THE IMPACT OF THE LEGISLATIVE REGULATION OF INDIVIDUAL EDUCATOR PERFORMANCE ON THE DELIVERY OF QUALITY BASIC EDUCATION

BY

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SUMMARY

The study was motivated by three factors. First, the critical importance of education for each individual and our society as a whole. Secondly, the poor state of basic education in South Africa. Thirdly, the central role educators play in the delivery of quality basic education. The process of education is a means of self-actualisation and provides individuals with the opportunity to experience their full intellectual and emotional potential as well as the means to participate in societal processes. It is also valuable to society as investment in education enriches the human capital of a country, is a source of responsible adults and a driver of economic growth. For the South African society, the most important contribution of education is that it is a vehicle for transformation and one of the only societal equalisers that exist. Unfortunately, despite the importance of quality education, all learners in South Africa do not have access to education of an equal standard.

Qualified, competent, and professional educators are central to the delivery of quality basic education. This study identifies the educator as the most important role player in the delivery of quality basic education. The focus is on the employment of educators in public basic education which is defined to include school education in South Africa from grade 1 to grade 12. For purposes of the study, educator performance was defined to include the capacity and conduct of educators in delivering basic education. “Capacity” refers to the qualifications, competence, content knowledge and skills of educators whereas “conduct” refers to the professionalism and attitude of educators.

One contributing factor to the poor state of basic education is the fragmented and otherwise inappropriate legislative regulation of educator performance in South Africa. For this reason, the experience with misconduct and incapacity of educators within the current legislative framework is investigated. The approach is descriptive and analytical - both quantitative and qualitative. It includes a description of existing research and views on the prevalence and impact of misconduct and incapacity of educators in and on basic education in South Africa. This is followed by a statistical overview of the extent of the application of discipline in the basic education sector based on information from the different Provincial Departments of Education and from arbitrations conducted by the Education Labour Relations Council. The qualitative analysis of these arbitration awards is particularly important since each matter

provides insight into the application of legal principles and the exercise of discretion by the different role players responsible for addressing misconduct and incapacity in basic education. Based on these insights, deficiencies in the current system of regulation of educator performance are tabulated. This, together with comparative insights from the English experience, is used to make specific proposals for a range of legislative amendments.

OPSOMMING

Die studie is deur drie faktore gemotiveer. Eerstens, die kritieke belang van onderwys vir elke individu en ons samelewing as geheel. Tweedens, die swak toestand van basiese onderwys in Suid-Afrika. Derdens, die sentrale rol wat opvoeders speel in die lewering van gehalte basiese onderwys. Die proses van opvoeding is 'n wyse van selfaktualisering en bied individue die geleentheid om hul volle intellektuele en emosionele potensiaal te ervaar asook die middele om aan prosesse in die samelewing deel te neem. Dit is ook waardevol vir die samelewing aangesien belegging in onderwys die mensekapitaal van 'n land verryk, 'n bron is van verantwoordelike volwassenes en 'n drywer is van ekonomiese groei. Vir die Suid-Afrikaanse samelewing is die belangrikste bydrae van onderwys dat dit 'n voertuig vir transformasie is en, as sulks, dat dit een van die enigste bestaande maatskaplike gelykmakers is. Ongelukkig, ten spyte van die belang van gehalte onderwys, het alle leerders in Suid-Afrika nie toegang tot onderwys van 'n gelyke standaard nie.

Gekwalifiseerde, bekwame en professionele opvoeders is sentraal tot die lewering van 'n gehalte basiese onderwys. Hierdie studie identifiseer dus die opvoeder as die belangrikste rolspeler in die lewering van gehalte basiese onderwys. Die fokus is op die indiensneming van opvoeders in openbare basiese onderwys wat gedefinieër is om skoolonderwys in Suid-Afrika van graad 1 tot graad 12 in te sluit. Vir doeleindes van die studie word opvoederprestasie gedefinieër om die bekwaamheid en gedrag van opvoeders in die lewering van basiese onderwys in te sluit. "Bekwaamheid" verwys na die kwalifikasies, bekwaamheid, inhoudskennis en vaardighede van opvoeders terwyl "gedrag" verwys na die professionaliteit en houding van opvoeders.

Een bydraende faktor tot die swak toestand van basiese onderwys in Suid-Afrika is die gefragmenteerde en andersins onvanpaste wetgewende regulering van opvoederprestasie. Om hierdie rede word die ervaring van wangedrag en onbekwaamheid van opvoeders binne die huidige wetgewende raamwerk ondersoek. Die benadering is beskrywend en analities – beide kwantitatief en kwalitatief. Dit sluit 'n beskrywing in van bestaande navorsing en sienings oor die voorkoms en impak van wangedrag en onbekwaamheid van opvoeders in en op basiese onderwys in Suid-Afrika. Dit word gevolg deur 'n statistiese oorsig van die omvang van die toepassing van dissipline in die basiese onderwyssektor gebaseer op inligting van die verskillende Provinsiale Onderwysdepartemente en uit arbitrasies wat deur die Bedingingsraad vir

Onderwys aangehoor is. Die kwalitatiewe ontleding van hierdie arbitrasietoekennings is veral belangrik aangesien elke aangeleentheid insig bied in die toepassing van regsbeginsels en die uitoefening van diskresie deur die verskillende rolspelers wat verantwoordelik is daarvoor om wangedrag en onbekwaamheid in basiese onderwys aan te spreek. Gebaseer op hierdie insigte word tekortkominge in die huidige sisteem van regulering van opvoederprestasie getabelleer. Dit, tesame met vergelykende insigte uit die Engelse ervaring, word gebruik om spesifieke voorstelle vir 'n reeks wetswysigings te maak.

DEDICATION

I dedicate this research to my father, Frans van den Berg, who spent 40 years of his life dedicated to enriching the lives of learners through education. Through his isiXhosa nick name *umfundisi* (“priest/missionary/teacher”), he embodies the calling of a true educator.

Growing up in a rural town in the Eastern Cape made me acutely aware of the differences between my life and the lives of learners I went to school with. It also revealed to me the impact education can have in one generation. This research is dedicated to the countless learners in South Africa who are dependent on the difference education can make in their lives.

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My husband Stefan, who is my greatest supporter. You encouraged me through every setback and celebrated every victory with me. Your enthusiasm for my career never wavers and I am forever grateful for you.

My brother Francois, for his continued support and for teaching me to code on Atlas.ti. so that I could productively analyse arbitration awards. You know I value time and you saved me so much of it, thank you.

My parents, Cecile and Frans, who supported this dream of mine without hesitation. Thank you for praying for me and for helping me believe in myself.

DECLARATION

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Date: April 2022

LIST OF ABBREVIATIONS

ACAS	Advisory Conciliation and Arbitration Service
ACRWC	African Charter on the Rights and Welfare of the Child
BCEA	Basic Conditions of Employment Act 75 of 1997
BRICS	Brazil, Russia, India, China and South Africa
CADE	Convention against Discrimination in Education
CCMA	Commission for Conciliation, Mediation and Arbitration
CDE	Centre for Development and Enterprise
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
DBE	Department of Basic Education
DBS	Disclosure and Barring Service
DfE	Department for Education
DHET	Department of Higher Education and Training
DOE	Department of Education
PDE	Provincial Department of Education
ECT	Early career teacher
EEA	Employment Equity Act 55 of 1998
ELRC	Education Labour Relations Council
EOEA	Employment of Educators Act 76 of 1998
ERA	Employment Rights Act 1996
ERSA	Economic Research Southern Africa
FET	Further Education and Training
FGM	Female genital mutilation
HEQSF	Higher Education Qualifications Sub-Framework
HOD	Head of Department
HSRC	Human Sciences Research Council
IBHR	International Bill of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Covenant on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation

IPO	Interim Prohibition Order
IQMS	Integrated Quality Management System
ISCED	International Standard Classification of Education
IT	Information Technology
ITE	Initial Teacher Education
ITT	Initial Teacher Training
LADO	Local Authority Designated Safeguarding Officer
LRA	Labour Relations Act 66 of 1995
MEC	Member of the Executive Council
MRTEQ	Minimum Requirements for Teacher Education Qualifications
NEPA	National Education Policy Act 27 of 1996
NNSSF	National Norms and Standards for School Funding
NQF	National Qualifications Framework
NSC	National Senior Certificate
NSE	Norms and Standards for Educators
NSNP	National School Nutrition Programme
OHCHR	Office of the High Commissioner for Human Rights
PAJA	Promotion of Administrative Justice Act 3 of 2000
PAM	Personnel Administrative Measures
PCP	Professional conduct panel
PIRLS	Progress in International Reading Literacy Study
PSA	Public Service Act 103 of 1994
PSCBC	Public Service Co-Ordinating Bargaining Council
PTS	Professional Teaching Standards
QMS	Quality Management System
QTS	Qualified Teacher Status
REQV	Relative Education Qualification Value
SACE	South African Council of Educators
SADTU	South African Democratic Teachers Union
SASA	South African Schools Act 84 of 1996
SCA	Supreme Court of Appeal
SEA	Schools Evaluation Authority
SGB	School governing body
SHPO	Sexual harm prevention order

SMT	School Management Team
SOA	Sexual Offences Act 2003
TMU	Teacher Misconduct Unit
TQU	Teaching Qualification Unit
TRA	Teaching Regulation Agency
TVET	Technical and Vocational Education and Training
UDHR	Universal Declaration of Human Rights
ULP	Unfair labour practice
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation

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CHAPTER 1: AN INTRODUCTION TO THE STUDY OF THE IMPACT OF THE LEGISLATIVE REGULATION OF INDIVIDUAL EDUCATOR PERFORMANCE ON THE DELIVERY OF QUALITY BASIC EDUCATION

1 1 Motivation for the study

The underlying rationale for this study is located in four interrelated considerations – the importance of a quality basic education[1] for individuals and society, the poor state of basic education in South Africa, the central role educators[2] play in the delivery of a quality basic education and the current legislative regulation of the employment of educators in general and their performance in particular. To set the scene for the formulation of the study's hypothesis and the delimitation of the study in light of this hypothesis,[3] the methodology it adopts,[4] the research questions it seeks to answer,[5] and a brief overview of its content and progression,[6] each one of these considerations informing the motivation for this study is considered below.

1 1 1 The importance of a quality basic education

The importance of quality basic education in any society is generally accepted. For the individual learner it is a means of self-actualisation, for society it is a source of responsible adults and a driver of economic growth and, for South Africa specifically, it is a vehicle for transformation.[7] Education is simply too important to allow for any

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1 The meaning of the phrase "quality basic education" is explored in more detail in chapter 2 and the first part of chapter 3. See also 1 2 2 below. Suffice it to say for now that it goes beyond merely being present in a classroom and it goes beyond the mere transfer of knowledge. It should also be mentioned that s 3(1) of SASA provides for compulsory schooling from the year a learner turns 7 until they turn 15 or at the end of grade 9, whichever comes first. Despite this provision and despite uncertainty about the meaning of the phrase "basic" education, for purposes of this study (and for reasons that becomes apparent in chapter 2) it is taken to encompass primary and secondary education (education until the end of grade 12).

2 In line with the terminology used in legislation and throughout this thesis, the term "educator" is used in the South African context.

3 Paragraph 1 2.

4 Paragraph 1 3.

5 Paragraph 1 4.

6 Paragraph 1 5.

7 Each one of these factors influencing the importance of education is addressed in chapter 2.

undue deterioration in the quality thereof, even in the face of what seems like insurmountable obstacles.[8]

On an individual level, education grants each person the opportunity to experience his or her fullest human potential. The United Nations Committee on Economic, Social and Cultural Rights noted that "the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence".[9] This approach recognises that the role of education is not only to realise future work prospects, earning capacity and the ability to make a meaningful contribution to the labour market, the economy and to society. Education also plays an important psychological role, improves self-esteem and serves as a means for each person to reach his or her intellectual and emotional potential.[10] Quality education also improves the experience of each person's rights to equality and human dignity. The fulfilment of the right to a basic education grants each person the opportunity to personally enjoy and experience the full array of human rights.[11]

For any society, an investment in education enriches the human capital of a country and promotes economic growth.[12] The challenge South Africa faces, as emphasised, by the Director-General of the Treasury in the 2018 national budget review, is that "economic growth is far too low to reduce alarmingly high unemployment and inequality".[13] In a parliamentary report assessing legislation and the acceleration of

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8 JP Rossouw "The potential remedial function of the law in the deteriorating public education system of South Africa" (2013) 46 *De Jure* 285 286. Rossouw is of the opinion that the legal framework "(i)n principle does provide the necessary support for the [education] system, but the improper way in which these legal principles are put into operation currently leads to further deterioration [of the education system]".

9 UNESCO "General Comment 13: The Right to Education (Art 13 of the Covenant)" (8 December 1999) UN Doc E/C.12/1999/10.

10 This is explored further in chapter 2.

11 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), para 23; R Kruger & C McConnachie "The Impact of the Constitution on learners' rights" in T Boezaart (ed) *Child Law in South Africa* 2 ed (2018) 534 537; F Veriava & F Coomans "The right to education" in D Brand & C Heyns (eds) *Socio-economic Rights in South Africa* (2005) 57 60.

