schedule 8 of the Labour Relations Act 66 of 1995.

²¹⁹ *Ibid.*

²²⁰ Basson *et al Essential Labour Law* 138.

²²¹ *Ibid.*

²²² Schedule 8 of the Labour Relations Act 66 of 1995.

²²³ Marcus "The stages in management of employee performance: a labour law perspective" (No date) <<http://www.roylaw.co.za/home/article/the-stages-in-management-of-employee-performance-a-labour-law-perspective/pageid/labour-law-articles>> (Accessed 2013-08-03).

of effecting such dismissal prior to expiry of the probationary period is that labour law principles as per paragraph 8(3) of the Code of Good Practice²²⁴ expect of an employer to investigate alternatives prior to dismissing employees for unsatisfactory work performance.

In *VLC Properties v Olwyn*²²⁵ the Labour Appeal Court (LAC) held that although the employee's performance was poor, she was an inexperienced young probationary employee in her first job and she should therefore have been given training.²²⁶

A probationary period should not be abused to deprive the employee of the status of permanent employment.²²⁷ This would constitute an unfair labour practice²²⁸ and contravene labour rights.²²⁹ However, a probationary period may be extended if the employer is of the opinion that the necessary training may improve the performance of the employee. If this is unsuccessful, the employer may put in mechanisms to dismiss the employee for poor performance. In the case of *Manqele v Babcock Equipment*²³⁰ the probationary period of the employee was extended for three months after he was found to be struggling with his work. After he failed to improve, he was dismissed. The arbitrator found that the applicant was unable to cope with simple routine tasks, which took newcomers about three weeks to master. The applicant could not therefore claim that he has been given insufficient training. His dismissal was upheld.

The Code of Good Practice cautions the employer not to extend the probationary period or dismiss an employee without allowing the employee to state a case in response.²³¹ In the case of *Fraser v Caxton Publishers (2005)*,²³² the arbitrator found that the applicant had overstated her curriculum vitae and that she had proved incompatible with her immediate supervisor. This was sufficient reason for the employer to terminate the relationship at the end of the probationary period. However, even though the employee was still on probation, she was entitled to be heard before her services were terminated. The arbitrator found that her dismissal at the end of the probationary period was therefore unfair procedurally as she had not been granted a hearing prior to the dismissal.

²²⁴ Labour Relations Act 66 of 1995.

²²⁵ [1998] 12 BLLR 1234 (LAC).

²²⁶ Basson *et al Essential Labour Law* 138.

²²⁷ Stelzner and Jordaan *Labour Arbitration* 48.

²²⁸ Basson *et al Essential Labour Law* 137.

²²⁹ S 23 of the Constitution

²³⁰ [2006] 10 BALR 976 MEIBC.

²³¹ See Chap 2 relating to the fairness of dismissals.

²³² BALR 232 (CCMA).

According to Jordaan and Stelzer, during the probationary period the employer must assess the employee's performance by giving reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render satisfactory service.²³³ Provided the employee is given a reasonable opportunity to improve, an employer is not precluded from terminating the services of the employee before the expiration of the probation period.²³⁴ If there is still no improvement then the probationer may even be dismissed without a formal hearing.²³⁵

Jordaan and Stelzer states further that if a probationary employee is dismissed or the probationary period is extended, he or she must be informed by the employer of his or her right to challenge the fairness thereof.²³⁶

3 7 2 PERMANENT EMPLOYEES (POOR WORK PERFORMANCE AFTER PROBATION)

After the probationary period has expired, most employees will have permanent employment status. Therefore, if an employee is not meeting the performance standards set by the employer, the employer must investigate the matter to establish the reasons for the unsatisfactory performance and, in the light of these reasons, consider ways short of dismissal to remedy the situation.²³⁷ Dismissal must be an action of last resort.²³⁸

The procedures the employer must follow to justify a dismissal for poor performance is set out in items 8(2)-(4) of the Code.²³⁹

The Code requires proper investigation before action is taken against an employee for alleged poor performance. In *Venter v Renown Food Products*,²⁴⁰ the employer was required to take all reasonable steps to assist the employer to remedy the alleged deficiency for the dismissal.²⁴¹ According to Grogan, an investigation is essential because it may well be that an employee's poor work is attributable to extraneous factors, like inadequate equipment or

²³³ Stelzner and Jordaan *Labour Arbitration* 49.

²³⁴ Grogan *Dismissal* 322.

²³⁵ Anonymous "Procedural and substantive fairness" (No date) <<http://www.labourguide.co.za/workplace-discipline/procedural-and-substantive-fairness-96>> (Accessed on 2013-09-11).

²³⁶ Stelzner and Jordaan *Labour Arbitration* 49.

²³⁷ Stelzner and Jordaan *Labour Arbitration* 50.

²³⁸ Reisner "Dismissal for Poor Performance" (No date) <<http://www.capelabour.co.za/blog/dismissal-for-poor-work-performance-2.html/>> (Accessed 2013-09-07).

²³⁹ Schedule 8 of the Labour Relations Act 66 of 1995.

²⁴⁰ (1989) 10 ILJ 320 (IC). Grogan *Workplace Law* 259.

²⁴¹ Basson and Hartdegen "Venter v Renown Food Products" (1989) <<http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/iljuta10&div=35&id=&page=>> (Accessed 2013-09-07).

organisational problems.²⁴² The Industrial Court indicated at an early stage that it was not prepared to accept an employer's opinion alone as sufficient proof that the employee's work performance was so poor as to justify dismissal. In *Gostelow v Datakor Holdings (Pty) Ltd t/a Corporate Copolith*,²⁴³ the court stated that the purpose of an assessment was to establish reasons for the employee's shortcomings and to apply a value judgment which is both procedurally and substantively fair.²⁴⁴ The investigation must therefore be aimed at properly assessing the employee. In the *National Union of Mineworkers v Libanon Gold Mining Co Ltd*²⁴⁵ the court observed that while what is required by the concept of consultation will depend on the circumstances of each case, what was generally required was a full explanation of why the employee's conduct was not acceptable and a proper discussion with the employee, his supervisor and his union as to whether and what extent his post could be adapted and to the extent to which he could be fitted into the workforce in another capacity either then or in the future.²⁴⁶

Fairness of proceedings is central to the process of poor performance. The entire process of an inquiry into an alleged poor performance should be conducted fairly. Employees should be made aware of the aspects in which their performance is alleged to be defective, and they must be given an opportunity to explain their alleged deficiencies.²⁴⁷ The "Rules of Natural Justice"²⁴⁸ therefore needs to be observed.

The Code provides that if employees display shortcomings in performing their duties, fairness requires that those employees should not only be informed that their performance is deficient but also that the employees should be given an opportunity to improve. The procedure for dismissals for poor work performance requires the employee to be counselled, monitored and offered assistance before the contract is terminated. Generally, an employer cannot justifiably conclude that dismissal is necessary if the employee could conceivably have met the required standard within a reasonable period.²⁴⁹

With regard to an appropriate sanction, dismissal must be an action of last resort. Dismissal will not be necessary if the employee could have been moved to another position, even if this

²⁴² Grogan *Workplace Law* 259.

²⁴³ (1993) 14 *ILJ* 171 (IC).

²⁴⁴ Grogan *Dismissal* 314.

²⁴⁵ (1994) 15 *ILJ* 585 (LAC).

²⁴⁶ Grogan *Workplace Law* 259.

²⁴⁷ Grogan *Workplace Law* 260.

²⁴⁸ See Chap 2 of Treatise.

²⁴⁹ Reisner "Dismissal for Poor Performance" (No date) <<http://www.capelabour.co.za/blog/dismissal-for-poor-work-performance-2.html/>> (Accessed 2013-09-07).

entails a demotion. In the case of dismissals for poor work performance, employers must prove that dismissal is necessary because employees are unable to perform their particular duties.²⁵⁰ In the case of *Buthelezi v Amalgamated Beverages Industries*,²⁵¹ the company dismissed the plaintiff for incapacity for poor performance. The court noted that she was promoted on merit despite her lack of formal qualifications. She was also promoted on merit in her previous job, which was not part of the company's affirmative action programme. The Court therefore averred that the company was obliged to give her more assistance, training and development, than would otherwise have been required. The dismissal was therefore held as procedurally unfair.²⁵² This judgment further indicates that an employer who knowingly appoints employees to positions for which they are not qualified, is bound to take more remedial action if the employee cannot cope.²⁵³

3 8 PROCEDURAL AND SUBSTANTIVE FAIRNESS IN INCAPACITY FOR POOR PERFORMANCE PROCEDURES

It is trite that the fairness of the dismissal for poor performance employees will be determined by both substantive and procedural considerations. The LRA lays down a number of guidelines which spell out what is required in order for a dismissal to be both substantively and procedurally fair. These guidelines are as a result of the accumulation of a number of principles which were built up by the old Industrial and Labour Appeal Courts over the preceding decades.²⁵⁴ A dismissal for poor performance can therefore be regarded as being procedurally correct but, substantively incorrect.

3 8 1 PROCEDURAL FAIRNESS

The procedure for poor performance is designed essentially to inform poor work performers of their deficiencies and to give them an opportunity to improve. The purpose of a fair procedure is inextricably enmeshed with the fairness of the decision to dismiss, the process of assessment, advice, counselling, guidance and warnings. It forms part of the integral component relating to the fairness of dismissals. The procedural requirements for dismissal for poor performance are spelled in the Code of Good Practice: Dismissals.²⁵⁵

²⁵⁰ *Ibid.*

²⁵¹ [1999] 9 BLLR 907 (LAC).

²⁵² Basson *et al Essential Labour Law* 142.

²⁵³ Grogan *Dismissal* 314.

²⁵⁴ Stelzner and Jordaan *Labour Arbitration* 1.

²⁵⁵ Grogan *Dismissal* 324.

Although a distinction is drawn between probationary employees and others, the procedure required in respect of all employees is similar. After probation, an employee may not be dismissed for poor work performance unless the employer has given the employee appropriate evaluation, instruction, training, guidance or counselling, after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily, the procedure leading to dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of dismissal, to remedy the matter and in the process, the employee should have the right to be heard and to be assisted by a trade union representative or fellow employee.²⁵⁶

A fair procedure requires the employer to:

- Carefully appraise the employee's work performance;
- An employee cannot be expected to know whether he or she is performing to the standard required. The employee must be informed of such. In *Schreuder v Nederduitse Gereformeerde Kerk, Wilgespruit*,²⁵⁷ the court held that the employer had failed to prove that the priest was incompetent as the dismissal was not preceded by relevant evaluation, guidance or training;²⁵⁸
- Counsel and assist the employee before taking further action. The Code requires the employer to provide appropriate support and assistance to the employee to improve his or her performance. This should be a two way process where the employee also contributes to proposals and solutions on how to improve his or her performance.²⁵⁹ Initial warning: In *Visser v Safair Freighters (Edms) Bpk*²⁶⁰ - the court stated that employees must be warned before action is taken against them for poor performance. The notice should indicate the respects in which the employee's performance is wanting;²⁶¹
- Warn the employee that he or she might possibly be dismissed if the employee's performance does not improve. The purpose of a warning is to advise the employee concerned of defective standards and to let him or her know that if he or she places a foot wrong that his or her non-compliance/further contravention, harsher sanctions

²⁵⁶ *Ibid.*

²⁵⁷ (1999) 20 ILJ 1936 (LC).

²⁵⁸ Basson *et al Essential Labour Law* 141.

²⁵⁹ Grogan *Dismissal* 326.

²⁶⁰ (1989) 10 ILJ 529 (IC).