12 In the South African context, it is also one of the only ways in which poor learners may enter the services sector of the labour market. See S van der Berg, C Burger, M de Vos, G du Rand, M Gustafsson, D Shepherd, N Spaull, S Taylor, H van Broekhuizen & D von Fintel "Low quality education as a poverty trap" (2011) *Social Policy Research Group Research Project* 3 <https://resep.sun.ac.za/wp-content/uploads/2012/10/2011-Report-for-PSPPD.pdf> (accessed 14-11-2021). See also M Gustafsson "The when and how of leaving school: The policy implications of new evidence on secondary schooling in South Africa" (2011) *Working Papers No 09/11, Stellenbosch University, Department of Economics.*

13 National Treasury of the Republic of South Africa "Budget Review 2018" (21-02-2018) *National Treasury* <http://www.treasury.gov.za/documents/national%20budget/2018/review/FullBR.pdf> (accessed 19-07-2018) vii.

change, the High-Level Panel noted the importance of developing South Africa's human resources.[14] Focusing governmental resources on the increase of the knowledge and skills of citizens will add to the wealth of the country and lead to economic growth.[15] The High-Level Panel referred to poverty, unemployment and inequality in South Africa as "the triple challenge".[16] The growth of the economy is dependent on the alleviation of the triple challenge. It is clear from recent reports that progress in this respect is staggeringly slow[17] and characterised by structurally ingrained and exceedingly high levels of unemployment.[18]

The current levels of unemployment link to the findings of the High-Level Panel that South Africa is faced with a structural mismatch between labour supply and demand.[19] The primary industries (that is, agriculture, mining, forestry, fishing and quarrying) have historically driven South Africa's economy.[20] However, there has been a drastic shift towards the tertiary sector (services)[21] as the driver of the economy.[22] This indicates that the economy is increasingly knowledge-based, which requires high-

[14] High Level Panel "High Level Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change" (2017) *Parliament of South Africa* 8 <https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf> (accessed 15-11-2021).

[15] High Level Panel "High Level Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change" *Parliament of South Africa* 8.

[16] High Level Panel "High Level Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change" *Parliament of South Africa* 32.

[17] In the second quarter of 2021, the economy grew by 1,2%. It should be noted that despite this growth, the Covid-19 pandemic has negatively impacted the South African economy and it is still 1,4% smaller than prior to the pandemic. See Statistics South Africa "The economy grows by 1,2% in Q2:2021" (07-09-2021) *Statistics South Africa* <http://www.statssa.gov.za/?p=14660> (accessed 15-11-2021).

[18] Statistics South Africa reports the unemployment rate to be 34,4% in the second quarter of 2021. Statistics South Africa "Media release: Quarterly Labour Force Survey (QLFS) Q2:2021" (24-08-2021) *Statistics South Africa* <http://www.statssa.gov.za/publications/P0211/Media%20release%20QLFS%20Q2%202021.pdf> (accessed 15-11-2021).

[19] High Level Panel "High Level Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change" *Parliament of South Africa* 126.

[20] BRICS "BRICS Joint Statistical Publication 2017" (2017) *BRICS* <http://www.brics2018.org.za/statistics> (accessed 10-07-2021) 55.

[21] According to BRICS "BRICS Joint Statistical Publication 2017" *BRICS* 55, the tertiary sector of the economy refers to "Wholesale, retail and motor trade, catering and accommodation; Transport, storage and communication; Finance, real estate and business services. General government and Personal services".

[22] W Blankley & I Booyens "Building a Knowledge Economy in South Africa" (2011) *HSRC Centre for Science, Technology and Innovation Indicators* <http://www.hsrc.ac.za/en/review/March-2011/knowledge-economy> (accessed 3-05-2019).

skilled workers. Instead, the country has a surplus of low- and semi-skilled workers.[23] Chapter 2 reveals that this mismatch is a result of the education system not meeting the desired outcomes to promote economic growth.

This is despite the fact that the education sector receives the largest portion of the national budget[24] and that expenditure on education (as a percentage of public expenditure) exceeds the levels of other developing countries.[25] South Africa is consistently investing more of its gross domestic product ("GDP") in education than any of the other BRIC emerging economies.[26] Furthermore, despite the pro-poor shift in education expenditure since 1994,[27] weak educational outcomes place strain on economic growth and equality.[28] The lack of a skilled workforce is one of the impediments to international investment, which emphasises the wider impact of a dysfunctional education system.[29] Aside from the personal growth brought about by education, education is crucial to the economic success of a country and has rightfully been described as an essential prerequisite for addressing poverty and unemployment.[30]

For South Africa in particular, education is a transformative tool since it has the potential to grant each person the opportunity to make a meaningful contribution to a free and equal society without discrimination. Apartheid classified citizens according to their physical characteristics, but education offers each person the opportunity to

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[23] High Level Panel "High Level Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change" *Parliament of South Africa* 126. See also N Spaull "Schooling in South Africa: How low-quality education becomes a poverty trap" in A de Lannoy, S Swartz, L Lake and C Smith (eds) *South African Child Gauge* (2015) 34 38.

[24] National Treasury "Budget 2021 Review" (2021) *National Treasury* 59 <http://www.treasury.gov.za/documents/National%20Budget/2021/review/FullBR.pdf> (accessed 13-11-2021).

[25] The share of public expenditure on education in South Africa was 6.9% of GDP in 2015, compared to India's 2.7% of GDP in 2017, Brazil's 6.2% of GDP in 2015, Russia's 3.7% of GDP in 2019 and China's 4.0% of GDP in 2019. See BRICS "BRICS joint statistical publication" (2020) *BRICS* 12 <https://eng.brics-russia2020.ru/images/132/34/1323459.pdf> (accessed 16-10-2021).

[26] BRICS is an acronym referring to the following emerging economies: Brazil, Russia, India, China and South Africa. BRICS "BRICS joint statistical publication" (2020) *BRICS* 12.

[27] J Seekings "Trade unions, social policy & class compromise in post-apartheid South Africa" (2004) 31 *Review of African Political Economy* 299 302-303; G Wills *An economic perspective on school leadership and teachers' unions in South Africa* PhD Dissertation, Stellenbosch University (2016) 1. Wills argues, however, that increased resources will not address systemic problems or be their solutions.

[28] South Africa's educational outcomes are discussed in chapter 2.

[29] M Cohen "SA spends higher proportion of budget on education than US, UK" (05-01-2017) *Fin24* <https://www.fin24.com/Economy/sa-spends-more-on-education-than-us-uk-and-germany-20170105> (accessed 19-07-2018). Government bureaucracy and restrictive labour regulations are reported to be two other reasons deterring investment in South Africa.

[30] High Level Panel "High Level Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change" *Parliament of South Africa* 140.

be actively part of the labour market regardless of their race. The importance of education as a transformative tool has been recognised in a number of court cases. For example, in *Governing Body of Rivonia Primary School v the MEC for Education: Gauteng Province* ("*Rivonia*")[31] Mbha J stated that the right to education is "an empowerment right that enables people to realise their potential and improve their conditions of living".[32] Similarly, in *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* ("*Ermelo*")[33] Moseneke DCJ emphasised that the deeply rooted inequalities due to South Africa's past cannot be eradicated without equitable access to education of an equal quality.[34]

At the same time, poverty in South Africa has become entrenched through generations and research shows that a lack of quality education perpetuates these circumstances.[35] Although it is recognised that social and cultural factors play a role, there is a connection between wealth and education and for most poor learners access to quality education is simply not within their reach.[36] Education can therefore only be a transformative tool if the quality of education delivered makes a valuable contribution to the lives of learners by giving them the skills to escape intergenerational poverty.

1 1 2 The poor state of basic education in South Africa

The Department of Basic Education ("DBE") reported in 2013 that 99% of children of (compulsory) school-going age were enrolled in an educational institution, which is

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31 2012 1 All SA 576 (GSJ).

32 *Governing Body of Rivonia Primary School v the MEC for Education: Gauteng Province* para 26; A Skelton "The role of the courts in ensuring the right to a basic education in a democratic South Africa: a critical evaluation of recent education case law" (2013) *De Jure* 1 18; UNESCO "General Comment 13: The Right to Education (Art 13 of the Covenant)" (8 December 1999) E/C.12/1999/10.

33 2010 2 SA 415 (CC).

34 *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo* Para 2.

35 Spaull "Schooling in South Africa: How low-quality education becomes a poverty trap" in *South African Child Gauge* 34.

36 Van Der Berg, S, C Burger, R Burger, M De Vos, G Du Rand, M Gustafsson, E Moses, D Shepherd, N Spaull, S Taylor, H Van Broekhuizen & D Von Fintel "Low quality education as a poverty trap" (2011) *Working Papers No 25/*11, Stellenbosch University, Department of Economics 1. The authors refer to "social mobility" as the combination of factors leading to wealth.

remarkable progress in increasing the availability of basic education in South Africa.[37] However, the significant increase in the availability of basic education since 1994 has not translated to the delivery of quality basic education or education of an equal standard in public schools. Spaull describes education in South Africa to be "a tale of two systems",[38] referring to the country's history of segregated education and so-called "white" and "black" schools,[39] which continues to affect the delivery of quality basic education today.[40] Consistency in educational quality therefore remains a challenge as there are highly functional (usually previously white schools) and dysfunctional schools (usually previously black schools) in one system. This means that an education system once segregated by race became a division by social class and wealth resulting in a failure of poor children reaching and thriving in the labour market.[41] The legacy of apartheid continues to be evident even though schools are now racially integrated.[42] The inequality in educational outcomes and the delivery of quality basic education becomes clear when considering that learners attending the poorest 60% of schools fall behind from the start of their school career and, in terms

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[37] Department of Basic Education "Macro Indicator Report" (2013) *Department of Basic Education* <https://www.education.gov.za/Portals/0/Documents/Reports/Macro%20Indicator%20Report%20October%202013.pdf?ver=2015-01-30-131458-227> (accessed 08-08-2018). It should be noted that this number only reflects enrolment at primary and lower secondary school level. UNICEF reports that "in 2017, only 1 per cent of 7–15-year-olds did not attend an education institution. The percentage jumped to 14 per cent of 16–18-year-olds". See UNICEF "Basic education brief: South Africa 2019/20" (2020) *UNICEF* 5 <https://www.unicef.org/esa/media/4981/file/UNICEF-South-Africa-2019-2020-Education-Budget-Brief.pdf> (accessed 15-11-2021).

[38] N Spaull "Education in SA: A tale of two systems" (31-08-2012) *Politicsweb* <http://www.politicsweb.co.za/news-and-analysis/education-in-sa-a-tale-of-two-systems> (accessed 07-08-2018).

[39] Under apartheid, schools were categorised as "white" or "black" schools. Even though schools in a democratic South Africa are no longer divided by race, this legacy continues to impact the quality of education delivered to learners attending formerly "black schools". The reason for this is that there was an unequal distribution of resources and in the training of educators between formerly black and white schools. See, eg, *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) para 46.

[40] Spaull "Education in SA: A tale of two systems" (31-08-2012) *Politicsweb* See also, S van der Berg & M Gustafsson "Educational outcomes in post-apartheid South Africa: Signs of progress despite great inequality" in N Spaull & JD Jansen *South African Schooling: The enigma of inequality* (2019) 25 25. See also See S van der Berg "Apartheid's enduring legacy: Inequalities in education" (2007) 16 *Journal of African Economies* 849.

[41] Van der Berg (2007) *Journal of African Economies* 850; The Economist "South Africa has one of the world's worst education systems" (07-01-2017) *The Economist* <https://www.economist.com/middle-east-and-africa/2017/01/07/south-africa-has-one-of-the-worlds-worst-education-systems> (accessed 20-07-2018).

[42] Spaull "Schooling in South Africa: How low-quality education becomes a poverty trap" in *South African Child Gauge* 34.

of learning, are three years behind their peers attending affluent schools by the time they reach grade 3.[43]

As mentioned, the tertiary (services) sector is the driver of the South African economy, but there is a shortage of high-skilled workers. A distorted picture of our educational outcomes is conveyed when the number of learners who drop out of school before reaching grade 12, and the number of progressed learners,[44] who write the National Senior Certificate ("NSC") examinations, are excluded from the pass rate.[45] Spaull uses the class of 2014 to illustrate the effect of these educational outcomes on society:

> "Of the 100 learners who started school in 2003, for example, only 49 made it to matric in 2014; 37 passed; and 14 qualified to go to university. Importantly, not all of those who qualify to go to university are accepted or enroll, and only half of those that initially enroll will eventually graduate".[46]

The high NSC examination ("matric") pass rate is widely publicised each year, but educational outcomes need to be analysed holistically. Using the above example and further research done by Spaull, only 40% of any given cohort pass the NSC examinations and therefore complete their schooling career.[47] The reality is, and this

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[43] Spaull "Schooling in South Africa: How low-quality education becomes a poverty trap" in *South African Child Gauge* 36; A Zoch "Life chances and class: Estimating inequality of opportunity for children and adolescents in South Africa" (2015) 32 *Development Southern Africa* 57 71. This connects with research done on the influence of class and socio-economic background on life chances and future prospects of children from low-income households.

[44] The DBE defines progression as "the advancement of a learner from one grade to the next, excluding Grade R, in spite of the learner not having complied with all the promotion requirements …". See Department of Basic Education "National Policy Pertaining to the Programme and Promotion Requirements of the National Curriculum Statement Grades R – 12" (2012) *Department of Basic Education* <https://www.education.gov.za/Portals/0/Documents/Policies/PolicyProgPromReqNCS.pdf?ver=2015-0> (accessed 02-05-2021).

[45] Equal Education "Matric Results an Indicator of Primary Schooling in Crisis" (04-01-2017) *Equal Education* <https://equaleducation.org.za/2017/01/04/matric-results-an-indicator-of-primary-schooling-in-crisis/#_ftnref1> (accessed 02-05-2021).

[46] Spaull "Schooling in South Africa: How low-quality education becomes a poverty trap" in *South African Child Gauge* 36.

[47] Spaull "Schooling in South Africa: How low-quality education becomes a poverty trap" in *South African Child Gauge* 36.

is confirmed by the high unemployment rate amongst the youth,[48] that 60% of South Africa's youth have little to no educational qualifications.[49]

While this is discussed in more detail in subsequent chapters, what may also be mentioned here is that the number of learners who qualify to study mathematics or science at university is low. Considering the impact of low-quality education, especially in disadvantaged schools that predominantly serve black learners, the number of black learners who qualify for such degrees is even lower. Taking into account the drop-out rate and the number of learners who fail the NSC examinations, only 1 in 200 black children who start school will qualify for mathematics or science degrees.[50] Spaull concludes that the averages of matric results communicated to the public overestimate the performance of the majority of learners as the 25% who excel raise the exceptionally weak performance of the remaining 75%.[51] The reality of these statistics is thus even more alarming when one considers the quality of education received by the 40% who are fortunate enough not to fall through the cracks. For the learners who do pass the NSC examination, the question is whether they can contribute to a skills-driven labour market. The short answer to this question – as explored in subsequent chapters – is no. The poor state of basic education simply adds to the importance and urgency of the proposed study.

1 1 3 The role of the educator in delivering a quality basic education

Immediately, it has to be acknowledged that the delivery of quality basic education depends on various factors and the input of many role players, all of which warrant continuous research and policy reform. These factors include accountable and professional management, sufficient learning materials, completion of the curriculum

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[48] Statistics South Africa categorises persons between the age of 15 and 34 years as "youth". The unemployment rate of the youth in South Africa was 46.3% in the first quarter of 2021. Statistics South Africa "Media release: Quarterly Labour Force Survey (QLFS) Q1:2021" (01-06-2021) *Statistics South Africa* <https://www.statssa.gov.za/publications/P0211/Media%20release%20QLFS%20Q1%202021.pdf > (accessed 15-11-2021).

[49] Spaull "Schooling in South Africa: How low-quality education becomes a poverty trap" *South African* in *Child Gauge* 36; The fact that the country's youth is largely uneducated is a reason why so many simply have no other choice but to be employed in the informal economy and this is worth noting as it illustrates how many workers work in circumstances with no legislative oversight. See N Smith & E Fourie "Perspectives on extending protection to atypical workers, including workers in the informal economy, in developing countries" (2009) 3 *TSAR* 516 517.

[50] Spaull "Education in SA: A tale of two systems" (31-08-2012) *Politicsweb*.

[51] Spaull "Education in SA: A tale of two systems" (31-08-2012) *Politicsweb*.

and a culture of teaching and learning in a school.[52] It is not the purpose of this study to investigate every contributing factor.[53] At the same time, it is safe to say the educator may be identified as the most important link in the chain, more important than any other educational resource.[54] As such, the purpose of this study is to focus on the role of around 400 000 educators in the South African public education system. The importance of the educator is also recognised by the DBEs Action Plan to 2019: Towards the Realisation of Schooling 2030, which identifies a number of goals the public education system aims to achieve by 2030.[55] This includes that an adequate supply of qualified educators is attracted to the profession and the professionalism and professional development, teaching skills, subject content knowledge and computer literacy of educators are enhanced.[56] Mindful of the importance of education, the integral role of an educator in delivering that education is probably best described by England's Department for Education in its statement that "teachers inspire children, raising their eyes to a world of possibility and supporting them to fulfil their potential".[57]

It should be acknowledged that educators in South Africa often work in challenging circumstances. Educators are also expected to at least have content knowledge of their subjects, understand the curriculum and have pedagogical knowledge as to how it should be implemented in the classroom through learning activities in a manner that

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[52] Spaull "Education in SA: A tale of two systems" *Politicsweb*. These performance indicators include: accountability; school management; culture of learning, discipline and order; Learning and Teaching Support Materials ("LTSM"); teacher content knowledge; teacher absenteeism; covering of the curriculum, weekly homework and frequency of testing; repetition and drop-out rate and, lastly, learner performance.

[53] D Isaacs & J Maserow "Introduction" in D Isaacs & J Maserow (eds) *Taking Equal Education into the Classroom* (2015) 4 <https://equaleducation.org.za/wp-content/uploads/2016/08/EE-in-the-classroom_EBook.pdf> mention a few of these factors such as socio-economic circumstances, infrastructure, availability of educational tools and materials, qualifications and experience of educators, accountable school management, parent involvement, efficiency of school governing bodies and a willingness amongst children to learn, which are all factors influencing education outcomes. These are not, however, the only factors that influence the quality of education.

[54] Spaull "Education in SA: A tale of two systems" (31-08-2012) *Politicsweb*; Wills *School leadership and teachers' unions* (2016) 15; L Smit "Wanted: Accountable Principals" (undated) *Helen Suzman Foundation* 46 <https://hsf.org.za/publications/focus/focus-68/%289%29%20Louise%20Smith.pdf> (accessed 14-11-2021).

[55] Department of Basic Education "Action Plan to 2019: Towards the realisation of Schooling 2030" (11-11-2015) *Department of Basic Education* <https://www.education.gov.za/Portals/0/Documents/Publications/Action%20Plan%202019.pdf?ver=2015-11-11-162424-417> (accessed 22-05-2021).

[56] Department of Basic Education "Action Plan to 2019: Towards the realisation of Schooling 2030" (11-11-2015) *Department of Basic Education* 32-40

[57] Department for Education "Teacher Recruitment and Retention Strategy" (2019) *Department for Education* 4 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786856/DFE_Teacher_Retention_Strategy_Report.pdf> (accessed 02-08-2021).

conveys the content to learners in a way they understand.[58] There most certainly are outstanding educators in South Africa's public schools who go beyond the call of duty despite a challenging work environment.[59]

At the same time, the potential negative impact of educator capacity and conduct (as the constituent elements of educator performance) is self-evident. As far as capacity is concerned, South Africa already faces a historical challenge. The same inequalities that exist amongst poor and wealthy schools exist in the training of educators. During apartheid, the qualifications received by black educators were inferior to their white counterparts.[60] The number of teachers produced annually[61] to enter the profession, coupled with the failure of the education system to retain adequately qualified and experienced educators, result in a mismatch of educator supply, especially to under-resourced schools.[62] The effect is that well-resourced schools (that are in a position to charge school fees additional to government funding) attract experienced and qualified educators placing them in a position to deliver quality education.[63] In contrast, the pool of candidates that apply to under-resourced schools is simply smaller, less qualified and inexperienced.[64] This explains, to a certain extent, why South African schools perform worse than the rest of the continent even though the country has greater resources, is less impoverished and has more educated parents.[65]

Existing research shows a shared concern about the magnitude of incapacity and misconduct in the basic education sector. While a report published by the Centre for

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[58] See N Taylor "Inequalities in Teacher Knowledge in South Africa" in N Spaull & J Jansen (eds) *South African Schooling: The Enigma of Inequality* 263 263.

[59] J Jansen "Personal reflections on policy and school quality in South Africa: When the politics of disgust meets the politics of distrust" in Y Sayed, A Kanjee & M Nkomo (eds) *The search for quality education in post-apartheid South Africa* (2013) 81 82-83.

[60] M Lajewski "South Africa's teaching profession: A look at the past, present and future" in J Maserow & D Isaacs (eds) *Taking Equal Education into the Classroom* (2010) 19.

[61] See JD Jansen "Changes and continuities in South Africa's higher education system, 1994 to 2004" in L Chrisholm (ed) *Changing Class* (2004) 293 296.

[62] Seekings (2004) *Review of African Political Economy* 305; J Maserow "Teachers by numbers: Finding a way in" in J Maserow & D Isaacs (eds) *Taking Equal Education into the Classroom* (2010) 67; H van Broekhuizen "Teacher supply in South Africa: A focus on initial teacher education graduate production" (2015) *No 07/2015, Working Papers from Stellenbosch University, Department of Economics* 83 <https://www.ekon.sun.ac.za/wpapers/2015/wp072015/wp-07-2015.pdf> (accessed 07-08-2018).

[63] See, eg, J Deacon "Are Fixed-Term School Governing Body Employment Contracts for Educators the Best Model for Schools?" (2013) *De Jure* 63-75.

[64] Lajewski "South Africa's teaching profession: A look at the past, present and future" in *Taking Equal Education into the Classroom* 25.

[65] Van der Berg (2007) *Journal of African Economies* 850-854.

Development and Enterprise ("CDE") found that around 81% of educators in South Africa are adequately qualified,[66] a qualified educator is not necessarily good or competent.[67] Furthermore, for any qualification to carry any weight, the educator at least needs to be present in the classroom, utilise instructional time and have the necessary pedagogical content knowledge.[68] In this regard, research shows that educators in South Africa have a high annual leave and absenteeism rate and, even when present, there is a waste of instructional time. On one conservative estimate, South African educators take around 20 to 24 working days' leave per year.[69] This in itself is not problematic (educators are entitled to annual leave).[70] The problem is that these days do not refer to leave taken during institutional closures,[71] but to days where

[66] A Bernstein (ed), J Hofmeyr, K Draper, C Simkins, R Deacon and P Robinson "Teachers in South Africa: Supply and demand 2013 to 2025" (2015) *Centre for Development and Enterprise* 17 <https://www.cde.org.za/wp-content/uploads/2018/07/Teacher-Supply-and-Demand-2013-2025-Full-Report-March2015-CDE.pdf> (accessed 14-11-2021); JL Beckmann "Competent Educators in Every Class: The Law and the Provision of Educators" (2018) 43 *JJS* 13. The qualification requirements for educators are discussed in Chapter 5. Adequately qualified as used here refers to the education qualification requirements in terms of the NQF Act.

[67] See Bernstein et al "Teachers in South Africa: Supply and demand 2013 to 2025" (2015) *Centre for Development and Enterprise* 11; Beckmann (2018) 43 *JJS* 2, 4; See also S Masondo "Education in South Africa: A system in crisis" (2016) *City Press* <https://www.news24.com/citypress/News/education-in-south-africa-a-system-in-crisis-20160531> (accessed 22-05-2021).

[68] The HSRC's study of official leave taken by educators estimates that conservatively each educator takes 20 to 24 working days leave a year. This, together with reports showing wasted learning time by educators who are present in the classroom but fail to teach their learners point to a bigger issue in regard to educator capacity and competence. V Reddy, C Prinsloo, T Netshitangani, R Moletsane, A Juan & D Janse van Rensburg "An investigation into educator leave in the South African ordinary public schooling system" (2010) *HSRC (commissioned by UNICEF*) 84 <http://www.hsrc.ac.za/uploads/pageContent/593/AnInvestigationintoEducatorLeavedec2010.pdf> (accessed 14-05-2021).

[69] Educators are entitled to the following types of leave in terms of chapter H of the Personnel Administrative Measures ("PAM") GN 170 in *GG* 39684 of 12-02-2016: annual leave, sick leave, temporary incapacity leave and permanent incapacity leave (which is subject to the employer's discretion), occupational injury and disease leave, special leave for quarantine purposes, maternity, pre-natal and paternity leave, adoption and surrogacy leave, family responsibility leave and special leave for urgent private affairs, special leave for professional and personal development and for religious observances, study purposes, examination purposes, participating in sporting, cultural and other events and for extraordinary circumstances. See also Reddy et al "An investigation into educator leave in the South African ordinary public schooling system" (2010) *HSRC (commissioned by UNICEF*) 84. It should be noted that PERSAL data calculates the leave rate much lower and at 3-4% but the under recording of leave may be due to educators failing to complete leave forms and a failure to capture leave on PERSAL.

[70] See s 20 of the BCEA. Educators as any other employee, are entitled to annual leave. In terms of item 4.3 of Chapter H of the Personnel Administrative Measures ("PAM"), an educator with less than 10 years' service is entitled to 22 working days leave per annum. See Personnel Administrative Measures (PAM) GN 170 in *GG* 39684 of 12-02-2016.

[71] In terms of Item 2 of Chapter J of PAM educators are regarded to be on annual leave during institution closures.

leave results in a probable loss of instructional time.[72] Furthermore, leave rates are highest in disadvantaged schools.[73] It is reported that grade 6 mathematics educators are absent for an average of nineteen working days per year.[74] In five of the nine provinces in South Africa, educators were absent for more than a month (more than twenty working days) in a year.[75] Even where educators are present at school, they are not necessarily teaching.[76]

Furthermore, Taylor notes that pedagogical and disciplinary knowledge of education is the foundation for quality teaching and learning.[77] He emphasises that this basic precondition for the delivery of quality basic education lacks in the majority of educators in South Africa.[78] Standardised testing reveals that the subject content and pedagogical knowledge of educators in South Africa are poor.[79] Taylor also points to the far-reaching effects of educators with poor English reading comprehension,[80] a reality that places severe constraints on transferring difficult concepts to learners in any subject.

Closely related to the capacity of educators – and, like capacity, an integral part of educator performance – is the conduct of educators. Experts in the field of education

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[72] Chapter B of PAM makes provision for the substitution of educators who are on leave. However, this policy can only be used if educators' leave is predetermined, such as maternity leave. See also Reddy et al "An investigation into educator leave in the South African ordinary public schooling system" (2010) *HSRC* 6.

[73] Reddy et al "An investigation into educator leave in the South African ordinary public schooling system" (2010) *HSRC* 84.

[74] N Spaull "Primary school performance in Botswana, Mozambique, Namibia and South Africa" (2011) *SACMEQ Working Paper No 8* 45 <http://www.sacmeq.org/sites/default/files/sacmeq/publications/08_comparison_final_18oct2011.pdf> (accessed 14-05-2021).

[75] These provinces were the "Eastern Cape (20.8 days), KwaZulu-Natal (24.6 days), Limpopo (20.3 days), Mpumalanga (20.8 days), and North West (22.1 days)". N Spaull "Primary school performance in Botswana, Mozambique, Namibia and South Africa" (2011) *SACMEQ Working Paper No 8* 45.

[76] Jansen "School Quality in South Africa" in *The Search for Quality Education in Post-apartheid South Africa* 83; Masondo "Education in South Africa: A system in crisis" (2016) *City Press*.

[77] N Taylor "Inequalities in teacher knowledge in South Africa" in N Spaul & JD Jansen (eds) *South African Schooling: The Enigma of Inequality* (2019) 263 263.

[78] 263.

[79] Beckmann (2018) 43 *JJS* 24; Bernstein et al "Teachers in South Africa: Supply and demand 2013 to 2025" (2015) *Centre for Development and Enterprise* 3; N Spaull "South Africa's Education Crisis: The quality of education in South African 1994-2011" (2013) *Centre for Development and Enterprise* 24-30 < https://www.section27.org.za/wp-content/uploads/2013/10/Spaull-2013-CDE-report-South-Africas-Education-Crisis.pdf> (accessed 15-11-2021).