²⁶¹ Grogan *Dismissal* 325.

may follow.²⁶² The employer is required to warn the employee that one further lapse could result in dismissal via a formal hearing. In *King v Beacon Island Hotel*²⁶³ the court held that if employees are not warned when committing an offence, they may legitimately assume that their conduct is acceptable.²⁶⁴

- Grant the employee a reasonable opportunity to rectify his or her deficiencies. The Code states that an employee should be allowed a reasonable period of time for improvement. How much time employees should be given depends on the circumstances;²⁶⁵
- Give the employee an opportunity to state his or her case before taking the final decision. Throughout the process, the employee must be given the opportunity to be heard in terms of the *audi alteram partem* principles.²⁶⁶ This means that the employee must be allowed to explain why he or she is falling short of the required standard. This action may determine the appropriate sanction or action by the employer;²⁶⁷ and
- Consideration of alternatives. According to Grogan, the extent of attempts made by the employer to assist the employee is critical to evaluating whether the dismissal is the appropriate sanction. If the employer has attempted all reasonable possible alternatives, dismissal will be accepted as the only remaining option. The only further issue might be to retain the employee in service, but in another position. In *Gostelow v Datakor Holdings (Pty) Ltd t/a Corporate Copolith*,²⁶⁸ the Industrial Court stated that before dismissing an employee for incapacity, the employer should consider a transfer to other suitable employment.²⁶⁹

3 8 2 SUBSTANTIVE FAIRNESS

The requirement of substantive fairness in incapacity for poor performance is satisfied by proof that the employee has failed to meet the performance standards set by the employer.²⁷⁰ It may however be that the employee's failure to meet the performance

²⁶² Grogan *Employment Rights* 137.

²⁶³ (1987) 8 ILJ 485 (IC).

²⁶⁴ Grogan *Employment Rights* 137.

²⁶⁵ Grogan *Dismissal* 327.

²⁶⁶ This principle is extensively covered in Chap 2 of this treatise.

²⁶⁷ Stelzner and Jordaan *Labour Arbitration* 53.

²⁶⁸ (1993) 14 ILJ 171 (IC).

²⁶⁹ Grogan *Dismissal* 328.

²⁷⁰ Grogan *Dismissal* 314.

standards may be for other reasons than the ability of the employee. The Code therefore requires that, in addition to proof of substandard performance, the employer also needs to prove that, the employee should have been aware, or could reasonably be expected to be aware, of the required performance standard, the employee was given a reasonable opportunity to meet the required standard; and the dismissal was an appropriate sanction for not meeting the required standard.²⁷¹

3 9 PROVING SUB-STANDARD PERFORMANCE

In order for an employer to prove that the performance of an employee is sub-standard, it needs to have an objective assessment or appraisal system in place. The system needs to be objective. In *Gostelow v Datakor Holdings (Pty) Ltd t/a Corporate Copolith*,²⁷² the court stated that the purpose of an assessment was to establish the reasons for the employee's shortcomings and to apply a value judgment which is both objective and reasonable.²⁷³

In addition, Grogan opines that in order to justify a dismissal, it needs to be proven that the standard exists, that it is reasonable and that the employee fell below the required standard.²⁷⁴

The difficulty of proving substantive fairness for poor performance was illustrated in *Robinson v Sun Couriers*²⁷⁵ and *White v Medpro Pharmaceuticals*.²⁷⁶

In *Robinson v Sun Couriers*, the CCMA found Robinson's dismissal to be unfair because the employer had neither established the reason for the poor performance nor brought any proof that the poor performance was the employee's fault. The judgment highlighted that employers are required to:

- (i) set targets that are proven to be reasonable,
- (ii) adjust targets when changed circumstances dictate this,
- (iii) give employees a real chance to achieve the desired performance level, and
- (iv) remove all obstructions to the achievement of the standards.²⁷⁷

²⁷¹ *Ibid.*

²⁷² (1993) 14 ILJ 171 (IC).

²⁷³ Grogan *Dismissal* 314.

²⁷⁴ Grogan *Dismissal* 315.

²⁷⁵ (2003) 1 BALR 97.

²⁷⁶ 2000 10 BALR 1182.

²⁷⁷ Israelstam "No excuses for poor performance" (No date) <<http://www.labourguide.co.za/poor-performance/no-excuses-for-poor-performance-472>> (Accessed 2013-05-06).

In the case of *White v Medpro Pharmaceuticals*, however, the employee failed to meet her targets in nine out of 10 months. The CCMA nevertheless found her dismissal to be unfair because the employer had set targets that were not achievable in the CCMA's view.²⁷⁸

In the more recent judgment of *Boss Logistics v Phopi*,²⁷⁹ the court examined what standard of performance is required and found that this will depend on the nature, complexity and volume of the work; the qualifications and experience of the employee, the degree of stress inherent in the position, the extent to which the employee is required to exercise their own initiative and the extent of the training required. The court noted that senior or managerial employees in general are required to monitor their own performance and to request assistance where needed.²⁸⁰

3 10 CONCLUSION

Employers have certain rights such as the right to maintain efficiency and ensure productivity. When alleged offences by employees occur, different procedures for maintaining discipline have been determined for different grounds that could lead to dismissal. Alleged incapacity should not be treated the same as misconduct. There is a clear distinction between the two even though this distinction may not always be very clear. Generally, in the disciplinary context, the purpose of sanctions is to be of a corrective and not punitive in nature. With poor performance, the purpose is to alert the employee to the need for improvement.²⁸¹ It is therefore important to decide on which ground or on which premise or reasons the dismissal will be founded as the procedural and substantive requirements to be fair will differ depending on the type of dismissal that is applicable.

Incapacity for poor performance does not require that fault must be attributed to the employee. It is not a case of misconduct. Considerations such as consultation, counselling and warnings, the opportunity to improve, possible alternatives, retraining and redeployment, are all relevant from a procedural perspective. The employer also has to take reasonable steps to improve the employee's performance. Dismissal is an option of last resort as the employer must first consider alternatives to remedy the matter.

²⁷⁸ *Ibid.*

²⁷⁹ 2012 (3) SA 409 (LC).

²⁸⁰ Juta's Advance Notification Service (June 2012) 1.

²⁸¹ *ISCA (Pty) Ltd and MAWU* ARD 8.1.1 and *Madayi v Timpson Bata (Pty) Ltd* (1987) 8 ILJ 494 (IC).

In cases where the employer knowingly appoints a person lacking the required skills,²⁸² it (the employer) has a duty to offer the necessary assistance, for example, where the employer appointed an employee lacking qualifications. In such cases, formal disciplinary steps will be found wanting where this assistance is not provided.

The Labour Relations Act²⁸³ in section 185 states that every employee has the right not to be unfairly dismissed. Section 188 of the Act²⁸⁴ requires both substantive and procedural fairness for a dismissal to be considered fair. Schedule 8 of the Labour Relations Act (Code of Good Practice: Dismissals) sets out the guidelines in cases of dismissals for poor performance. All these factors have to be considered and followed for a dismissal to be fair.

The Code also provides a more relaxed procedure to follow for employees appointed on probation. There is also an interpretation that no formal hearing needs to take place for a dismissal to be fair. However, there are certain procedural requirements that need to be followed for a dismissal to be fair. These include an investigation, alternate placement, right to be heard and representation.

In conclusion, a dismissal for poor performance is therefore a signal that there is no commercial purpose in pursuing the relationship and that the employee's performance cannot be corrected.²⁸⁵ A dismissal would therefore be the last resort.

²⁸² *Buthlezi v Amalgamated Beverages Industries* [1999] 9 BLLR 907 (LAC).

²⁸³ 66 of 1995.

²⁸⁴ 66 of 1995.

²⁸⁵ *Larcombe v Natal Nylon Industries (Pty) Ltd* (1986, 7 ILJ 326 IC).

CHAPTER 4

THE PROCESS OF PERFORMANCE EVALUATION SYSTEM IN EDUCATIONAL INSTITUTIONS

4 1 INTRODUCTION

The main responsibility of the Department of Basic Education (DBE) is to ensure access to quality education. One of the key inputs to achieve this is the availability of adequate human resources. This includes the setting of reasonable standards which employees should subscribe to and will be measured against.

The National Policy Act²⁸⁶ provides that the Minister shall determine the policy for the planning, provision, financing, staffing, co-ordination, management and governance, programmes, monitoring, evaluation and well-being of the education system.²⁸⁷

The National Policy Framework for Teacher Educational and Development in South Africa (2007)²⁸⁸ aims to provide an overall strategy for the successful recruitment, retention and professional development of teachers. The roles and competencies of teachers, as stated in the Norms and Standards (2000),²⁸⁹ describes a teacher as a person with demonstrated ability of imparting knowledge to learners, learning mediator, interpreter and designer of learning programmes.²⁹⁰ To achieve these competencies (as per the Norms and Standards), it is important that the Department has appropriate job descriptions in place for each job. This should be linked to the required standards of the particular jobs and it be aligned to the overall strategic objectives of the Department. It is also important that the education department have a proper recruitment and selection process in place to appoint the best person for a job especially if it is the manager (principal) of a school.

The public education sector, however, is different to other sectors of the public service. In education, the Department does not generate or create posts through a job evaluation or analysis process. It is also not always in a position to identify and appoint their best

²⁸⁶ 27 of 1996.

²⁸⁷ Department of Basic Education *National Human Resource Planning Framework* (2013) 8.

²⁸⁸ *Government Gazette* 502 No 29832 26 April 2007.

²⁸⁹ *Government Gazette* 415 No 20844, 4 February 2000.

²⁹⁰ Department of Basic Education *National Human Resource Planning Framework* 8.

candidates for a position. The afore-mentioned prevails because of the generic nature of the job specification. Job specifications in education are not specific but rather general in their application. Specific job specifications will ensure specialised skills and competencies. This in turn promotes the realistic achievement of educational goals and standards that can be linked to performance. Should an educator underperform, the specific job specification will form the baseline document for identifying the goal and targets that needs to be achieved.

This chapter will discuss the importance of a job analysis, description and specification processes and the nexus it has to the establishment of performance indicators and performance assessments vis-à-vis how posts are created or generated in the education sector and how it is not contributing to the setting of targets to which educators can be appraised.

The chapter will furthermore discuss the recruitment and selection processes in education; the roles and functions of stakeholders' groupings (school governing bodies and unions) and why the education departments are not in a position to appoint the best candidates to posts, but are held responsible for the results of learners and the underperformance of its educators.

4 2 CREATION OF EDUCATOR POSTS

4 2 1 JOB ANALYSIS AND EVALUATION

The creation of posts in public service, excluding education, is similar to that of the private sector. It consist of a process of job analysis and evaluation, where job information is gathered, analysed and recorded as the job exists and not as the job should exist.²⁹¹

The information produced in a job analysis is critical, since it identifies the job descriptors and specifications of a post. It also establishes essential information for the establishment of performance standards and appraisal. Furthermore, the information is used for the design and implementation of training and development programmes. It allows managers to plan and offer career planning and development for their employees.²⁹²

In education job analysis of posts do not take place. An education department is therefore unable to utilise the job analysis information for the of purposes of creating a right fit between job and educator; to assess the performance of an educator; to determine the worth of a

²⁹¹ Stone *Human Resource Management* 3ed (1998) 122.

²⁹² Stone *Human Resource Management* 123.

particular task; and to analyse training and development needs of an educator delivering that specific job.

4 2 2 CREATION OF POSTS IN THE EDUCATION SECTOR FOR INSTITUTIONS (SCHOOLS)

The process involved in the creation of posts in education is largely budgetary driven. Once a provincial education department receives their monetary allocation from their Provincial Treasury they enter into a process of consultations with the school governing bodies (SGB's) and unions on the creation and distribution of posts to schools.²⁹³

The regulations firstly require the Member of the Executive Council (MEC) to, amongst others, consult unions and school governing bodies on determining of the educator post establishment with due regard to the budget.²⁹⁴

The regulations require that the Head of Department (HOD) must, amongst others, consult unions and school governing bodies on determining of the educator post establishment of each public school in the province.²⁹⁵

It is evident, from the above that the process envisages active consultations with the relevant trade unions and school governing bodies. It is important to understand that the mentioned consultative processes are integral to the creation and distribution of post establishments. The consultation itself, is not a negotiation nor a consultation with one party to the exclusion of the other.