[80] Taylor "Teacher knowledge" in *South African Schooling: The Enigma of Inequality* (2019) 269.

law have long written on challenges around the misconduct of educators.[81] This research shows, for example, that sexual misconduct by educators towards learners remains a particular challenge.[82] Violence,[83] assault and corporal punishment[84] have also been investigated. And, as far as educator absence is concerned, the earlier discussion already mentioned the challenge posed by the lawful absences of educators. This is exacerbated by unauthorised absences. This thesis shows that the unauthorised absence and abscondment[85] of educators are regularly considered at formal disciplinary enquiries.[86] However, these enquiries represent only the tip of the iceberg as they include only those instances where the absenteeism or abscondment by educators was of such a nature that it warranted formal disciplinary steps. The number of infractions is in all probability much higher if one takes into account every single instance of unauthorised absence in schools across South Africa. In this regard, Jansen[87] points to the development of an adversarial culture[88] in certain schools resulting in frequent absences. In these cases, it is doubtful that absence is properly

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81 See, eg, JP Rossouw & E de Waal "Employer tolerance with educator misconduct versus learners' rights" (2004) 24 *South African Journal of Education* 284-288; JP Rossouw "Decentralisation in South African public schools: A labour law perspective on the role of the principal in managing staff misconduct" (2001) 19 *Perspectives in Education* 123-136; JP Rossouw "The potential remedial function of the law in the deteriorating public education system in South Africa" (2013) *De Jure* 285-309.

82 K Calitz & C de Villiers "Sexual abuse of pupils by teachers in South African schools: The vicarious liability of education authorities" (2020) 137 *SALJ* 72-107; E de Waal & RD Mawdsley "Student/learner allegations of teacher sexual misconduct: A teacher's right to privacy and due process" (2011) *De Jure* 74-100; A de Wet & I Oosthuizen "The nature of learner sexual harassment in schools: an education law perspective" (2010) 42 *Acta Academica* 194-229; SA Coetzee "Law and policy regulating educator-on-learner sexual misconduct" (2012) *Stell LR* 76-87; SA Coetzee "Victim rights and minimum standards for the management of learner victims of sexual misconduct in South African schools" (2013) 14 *Child Abuse Research: A South African Journal* 37-48; SA Coetzee "Educator sexual misconduct: Exposing or causing learners to be exposed to child pornography or pornography" (2015) 18 *PELJ* 2108-2139; SA Coetzee "Holding the state directly liable for educator-on-learner sexual abuse" (2018) 19 *Child Abuse Research: A South African Journal* 30-44; SA Coetzee "Promoting fair individual labour dispute resolution for South African educators accused of sexual misconduct (part 1)" (2021) 29 *Journal of South African Law* 29-42.

83 C de Wet "Educators as perpetrators and victims of school violence" (2007) 20 *Acta Criminologica* 10-42.

84 M Reyneke "Educator accountability in South Africa: Rethink section 10 of the South African Schools Act" (2018) 43 *JJS* 117-144.

85 As to the difference between unauthorised absence and abscondment, see chapter 6 below.

86 In chapter 6.

87 Jansen "School quality in South Africa" in *The Search for Quality Education in Post-apartheid South Africa* (2013) 82-84.

88 According to Jansen, this so-called adversarial culture in some schools is political in nature. He states that "[t]he adversarial culture finds political accommodation in the strong organisational base provided by the largest teachers' union, the South African Democratic Teachers Union, or SADTU". See Jansen "School quality in South Africa" in *The Search for Quality Education in Post-apartheid South Africa* (2013) 86. See also chapter 6.

managed in many schools, meaning the problem is probably bigger than available statistics reveal.

1 1 4 The current regulation of educator performance

According to Beckmann, the quality of the legal framework and its implementation[89] largely determine the quality of the educator[90] and, by implication, the quality of education. Any focus on the regulation of the employment of educators has, as a point of departure, to account for the three dimensions of the regulation of any employment relationship – the individual dimension, the collective dimension and the dispute resolution dimension. These dimensions do not represent watertight compartments. And, while serious reservations have been expressed about the impact of the collective dimension of the regulation of educators on the delivery of quality basic education,[91] this will not be the focus of the research. The focus is on the individual dimension of the relationship and, within that context, on the regulation of individual educator performance. The aim of the proposed study is thus to investigate the influence of one factor – the legislative regulation of individual educator performance – on the delivery of quality basic education. The discussion will of necessity include

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89 Unfortunately, according to Beckmann, the implementation of the legal framework lacks in many respects. This can also be seen from the analysis of ELRC arbitration awards in chapter 6 below in regard to addressing misconduct and incapacity in the sector. See Beckmann (2018) *JJS* 1-31.

90 Beckmann (2018) *JJS* 2, 4.

91 The collective dimension would relate to the regulation and functioning of trade unions and collective bargaining (inclusive of strikes) in the education sector. See, eg, L Govender "Teacher unions' participation in policy making: A South African case study" (2015) 45 *Compare: A Journal of Comparative and International Education* 184 184; Report of the Director-General "Freedom of association in practice: Lessons learnt" (2008) *International Labour Conference* <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_096122.pdf> (accessed 10-09-2018); R Davis "SADTU: SA's most controversial trade union faces human rights probe" (2017) *Daily Maverick* <https://www.dailymaverick.co.za/article/2017-05-11-sadtu-sas-most-controversial-union-faces-human-rights-probe/> (14-09-2018); MM Botha "Responsible unionism during collective bargaining and industrial action: Are we ready yet?" (2015) *De Jure* 328 330; Wills *School Leadership and Teachers' Unions* (2016) 11, 172; J de Clercq "Professionalism in South African education: The challenges of developing teacher professional knowledge, practice, identity and voice" (2013) *Journal of Education* 1-23; G Whittles "SADTU, Basic Education in tense stand-off over ANA's" (2015) *Eyewitness News* <https://ewn.co.za/2015/11/26/Will-ANAs-continue-with-major-union-participation> (accessed 22-08-2018); J Heystek "Principals' perceptions of the motivation potential of performance agreements in underperforming schools" (2015) 2 *South African Journal of Education* 1-10; T Zengele "Have trade unions taken over the South African education system? Redeployment in progress" (2013) 2 *West East Journal of Social Sciences* 88 89; J Volmink et al "Report of the ministerial task team appointed by Minister Angie Motshekga to investigate allegations into the selling of posts of educators by members of teachers' unions and departmental officials in provincial education departments" (2016) *Department of Basic Education* <https://www.gov.za/documents/report-ministerial-task-team-appointed-minister-angie-motshekga-investigate-allegations> (accessed: 22-03-2018).

consideration of developments and influences in the collective sphere – such as the impact of collective agreements relating to educator performance and the impact of trade union activity on the application of discipline.

The regulation of educator performance starts with international recognition, promotion and description of a right to a free and compulsory basic education, albeit adapted in each country to accord with its specific cultural and historical context.[92] The Universal Declaration of Human Rights of 1948 ("UDHR")[93] first extended this right in its article 26, a right subsequently reaffirmed (and, to some extent, expanded on) in other international instruments (all to be considered in this study). Importantly, these instruments also serve as guides to the content of a quality basic education, which of necessity impacts on the role of educators. Notable in this regard was the development by the former Special Rapporteur of the Commission of Human rights at the United Nations, Katarina Tomaševski, of a framework for "meaningful education" built around the so-called four A-scheme - availability, accessibility, acceptability and adaptability.[94] This was done on the premise that education by implication has to be meaningful and to give content to the quality of education.[95] This study remains mindful of these four A's – especially "acceptability" – to evaluate whether education is indeed meaningfully delivered by educators in South Africa.

The right to basic education is also an unqualified right provided for in section 29(1)(a) of the Constitution of the Republic of South Africa, 1996 ("Constitution").[96] The recognition of education as a basic human right in South Africa signifies the importance of education not only as a means to self-actualisation but as an essential element for the growth of the economy through the inclusion of each person in the labour market. As such, the Constitution also emphasises the power of education as a transformative tool. Since the Bill of Rights is justiciable, the right to basic education

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92 The African Charter on the Rights and Welfare of the Child of 1990 ("ACRWC") (adopted on 1 July 1990, entered into force 29 November 1999) OAU Doc. CAB/LEG/153/Rev.2 (1990) is one such a regional instrument which tailors the right to education specific to the African context. Ratified by South Africa in 2000.

93 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 (III).

94 K Tomaševski "Preliminary report of the Special Rapporteur on the Right to Education" (1999) *United Nations Digital Library* 42-74 <https://digitallibrary.un.org/record/1487535#record-files-collapse-header> (accessed 26-05-2021).

95 K Tomaševski "Human rights obligations: Making education available, accessible, acceptable and adaptable" (2001) *Right to Education* <http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf> (accessed 08-10-2018).

96 *Governing Body of the Juma Musjid Primary School v Essay NO and Others* 2011 8 BCLR 761 (CC) para 37.

has also been successfully protected and interpreted through litigation. Beckmann and Prinsloo conclude that litigation has had both positive and negative results, but what is evident from a review of 20 years of litigation is that not enough has been done to ensure the provision of quality education to the poor.[97] For purposes of this study, insights from this history of litigation are limited. The reality remains that litigation is reactive in nature and, to the extent that the right to basic education has come before the courts, the focus has been on infrastructural preconditions for its delivery.[98] At the same time, however, the Constitution serves an important reminder that any regulation of educator performance has to be done mindful of especially two other rights in the Constitution – the rights of children in section 28 (with most learners being children) and the employment rights of educators provided for in section 23.

Against the background of international law and the Constitution, the South African Schools Act 84 of 1996 ("SASA") endeavours to give effect to the right to basic education, provides for uniform norms and standards and regulates the organisation, governance and funding of schools.[99] In conjunction with the Labour Relations Act 66 of 1995 ("LRA") and other general labour laws, the Employment of Educators Act 76 of 1998 ("EOEA") is the main piece of legislation regulating employment in the education sphere. And, as far as educator performance is concerned, Wills mentions that "stringent labour legislation and substantial union involvement create significant barriers to dismissals", which is alarming considering the effect underperforming educators have on the future of their learners.[100] It is therefore necessary to evaluate the protection offered to educators through this legislation and to consider whether it is protecting them to an extent that is unduly detrimental to learners.[101] Furthermore, the South African Council of Educators ("SACE") is the professional body for and exercises control over the teaching profession in terms of the South African Council of Educators Act ("SACE Act"). As the discussion shows, there is a large measure of overlap between the functions of this council and the employment relationship in the

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97 J Beckmann & J Prinsloo "Some aspects of education litigation since 1994: Of hope, concern and despair" (2015) 35 South African Journal of Education 1 10. See also A Skelton "The role of the courts in ensuring the right to a basic education in a democratic South Africa: A critical evaluation of recent education case law" (2013) 46 *De Jure* 1-23.

98 See the discussion in chapter 3.

99 The Preamble of SASA.

100 Wills *School leadership and Teachers' Unions* (2016) 18.

101 See J Beckmann & HP Füssel "The labour rights of educators in South Africa and Germany and quality education: An exploratory comparison" (2013) *De Jure* 557-582.

basic education sector, yet in practice there is undue fragmentation, an issue that is also addressed in subsequent chapters.

The public basic education system in South Africa comprises of 92% of all schools in South Africa, caters for 95% of all learners and employs 91% of all educators.[102] Of the educators employed in the public school system, by far the majority (around 68%)[103] of educators in public schools are appointed against the provincial post establishment and are so-called "departmental educators" with the remainder being appointed by school governing bodies ("SGB"). In general, the basic education sector forms part of the public service and, as such, educators are public servants, except in those cases where educators are not employed by the DBE or Provincial Department of Education ("PDE"), but by the school governing body or an independent (private) educational institution.[104] Section 3(1)(b) of the EOEA determines that the Head of Department (at the PDE) is the employer of all educators appointed against the provincial post establishment of public schools.[105]

It is against this backdrop that legislation seeks to regulate educator performance (in the sense of incapacity and misconduct). In case of educators appointed by the SGB, the rules that apply are the well-established principles of the LRA.[106] However, in case of the majority of educators (those on the provincial post establishment, in other words, departmental educators) this is done through a combination of the LRA and the EOEA and, as far as the EOEA is concerned, through its main provisions as well as Schedules 1 (incapacity) and 2 (misconduct).[107] This already constitutes a fragmented approach where different rules apply to differently appointed educators,

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[102] This is discussed in more detail in chapters 4 and 5.

[103] In 2014, The Federation of Associations of Governing Bodies of South African Schools ("FEDSAS") published the results of an "Environmental Analysis" which represents information from 561 schools that participated in the study. According to the report, across all nine provinces (in the schools that participated) an average of 30,18% of educators were appointed by SGBs, 67,55% were appointed by PDEs and 2,27% posts were vacant. With regard to non-educator staff, 57,46% were appointed by SGBs, 38,20% were appointed by PDEs and 4,33% of non-educator posts were vacant. See FEDSAS "FEDSAS Environmental Analysis Research Report" (2014) *FEDSAS* 1,4, 9. Note, however, that this study is based on a relatively small sample of schools.

[104] Section 20(4) of SASA determines that public schools may establish additional educator posts but that, in terms of S 20(9), such posts as well as the way in which the school will cover their cost must be provided for in the school's annual budget presented by the School Governing Body. *Barkhuizen v Laerskool Schweizer-Reneke and others* (2019) 40 ILJ 1320 (LC), para 9 confirmed that SGB appointed educators do not fall within the ambit of the EOEA.

[105] The Minister of Basic Education is the employer of educators appointed against the provincial post establishment for purposes of determining their salaries and other conditions of service. See s 3(2) of the EOEA.

[106] This is discussed in chapter 5.

[107] This is discussed in chapter 5.

yet all working within one system (public basic education). This state of affairs may well impact on the efficient management of educator performance and impact on quality basic education. In addition, there are apparent curiosities in the provisions of the EOEA. First, section 16 deals with the “capability” of educators but makes no mention (unlike in the case of misconduct) of what the basic standards expected of all educators are. Secondly, as far as misconduct is concerned, the Act makes a curious distinction between types of misconduct in section 17(1) for which educators “must” be dismissed, while section 18(1) provides for a long list of other types of misconduct which may lead to an array of sanctions. Thirdly, it is already noteworthy that section 18(3) provides for fines, suspension without pay and demotion as disciplinary sanctions short of dismissal, a state of affairs not ordinarily encountered in most workplaces (where final warnings are used as the most serious alternative to dismissal). These curiosities, by no means exhaustive, already raise questions about their potential and real impact on the efficient management of educator performance and are considered in detail in this thesis.

1 2 Hypothesis and delimitation of the study

1 2 1 Hypothesis

In light of the earlier discussion, the hypothesis of the proposed study may be formulated as follows:

The lack of delivery of a consistently high quality basic education in South Africa denies learners self-actualisation, precludes improvement of the economic welfare of society and prevents transformation of the South African society. Qualified, competent, and professional educators are central to the delivery of a quality basic education. One contributing factor to the poor state of basic education is the fragmented and otherwise inappropriate legislative regulation of educator performance. This calls for an adjustment to the current system of regulation of educator performance.

1 2 2 Delimitation

Based on the remarks earlier in this chapter and also the hypothesis described above, it is important to note the specific focus of this study:

- It focuses on educator performance, defined to include the capacity (or competence) and the conduct of educators. This approach is also in line with

the approach of SACE to the profession of teaching – it is built around the twin elements of competence and conduct.

- It focuses on basic education, defined (in chapter 2) to include education from grade 1 up to and including grade 12. Put differently, it focuses on education delivered by the South African (primary and secondary) school system.
- It uses as a yardstick the delivery of a "quality" basic education, a concept expanded on in chapters 2 and 3.[108] The study expressly eschews mere transfer of knowledge, literacy and numeracy, or statistical "success rates" as determinative yardsticks of a quality basic education. All of these are, of course, important indicators of the strength of any basic education system and the reality is that the South African education system already fails at these basic hurdles. The question rather is whether learners reach their potential and are given the skills to become "active and productive members of society".[109] In line with the United Nation's Sustainable Development Goal 4, quality education may be defined as "one that focuses on the whole child - the social, emotional, mental, physical, and cognitive development of each student regardless of gender, race, ethnicity, socioeconomic status, or geographic location. It prepares the child for life, not just for testing".[110] Ban Ki-moon, former secretary-general of the United Nations notes that "education must fully assume its central role in helping people to forge more just, peaceful and tolerant societies".[111] It is clear from these definitions that, albeit important, quality education is not only about being in a classroom, nor only a transfer of knowledge, but also about instilling in a child the values and skills necessary to be a productive member of the economy and a contributing member of society.

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[108] Taylor and Spaull note that defining quality education poses challenges as it depends on the focus of the enquiry, which is usually either the "test result average" or the "value added by the school to its students". See S Taylor & N Spaull "Measuring access to learning over a period of increased access to schooling: The case of Southern and Eastern Africa since 2000" (2015) 41 *International Journal of Educational Development* 47 48.

[109] S Slade "What do we mean by a quality education?" (22-02-2017) *Huffpost* <https://www.huffingtonpost.com/sean-slade/what-do-we-mean-by-a-qual_b_9284130.html> (accessed 10-08-2021).

[110] ACSD "ASCD and Education International Release Statement on Defining a Quality Education" (17-02-2016) *ACSD* <http://www.ascd.org/news-media/Press-Room/News-Releases/ASCD-and-Education-International-Release-Statement-on-Defining-a-Quality-Education.aspx> (accessed 10-08-2018).

[111] ACSD "ASCD and Education International Release Statement on Defining a Quality Education" *ACSD.*

- It focuses on the delivery of basic education by the public school system in South Africa, which caters for 95% of all learners in South Africa and, within that system, on the performance of the 68% of educators who are employees of the provincial departments of education and whose performance are regulated through a combination of the LRA and the EOEA. As mentioned, other educators' performance is regulated through the LRA. Their position will be referred to as and when necessary.

1 3 Methodology

1 3 1 Overview of sources

This research is done by way of a literature-based study. The approach with regard to the literature is threefold. First, it consists of a statistical analysis of primary and secondary sources of the link between economic growth and quality education, the state of basic education in South Africa, as well as the extent of disciplinary action in the basic education sector. In this regard, statistical releases and academic articles analysing these statistics are used. Second, primary and secondary legal sources, such as legislation, case law, academic books and articles are used to explore the meaning of the current legal regulation of educator performance in South Africa. Third, the implementation and impact of the legislative framework in practice are evaluated through original analysis of case law and arbitration awards using qualitative data analysis software, namely Atlas.ti. This is supplemented with reference to existing reports, books, journal articles, media reports and relevant dissertations. This study is therefore not only about the regulation of employment in education, but also about the implementation of such legislation in practice. Ultimately, the study evaluates whether an adjustment in the regulation of labour legislation may improve the current situation in the education sector.

1 3 2 Comparative insights

The discussion places the South African experience in comparative context by considering the regulation of and experience with educator performance in England. The choice of England as a comparator is justified by the historical link between the

education systems of the two countries,[112] the fact that the education systems of England and South Africa are comparable based on their structure and the number of schools,[113] educators and learners and, lastly, it is a country that is also increasingly multi-cultural with a developed economy that delivers a high standard of education (in contrast to South Africa).[114] The purpose of the discussion is to reflect on the right to education in England and the regulation of educator performance compared to South Africa. This assists in answering the research question because the English system already contains high and clear standards of educator performance together with greater integration of the whole system in education which, this research shows, is in contrast to the South African reality.

It should perhaps be mentioned that, as part of this research, the position in India was also extensively investigated and recorded. India is a fellow BRICS country and at a similar stage of economic development and, like South Africa, is a multi-cultural and multi-lingual society with a history of colonialism and is characterised by persistent poverty, high inequality and corruption.[115] In addition, India also recognises a right to education, has compulsory elementary schooling and is a signatory to important international instruments providing for the right to education.[116] However, while the Indian experience is interesting as far as the regulation of education and the employment of educators, in general, are concerned (especially the extensive use of "contract teachers"), there is little detail available (in contrast to England) about the specific regulation of and experience with educator performance. As such, the results of this part of the research is not included in the final version of this thesis but remains on file with the author.

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[112] J Fourie & C Swanepoel "When Selection Trumps Persistence: The Lasting Effect of Missionary Education in South Africa" (2015) *Tijdschrift voor Sociale en Economische Geschiedenis* 1 2-3, 10.

[113] See Department for Education "DfE Consolidated Annual Report and Accounts 2019-20" (2020) *Department for Education* 12 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/932898/DfE_consolidated_annual_report_and_accounts_2019_to_2020__web_version_.pdf> (accessed 10-10-2021).

[114] See chapter 6.

[115] See, eg, A Skelton *Strategic litigation impacts series: Equal access to quality education* (2017) <https://www.opensocietyfoundations.org/sites/default/files/strategic-litigation-impacts-education-20170322.pdf> (accessed 13-09-2013) 12.

[116] This right is contained in article 21A of the Constitution of India, 1950 and The Right of Children to Free and Compulsory Education Act, 2009. The international instruments are discussed in chapter 3.

1 4 Aims and value of the study

The aims of this research (and, by implication, the research questions to be investigated) are to:

- Explore and identify general consensus on the meaning and interrelatedness of the constituent elements of the phrase “quality basic education”.
- Explore the importance of a quality basic education as a transformative tool as well as an essential precondition for economic growth and self-actualisation.
- Explore the state of basic education in South Africa and the role of the educator in delivering it.
- Enquire into the international recognition of the right to education and the content ascribed to this right in international law and to identify what these insights tell us about the role of educators in delivering a quality basic education.
- Enquire into the nature and content of the right to basic education in the South African Constitution, also in the context of other fundamental rights, such as the rights of children and the rights of employees and to identify what implications this holds for the role of educators and the management of educator capacity and discipline in schools.
- Accurately describe and analyse the current legislative regulation of the employment of educators in general and their performance in particular to identify both the role players involved and apparent deficiencies in that regulation.
- Conduct a quantitative and a qualitative analysis of the actual experience with the capacity and conduct of educators in the public basic education system through a study of available statistics and relevant case law in order to identify deficiencies in the regulation itself or in the implementation of that regulation.
- Conduct a comparative overview and analysis of the legal regulation of and experience with educator performance in England, a country with a high-functioning system of public basic education, to identify possible lessons and recommendations for South Africa.
- Analyse generally how the current regulation of educator performance affects, if at all, the current poor outcomes of the delivery of basic education in South Africa.

- Make specific recommendations for the adaptation of the regulation of educator performance in such a way that regulation is properly aligned to the goal of the delivery of quality basic education in South Africa.

The value of the study is self-evident: every member of society and society itself depends on the delivery of a quality basic education. Rectification of any deficiencies in legislation that impede the delivery of a quality basic education will contribute to the self-actualisation of learners, the economic position of those learners as well as the transformation and well-being of society.

1 5 Brief outline of the thesis

The purpose of chapter 2 is threefold: to reflect on the nature of the three constituent elements of the phrase “quality basic education”; to consider the importance of education in general, and basic education in particular, and to juxtapose insights from this discussion with the current state of the delivery of basic education in South Africa, and to provide an introductory reflection on the performance of educators in South Africa. It is important to note the chapter’s premise, namely that the appropriateness of the regulation of societal phenomena – the delivery of quality basic education included – depends on a sound understanding of that phenomenon. As such, the focus of the chapter is not on the legal regulation of basic education.

Chapter 3 is the first of three chapters that describe the legal framework within which basic education is delivered in South Africa. It focuses on the international and constitutional recognition of the right to basic education and aims to identify the implications for the regulation of educator performance from such recognition. The chapter illustrates the broad international consensus on and international legal recognition of the right to education. The discussion also shows that some guidance may be obtained from international legal instruments about the nature and content of a basic education as a legal concept and, by implication, the demanding role educators have to play in this process. The chapter also considers the Constitution, which, in section 29(1)(a), provides for an unqualified right to a basic education. Attention is paid to jurisprudence concerning the nature of the constitutional right to basic education, while the legal meaning of this constitutional right is contextualised using international instruments, the experience of the courts in dealing with violations of this right and the

views of academics. At the same time, this chapter considers two additional and important factors that should be borne in mind in evaluating the role of educators in delivering basic education – that the right to a basic education should also be seen as a children's right and that the rights of learners should be balanced with the rights of educators as employees. Last-mentioned are extensively protected at international and constitutional levels and through domestic legislation.

Chapter 4 provides an overview of the legislative framework through which the delivery of basic education is operationalised in South Africa against consideration of the societal background in which the system must operate. The Constitution, apart from establishing the right to a basic education, also provides the foundational principles for the governance of basic education. Schedule 4 of the Constitution determines that school education is a matter of concurrent power between the national and provincial governments. At national level, SASA and the National Education Policy Act 27 of 1996 ("NEPA") are the two pieces of legislation that regulate the basic education system. The provisions of especially SASA are considered in some detail. Two other pieces of national legislation, namely, the South African Council for Educators Act 31 of 2001 ("SACE Act") and the National Qualifications Framework Act 68 of 2008 ("NQF Act") are also considered. The role of the provinces in the delivery of basic education is also discussed. The functions of and tensions between the many different role players in this system of cooperative governance and participatory democracy that legislation tries to create – from the Minister of Basic Education at national level, through to the principals and school governing body – are considered. The last part of this chapter describes the broad principles applicable to the regulation of the employment of educators within the basic education system. While the EOEA is the piece of legislation specifically enacted to regulate the employment of educators in the public basic education system, the discussion shows that the principles in the LRA remain important, as do the impact of collective agreements reached in terms of the LRA and the individual contract of employment.

In chapter 5 the principles specifically applicable to individual educator performance in South Africa are considered, mindful that individual educator performance is defined to encompass the conduct and capacity of educators appointed against the provincial post establishment by a PDE. The rules regulating the conduct and capacity of departmental educators are contained in the EOEA, which expressly incorporates the principles of the LRA. For this reason, and even though these principles are well

established, the chapter first provides an overview of the LRA principles relating to conduct and capacity. This is followed by consideration of the provisions of the EOEA, specifically sections 16 to 18 of that Act as well as Schedules 1 and 2. Important developments and provisions relating to the professional registration of educators, their minimum qualifications and core competences – all issues which ultimately determine the substantive fairness of the employer's decision-making based on alleged incapacity, are also considered.

Chapter 6 is the heart of this thesis and analyses the experience with misconduct and incapacity of educators within the current legislative framework as described in the earlier chapters. The approach of the chapter is descriptive and analytical - both quantitative and qualitative. It commences with a description of existing research and views on the prevalence and impact of misconduct and incapacity of educators in and on basic education in South Africa. This is followed by a statistical overview of the extent of the application of discipline in the basic education sector based on information from the different PDEs themselves and from arbitrations conducted by the Education Labour Relations Council ("ELRC"). The presence (or absence) of statistics already tells a story of deficiencies in the system and calls for reform. The chapter – through analysis of 138 arbitration awards of the ELRC – also identifies deficiencies concerning substantive fairness (specifically focusing on the most prevalent types of misconduct, sanction, and consistency), procedural fairness, the use of suspension as part of the disciplinary process and poor work performance (as incapacity) in the basic education sector. The qualitative analysis of these awards is particularly important since each matter provides insight into the application of legal principles and the exercise of discretion by the different role players responsible for addressing misconduct and incapacity in basic education. Based on these insights, along with earlier insights from the preceding chapters, deficiencies in the current system of regulation of educator performance are tabulated.