The HOD on the other hand must “determine the educator post establishment of each public school in the province by applying the post distribution model”.²⁹⁶ In addition, he or she must “take into account the post establishment of the provincial department of education and the need for redress in the implementation and promotion of curriculum policy”.²⁹⁷ The HOD must determine this process annually and exercise his or her authority to distribute post establishments, after consultation with the trade unions and SGBs.

²⁹³ Regulation 1(c) of the Regulations for the Creation of Educator Posts in a Provincial Department of Education and the Distribution of such posts to the Educational Institutions of such a Department.

²⁹⁴ *Ibid.*

²⁹⁵ Regulation 2(b) of the Regulations for the Creation of Educator Posts in a Provincial Department of Education and the Distribution of such posts to the Educational Institutions of such a Department.

²⁹⁶ This is a scientific model that allocates posts to schools based on various formulas.

²⁹⁷ Regulation 2(b)(ii)(bb).

As can be seen, the process totally differs from that of the rest of the public and private sectors. The process does not lend itself to be used for identifying an evaluation of educators, training and development process, nor to determine trends and weaknesses in the system. It is purely used to create a distinct quantitative number of posts to be distributed amongst schools.

4 2 3 THE DETERMINATION OF JOB DESCRIPTIONS AND SPECIFICATIONS OF EDUCATORS AT SCHOOLS

The Personnel Administration Measures (PAM), which forms part of the Employment of Educators Act (EEA)²⁹⁸ includes terms and conditions of employment for educators. While educators employed by the State do not individually receive an employment contract, the measures in the PAM form the basis of the contractual agreement with the employer. Negotiations may alter their specifications from time to time in the form of collective agreements.²⁹⁹

Chapter A of the PAM sets out the workload, duties and responsibilities of educators. It provides a generic job description for educators appointed on various levels that include that of principals.³⁰⁰ Supervisory functions are added to the job description the more senior the post. It sets out the core duties during the formal school day and after. According to Rossouw, the terms and conditions of educators employed by the State are seldom negotiated, and never on an individual level.³⁰¹ This therefore inhibits the manager or supervisor from adding additional responsibilities that can be target set, to the educators' job description. Should an educator therefore underperform, the manager would be restricted to the information of the generic job description. This information may be insufficient to place an educator on a programme of incapacity for poor performance should the learners in the educator's class under-perform. It also sets out information on the duties and responsibilities of every post level.³⁰²

Chapter A of the PAM also specifies the workload per educator,³⁰³ which is a minimum of seven hours per school day. It makes provision for an educator to attend ongoing professional development up to 80 hours per year.³⁰⁴ The purpose of the 80 hours is to

²⁹⁸ 76 of 1998.

²⁹⁹ Rossouw *Labour Relations in Education. A South African Perspective* 65.

³⁰⁰ Chap A paras 4.1 – 4.5.

³⁰¹ Rossouw *Labour Relations in Education. A South African Perspective* 65.

³⁰² *Ibid.*

³⁰³ Chap A par 5.2.

³⁰⁴ Rossouw *Labour Relations in Education. A South African Perspective* 65.

provide time for educators to attend capacity building workshops, professional development exercises etc. Should an educator however be placed on a programme of incapacity, the 80 hours of development can be used for this purpose as well.

It is accepted that generic specification of posts contributes to poor performance. A study, entitled “Educator Workload in South Africa” conducted by the Human Science Research Council (HSRC) on behalf of the Education Labour Relations Council (ELRC) compared the number of hours that educators spend on their different activities with that of the national policy.

The findings indicated the following:

- Educators spend less time overall on their activities than the total number of hours specified by the policy; whereas the policy expects 1 720 hours (translated into 43 hours per week or 8.6 hours per day in a 5-day week) to be spent on all activities, educators on average spend 1 599 hours per annum, 41 hours per week and 8.2 hours per day on all school-related activities; and
- Educators also spend less time on actual teaching or instruction than is specified in the policy. Whereas the policy expects educators, on average, to spend between 64 and 79% of the 35 hour week on teaching, the average time that teachers actually spend on teaching is 46% of the 35 hour week, or 41% of their total school-related time, an average of 3.2 hours a day.³⁰⁵

From the above, it can be concluded that the non-adherence to the time spent on teaching, learning and other related activities may be one of the factors contributing to the weak-performance of learners at schools and in the system. The Workload Study conducted by the HSRC has also identified this weakness and proposed that the Integrated Performance Management System (IQMS)³⁰⁶ needs to be reviewed and its’ implications and educator workload needs to be considered for inclusion.³⁰⁷ Should this factor be included it can be used as a performance tool to measure the work performance of educators especially if an educator underperforms.

³⁰⁵ Chisholm, Hoadley, wa Kivulu, Brookes, Prinsloo, Kgobe, Mosia, Narsee and Rule *Educator Workload in South Africa* (2005) xi.

³⁰⁶ The instrument used to measure the performance of educators.

³⁰⁷ Chisholm *et al Educator Workload in South Africa* 186.

4 3 THE RECRUITMENT AND SELECTION PROCEDURES OF EDUCATORS AT INSTITUTIONAL LEVEL (SCHOOLS)

The recruitment process is the most fundamental process of identifying the right candidates for employment and stimulating them to apply for jobs in an organisation. The process is designed to staff the organisation with new employees and to provide promotional opportunities for staff within an organisation. It also locates and attracts the right potential candidates to the right job openings within an organisation. These candidates must have the required capacity to generate a sustainable competitive advantage for the organisation.³⁰⁸

The purpose of a selection process is to predict the job performance of candidates. This is done by assessing/measuring the candidates' knowledge, qualifications, skills and experience using assessment methods such as:

- Review of CV/application form;
- interviews; and
- practical tests, if required.³⁰⁹

In education at institutional level (school) the process is similar but with two major differences: firstly, part of school governing bodies responsibility is to actively participate in the appointment processes of educators,³¹⁰ while the State is the employer.³¹¹ Secondly, unions play an active role in the process of appointing educators in schools. They are given observer status in interview processes to help ensure fair treatment of the members.³¹²

The importance of the recommendation of functions of school governing bodies in appointments and promotions was tested in the case of *The Governing Body of the Point High School v Head of the Western Cape Education Department*.³¹³ The HOD of the department appointed two other candidates other than the two nominees of the governing body, from the preference list to the positions of principal and deputy-principal. The school governing stated that their recommendation was based in the best interest of the learners at

³⁰⁸ Stone *Human Resource Management* 3ed (1998) 175.

³⁰⁹ Anonymous "Purpose of Recruitment and Selection: University of Glasgow" (No date) <<http://www.gla.ac.uk/services/humanresources/staffdevelopment/e-learning/recruitment-e-learning/recruitmentselectionpolicyandlegislationupdate/recruitmentandselectiongoodpracticeprinciples/>> (Accessed 2013-09-22).

³¹⁰ S 16 of South African Schools Act.

³¹¹ Rossouw *Labour Relations in Education. A South African Perspective* 87.

³¹² Rossouw *Labour Relations in Education. A South African Perspective* 103.

³¹³ Case 14188/2006 (C).

the particular school and to appoint a principal and vice-principal that were significantly less capable than those who were nominated by them, was unacceptable. This was in spite of the fact that the Employment of Educators Act provided authority to the HOD to choose a suitable candidate from a preference list of nominees.³¹⁴

The court stated that if the SGB's consideration is not appointed for whatever reason, full reasons for such decisions should be provided without delay. The court therefore dismissed the case and reversed the HODs decision and appointed the SGB's preferred candidates.³¹⁵

The *Point* judgment indicates the power of the recommendation of functions of school bodies in appointments.

The judgment further shows that education departments are not necessary in a position to appoint the best candidates to a post, since it is dependent on a school governing body to interview and nominate a candidate, who in the opinion of the governing body, is the best candidate for the position. Yet, the department as employer is responsible for the payment of the educators' salaries, their performance and if educators' underperform, to take the necessary steps to capacitate or dismiss them for under performance. They also have to accept that the responsibility of the underperformance of learners if the educators recommended by the school governing body do not perform in terms of their core function in providing quality education to children-

4 4 CONCLUSION

The job analysis process is a fundamental human resource management activity. It is a process whereby jobs are studied to determine their tasks, duties and responsibilities, their relationships to other jobs, the conditions under which the work is performed and the personal qualities and competencies required for satisfactory performance. The products of the job analysis process are job descriptions and job specifications.³¹⁶ In the education sector and at school level, no detailed job analysis takes place and therefore no detailed study can take place of duties, tasks and responsibilities of educators. The afore-mentioned limits the ability of measuring the performance of educators, in terms of what work must be performed, where it is performed and who will perform it. The system consists of generic job descriptions with similar activities from the lowest to the highest grading.

³¹⁴ Rossouw *Labour Relations in Education. A South African Perspective* 89.

³¹⁵ *Ibid.*

³¹⁶ Stone *Human Resource Management* 198.

The creation of posts is also done scientifically via a post distribution model that is budgetary driven and not based on job content or function. Only a limited number of posts can be afforded by provincial departments. This negates productivity, quality of work and motivation. The process has a direct input into how many posts are to be established, distributed and for which purpose.

The purpose of a recruitment and selection process is to locate, attract and appoint the best person for a particular position in order to achieve an organisation's business and strategic objectives. The appointee should therefore possess the required knowledge, appropriate skills, abilities, and personal qualities and attributes in order to contribute in achieving these objectives. In education, a composite arrangement exists where School Governing Bodies provide a recommendation, via an interview process, to the education department in terms of who they believe is the most appropriate person for the post or manager of a school. Through relevant case law, the education department is obliged to appoint the candidate recommended by the school governing body and may only deviate from it based on certain conditions stipulated in section 6³¹⁷ of the Employment of Educators Act.³¹⁸ Identifying the best candidate for the post is not one of the stipulations, yet it is incumbent on education departments ensuring that the children receive quality education. They are also responsible for implementing the process of incapacity for poor performance, if the appointee does not perform to the required work standards.

In conclusion, it is evident that the educational system in South Africa does not possess a systemic process to analyse and evaluate a post at school level. It is therefore not in a position to attach the job description and functions to performance indicators. It is also not always in a position to appoint their best candidates to a post, yet education departments are responsible for the quality of education and should an educator underperform, it is also responsible for the implementation of a poor performance process.

³¹⁷ (i) [T]he democratic values and principles referred to in section 7(1);
(ii) any procedure collectively agreed upon or determined by the Minister for the appointment, promotion or transfer of educators;
(iii) any requirement collectively agreed upon or determined by the Minister for the appointment, promotion or transfer of educators which the candidate must meet;
(iv) a procedure whereby it is established that the candidate is registered or qualifies for registration as an educator with the South African Council for Educators; and
(v) procedures that would ensure that the recommendation is not obtained through undue influence on the members of the governing body.

³¹⁸ 78 of 1998.

CHAPTER 5

AN ANALYSIS OF THE PERFORMANCE MANAGEMENT AND PERFORMANCE INITIATIVES IN EDUCATION

5.1 INTRODUCTION

Performance Management is a systemic approach to managing people, goals, measurement, feedback and recognition as a way to motivating employees to achieve their full potential, in line with the organisational objectives.³¹⁹

It ensures that jobs are properly designed and that qualified personnel are hired, assessed, trained, rewarded and motivated to achieve the organisation's strategic objectives.³²⁰

Performance management is also used to assist organisations in establishing a climate that is conducive to motivating employees and thereby develop and achieve high standards of performance. It is not an event, but rather an on-going process that are intended to:

- Ensure common understandings of performance expectations;
- Improve employee competencies and raise employees enthusiasm to meet performance expectations;
- Develop employees; and
- Recognise and reward employees who constantly perform at superior level.³²¹

Performance management therefore plays a vital role in helping an organisation achieve its goals by providing a link between strategic planning and performance appraisal. The focus has moved from measuring subjective personal qualities, to measuring performance against pre-agreed outputs or outcomes.³²²

³¹⁹ Mathula "Performance Management From Resistance to IQMS- From Policy to Practice" May 2004 <www.thutong.doe.gov.za/resourcedownload.aspx?id=18280> (Accessed 2013-08-08).