Chapter 7 is the comparative chapter and discusses the operationalisation of the right to education in England as well as the legislative regulation of the employment of teachers[117] and their performance. The chapter provides an overview of the composition of the education sector, the history of education and the current state of education in England. This chapter also considers the right to education and the

[117] The terminology used in England is "teacher" and "pupil".

regulation of the employment of teachers in England in some detail. As far as the regulation of the performance of teachers in England is concerned, the discussion shows that England follows much the same broad approach as in South Africa – with a professional body exercising jurisdiction over the teaching profession and the principles of labour law regulating the conduct and capability of individual teachers in their immediate employment context. This chapter concludes with reflections based on the regulation of educator performance in England. Based on these insights, recommendations in addition to those made in chapter 6 are made for the legislative regulation of educator performance in South Africa.

Chapter 8 provides a summary of the insights gained throughout the thesis and, in particular, uses the deficiencies tabulated in chapter 6 and the comparative insights from the English experience to make specific proposals for a whole range of legislative amendments.

CHAPTER 2: THE NATURE, IMPORTANCE AND STATE OF QUALITY BASIC EDUCATION IN SOUTH AFRICA

2 1 Introduction

This chapter departs from the premise that any reflection on the appropriateness of the regulation of societal phenomena – the delivery of quality basic education included – depends, in the first instance, on a sound understanding of the nature of that phenomenon, its importance to individuals and to society, its current state, as well as the competing interests that underlie it. As such, the purpose of this chapter is threefold. First, the chapter reflects on the nature of the three constituent elements of the phrase "quality basic education" that form one leg of the focus of this thesis, also in an attempt to distil and delineate the meaning of this phrase as a basis for the further enquiry. Second, not only to emphasise the importance of this study, but also to identify some of the competing interests that underlie the delivery of quality basic education, the chapter considers the importance of education in general, and basic education in particular, and juxtaposes insights from this discussion with the current state of the delivery of basic education in South Africa. Lastly, given the central role of educators in the delivery of a quality basic education, the chapter also provides an introductory reflection on the performance of educators in South Africa.

At the outset, it should be emphasised that this chapter is not designed to discuss the current regulation of the delivery of quality basic education, but merely to describe it as a societal phenomenon (and imperative) and to identify some of the pitfalls associated with it in South Africa as a basis for the further discussion. In this regard, it should be kept in mind that chapters 3 to 5 below consider the current legal framework applicable to the delivery of quality basic education by addressing, in turn, the international and constitutional framework, the structural operationalisation of basic education through legislation as well as the legal principles applicable to the performance of educators. Chapter 6 provides a critical analysis of the regulation of educator performance in practice and chapter 7 places the discussion in a comparative context.

In pursuit of the goals of this chapter, paragraph 2 2 first provides brief remarks on the concept "basic" education in the South African context – with the emphasis on the word "basic". Drawing in advance on some of the insights from the discussion in chapter 3, it may already be said that the term "basic education" or similar terms (such

as “fundamental”, “primary” or “elementary”) are often included in legal instruments, yet with little or no indication as to their exact meaning. Even so, paragraph 2 2 endeavours to analyse and identify the general meaning which may be ascribed to the term “basic education” with reference to the terminology used in the education sector in South Africa, other jurisdictions, as well as the existing international framework informing its meaning. At the same time, however, the term “basic education” is of considerable legal import as it is included as such in the South African Constitution. This is considered in more detail in chapter 3.

In paragraph 2 3 of this chapter, the meaning and importance of “education” are considered. The discussion focuses on the general meaning and importance of education to the individual and to society. As mentioned, the discussion is not undertaken through a human rights or legislative lens[1] but rather provides a general overview of the content, value and potential of education to each individual and society as a whole. In particular, the societal importance of education requires a consideration of the history of education in South Africa as this history informs current political ideals, policymaking, and parliament’s legislative agenda. Furthermore, a discussion of the importance of education to society will be incomplete without a consideration of its economic value, specifically the possible direct and indirect impact of education on economic growth. By direct impact is meant the ability of the basic education system to adequately prepare learners to become active participants in the economy. By indirect impact is meant the impact of education on the development of the autonomy of a person and the decisions educated persons may make that contribute to the economy.

Paragraph 2 4 focuses on the meaning of “quality” as used in the phrase “quality basic education”. The discussion shows from the outset that “quality” in this context is a reactive term that responds (and must respond) to the realities and needs of every education system. Considering the importance of a quality basic education, legal developments and academic discourse, an operative definition of a “quality basic education” is proposed against the background of the earlier discussion of a “basic education” in this chapter. At the same time, it is emphasised that there should be no exhaustive definition of “quality education” since it should continuously respond to the reality and need created by the context in which it functions.

[1] The meaning and importance of education in legal terms are considered in chapter 3.

Lastly, paragraph 2 5 provides an overview of the state of basic education in South Africa. This includes an analysis of the low-quality education delivered to the majority of learners as measured by South Africa's performance in standardised assessments. It also includes a discussion of the low requirements for passing the National Senior Certificate ("matric") examination. Ultimately it is shown, with reference to existing research on the topic, that the future prospects of learners who receive a low-quality education are bleak. It also perpetuates intergenerational poverty. Throughout this chapter, it is acknowledged that various elements contribute to the delivery of a quality basic education. One of these elements – that is also introduced in paragraph 2 5 – is a qualified, competent, and professional educator. At a first level, as was emphasised, the quality of education cannot exceed the quality of our educators.[2] The capacity and conduct of educators in South Africa are briefly considered as a basis for further analysis of the individual performance of educators that follow in subsequent chapters.

2 2 An initial observation about "basic" education in the South African context

The terminology used to refer to the initial level of education differs across education and legal systems. In South Africa, the terminology used in the education sector to describe these initial levels of education includes "basic", "primary" and "secondary". Section 29(1)(a) of the Constitution of the Republic of South Africa, 1996 ("Constitution") refers to a basic education whereas the terms "primary" and "secondary" are used in practice to refer to education up to a certain level or grade.[3] Another term used in the education sector is "early childhood development", which refers to the first nine years of a child's life.[4] Children in South Africa attend grade R,

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2 W Billie, N Moshani, L van der Elst, & U Hoadley (eds) "Do Teachers in South Africa Make the Grade?" (2018) 1 *Human Factor* 1 13. Volmink, who made this statement, is an experienced educationalist and has served as chairperson of the examination standards body, Umalusi. He was also head of the ministerial task team that investigated the selling of educator posts by trade union officials in 2016. This is discussed in paragraph 2 5.

3 See generally Department of Basic Education "Curriculum" (2022) Department of Basic Education <https://www.education.gov.za/Curriculum/NationalCurriculumStatementsGradesR-12.aspx>.

4 See Department of Basic Education "Early Childhood Development" (2021) *Department of Basic Education* <https://www.education.gov.za/TheDBE/DBEStructure/GET/EarlyChildhoodDevelopment/tabid/96/Default.aspx> (accessed 22-05-2021).

referring to one year of education before primary education.[5] In turn, "primary education" refers to grades 1 to 7 (the first seven years of schooling) whereas "secondary education" comprises grades 8 to 12 (the final five years of schooling). In total, a learner in South Africa who attends grade R up to and including grade 12, will have completed thirteen years of education. However, in terms of section 3(1) of the South African Schools Act 84 of 1996 ("SASA"), the compulsory part of education refers to the first nine years of school, from grade 1, in the year the child turns seven, to grade 9, or until a child reaches the age of fifteen years (whichever occurs first).

In contrast, a study of the education system of a developed economy, England, which is considered in more detail in chapter 7, shows a different approach to and terminology used to describe the initial stages of education. Section 156 of the (English) Education Act 2002 defines "primary education" and includes children from the age of two years until children attain the age of 10 years and six months.[6] The compulsory years of education in England are discussed in chapter 7. The point, for now, is that the meaning of a basic or elementary education differs across education and legal systems. This inevitably also means that the content and quality of such education will be different – at least as far as England is concerned.

With this in mind, the discussion that follows provides an overview of what is meant, for purposes of this research, by a "basic" education in the South African context. This requires consideration of the international consensus on the meaning of this term. Again, the focus is not on the specific legal meaning of a basic education, but rather what the general understanding of this term is. The United Nations Educational, Scientific and Cultural Organisation ("UNESCO") defines a basic education as:

> "[a] [w]hole range of educational activities, taking place in various settings, that aim to meet basic learning needs as defined in the World Declaration on Education for All (Jomtien, Thailand, 1990). According to the International Standard Classification of Education

[5] See Department of Basic Education "Action Plan to 2019: Towards the realisation of Schooling 2030" (11-11-2015) *Department of Basic Education* <https://www.education.gov.za/Portals/0/Documents/Publications/Action%20Plan%202019.pdf?ver=2015-11-11-162424-417> (accessed 22-05-2021).

[6] Section 156(2) of the Education Act 2002 ch 32. The compulsory part of education in England is discussed in chapter 8.

> ("ISCED") standard, basic education comprises primary education (first stage of basic education) and lower secondary education (second stage)".[7]

Two aspects of basic education can be identified from this definition. First, with regard to the content of education, it should meet basic learning needs. Article 1 of the World Declaration on Education for All describes basic learning needs and how these needs can be met:

> "Every person – child, youth and adult – shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning. The scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time".[8]

Second, in line with the ISCED standard, basic education is linked to two stages of education - primary and lower secondary education. In the South African context, however, there is an ongoing debate on the meaning of a basic education. This is not surprising since the right to a basic education constitutes a specific fundamental right in South Africa. While this right and its operationalisation are discussed in greater detail in subsequent chapters, what may be mentioned at this stage is that the word "basic" appears in section 29(1)(a) of the Constitution, in SASA and the National Education Policy Act 27 of 1996 ("NEPA"). The Constitution refers to the right to a basic education and SASA and NEPA give effect to this right through national legislation. However, a "basic" education is not defined in any of these legal

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[7] See the UNESCO "Basic Education Definition" (2021) *UNESCO Glossary* <http://uis.unesco.org/en/glossary-term/basic-education> (accessed 20-10-2021). The General Conference of UNESCO Member States adopted the ISCED in November 2011, which means that it is now an international agreement. The ISCED refers to the International Standard Classification of Education which provides definitions and concepts that can be applied to education systems internationally. It recognises that education systems are unique to their context and are therefore difficult to compare. This system of international definitions and concepts therefore assist in providing consensus on education terminology. See UNESCO "ISCED 2011" (2011) *UNESCO* <http://uis.unesco.org/sites/default/files/documents/international-standard-classification-of-education-isced-2011-en.pdf> (accessed 15-10-2021).

[8] Article 1 of the World Declaration on Education for All.

documents.[9] For present purposes, it is perhaps more noteworthy that in 2009 the Department of Basic Education ("DBE") was established. This department was formerly known as the National Department of Education, which was then divided into the DBE and the Department of Higher Education and Training ("DHET"). The DHET has authority over tertiary education whereas the DBE is responsible for education from grades R to 12 and adult literacy programmes.[10] Grade R to grade 12 refers to pre-primary, primary and secondary education and includes the entire formal school period in South Africa.[11] At the same time, this development perhaps gives guidance on the different stages of education that make up a basic education but does not really address the second leg of the international approach to the meaning of a basic education, which relates to the content thereof. Admittedly, the fact that the DBE also exercises jurisdiction over adult literacy programs provides a hint that basic education is not solely to be determined by the formal stages of schooling in South Africa, nor the age of learners, but also by its content.

Also envisaged at an international level, is the reality that each education system is unique and should cater for the needs of learners in the specific context in which it operates.[12] As such, and also in light of uncertainty and differences in approach that do exist, it is submitted that, for purposes of this research, it is not necessary to define the exact time period of basic education in South Africa, nor the content of such an education. An easy compromise in search of an operative definition would be to accept the approach of UNESCO to the content of basic education and to combine it with the duration of basic education as envisaged by the South African government (grades R-12). After all, the ultimate focus of this study is on the role of educators in delivering basic education (whatever the period or content thereof). What is important, though, is that basic education is seen as a necessary building block for effective participation

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9 Both pieces of legislation refer to the word "basic" in regard to the Minister of Basic Education. SASA refers to a basic adult education in s 21 but does not define the term. Similarly, s 4 of the NEPA deals with directive principles of national education policy and refers in subs (a)(ii) to a basic education, in that national education policy should advance the right to a basic education and equal access to education institutions.

10 See the Department of Basic Education "About basic education" (2021) *Department of Basic Education* <https://www.education.gov.za/AboutUs/AboutDBE.aspx> (accessed 22-05-2021).

11 See chapter 3 for a discussion of the compulsory period of schooling in South Africa as determined by s 3(1) of SASA. Whether the compulsory period of schooling, from the age of seven up to grade 9 or 15 years of age, should be considered a basic education is still up for debate.

12 Article 1 of the World Declaration on Education for All.

in society or for further education, whether that be formal,[13] informal[14] or non-formal.[15] As such, basic education is important. In fact, if one considers the effect of low-quality basic education on a learner's future prospects (be it as an entrant into the job market or as a basis for tertiary education), it is clear that basic education is of decisive importance.[16]

It is also important to note that this thesis focuses on the delivery of basic education in public schools (as opposed to independent or so-called private schools).[17] There are at least two important reasons for this. First, the public school system comprises almost 92% of all schools in South Africa, caters for 95% of all learners and employs 91% of all educators.[18] Perhaps more importantly, as the discussion in this and subsequent chapters show, the delivery of a quality basic education is under most pressure where such an education is delivered in public schools on a no-fee basis. This is often in poor areas and it is dependent on government spending within the current regulatory framework applicable to the school system in general[19] and to the employment of educators within that system in particular.[20] Where it is deemed

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[13] Formal education refers to structured, systemic, organised education which contains a curriculum with specific outcomes that are reached through the curriculum objectives, content and methodology. This type of education usually takes place in an educational institution such as a school or university. See H Eshach "Bridging In-School and Out-Of-School Learning: Formal, Non-Formal and Informal Education" (2007) 16 *Journal of Science Education and Technology* 171 173; See also Passion in Education "Types of Education" (2019) *Passion in Education* <https://www.passionineducation.com/types-of-education-formal-informal-non-formal/> (accessed 22-05-2021).

[14] Informal education takes place spontaneously and the learning process can take place through what the learner is reading, watching, listening to or even through hobbies. Informal education usually takes place within the learner's family structure, community or peers. See Eshach (2007) *Journal of Science Education and Technology* 173; See also Passion in Education "Types of Education" (2019) *Passion in Education.*

[15] Non-formal education can be described as a type of learning that is pursued by a learner (who can be an adult) based on their internal motivation or interest in the topic. It may be offered by an educational institution or organisation, similarly to formal education. It is distinguished based on the fact that the learner chooses to pursue the education, for whatever intrinsic reason. For example, a fitness programme or course offered by an organisation. See Eshach (2007) *Journal of Science Education and Technology* 173; See also Passion in Education "Types of Education" (2019) *Passion in Education.*

[16] Part 5 below discusses the state of basic education in South Africa and reveals how low-quality education perpetuates intergenerational poverty.

[17] The different types of schools envisioned by the South African basic education system are discussed in more detail in chapter 4 below.

[18] This is discussed in more detail in chapter 6. These percentages are calculated using the numbers in graph 1 in chapter 6. See also Department of Basic Education "Education Statistics in South Africa in 2016" (2018) *Department of Basic Education* 4-5 <https://www.education.gov.za/Portals/0/Documents/Publications/Education%20Statistic%20SA%202016.pdf?ver=2018-11-01-095102-947> (accessed 29-07-2020).

[19] Discussed in chapter 4.

[20] Discussed in chapter 5.

necessary in this and the following chapters, attention will also be paid to the independent school system.

2 3 The meaning and general importance of "education"

2 3 1 The meaning of education

Education can be described as a process and, inherent in any process, is some form of activity and movement, or more specifically, change.[21] In 1910 Thorndike stated that "education is concerned with certain changes in the intellects, characters and behavio[u]r of men, its problems being roughly included under these four topics: Aims, materials, means and methods".[22] A very broad and general description of education, therefore, is that it consists of a process that effects change in its subjects. Education therefore has the ability to change and hopefully improve a variety of aspects connected to the human personality. As mentioned, the manner in which education is imparted is through aims, materials, means and methods. At the same time, to give content to education includes a consideration of various elements, from the manner it is imparted to each individual learner, to the social, political, and economic context of the country in which the process takes place. This sheds further light on the change that occurs as a result of this education process – it is not merely an individual endeavour but inevitably impacts the collective and societal spheres of each country.[23] The following section addresses the elements that provide insight into the meaning of education to both the individual and the society in which he or she functions.

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[21] Education is defined as "the action or process of educating or of being educated" and "the knowledge and development resulting from the process of being educated". See the Mirriam Webster Dictionary available at <https://www.merriam-webster.com/dictionary/education> (accessed 29-07-2021).

[22] EL Thorndike "The Contribution of Psychology to Education" (1910) 1 *Journal of Educational Psychology* 5.

[23] In most of his work Michael Apple grapples with the question whether the economic and cultural spheres of society dominate the education sector or whether education is powerful in its own right. This leads him to question the power education has to change society and he comes to the following conclusion: "It depends. And it depends on the hard and continued efforts by many people". The impact of education in society is ultimately dependant on co-operation between economic, political and cultural forces. MW Apple *Can Education Change Society?* (2013) 2, 23.

2 3 2 The individual dimension of education

In the 1960s Peters endeavoured to give meaning to the concept of education.[24] He argued that three factors should be present before something can be considered an "education".[25] First, for anything to be considered an education, there must be "something valuable and worthwhile" going on.[26] Second, education requires an understanding that goes beyond the topic at hand, referring to a comprehension of principles underlying the skills and information related to the topic.[27] Third, education requires a development of the person and an understanding of the context in which the subject is being taught.[28] The three elements present in Peters's definition of education corresponds with the idea that education is ultimately a process that effects change in the individual. Ulich aptly explains the importance of this change effected in human life by saying that:

> "We do not live merely to survive, and we do not educate merely for further survival; the essence of man lies in his desire for life, not only as a biological datum, but as something which is worth having and which provides a reality that he can love for its inherent wealth and value".[29]

If the process of education (and the change it effects) adds value to one's life, it is necessary to consider what a meaningful education entails and what the requirements are for it to add significance to human life. One way to establish what education adds to the lives of learners is to look at the aims of education. This is the more practical side of the education process. Winch and Gingell mention that the aims of education can be categorised differently in each society depending on its view and the position of education in its specific context.[30] There certainly is not one exclusive way in which

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24 C Winch & J Gingell *Philosophy of Education: The Key Concepts* 2 ed (2008) 63.
25 63-65.
26 63. Peters required more from education than just to be the means to an end. The process of education must in itself be worthwhile, not merely to be able to fulfil some external purpose but to be involved in education for the sake of education itself. He drew the distinction between education and "training", with education being valuable in and of itself and training being valuable for it prepares one for an external goal such as getting a job. This sentiment is shared by Apple *Can Education Change Society?* 5.
27 Winch & Gingell *Philosophy of Education* (2008) 64.
28 64.
29 R Ulich *Philosophy of Education* (1961) 4.
30 Winch & Gingell *Philosophy of Education* 9-12.

to classify education in South Africa, but the approach Winch and Gingell used in categorising certain aims of education may be applied to our context:

Figure 1: Aims of education[31]

Major educational aims: concern[ed] with the needs of society and with the needs of individuals

Individual needs	Social needs
1 The promotion of autonomy	1 To promote economic development
2 To give the individual a secure background	2 To preserve the society's culture
3 To give an individual the ability to take part in society through an occupation	3 To produce good citizens

These aims show that education addresses both individual and societal needs. However, the extent to which these aims will be realised for each individual learner depends on the standard and content of the specific education at hand. In this regard, it is important to differentiate between training and education. Training has been distinguished from education in that it focuses on preparing a student for a specific task whereas education requires a broader understanding of the task at hand.[32] Training is therefore not as autonomous as education in the sense that the student has little room for deviation in both the learning and application spheres of training.[33] Education provides a student with the necessary skills to apply their knowledge to different scenarios.

In a similar vein, Biesta identifies the first function of education to be to qualify learners to become an active part of society by engaging in the workforce and contributing to the economy.[34] Second, the social function of education relates to the transferral of values and norms in line with the traditions and culture of the relevant country.[35] As mentioned above, an education system is a reflection of the cultural and political context of each country and its purpose is to contribute the skills attained

31 11.

32 214; RS Peters *Ethics and Education* (1966) 32. Peters argues that
"[a] man with a 'trained mind' is one who can tackle particular problems that are put to him in a rigorous and competent manner. An 'educated mind' suggests much more awareness of the different facets and dimensions of such problems".

33 Winch & Gingell *Philosophy of Education* 215.

34 G Biesta "Good Education in an Age of Measurement: On the Need to Reconnect with the Question of Purpose in Education" (2009) 21 *Educ Asse Eval Acc* 33 40.

35 40.

through education to society by way of participation in the workforce. The last function of education is more individualistic[36] in that it assists in the development and independence of learners.[37] This function aimed at the individual, links to the earlier discussion that education is a process that effects change in its subjects and enables the individual to develop various aspects of his or her personality through education. These different aims and functions of education emphasise the idea that education does not merely refer to schooling[38] and that a basic education requires more than the successful completion of compulsory years of education. An education can only be considered "an education" if it provides learners[39] with the comprehension to apply their skills to different scenarios.[40] Van der Vyfer's view of education and its impact on the individual reveals the different elements inherent to this complex term:

> "Education provides knowledge, prepares one for meaningful and lucrative employment, promotes a healthy life style, cultivates an understanding of the complexities of historical eventualities and current affairs, instils in a learner a certain moral consciousness, and stimulates conduct that is conducive to a better future".[41]

Education inevitably has a significant psychological influence on a learner. According to Warnock the most important part of education is activation of the imagination of the learner and strengthening it to see beyond what is at hand, to what is possible.[42] Educational institutions can therefore be mechanisms for transformation or be instrumental to social division and exclusion.[43] Two examples from South Africa may be used to explain the profound impact of education on the development of a learner's autonomy and understanding of society. The first example is poverty. In South Africa, stark differences in background are particularly prominent in education – between learners and between schools. Here the interesting distinction made between absolute

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36 41. Biesta refers to the individual process of education as "subjectivication".
37 41.
38 Schooling refers to all the activities that take place within the institution of schools such as routine, wearing uniform, discipline, and extra-curricular activities. Winch & Gingell *Philosophy of Education* (2008) 189-190.
39 Literature refers to "students" whereas SASA refers to a "learner". When referring to a person attending school in South Africa, this research will refer to a "learner".
40 Peters *Ethics and Education* 32.
41 JD van der Vyfer "Constitutional Protection of the Right to Education" (2012) 27 *SAPL* 326 326.
42 M Warnock "Towards a Definition of Quality in Education" in RS Peters (ed) *The Philosophy of Education* (1973) 112 113.
43 AT Johnson "University Infrastructures for Peace in Africa: The Transformative Potential of Higher Education in Conflict Contexts" (2019) 17 *Journal of Transformative Education* 173 175.

and relative poverty by Dieltiens and Meny-Gilbert becomes relevant.[44] Statistics South Africa determined in 2018 that the lower-bound poverty line ("LBPL") is R784 per person per month.[45] Absolute poverty therefore refers to the situation where one's income falls below this threshold.[46] In contrast, relative poverty focuses on each person's experience of poverty in that exclusion and inequality prevalent in their community foster their own experience of poverty as they compare their circumstances to those around them.[47] Learners are therefore less likely to drop out of school if their peers are equally poor, compared to a situation where there is a combination of different socio-economic circumstances present at school.[48] This points to the psychological effect of poverty on education in a country with significant economic inequalities influencing learners' school experience. Poverty is only one factor that has a psychological effect on learners' experience at school and portrays the broad challenge and mandate of the education system to promote transformation and inclusion.

The second example is the effect of education on the development of autonomy in learners. As mentioned above, education systems can be instrumental in social transformation and inclusion, but may also contribute to political, violent, and discriminatory practices by learners.[49] In this context education and the school play a vital role in the information learners can access. This information may impact on their way of thinking and may lead to a greater understanding of the world they live in. It is for this reason that autonomy can be used as an example of how education psychologically develops a person and is a building block to self-actualisation, empowerment and ultimately transformation and liberation of a society. Education develops the basic capabilities a learner needs to apply the skills they have acquired to real situations.[50] At the heart of autonomy is choice. Before an informed decision

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[44] V Dieltiens & S Many-Gilbert "School Drop-Out: Poverty and Patterns of Exclusion" in S Pendlebury, L Lake & Charmaine Smith (eds) *South African Child Gauge* (2008) 46-47.

[45] Statistics South Africa "National Poverty Lines" (2018) *Statistics South Africa* 3 <http://www.statssa.gov.za/publications/P03101/P031012018.pdf> (accessed 26-10-202). The LBPL refers to the welfare of a person in terms of food and other household necessities. The extreme poverty line which refers only to food is at R547 per person per month. The LBPL is therefore a combination of the average expenditure on food and other household necessities per month.

[46] Dieltiens & Many-Gilbert "School drop-out: Poverty and patterns of exclusion" in *South African Child Gauge* 46.

[47] 47.

[48] 47.

[49] Johnson (2019) *Journal of Transformative Education* 175.

[50] Dieltiens & Many-Gilbert "School drop-out: Poverty and patterns of exclusion" in *South African Child Gauge* 49.

can be made one needs available information as well as the knowledge and rationality to understand the information and ultimately make a decision appropriate to the circumstances. By providing learners with information and the necessary skills to develop their autonomy, learners will increasingly build the capacity to make choices regarding their own education and future, also to the benefit of society.

All of these considerations show that education is a multi-faceted concept in that it not only prepares a learner for future work, is not merely aimed at training for a specific job, but should equip learners with the necessary skills to be adaptable and autonomous to different scenarios they may be faced with.[51] It also shows that even though education takes place in a school, education is not the same as schooling.[52] However important the soft skills children learn while in the school environment, it is of little value without an accompanying quality education. The question is then whether basic education in South Africa achieves these general aims of education, namely, to add value to the lives of learners, provide the underlying skills to comprehend beyond the specific topic and, lastly, to develop the learner as a whole with an understanding of the context in which the topic is conveyed. This is considered in more detail in paragraph 2 5 below.

2 3 3 The collective or societal dimension of education

2 3 3 1 An overview of the history of education in South Africa

Historically, only the elite and wealthy had access to formal education. In England, for example, it was only from 1500 to 1600 that the middle class started to gain access to education.[53] In South Africa and largely as a result of the collective power exerted by trade unions in the 1900s, access to education for the more general population was achieved.[54] Ulich notes that initially, admission to education institutions was the result

[51] See Quacquarelli Symonds "The Global Skills Gap in the 21st Century" (24-08-2018) *Quacquarelli Symonds* <https://www.qs.com/portfolio-items/the-global-skills-gap-in-the-21st-century/> (accessed 23-05-2019) for the skills employers expect of graduates globally.
[52] See Winch & Gingell *Philosophy of Education* (2008) 189-190.
[53] Ulich *Philosophy of Education* (1961) 242.
[54] 242. See, for example, E Webster "The Two Faces of the Black Trade Union Movement in South Africa" (1987) 39 *Review of African Political Economy* 33-41.

of the furthering of political, economic, religious and humanitarian interests.[55] The United States was the pioneer for integration of vocational schools with liberal schools.[56] Liberal education focuses on the learner as an individual and on developing the minds of learners.[57] Vocational education primarily prepares learners to be able to fulfil a certain task and do a specific job.[58] After World War II European countries followed suit, thereby modelling the school structure according to basic/elementary education for around six years, followed by secondary education and thereafter further/tertiary education.[59] This system allowed children from different backgrounds to access formal education and post-school training.[60]

Prior to South Africa's democratisation in 1994, access to education was divided along racial lines with the white minority receiving a liberal education while the black majority received an informal, or so-called Bantu education.[61] Bantu education was in many ways inferior to the liberal education received by white learners. For instance, the initial target set in 1955 was that black learners only receive at least four years of education.[62] This very low target was not reached by 1973, with only 70% of black children enrolled at a school. [63] This number did however increase from the low level of 40 to 45% that existed in 1955.[64]

By the 1980s, following the uprise of black learners who demanded access to adequate education, the government started providing access to vocational training to

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55 243. Stone investigated literacy in England in 1640 to 1900. He notes that at different times in history, society valued education for different reasons. As a result, the manner in which any society organises education is dependent on seven factors, namely: "social stratification, job opportunities, religion, theories of social control, demographic and family patterns, economic organization and resources, and finally political theory and institutions". See L Stone "Literacy and Education in England 1640-1900" (1969) *Past & Present* 69 70.