³²⁰ Stone *Human Resource Management* 262.

³²¹ Public Service Commission *Toolkit for the Management of Poor Performance in the Public Service* (2007) 5.

³²² Public Service Commission *Toolkit for the Management of Poor Performance in the Public Service* 2.

In education the principles of performance management is the same as mentioned above, except that it has gone through various metamorphosis since 1993. According to Mathula,³²³ the South African experience of evaluations within the schooling system has not been a positive one.³²⁴ He states further that since 1993 Government has put in place large scale efforts to improve the performance management systems in education in an attempt to improve the system.³²⁵ None of these systems have however been successful in improving the quality of education and performance of learners.

It is therefore important to examine the following:

- I. The initiatives by the Department of Basic Education to improve the performance of educators and schools; and
- II. the performance management system of educators at institutional level.

5 2 DEFINITION OF PERFORMANCE MANAGEMENT AND THE SETTING OF PERFORMANCE STANDARDS

Stone defines performance management as an interlocking set of policies and practices which have as their focus the enhanced achievement of organisational objectives through a concentration on individual performance.³²⁶

Stelzner, Jordaan,³²⁷ Grogan³²⁸ and Basson *et al*³²⁹ all maintaining that it is the prerogative of the employer to determine the standards of a performance system. The courts have the same interpretation. In *A-B v SA Breweries*³³⁰ an employee was charged with poor performance. In this matter the arbitrator held that it is the prerogative of the employer to set standards.³³¹

³²³ Mathula "Performance Management From Resistance to IQMS- From Policy to Practice" May 2004 <www.thutong.doe.gov.za/resourcedownload.aspx?id=18280> (Accessed 2013-08-08).

³²⁴ *Ibid.*

³²⁵ *Ibid.*

³²⁶ Stone *Human Resource Management* 265.

³²⁷ Stelzner and Jordaan *Labour Arbitration* 53.

³²⁸ Grogan *Dismissal* 313.

³²⁹ Basson *et al Essential Labour Law* 139.

³³⁰ (2001) 22 ILJ 495 (CCMA).

³³¹ Basson *et al Essential Labour Law* 139.

5 3 THE INITIATIVES BY THE DEPARTMENT OF EDUCATION TO IMPROVE PERFORMANCE AT SCHOOLS

Since 1993, the Department of Education has implemented various initiatives, in an attempt to improve the quality of education and measure the performance of educators.

These are the following:

- The Developmental Appraisal System (DAS): ELRC Resolution 4 of 1998;
- Whole School Evaluation;
- Performance Management and Development System for Office- Based Educators (PMDS): ELRC Resolution 2 of 2002;
- The Protocol and Instrument for Observing Educators: ELRC Resolution 3 of 2003;
- The Integrated Quality Management System (IQMS): ELRC Resolution 8 of 2003; and
- The Education Laws Amendment Act, Act 31 of 2007.

In spite of the numerous initiatives and the attempts made it has not succeeded in improving the quality of education, capacitating educators, management of underperformance, let alone dismissing transgressors for poor performance.

Each of these systems/initiatives is discussed below.

5 3 1 THE DEVELOPMENTAL APPRAISAL SYSTEM (DAS)³³²

The Developmental Appraisal System (DAS) forms part the terms and conditions of employment of educators determined in terms of section 4 of the EEA. The aim of DAS is to facilitate the personal and professional development of educators in order to improve the quality of teaching practice and educational management. It is based on the principle of life-long learning and development. This implies that one has to prioritise areas for growth and development throughout one's career in education.

According to Mathula, DAS failed because of a number of reasons, some of which are:³³³

³³² Mathula "Performance Management From Resistance to IQMS- From Policy to Practice" May 2004 <www.thutong.doe.gov.za/resourcedownload.aspx?id=18280> (Accessed 2013-08-08).

³³³ *Ibid.*

- Complicated Core criteria: The core criteria are too complicated and cannot be understood easily.
- Poor correlation of DAS to other policies (e.g. Curriculum 2005 and Whole School Evaluation);
- Dormant appraisal structures: Structures were set up according to policy, but were not operationalised;
- Unrealistic implementation plans: It has been realised and acknowledged that the national, full scale implementation of DAS was over-ambitious and unrealistic;
- No tangible rewards for DAS implementation at grassroots level;
- Apathy: Senior Management had attitudes of indifference regarding the implementation of DAS as a result of other non-standardised appraisal systems being in place or the existence of negative attitudes derived from the ineffectiveness of past systems; and
- Resistance to change: Stakeholders, being aware of the operational and policy constraints of DAS, were not willing to accept accountability for this change initiative for fear that any failure would reflect upon them in a negative manner.³³⁴

5 3 2 WHOLE SCHOOL EVALUATION (WSE)³³⁵

The policy on Whole School Evaluation is a notice in terms of section 3(4)(l) of the National Education Policy Act.³³⁶ This policy is aimed at improving the overall quality of education and management in schools as a process. It is meant to be supportive and developmental rather than punitive and judgmental. The policy maintains that it will not be used as a coercive measure, though part of its responsibility will be to ensure that national and local policies are complied with. The policy also contains a built-in mechanism for reporting findings and providing feedback to the school and to various stakeholders: National and Provincial

³³⁴ *Ibid*

³³⁵ *Ibid*

³³⁶ 27 of 1996.

Education Departments, parents and society in general on the level of performance achieved by the school.

The aims of the policy have been identified as follows:

- External moderation of schools;
- identification and evaluation of school effectiveness;
- increase the level of accountability;
- strengthen the support given to schools;
- provide feedback to all stakeholders; and
- identify aspects of excellence within the system.

The policy has not been successful in improving the performance levels of educators as it dealt with the performance of a school and not an educator.

5 3 3 PERFORMANCE MANAGEMENT AND DEVELOPMENT SCHEME FOR OFFICE-BASED EDUCATORS (PMDS)³³⁷

The Performance Management and Development Scheme for Office Based Educators (PMDS) was a Collective Agreement (Number 2 of 2002) between stakeholders to the ELRC. It was therefore not a policy developed and implemented by the Department of Education. The PMDS, links the need for effective staff performance with the corporate planning cycle. The policy emphasises the importance of integrating the various processes in the scheme into the normal work of supervisors and staff and not view them as an additional administrative requirement.

The aims of the PMDS Scheme are accordingly the following:

- improve performance against corporate goals by establishing a performance culture;
- improve individual's awareness and understanding of their work objectives and the performance standards expected of them;
- ensure that individuals know how their performance against these standards is perceived;

³³⁷ Mathula "Performance Management From Resistance to IQMS- From Policy to Practice" May 2004 <www.thutong.doe.gov.za/resourcedownload.aspx?id=18280> (Accessed 2013-08-08).

- improve communication between supervisors and their staff;
- evaluate performance fairly and objectively;
- provide opportunities to identify the individual's development needs and to devise, together with their supervisors, plans to address those needs;
- facilitate the effective management of unsatisfactory performance; and
- provide a possible future basis for decision on rewards.

The PMDS was initiated to provide a performance management system for office-based educators and not for school-based educators. This system is therefore not applicable to school-based educators.

5 3 4 THE PROTOCOL AND INSTRUMENT FOR OBSERVING EDUCATORS³³⁸

The Protocol and Instrument for Observing Educators was also a Collective Agreement (Number 3 of 2003) between stakeholders to the ELRC. It was also therefore not a policy developed and implemented by the Department of Education.

This policy was developed as a result of the deadlock that arose around the implementation of the Whole School Evaluation policy and the Developmental Appraisal System that has been in existence since April 2002.³³⁹ Since the system did not deal with measuring the performance of educators, it therefore could not contribute in improving their actual performance or contribute to assist an educator that has underperformed.

5 3 5 THE INTEGRATED QUALITY MANAGEMENT SYSTEM (IQMS)³⁴⁰

The Integrated Quality Management System is another Collective Agreement (Number 8 of 2003) between stakeholders to the ELRC. It was also therefore not a policy developed and

³³⁸ *Ibid.*

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*

implemented by the Department of Education. The purpose of the agreement is to align the different Quality Management programmes that are in existence. These programmes include the Developmental Appraisal, Performance Measurement and Whole School Evaluation. The IQMS therefore seeks to monitor and support these processes. The underpinning philosophy of the Integrated Quality Management System (IQMS) is based upon the fundamental belief that the purpose of the system is fivefold:

- To determine competence;
- To assess strengths and areas for development;
- To provide support and opportunities for development to assure continued growth;
- To promote accountability; and
- To monitor an institution's overall effectiveness.

Since the implementation of the IQMS there have been several problems with its implementation. Besides not improving the standard and performance of educators it also did not include a performance indicator to measure the performance of learners and the pass rate quality of passes of learners.

This above-mentioned led to the Department of Education commissioning Class Act Educational Services to conduct an IQMS Implementation Review in 2007.

The key findings were the following:

- Clarification is required concerning the purposes of the IQMS.
- Relationship between Development Appraisal (DAS) and Performance Measurement (PM) needs attention.
- Professional development opportunities must be afforded to all educators.
- "Lip service" paid to contextual differences between schools.
- Ambiguous language used in instruments.
- IQMS design is incomplete.
- On-going IQMS training is required.
- The cascade model of training needs to be revisited.
- Training provided must be quality assured.
- The rating system is problematic.
- Confusion between the School Development Plans; District Development Plans; School Improvement Plans and District Development Plans.

- Document management needs attention.
- Poor timing of Performance Measurement (PM).
- Provincial capacity.
- District capacity.
- School capacity.
- Problems with validity.
- Problems with reliability.
- Implementation of moderation
- Poorly completed documents.
- Shift required from personal motivation to institutional competencies.
- Negative legacy of inspection exists.
- Inconsistent status given to the IQMS.³⁴¹

Some of the recommendations that were made to improve the system are:

- Explore the possibility of developing context-specific performance indicators;
- Build in formal quality assurance indicators;
- Ensure continuous training;
- The rating scale should be tabled for discussion at ELRC level (The scale currently consist of a rating from 1 to 4 with only the rating of 1 identifying underperformance);
- Establish and acknowledge where pockets of excellence occur;
- Significant financial resources to be made available; and
- IQMS instruments must measure what they claim to measure.³⁴²

The Class Act Educational Services IQMS Review identified various weaknesses in the system. Most importantly, it was recommended that the instrument must measure what it claims to measure and that is the performance of an educator in relation to the performance of the learner in the classroom.

5 4 THE ROLE OF THE PRINCIPAL IN IQMS

There is not a significant difference between the role of a principal and post level one educator with regard to the performance indicators in the IQMS, even though the principal is the manager of the school and accepts the overall responsibility of the performance of

³⁴¹ Class Act Educational Services *IQMS Implementation Review* (2007) 1-13.

³⁴² *Ibid.*

educators and learners. One would therefore expect that the performance assessment instrument applicable to principals would reflect the responsibilities of principals different to that of a post level one educator.

There are twelve standards in terms of which a principal's performance is assessed, seven of which are exactly the same as that of a post level one educator focussing on teaching that happens in a specific classroom. In addition to these seven standards, the principal must also account for the administration of resources, records, personnel, decision-making and accountability, leadership, communication and servicing the governing body, and strategic and financial planning. The principal is the manager and leader of the school. He or she should have more management and supervisory performance indicators in comparison to a post level one educator. His or her central focus should also be on the overall responsibility of the teaching and learning process that should be the central focus of the school.³⁴³

5 5 THE EDUCATION LAWS AMENDMENT ACT³⁴⁴

The Education Laws Amendment Act is a further attempt to regulate the performance management system in education, to address the challenges and to improve on the education system. It is a legislated performance management plan through which the Minister of Education seeks to hold the Member of the Executive Council (MEC), and through his/hers principals accountable for performance. The purpose is also improving the performance of underperforming schools.

The procedures are as follows:

- I. The Head of Department (HoD) must annually identify public schools that are underperforming.
- II. The HoD must send a written notice to such schools where the HoD is satisfied that:
 - (i) the standard of performance of learners is below the standards prescribed by the National Curriculum Statement,

³⁴³ Smit "Wanted: Accountable Principals" 2013 68 *Focus* 47.

³⁴⁴ 31 of 2007.

- (ii) there has been a serious breakdown in the management or governance of school and which is prejudicing or likely to prejudice the performance of the learners, and
 - (iii) the safety of learners or staff is threatened.
- III. The school must respond within 14 days to the notice and as soon as possible thereafter the school must submit to the HoD a plan for correcting the situation.
- IV. The HoD must take all reasonable steps to assist the school.
- V. The HoD may take a number of steps to assist the school, but must consider the following steps:
 - (i) implementing the incapacity code for poor work performance in section 16 of the Employment of Educators Act (EEA),
 - (ii) withdrawing the functions of the SGB, and
 - (iii) appointing persons to perform all or some of the functions of the SGB.
- VI. The counselling of the principal, in terms of the incapacity code of the EEA, may include the appointment of an academic mentor to take over the functions and responsibilities of the principal for a period of time.

These corrective measures are management tools to be used to improve performance and allow managers to achieve the required performance. They are also tools which may be used in the overall context of achieving the objectives of the IQMS, whose main purpose is to ensure quality public education for all.³⁴⁵ This would have provided the Department with a benchmark to the performance assessment of principals and should they not have performed, it could be used to put in place a proper developmental process. If this process has been unsuccessful, a formal process of incapacity for poor performance could be initiated.

³⁴⁵ Mathula "Performance Management From Resistance to IQMS- From Policy to Practice" May 2004 <www.thutong.doe.gov.za/resourcedownload.aspx?id=18280> (Accessed 2013-08-08).

5 6 FRAMEWORK FOR THE ESTABLISHMENT OF AN OCCUPATION SPECIFIC DISPENSATION (OSD) FOR EDUCATORS IN THE PUBLIC EDUCATION

The purpose of the Framework for the Establishment of an Occupation Specific Dispensation for Educators in the Public Education was established by means of a Collective Agreement No 1 and 2 of 2008. It is to ensure a fair, equitable and competitive remuneration structure for identified categories of employees, which would provide for longer salary bands and substantial overlaps between salary levels to facilitate adequate salary progression to employees who choose to remain in the classroom instead of aspiring to move into supervisory or management posts.

It was also intended to ensure proper career pathing, that does not entail automatic increases but provide for a forward looking plan to systematically increase salaries after pre-determined periods, based on specific criteria such as performance, qualifications, competencies, scope of work and experience; would be put in place. The agreement provides for a performance agreement for principals and deputy principals, that includes target setting of performance that could be linked to school and learner performance.³⁴⁶ This part of the agreement was however never implemented. An agreement between the employer and unions could not be reached on the format, criteria and performance indicators that should be included in the performance agreement. This would have been a perfect opportunity for the Department of Education to place their principals and deputy principals on target based performance agreements, linked to the pass rate and learner performance.

5 7 THE ROLE OF PERFORMANCE MANAGEMENT IN INITIATING THE PROCESS OF INCAPACITY FOR POOR PERFORMANCE OF EDUCATORS

The process of performance management has a direct link in determining the performance standards of educators. Without a proper performance appraisal system or the inadequate management of the system, no manager will be in a position to place an under-performing educator on a poor performance management programme. The EEA makes direct reference to the two processes.

³⁴⁶ Anonymous "Framework for the Establishment of an Occupation Specific Dispensation" (OSD) for educators. (No date) <<http://www.elrc.org.za/Display2.asp?SectID=18&ItemID=142>> (Accessed 2013-09-28).

Section 16 of the Employment of Educators Act³⁴⁷ provides that:

“Incapable educators – If it is alleged that an educator is unfit for the duties attached to the educator’s post or incapable of carrying out those duties efficiently, the employer must assess the capacity of the educator and may take action against the educator in accordance with the incapacity code and procedures for poor work performance as provided in Schedule 1.”

Section 16 of the Act as it relates to performance and giving account to one’s actions and being held accountable for them is through a process of performance management. To improve the performance of an educator, it is imperative that managers give appraisal priority, because without it, the system will not be improved.

5 6 CONCLUSION

The management of performance of employees is full of challenges as it is one of the key elements for any organisational success. In performance management everyone has a role to perform. The process of performance assessment is not a simple task, as it relates to the direct performance of an individual with each person believing that they are performing at an acceptable level.

A positive and well-functioning performance management system can yield excellent results when all the employees at all levels can be trusted to be contributors to the overall performance of the organisation. If not, it could lead to an organisation being negatively affected that could lead to a decrease in productivity, motivation and moral of employees. In the absence of a well-functioning performance management system, the education system is suffering by virtue of the afore-mentioned symptoms.

None of the proposed systems were successful in improving the results of learners and education. Various reasons have been cited for this and, I am of the opinion that government has failed to institute the fundamental principles when they developed the existing systems.

The first main principle that was not adhered to is that the development of a performance management system is the prerogative of the employer. Basson, Stelzer, Jordaan and Grogan all confirm that it is the responsibility of the employer to set reasonable targets for employees to follow and achieve.

³⁴⁷ 76 of 1998.

Secondly, that the setting of performance standards is the responsibility of the employer. As viewed above, all the initiatives³⁴⁸ to improve the performance of the system was a negotiated process in the ELRC, which led to various collective agreements. In any negotiations, unions will always look after the best interest of their members.

Thirdly, not one of the initiatives includes a key objective to measure the performance of an educator in relation to the performance of the learners. In education, your clients are your learners and therefore all systems should be geared towards improving their knowledge, skills abilities, performance and their results.

Fourthly, as long as managers do not have performance agreements with detailed targeted objectives in place, they will not be in a position to appraise a set objective. Principals, as leaders and managers of their schools, are pivotal to the success of schools providing quality teaching and learning.³⁴⁹

Fifthly, none of the instruments implemented, allows for a manager to do a proper assessment of an educator's performance and if he or she underperforms, a process of incapacity for poor performance cannot be implemented. It is for these reasons that not one educator at school level as yet has been dismissed for incapacity for poor performance in education.

Finally, as long as there is no reward system in place to reward excellent performance, many educators will not be motivated to perform above the required norm.

In conclusion, I am of the opinion that as long as government do not set targets for educators, linked to the performance of schools and the results of learners, no matter which system they introduce, it will not have the desired results. Furthermore, as long as principals are not held accountable for their schools, the system will not improve.

³⁴⁸ Except the Processes initiated in the Education Laws Amendment Act of 2007.

³⁴⁹ Smit "Wanted: Accountable Principals" 46.

CHAPTER 6

THE INCAPACITY PROCESS FOR POOR PERFORMANCE IN EDUCATION AT INSTITUTIONAL LEVEL

6 1 INTRODUCTION

Investing in staff development instils motivation and performance. When issues of poor performance is not addressed or managed it can demotivate and contribute to an unhealthy and unproductive working relationship. It is generally accepted the establishment of effective performance management systems, can have significant benefits for any organisation. Reviewing, refining and implementing performance management systems can result in significant benefits.³⁵⁰

In the previous chapter,³⁵¹ the Integrated Quality Management System (IQMS) that is applicable to educators was discussed. It was further identified that, in terms of section 16 of the Employment of Educators Act (EEA),³⁵² the IQMS is the only process that allows a manager to formally assess whether the performance of an educator meets the required standards, or not. If not, the EEA makes provision for an educator to be placed on incapacity due to poor performance, that could lead to his or her dismissal should the performance levels of the educator not improve.

This chapter will outline the incapacity process for poor performance in terms of the EEA as well as the processes that are to be followed once the performance management system identifies that an educator underperforms.³⁵³

³⁵⁰ Anonymous "Managing Performance" no date <http://www.fairwork.gov.au/resources/best-practice-guides/pages/managing-underperformance.aspx> (Accessed 2013-07-07).

³⁵¹ Chap 5.

³⁵² 76 of 1998.

³⁵³ Schedule 1 of the Employment of Educators Act 76 of 1998.

6 2 THE PROCEDURE OF INCAPACITY FOR POOR PERFORMANCE FOR EDUCATORS EMPLOYED IN TERMS OF THE EMPLOYMENT OF EDUCATORS ACT (EEA)

6 2 1 DISCHARGE OF EDUCATORS

In terms of the common law, when employees enter into an employment contract, they undertake to work according to reasonable qualitative and quantitative standards of performance set by the employer. If they are unable to meet these targets and if all reasonable remedial measures to deal with them were taken by the employer, have failed, dismissal may be the only appropriate course of action.³⁵⁴ The course of action which the employer needs to put into place to address the underperformance of the educator is the incapacity for poor performance process in terms of schedule 1 of the EEA.

Section 11(1)(d) of the EEA³⁵⁵ provides that an educator can be discharged from service “on account of unfitness for the duties attached to the educator’s post or incapacity to carry out those duties efficiently”.³⁵⁶

Section 13(1)(b) of the EEA states that “educators on probation may be discharged from service after reasonable notice to the educator and upon the expiry of the period of probation or any extension thereof”.³⁵⁷

Section 16 of the EEA provides as follows: “if it is alleged that an educator is unfit for the duties attached to the educator’s post or incapable of carrying out those duties efficiently, the employer must assess the capacity of the educator and may take action against the educator in accordance with the incapacity code and procedures for poor work performance as provided in for Schedule 1”.³⁵⁸

Schedule 1 of the EEA contains the procedure that the employer should follow when it needs to charge an educator with underperformance. An education department is therefore not required to follow the procedure of the Code of Good Practice in the Labour Relations Act (LRA).³⁵⁹ However, should there be any conflict between the two processes or if the EEA

³⁵⁴ Gauteng Provincial Government Circular No 62/2007 dated 22 August 2007: Dealing with Incapacity.

³⁵⁵ 76 of 1998.

³⁵⁶ S 11(1)(d) of the Employment of Educators Act 76 of 1998.

³⁵⁷ S 13(1)(b) of the Employment of Educators Act 76 of 1998.

³⁵⁸ Chap 5, s 16 of the Employment of Educators Act 76 of 1998. Schedule 1 contains the procedures for dealing with poor work performance.

³⁵⁹ 66 of 1995.

process is less favourable, the provisions of the LRA will apply. The education department will however, still be required to follow the principle of fairness and statutory requirements as discussed in a previous chapter³⁶⁰ of this treatise. The determination of fairness must be for both the employer as well as the educator.

Section 16 of the EEA requires that an education department may only take action against an educator once it has assessed the performance of an educator in terms of the Integrated Quality Management System (IQMS). The IQMS is therefore the only performance measuring tool that measures the individual performance of an educator. Unfortunately, the IQMS tool does not provide for target setting of learners results as a performance criteria. The Developmental Appraisal System (DAS) and Whole School Evaluation (WSE) Processes,³⁶¹ also does not form part of the direct performance evaluation of an educator and therefore cannot be used to assess educators.

It is submitted that the most appropriate system to measure the performance standards of an educator will be to target set the performance of an educator in relation to the number and quality of passes of the learners. The purpose and importance of target setting in a school environment are that targets are more active measurements and they are about what is going to happen next. It is also about how the efforts of systems, schools and students will perform in reaching the targets, how they will be assessed, and what will be done with those results when they have been obtained. Targets can also be seen as part of a process for continuous improvement both for the improvement of the system and the educator. Muller describes a target in a school environment as a quantifiable performance level or change in performance level to be attained within a specified time.³⁶²

A proper assessment tool is essential to measure the performance of educators. This will be the only evaluation tool which a court will refer to when assessing whether an employer has followed a fair procedure in identifying the performance of an educator. The importance of a proper assessment tool was emphasised in the case of *Schreuder v Nederduitse Gereformele Kerk, Wilgespruit*.³⁶³ In this judgment the court assessed whether the church had a proper assessment tool and performance measuring process in place to measure the individual performance of the minister. As the church did not have the required systems in

³⁶⁰ Chap 2.

³⁶¹ See Chap 5.

³⁶² Muller *The National Education Performance Monitoring Task Force* (2001) 12-14.

³⁶³ (1999) 20 ILJ 1936 (LC).

place, the court held that the employer had failed to prove that the minister was incompetent as dismissal was not preceded by relevant evaluation, guidance or training.³⁶⁴

6 3 THE INCAPACITY FOR POOR PERFORMANCE PROCESS

6 3 1 THE NECESSITY OF HAVING A PROPER PROCESS TO REMEDY POOR PERFORMANCE

Despite having the will, when an employee lacks the ability or fails for some reason to do the job, such poor performance can be described as incapacity. There is a clear distinction between capacity and performance. The former is about performance and outputs not about behaviour or conduct. The LRA³⁶⁵ recognises this and ensures that issues of performance are handled under the heading of capacity/incapacity.

The LRA³⁶⁶ does not prescribe a formal or informal process that employers need to follow. The process to be followed is left to the discretion of the employers as long as the conditions in the Code of Good Practice are applied. The LRA lays down guidelines which clearly outlines what is required for a dismissal to be both substantively and procedurally fair.³⁶⁷ These guidelines have proved a challenged and quite difficult for employers to implement as a dismissal for poor performance can be regarded as being procedurally correct but, substantively incorrect.

The difficulty of proving underperformance is best illustrated by the cases of *White v Medro Pharmaceuticals (Pty) (Ltd)*³⁶⁸ and in *Robinson v Sun Couriers*.³⁶⁹ Both cases concerned the dismissal of salespersons for failing to meet sales targets. The CCMA deemed Robinson's dismissal unfair because Sun Couriers had not established the reason for the poor performance, or brought any proof that the poor performance was the employees fault.³⁷⁰

In the *Medro Pharmaceutica's* case, the employee failed to meet her targets for nine out of ten months. Nevertheless, the CCMA ruled the dismissal unfair because the employer had set unachievable targets (even though everyone else in the company had no problem

³⁶⁴ Basson *et al Essential Labour Law* 141.

³⁶⁵ 66 of 1995.

³⁶⁶ 66 of 1995 - Code of Good Practice Schedule 8.

³⁶⁷ Stelzner and Jordaan *Labour Arbitration* 1.

³⁶⁸ (2000) 10 BALR 1182 (CCMA).

³⁶⁹ (2001) 5 BALR 511 (CCMA).

³⁷⁰ Patterson "Show That Poor Performer The Door Without Landing Yourself At The CCMA" February 2013 <http://membership.fspbusiness.co.za/content/show-poor-performer-door-without-landing-yourself-ccma> (Accessed 2013-05-06).

meeting them!).³⁷¹ In both cases however, the awards indicated that it is the employer's right to set performance standards provided that it is reasonable and achievable for its employees and not unlimited.³⁷²

In education, the EEA outlines the process to be followed for an incapacity hearing. The EEA however, shelters itself thereby ensuring that it abides by the principles of the LRA. Paragraph 1(1) of Schedule 1 states that "The Code of Good Practice contained in Schedule 8 of the LRA insofar as it relates to incapacity, constitutes part of the Code and Procedures of the EEA in respect of poor work performance".³⁷³ This provides that the process needs not to be too technical and formalistic. In the case of *Avril Elizabeth Home for the Mentally Handicapped v CCMA*³⁷⁴ the court explained that the purpose of the Labour Relations Act processes are to provide for less technical and formalised disciplinary processes in comparison to the past. This was also confirmed in *Nitrophoska (Pty) Ltd v CCMA*.³⁷⁵

In education, dismissals for poor performance must be for a fair reason and effected in accordance with a fair procedure and therefore needs to be procedurally and substantively fair. The Department of Education in addition to the procedural fairness needs to prove the substantive fairness of the process regarding the substandard performance of the educator.

In terms of the above-mentioned, the Department of Education must prove the following:

- the educator should have been aware, or could reasonably have been expected to be aware, of the required performance standard;
- the Educator was given a reasonable opportunity to meet the required standard; and
- dismissal was an appropriate sanction for not meeting the required standard.³⁷⁶

Before the Department of Education decides to initiate the process, it should consider the following in terms of the prescribed code:

- The extent to which the incapacity impacts on colleagues and learners;

³⁷¹ *Ibid.*

³⁷² Grogan *Dismissal* 315.

³⁷³ Schedule 1 of the Employment of Educators Act of 76 of 1998.

³⁷⁴ [2006] 9 BCLR 833 (LC).

³⁷⁵ [2001] 8 BCLR 765 (LC).

³⁷⁶ Grogan *Dismissal* 314.

- the public and the work of the office or institution;
- the extent to which the employee fails to meet the required performance standards established by the Department;
- the extent to which the employee lacks the necessary skills to perform in accordance with the employee's job description;
- the nature of the employee's work and responsibilities; and
- the circumstances of the employee.³⁷⁷

6 3 2 INITIATION OF THE INCAPACITY PROCESS

When a principal or supervisor considers placing an educator on a programme of underperformance it is important that he or she investigate the underperformance and whether the educator was aware of the level of performance expected of him or her. During the investigation the problems experienced by the educator should be discussed with him or her, and ways and means of overcoming the problems should be introduced.³⁷⁸ He or she should also be aware that the performance standards are reasonable, attainable and be objectively measurable. He or she should also have documentary proof that the educator has underperformed and that it could be traced back over a period of time. According to Grogan, an employer cannot know whether or how to counsel the employee unless the reasons for the failure to attain the target have been investigated.³⁷⁹ In the case of *French v Compuware Corporation Southern Africa*³⁸⁰ a commissioner held that the dismissal of a salesperson was unfair because his failure to reach the sales targets was due to circumstances beyond his control. Grogan also states that the performance standard can be conveyed to employees either by means of general directives or by ad hoc and ad hominem measures such as warnings and counselling if the employee's performance becomes deficient.³⁸¹

³⁷⁷ Sub-Item 1(2) of schedule 1 of the Employment of Educators Act 76 of 1998.

³⁷⁸ Grogan *Workplace Law* 259.

³⁷⁹ Grogan *Workplace Law* 261.

³⁸⁰ (2003) 24 *ILJ* 2011 (CCMA).

³⁸¹ Grogan *Dismissal* 322.

It is essential that professional-performance problems are clearly identified and given appropriate consideration and support at the earliest possible stage. The nature of the problem, its level of seriousness and cause(s), must be investigated and identified by structured information gathering and systematic recording.³⁸²

Following the outcomes of the assessment of the educator's performance in terms of the IQMS,³⁸³ the principal or supervisor must make a decision as to whether to take no further action, give informal support or take action in terms of the incapacity programme.

Should the principal or supervisor decide to take action against the educator, he or she should assist and develop the educator through normal performance development systems. Fairness requires that the educator should not only be informed that his or her performance is deficient, but also that he or she be given an opportunity to improve.³⁸⁴ If this is not effective, the principal or supervisor must initiate the formal incapacity process. The process applies to educators appointed permanently, on probation, on contract³⁸⁵ and in a substitute capacity.³⁸⁶ The educator is allowed union representation when this process is activated. If these rights have not been afforded to the educator, any action taken as part of the procedure may be regarded as being void. Once this has been ascertained the principal or supervisor must follow the procedure as set out in schedule 1 of the EEA.

6 3 3 PROCEDURES IN TERMS OF SCHEDULE 1 OF THE EMPLOYMENT OF EDUCATORS ACT

When a principal or supervisor is of the view that an educator is not performing in accordance with the job performance standards that he or she has been employed to do, the principal or supervisor must:

- give reasons to the educator why it is necessary to initiate the procedure; and

³⁸² Rochdale Metropolitan Borough Council Model Procedure for Handling Unsatisfactory Work Performance 4.

³⁸³ Par 2(2) of Schedule 1 states that the performance standards to be used must be prescribed by the Minister. These standards are defined in the IQMS.

³⁸⁴ Grogan *Dismissal* 322.

³⁸⁵ Fixed term contracts.

³⁸⁶ These are educators appointed in place of an educator that is on sick or maternity leave etc.

- after serving the written notices, meet with the educator or his or her union representative or fellow employee.³⁸⁷

In the said meeting the principal or supervisor must explain the requirements of the job, the expected required standard to be met, and the educator's performance, indicate the perceived poor performance and hear the employee's response thereto.³⁸⁸

According to Rossouw,³⁸⁹ all relevant factors should be considered and the educator must be given ample opportunity to be heard. After this evaluation, realistic timeframes must be set for the educator to meet the required standards of performance, subsequent to appropriate training and counselling.

An educator needs to agree to be placed on a developmental programme for incapacity for poor performance. If the educator refuses to participate in such a programme or fails to follow the programme of incapacity, the education department may take disciplinary steps against him or her.³⁹⁰ This process would take place in terms of section 18 and schedule 2³⁹¹ of the EEA.

Once an educator has completed a programme of counselling and training and still does not meet the required performance standards, the employer may:

- consult the educator and provide further training or counselling; or
- transfer, demote or dismiss the educator.³⁹²

Where the educator's performance fails to improve, notwithstanding suitable guidance and instruction and sufficient time allocated, the educator should be granted a final opportunity to consult with the employer prior to being dismissed,³⁹³ since dismissal should be regarded and applied as a sanction of last resort. Before an employer can proceed to transfer, demote or dismiss an educator for poor performance, it first needs to convene an inquiry,³⁹⁴ in order

³⁸⁷ Rossouw *Labour Relations in Education. A South African Perspective* 158.

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*

³⁹⁰ S 2(5) (a) of Schedule 1 of the Employment of Educators Act 76 of 1998.

³⁹¹ These are the misconduct procedures to be followed to charge educators with misconduct.

³⁹² Rossouw *Labour Relations in Education. A South African Perspective* 158.

³⁹³ Van der Walt, Le Roux and Govindjee *Labour Law in Context* 124.

³⁹⁴ The process of the inquiry is set out in Schedule 2 of the Employment of Educators Act 76 of 1998.

to provide the educator with an opportunity to make representations in response to the allegations against him or her.³⁹⁵ This inquiry follows a formal process, as outlined below.

6 3 4 THE FORMAL INQUIRY PROCESS

The inquiry process forms the final stage of the incapacity procedure and takes the same form as a misconduct hearing. The purpose of the inquiry is to establish whether the educator is capable of attaining an acceptable standard of work.³⁹⁶ Although an educator is not “charged” with failing to comply with a performance standard, they are still entitled to know the standard that they are required to meet. They are also entitled to other procedural rights, such as the right to be represented, to cross examine, to present argument and to be heard impartially.³⁹⁷ Legal representation is also allowed but is not an absolute right, and is subject to the approval of the presiding officer. Grogan recommends that in some cases of alleged poor performance, the presiding officer be assisted by an independent specialist who is familiar with the employee’s work and capable of understanding any special problems related to it.³⁹⁸

The procedures as laid down in Schedule 2(7)(2) of the EEA require that a presiding officer be appointed by the employer.³⁹⁹ Grogan agrees with this point of view and states that it is the prerogative of the employer to appoint the presiding officer.⁴⁰⁰ The EEA⁴⁰¹ however, does not refer to who the presiding officer should be and it could therefore be an internal or external person that is to preside over the inquiry. If the underperforming educator is the principal of a school, it would be advisable that the presiding officer is his or her direct supervisor or an external independent person with the required knowledge of the processes of underperformance. It is also advisable that the presiding officer should at least be one level higher than the accused and or the initiator and must be impartial.

Before an employer decides to follow the inquiry process, which could lead to the dismissal of the educator, it should have investigated and exhausted all remedies and possibilities short of dismissal, to assist and accommodate the educator.⁴⁰² Before charging the educator

³⁹⁵ S 6 of Schedule 1 of the Employment of Educators Act 76 of 1998.

³⁹⁶ *Camhee v Parkmore Travel* [1997] 2 BLLR 180 (CCMA).

³⁹⁷ *Grogan Dismissal* 327.

³⁹⁸ *Ibid.*

³⁹⁹ Schedule 2(7)(2) of the Employment of Educators Act 76 of 1998.

⁴⁰⁰ *Grogan Dismissal* 241.

⁴⁰¹ 76 of 1998.

⁴⁰² *Grogan Dismissal* 323.

with inefficiency or underperformance, his or her work performance must not have improved to the extent of meeting the required standards.⁴⁰³

The inquiry process for educators consists of the following steps:

1. The educator must be given written notice at least five working days, prior the inquiry;
2. the educator may represent himself, or by a representative of his trade union or another employee;
3. reasons should be provided to the educator as to why it was necessary to initiate the procedure. Legal representation is allowed subject to the approval of the Presiding Officer;
4. the educator or the representative should be heard on the reasons why the educator should not be charged with incapacity or what was the reasons therefore;
5. the written notice of the inquiry must include a description of the inefficiencies or the alleged shortcomings of the educator. It should also include the time, place and venue of the inquiry, the information of the rights of the educator to representation and on the rights of the educator to call witnesses;
6. a record of the notice of the inquiry and the proceedings must be kept and read before the start of the proceedings;
7. the representative of the employer will first need to lead evidence on the performance of the educator;
8. the educator or his or her representative may question any witness called by the employer's representative;
9. when the employer representative has finalised his or her case, the representative will be granted an opportunity to lead evidence and the employer representative being allowed to cross-examine;

⁴⁰³ Public Service Commission *Poor Performance Toolkit* 14.

10. the presiding officer must give a finding on whether or not the educator has underperformed or not and must inform the educator of his or findings and reasons;
11. before deciding on the sanction, the presiding officer must give the educator an opportunity to present evidence in mitigation, while the representative of the employer may present evidence of aggravating circumstances;
12. the presiding officer must communicate the final outcome of the inquiry to the employer and educator within five working days of the conclusion of the underperformance inquiry.⁴⁰⁴

According to Joubert and Prinsloo,⁴⁰⁵ the purpose of the prescribed procedures in the EEA,⁴⁰⁶ is to ensure that the actions of the employer against that of the educator meet the requirements of substantive and procedural fairness which is discussed in Chapter 2 of this treatise.

6 3 5 THE DECISION OF THE PRESIDING OFFICER

When the procedural and substantive formalities have been finalised, the presiding officer must decide whether the allegations of poor performance against the educator have been proven or not. If not, no further action on the side of the presiding officer is required except to make known the outcome. If the presiding officer recognises that underperformance has been proven, he or she must decide what would be an appropriate sanction in the circumstances.

6 3 6 DETERMINATION OF A SANCTION

When considering an appropriate sanction, the chairperson may determine whether there are any alternatives to dismissal. Possible alternatives to dismissal include adapting the educator's current duties so that he or she is able to perform them⁴⁰⁷ or if the educator could be moved to another position or even demoted.⁴⁰⁸ These alternatives, if available, must be presented to the educator. Should the educator not accept the alternatives offered by the

⁴⁰⁴ Rossouw *Labour Relations in Education. A South African Perspective* 177-178.

⁴⁰⁵ Joubert and Prinsloo *The Law of Education in South Africa* 216-217.

⁴⁰⁶ 76 of 1998.

⁴⁰⁷ Reisner "Dismissal for Poor Performance" August 2010 <http://www.capelabour.co.za/blog/dismissal-for-poor-work-performance-2.html> (Accessed 2013-10-10).

⁴⁰⁸ Grogan *Dismissal* 323.

employer or there are not viable alternatives, the presiding officer's outcome may be one of the following sanctions:⁴⁰⁹

- counselling;
- a verbal warning;
- a written warning;
- a final written warning;
- fine not exceeding one month's salary;
- suspension without pay for a period not exceeding three months;
- demotion;
- a combination of the first five sanctions above; or
- dismissal

The obligation to consider alternatives to dismissal was put at its strongest in *Gostelow v Datakor Holdings (Pty) Ltd t/a Corporate Copolith*.⁴¹⁰ In this judgment the court stated that before dismissing an employee for incapacity, an employer should consider transfer to other suitable employment.⁴¹¹ Grogan however states that this obligation does not arise where no suitable positions are available at the time and also that an employer is not obliged to create a position for an incompetent employee.⁴¹²

It is not always necessary to dismiss employees for incapacity or for offences of misconduct. The courts have made it clear that an employer should at least allow the employee to plead in mitigation, and that the employer should at least consider the possibility of a lesser sanction.⁴¹³ Schedule 2 at section 8(2) of the EEA⁴¹⁴ therefore refers to a demotion as an alternative to a dismissal, which is agreed upon between the employer and the educator. This arises in a type of a "plea bargaining" situation and is distinguishable from the imposition of a sanction by a presiding officer as contemplated above in the Act.

According to Rossouw,⁴¹⁵ demotion is not permitted as an alternative to dismissal unless the employee consents. Referring to a Commission for Mediation and Arbitration (CCMA)

⁴⁰⁹ Sanctions are identified in s 18(3) of the Employment of Educators Act 76 of 1998.

⁴¹⁰ (1993) 14 ILJ 171 (IC).

⁴¹¹ Grogan *Dismissal* 328.

⁴¹² *Ibid.*

⁴¹³ Grogan *Dismissal* 168.

⁴¹⁴ 76 of 1998.

⁴¹⁵ Rossouw *Labour Relations in Education. A South African Perspective* 180.

outcome in *Egerton v Mangosuthu Technikon*⁴¹⁶ in which the employer transferred and demoted the employee as a disciplinary sanction. The writer do not agree with Rossouw's interpretation, since section 18(3)(g) of the EEA clearly provides for demotion as a stand-alone sanction. The subsection augments that "imposing" a sanction which clearly indicates a unilateral decision and that no consent to such a sanction is required. This point of view is supported by Grogan. He opines that demotions may be deemed fair if they are aimed at avoiding retrenchment or dismissal for incapacity,⁴¹⁷ or if the employee is demoted as a disciplinary penalty.⁴¹⁸

Should the representative of the employer request a dismissal from the presiding officer for the poor performance of an educator, the employer must prove that the dismissal is necessary, since the educator is unable to perform his or her particular duties.⁴¹⁹

6 3 7 APPEALS

The Code of Good Practice: Dismissals in the LRA⁴²⁰ makes no mention of a right to appeal. However, where an appeal is provided for in an incapacity process, it must be afforded, unless the educator waives his or her right of appeal.

When a presiding officer has found that an educator has not performed in terms of the required performance standards and has issued a sanction, the educator needs to decide whether he or she wishes to appeal the sanction or not. Generally an appeal process is only available for the plaintiff to object to a higher or independent authority, on the outcome of sanction by a presiding officer. The appeal process in education however also permits the employer the opportunity as well to appeal the sanction of a presiding officer should it not be satisfied with the sanction given by the presiding officer. Schedule 2(9)⁴²¹ grants an educator or an employer the right to appeal against a finding or sanction to the Member of the Executive Council (MEC) for Education. The MEC may decide to dismiss the appeal, substitute the sanction with a lesser sanction or with a more punitive sanction. The latter would usually be in instances where the employer has appealed against the sanction.

⁴¹⁶ (2002) 10 BALR 1047 (CCMA).

⁴¹⁷ *A-B v SA Breweries Ltd* (2001) 22 ILJ 495 (CCMA).

⁴¹⁸ Grogan *Workplace Law* 79.

⁴¹⁹ Grogan *Dismissal* 328.

⁴²⁰ 66 of 1996.

⁴²¹ Employment of Educators Act 76 of 1998.

It is submitted that this section of the EEA, which allows the employer to appeal a sanction of a presiding officer, is *ultra vires* and subject to a review if challenged by a plaintiff. The reasons for the afore-mentioned are that the employer appoints the presiding officer, who in most instances would be an employee of the employer, in this case, the department of education. Indirectly, the employer is actually appealing a decision by its' own employee and/or representative.

Should an educator be dissatisfied with the decision of the appeal authority or the presiding officer, he or she may lodge a dispute with the Education Labour Relations Council (ELRC). The ELRC will appoint an independent mediator in an attempt to resolve the dispute through a process of conciliation. If this process proves unsuccessful, an arbitrator will be appointed to adjudicate over the dispute in order to determine if the employer has followed the correct procedural and substantive processes when charging the educator for underperformance.

6 4 CONCLUSION

There is a fundamental duty on educators to provide competent performance. If educators are not capable of performing, they can be dismissed for poor performance. The process to place an educator on an underperformance programme is one of rehabilitation. The rehabilitation process consists of both informal and formal processes such as counselling and developmental initiatives, with the aim of improving the performance levels of the educator.

If an educator is still unable to meet required performance standards, the process becomes punitive and the educator will be subjected to appear before a formal inquiry that is chaired by a presiding officer. This process could lead to a dismissal of an educator. In this instance the employer must ensure that the dismissal is both procedurally and substantively fair.

As a manager, one has the responsibility to manage the performance of your educators. The management of underperformance is totally dependent on this process. This process will depend on whether the employer has properly assessed an educator in terms of the IQMS. It is therefore important that proper performance management processes are in place before addressing the performance of an educator. The two processes are directed interrelated.

CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

7 1 INTRODUCTION

The main purpose of this treatise was to determine why no educator has been dismissed for underperformance in South Africa given the huge fiscal investment in education. The performance of the system has not produced the desired results and the outcome of education is not in keeping with the substantial input.

This chapter provides a conclusion to the preceding chapters and provides an explanation regarding why no educators have been held accountable for the state of the education system by virtue of poor performance. It also provides a set of recommendations to the legislatures, role-players, administrators and stake-holders in education to improve the standard of the education system and to manage educators that do not perform and meet the required performance standards.

7 2 CONCLUSION

In attempting to understand the problems linked to the liability of public schools, it becomes evident that good governance relies on consultation and positive action plans involving all role-players. School governance is not about imposing authority on schools, but rather about removing barriers that prevent the creation of effective education for all and to co-operatively deliver quality education. These barriers include educators that do not perform to the required standards.

In the area of dismissing educators for poor performance, there has been a departure from the common law approach. Under the common law, if an educator underperforms, his/her employment contract could be terminated, on those grounds. The promulgation of the Labour Relations Act (LRA)⁴²² brought about a fair approach to dismissals for under performance. The approach centres on fairness and requires that dismissals for

⁴²² 66 of 1995.

underperformance must be for a fair reason and effected in accordance with a fair procedure i.e. such dismissals must be procedurally and substantively fair.

In terms of the LRA, fairness relating to dismissals for underperformance requires that:

- the educator should have been aware, or could have been aware, or could reasonably have been expected to be aware, of the required standard;
- the educator was given a reasonable opportunity to meet the required standard; and
- the dismissal was an appropriate sanction for not meeting the required standard.

These provisions in the LRA are aligned to international labour law requirements, i.e. International Labour Organisation (ILO) standards of dismissals. Article 4 of ILO Convention 158 requires a valid reason for an employee's services to be terminated.⁴²³

The courts have also provided guidance on whether an educator dismissed for underperformance can utilise two separate branches of law for a single act. The law does not allow the possibility of two remedies. The judgment of Mckenzie,⁴²⁴ stated that an educator that has been dismissed for underperformance cannot utilise administrative law procedures to challenge his or her dismissal if he or she has a remedy under the provisions of the labour laws. This remedy requires an educator to follow a procedure that is both procedurally and substantively fair.

There is also a direct relationship between performance management, training and development and dismissing educators that have underperformed. If performance management is not implemented correctly, a principal or supervisor will not be in a position to implement measures of a corrective nature or be able to dismiss an educator for underperformance.

In education the creation of posts is done scientifically and is not based on job content or function. There is therefore no direct job content of functions from this process that feeds into the performance management system of an educator. Job descriptions are also primarily generic with a one size fits all approach. Without a sound definitive job description,

⁴²³ ILO Convention 158. Termination of Employment Convention, 1982 http://www.ilocarib.org.tt/projects/cariblex/conventions_8.shtml (Accessed 2013-11-07).

⁴²⁴ *South African Maritime Safety Association v McKenzie* (017/09) [2010] (SCA).

there is no sound starting point for the interview or way of measuring improvements in performance. The implementation of a sound performance management starts at the beginning of the organisational development stage. The job analysis, description and specification processes amongst others, sets out the task, duties and responsibilities, personal qualities, skills and competencies required for satisfactory performance. A performance appraisal should be about the improvement and appraisal of the various tasks in the job description.⁴²⁵ This is lacking in education.

None the performance management systems/processes introduced prior to the Integrated Performance Management System (IQMS) have yielded the required results of improving learner performances. The reason for the afore-mentioned is that none of the systems have dealt with the direct performance of an educator and the learners.

The IQMS introduced in 2003, was the first performance measuring system that directly deals with the performance of educators. This system has also proved unsuccessful in improving the performance of educators and learners. In an IQMS Implementation Review in 2007, the review identified a number of shortcomings with the system. It recommended a number of proposals to improve the system, most notably, a review of the rating from a 4 point scale to a 5 point scale and the linkage between learner achievement and educator performance.

The shortcomings identified in the IQMS makes it extremely difficult to measure the performance of an educator against its primary responsibility, which is learner performance.

Another challenge that an education department experiences is that it is not necessary in a position to select and appoint their best candidates to a post. A composite arrangement exists where school governing bodies, through an interview process provide candidate recommendations to the department to make an appointment. The department however, administers the performance of the educator and could also be required to place an underperforming educator on a poor performance programme.

The discussion thus far attempts to explain why no educator has been held accountable for the state of the education system and why no educator has been dismissed for poor performance since integration of the education systems in 1994.

⁴²⁵ Trainer, A "Why do Performance Appraisals Go Wrong" December 2012 <http://www.siliconbeachtraining.co.uk/blog/performance-appraisals-training-avoiding-mistakes/> (Accessed 2013-09-01).

7 3 RECOMMENDATIONS

Raising the standards of schools and the quality of teaching and learning, should be one of the government's most important educational priorities. This implies raising the standards of achievement and attainment of learners. Children have the right to expect that the educational system will enable them to perform at the highest level. Educational institutions together with government should therefore set targets on an annual basis and seek methods to reach the set targets.⁴²⁶

Every year however, expressions of alarm and disappointment are voiced by political leaders, education specialists, media commentators in particular together with the public in general, about the poor performance of learners. Higher Education authorities and the business sector employers are dismayed by the small numbers of learners who qualify in Mathematics and Science subjects. Around 40% of the candidates who sit for the annual examinations do not achieve the pass requirements for the relatively modest National Senior Certificate (NSC). The afore-mentioned is taken to be a reflection of the poor state of teaching and learning experienced by the majority of learners. The said conclusions are borne out by all other learner assessment studies in which representative numbers of South African children have participated.⁴²⁷ The national focus on the need to uplift the education system has brought the education departments and education stakeholder bodies together in an effort to address the system's problems.⁴²⁸ While some of the initiatives introduced have improved the education system in general, such as universal access to primary schools, the initiatives introduced to improve the number of learners passing and the quality of passes have not shown any major improvement. According to the Global Competitiveness Index Report 2012-2013,⁴²⁹ South Africa ranks 133 and 146 in terms of quality of primary and secondary education respectively, and 148 (last) in terms of the quality of Mathematics and Science education in the world.⁴³⁰

The writer is of the opinion that no matter what initiatives the education system introduces to improve the number of learners passing and quality of the passes, it will not significantly improve the latter as a result of a lack of a cohesive monitoring and evaluation policy and

⁴²⁶ Northern Ireland Education Department *Target Setting: A Guide to Primary Schools* (no date) 1.

⁴²⁷ DBE *Education for All: Country Report: South Africa* (2010) 34.

⁴²⁸ DBE *Education for All: Country Report: South Africa* 38.

⁴²⁹ The Global Competitiveness Report (GCR) is a yearly report published by the World Economic Forum. The Global Competitiveness Report ranks countries based on the Global Competitiveness Index.

⁴³⁰ Schwab *The Global Competitiveness Report 2012–2013* (2012) 435, 442-443.

aspects relating to job descriptions and performance management as mentioned above. The existing systems operate largely in isolation and tend to have serious flaws.

Furthermore, unless educators are given reasonable targets to achieve, they will not know what the required standards are and therefore the education department will not be in a position to manage performance properly and thereby hold them accountable for any underperformance.

Educators that are unable to achieve the targets should be disciplined and if necessary dismissed for poor performance. The right of the child to decent education should outweigh the underperformance of the educator.

It is evident that the Department of Education got the basics wrong when they developed systems to appoint and performance manage educators. It is for these reasons that no educator has been dismissed for under and/or poor performance.

It is against the background of the afore-mentioned that the following recommendations are made, in order to identify sustainable mechanisms to monitor and improve the performance management of educators. Consequently, if they cannot achieve the reasonable targets set, or they continually underachieve, that the system has the mechanisms in place to charge an educator for underperformance.

Job Analysis, Specification and Descriptions: There should be a job analysis- specification and-description process, for each category of posts. For example, a job analysis, specification and description should be done for an accountancy post. This process would identify the requirements, job content and design for the post. It would also identify the minimum targets for the post. The job description should be adapted to the needs and circumstances of the school. The appraisal is expected to be about the improvement and appraisal of the various tasks in the job description.

Performance Management System: The performance management system that is, the IQMS, should be reviewed or amended to include the following:

- Synergy between the performance management system and strategic planning, human resource management processes, organisational culture, structure and other major organisational systems and processes;⁴³¹
- the evaluation instrument must have more specific and clear indicators;
- a link between learner achievement and educator performance;
- provide for statutory school target setting and place accountability within the school framework; and
- to increase the rating scale from a four point to a five point scale. The point of three should be norm; fewer than three should require attention and development and above three should be good or excellent.

Training and Development: The Department of Education needs to prioritise staff professional development and support systems. It needs to develop coherent plans which will incorporate an improved and strengthened training strategy. The department should, furthermore, invest more time and resources in professional development and opportunities for collaboration so that educators are provided with the means to build their capacity over time.⁴³²

The Role of Trade Unions in Performance Management: Trade unions should not be allowed to be directly involved in the drafting of a performance management system, nor should they play a role in the setting of targets. This is the responsibility of the employer and trade unions have vested interests since they represent their members. Given the context of the South African education and political landscape, unions could be consulted but the possibility of negotiation should be discouraged. The consultation process will result in an improved relationship with unions but ultimately, it is the responsibility of the employer to develop a performance management system and set reasonable targets.

⁴³¹ Saravanja "Ten common causes of failure of performance management. And how to remedy it" No date <<http://regenesys.co.za/2011/03/10-reasons-why-performance-management-fails-and-how-to-remedy-them/>> (Accessed 2013-04-24).

⁴³² Mathula "Performance Management From Resistance to IQMS- From Policy to Practice" May 2004 <www.thutong.doe.gov.za/resourcedownload.aspx?id=18280> (Accessed 2013-08-08).

Developmental Appraisal System (DAS) and Whole School Evaluation System (WSE): DAS should be scrapped altogether; the system is outdated and has been overtaken by the IQMS and Skills Development Act. The process of WSE should be intergraded with IQMS. There should be a correlation between the scores of WSE rating and the IQMS scores awarded to the principal and the schools' performance, particularly learner achievement in the Systemic Test and National Senior Certificate Examinations. The WSE scores should also be used to identify an underperforming principal. Mechanisms could be put into place immediately to increase the school's and principal's performances.

Rewards and Incentive Scheme: A reward system that acknowledges high performance and discourages low and mediocre performances must be put in place. A comprehensive and holistic reward system, which includes various rewards such as financial rewards, public acknowledgments, merit awards, greater work responsibilities as well as learning and study opportunities, should be implemented. Much greater emphasis must be given to non-monetary rewards.⁴³³

Recruitment and Selection: The current process of recruitment and selection has disempowered the employer from appointing the best candidates to a post. The provisions in the South African Schools Act should be amended in order to grant the employer the sole discretion and accountability to make appointments, since it is responsible for the remuneration of the educators' salaries, their performance appraisal and their dismissal, if they underperform. Alternatively, the selection committee of the school governing body should consist of departmental officials and school governing members when they are conducting interviews. The departmental officials should always be in the majority as they are the employer of the incumbent.

Competency Tests: The recruitment and selection process should also make provision for principals to undergo a competency test, as part of the selection process, before they are appointed in a post. This is to ensure that they fit the profile of the post and most importantly, that their developmental needs are identified up front in order for the education department to embark on a customised Individual Developmental Plan.

⁴³³ Saravanja "Ten common causes of failure of performance management. And how to remedy it" No date <http://regenesys.co.za/2011/03/10-reasons-why-performance-management-fails-and-how-to-remedy-them/> (Accessed 2013-04-24).

Probationary Periods: All newly appointed principals and educators should be appointed on probation before they are to be made permanent. During this period they should be monitored, assessed and if necessary, subjected to developmental exercises.

Orientation Programme: All newly appointed principals and deputy principals should be exposed to an orientation programme, before they take up their positions. The programme should highlight and familiarise them with the ethos and expectations of the post, the school and the community. It will also allow the principal to understand what the employer's expectations are relating to performance and targets.

Performance Contracts for Principals and Deputy Principals: Principals and deputy principals should accept accountability for their schools, which includes the performance standards of learners. They should be able to lead, shape, direct, manage, develop, manage the resources in the school, and ensure training and development needs.⁴³⁴ The principal and his or her deputies are the leaders and managers of the school. Their core performance criteria therefore cannot be identical to that of a post level 1 or 2 educator. They are the leaders in determining and shaping the lives of the future generation. They should therefore be placed on performance based contracts that includes the criteria listed above, but most importantly, be target set with clear performance targets regarding the achievement of learners.

The role of the district officials: The Education Department's should empower the district officials to manage, provide guidance and support to principals. Their performance contracts, from a functional perspective should include the performance targets of their respective schools that they are responsible for.

Incapacity for Poor Performance Toolkits: Principals and their supervisors are not necessarily trained and versed in human resource management techniques and processes. When required to charge an educator for incapacity, they may often find this challenging out of a lack of experience. To prevent this, principals should be trained in dealing with these processes. They should also be provided with a toolkit which provides them with a step by step procedure on what they should do. There should be similar kits for the chairperson/presiding officer as well as the initiator.

⁴³⁴ Smit "Wanted: Accountable Principals" 48.

In conclusion and based on the recommendations above, if the Department of Education has these structures and processes in place, managers and principals will be able to operate within an effective system that will provide them with the required resources to properly manage individual performance. If any educator underperforms, these resources, together with the toolkits, will form the basis to a successful dismissal for poor performance. Although such a dismissal will have a detrimental effect on the educator, it will be in the best interests of learners and public education in South Africa.

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