56 This is discussed in more detail below. Vocational education is defined as "training for a specific occupation in agriculture, trade, or industry through a combination of theoretical teaching and practical experience" whereas liberal education is defined as "education based on the liberal arts and intended to bring about the improvement, discipline, or free development of the mind or spirit" See the Mirriam-Webster Dictionary available at <https://www.merriam-webster.com/dictionary/vocational%20education>.

57 According to Ulich liberal education is "intended to prepare individuals for those parts of their lives that are not subject to necessity or to the demands of other people". See Ulich *Philosophy of Education* (1961) 121.

58 Ulich mentions that vocational and citizenship education are considered types of education subservient to liberal education. See Ulich *Philosophy of Education* 221.

59 243-244.

60 243, 246. Some criticised this movement towards equality of access to education as lowering the standard of education in these institutions.

61 See L Chisholm "Redefining Skills: Black Education in South Africa in the 1980s" (1983) 19 *Comparative Education* 357-371.

62 KB Hartshorne "Bantu Education" (1974) 121 *SA Medical Journal* 2517 2517.

63 2517.

64 2518.

black learners.[65] Chisholm notes that it was in the interest of the apartheid government to provide the majority of learners (both black and white) with vocational training as the government needed an abundance of labourers to contribute to the primary industry of the economy (which refers to agriculture, mining, forestry, fishing and quarrying).[66] In 1981, the Technical and Vocational Education Subcommittee of the Human Sciences Research Council ("HSRC") in their report on vocational training mentioned that:

> "[t]he majority of pupils require a vocational training at school to enable them to enter the world of work. The minority require the development of academic skills….50-80% of children in standards 5-8 [now known as grades 7-10] receiving vocational education in future is in line with the manpower needs of South Africa".[67]

Hartshorne, the then Director of Education Planning at the Department of Bantu Education, stated in 1974 that the expansion of access to education at all levels depended primarily on two factors - an adequate supply of educators and improvement of the quality of educators through training.[68] As school enrolment numbers started to increase drastically toward the 1970s, the supply of qualified educators, specifically graduate educators, did not keep up, with the result that at least 35% of educators at secondary schools were unqualified or underqualified.[69] State funding was prioritised toward the education of white learners with the result that black learners received the least benefit.[70] This black schooling system was characterised by a major lack of resources, with high educator-learner ratios, a large number of unqualified or underqualified educators, as well as a lack of learning materials. In this regard, Moseneke DCJ mentioned in *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* ("*Ermelo*")[71] that one of the most devastating effects of South Africa's history is the imbalance in the distribution of skills as a result of a

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65 2518.

66 Chisholm (1983) *Comparative Education* 358-359; See also Hartshorne (1974) *SA Medical Journal* 2518.

67 Technical and Vocational Education Subcommittee "Investigation into Education: An Intent to Provide Equal Education for All" (1981) *Human Sciences Research Council* 95 <http://www.hsrc.ac.za/en/review/hsrc-review-march-2019/hsrc-investigates-education-1908-1981> (accessed 15-10-2021); Chisholm (1983) *Comparative Education* 358.

68 Hartshorne (1974) *SA Medical Journal* 2518.

69 2518.

70 F Veriava & F Coomans "The Right to Education" (2005) in D Brand & C Heyns (eds) *Socio-economic Rights in South Africa* 60.

71 2010 2 SA 415 (CC).

discriminatory education system.[72] Segregation based on race pre-destined learners for certain jobs or careers that were in line with the then government's vision of the country's future. The result, as Woolman and Fleisch put it, is that "our society has inherited a radically unequal system of education that long preserved seats in schools, places in the economy and jobs in government for a white elite, while it denied the vast majority of black South Africans the training to be anything more than hewers of wood and drawers of water".[73]

South Africa's colonial history and the systemic and institutionalised racial segregation in all spheres of society have had an enduring impact on the public education sector.[74] In this regard, two points may be made. First, there is continued inequality between former white and black schools.[75] Second, the historically inferior training received by black educators under the apartheid regime continues to impact the current quality of education.[76] These two points are elaborated on in paragraph 2 5 below in the context of the discussion of the state of education in South Africa.

This history necessitated a major shift in the focus of the first democratically elected government in South Africa in 1994. Central to this shift was the extension of the guarantee of at least a basic education to each person, while standardising the curriculum and the training of educators.[77] One of the primary objectives of the post-apartheid government was transformation of the racially segregated education system. The education system was met with the challenge of accommodation of the democratic ideals of equality and human dignity, while delivering a standard of education which would ensure competitive adults in an increasingly globalised world.[78] The availability of education was primarily addressed by a redistribution of public

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[72] *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) para 46.

[73] S Woolman & B Fleisch *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (2009) 109.

[74] Van der Vyfer (2012) *SAPL* 342; *Juma Musjid Primary School v Essay N.O. and others* 2011 8 BCLR 761 (CC) para 42.

[75] Under apartheid, schools were distinguished between as "white" or "black" schools. Even though schools in democratic South Africa are no longer divided by race, this legacy continues to impact the quality of education delivered to learners attending formerly "black schools". The reason for this is that there was an unequal distribution of resources and in the training of educators between formerly black and white schools. See *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) para 46.

[76] See Hartshorne (1974) *SA Medical Journal* 2517-2518.

[77] See JD Jansen "Changes and Continuities in South Africa's Higher Education System, 1994 to 2004" in L Chrisholm (ed) *Changing Class* (2004) 293; E Fiske & H Ladd "Racial Equity in Education: How Far has South Africa come?" (2006) 24 *Perspectives in Education* 95 96.

[78] D Hammett & L Staeheli "Transition and the Education of the New South African Citizen" (2013) 57 *Comparative Education Review* 309 309-310.

expenditure to formerly black and rural schools that were inadequately resourced during apartheid.[79] The progress made in this regard as well as certain shortcomings are discussed in paragraph 2 5 below. All of this means that, as a result of a discriminatory and unequal history, the importance of education cannot be overestimated in South Africa. At the same time, this brief consideration of the societal experience with education explains the continuing political imperative around education and why it continues to be a contentious issue.

2 3 3 2 Political ideals and the provision of education

The history of education in South Africa, to a large extent, explains its political significance. To satisfy the need for education, the democratic government in 1994 aspired to provide everyone with access to education of an equal standard. As mentioned above, the first step in this direction was transforming racially segregated schools and redistributing public expenditure to formerly black and rural schools that were inadequately resourced during apartheid.[80] This is in line with the constitutional framework discussed in chapter 3. As confirmed by *Ermelo*, there is a particular focus on the public education system when implementing the constitutional promise of equality and transformation.[81] Within the first three years of democracy, through social and educational policies, 33% of public expenditure was redirected to the poorest families in South Africa.[82] In 2019, President Cyril Ramaphosa reported that 99% of children have access to basic education compared to 51% in 1994.[83] Unfortunately, the availability of education has not translated to access to equal education in a

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79 Van der Vyfer (2012) *SAPL* 326 342; *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) paras 45-46; Seekings (2004) *Review of African Political Economy* 301; S van der Berg "Redistribution through the Budget: Public Expenditure Incidence in South Africa, 1993-1997" (2001) 27 *Social Dynamics* 140-164.

80 Van der Vyfer (2012) *SAPL* 342; *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) paras 45-46.

81 *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) para 47; L Arendse "The South African Constitution's Empty Promise of "Radical Transformation": Unequal Access to Quality Education for Black and/or Poor Learners in the Public Basic Education System" (2019) 23 *LDD* 101 106.

82 Seekings (2004) *Review of African Political Economy* 301; Van der Berg (2001) *Social Dynamics* 140-164.

83 C Ramaphosa "The ANC's 2019 Election Manifesto" (2019) *Politcsweb* <https://www.politicsweb.co.za/documents/the-ancs-2019-election-manifesto> (accessed 30-05-2019); Statistics South Africa "Community Survey 2016" (2016) *Statistics South Africa* <http://cs2016.statssa.gov.za/wp-content/uploads/2016/07/NT-30-06-2016-RELEASE-for-CS-2016-_Statistical-releas_1-July-2016.pdf> (accessed 3-06-2019) 43. According to the survey, in 2016 the distribution of the population aged 25 years and older with primary education was 22 465 086 compared to 10 048 472 in 1996.

democratic South Africa.[84] This is discussed in greater detail in paragraph 2 5 below, but it may already be mentioned that standardised assessments reveal that the quality of education in the majority of formerly disadvantaged schools continue to lag behind their advantaged counterparts.[85] Furthermore, many of these schools continue to operate with insufficient infrastructure, learning materials and scholar transport.[86] For the majority of black learners in South Africa, the pro-poor shift in expenditure has not translated to quality education.[87]

To return to the political significance of education, it is general knowledge that black learners and employees played a significant role in opposing the apartheid government through collective action. The pressure exerted by trade unions was instrumental in South Africa's ultimate democratisation.[88] Trade unions remain important role players in the education sector, also as a result of the alliance between the ruling African National Congress ("ANC") party and the Congress of South African Trade Unions ("COSATU"), with the South African Democratic Teachers Union ("SADTU") one of its affiliates.[89] The influence of trade unions in the education sector is not always seen as positive. In fact, Jansen has gone so far as to state that one reason for the comparative quality of education in affluent schools is because they are not "held hostage" by trade unions and the culture of politics associated with it.[90]

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84 In chapter 3 the four A-scheme developed by Katarina Tomaševski is discussed. In line with that approach, it should be mentioned here that the "availability" of education refers to its provision in terms of a proper regulatory framework, budgetary allocations and sufficient educators. "Access" to education requires more than availability, it requires that aspects hindering learners to access education, such as transport, school uniform and school fees be eradicated. As such, it cannot be said that near universal "access" to basic education has been achieved, as claimed by president Ramaphosa, but rather that near universal basic education is "available". See K Tomaševski "Primer No 3: Human Rights Obligations: Making education available, accessible, acceptable and adaptable" (2001) *Right to Education* <https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf> (accessed 15-10-2021).

85 Arendse (2019) *LDD* 139.

86 139.

87 South Africa's unemployment rate is at 32,5% translating to 7.2 million unemployed persons. More than half (52.3%) of the unemployed persons had education levels below matric compared to 1.8% of graduates and 7.5% with other tertiary qualifications. The group with the highest unemployment is between 15 and 24 years of age with a rate of 63.2% and with unemployment higher among black Africans (36.5%) than any other race. See L Omarjee "SA's jobless number grows to 7.2 million as unemployment rate breaches new record" (23-02-2021) *News24* (accessed 07-06-2021) <https://www.news24.com/fin24/economy/sas-jobless-grows-to-72-million-as-unemployment-rate-breaches-new-record-20210223>; See also Statistics South Africa "Quarterly Labour Force Survey" (2020) *Statistics South Africa* 13 which can be accessed at <http://www.statssa.gov.za/publications/P0211/P02114thQuarter2020.pdf> (15-10-2021).

88 See C Garbers et al *The New Essential Labour Law Handbook* (2019) 4-8.

89 J Jansen "Personal Reflections on Policy and School Quality in South Africa: When the Politics of Disgust Meets the Politics of Distrust" in Y Sayed, A Kanjee & M Nkomo (eds) *The Search for Quality Education in Post-Apartheid South Africa* (2013) 88.

90 85.

This, in turn, means that education has been used by political parties to get voter support at polls. Lofty goals and promises about the transformation of the education system in favour of the poor are used by political leaders to convince a nation desperate for quality education.[91] Even though this pro-poor movement since 1994 provided almost universal availability of basic education, the system once segregated by race became a division by class and wealth, resulting in a failure of poor children reaching and thriving in the labour market.[92] The 9-year rule of President Jacob Zuma which ended in 2018 was characterised by bribery and plundering of state resources which severely impacted this promise of a better future for all in democratic South Africa.[93] According to Bloomberg, around half of the country's citizens live in "chronic poverty" and the World Bank, as also reported by TIME, branded South Africa the most unequal country in the world.[94]

In this regard, Baker focuses on the spatial inequality in Cape Town specifically and how racial segregation has turned into economic segregation post-apartheid.[95] The central business district of the city, where the majority of jobs are, is far removed from the neighbourhoods and informal settlements where 60% of Cape Town's (mostly black) population live.[96] Workers do not have the economic power to own or rent property closer to their jobs.[97] This results in a high percentage of wages and time

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91 See Ramaphosa "The ANC's 2019 Election Manifesto" (2019) *Politcsweb*; M Maimane "The manifesto for change" (2019) *Democratic Alliance* <https://www.da.org.za/campaigns/manifesto> (accessed 30-05-2019); W Wessels "Department of Education should focus on quality education rather than matric pass rate" (2017) *Freedomfront Plus* <https://www.vfplus.org.za/media-releases/department-of-education-should-focus-on-quality-education-rather-than-matric-pass-rate> (accessed 30-05-2019).

92 The Economist "South Africa has one of the world's worst education systems" (07-01-2017) *The Economist* <https://www.economist.com/middle-east-and-africa/2017/01/07/south-africa-has-one-of-the-worlds-worst-education-systems> (accessed 20-07-2018); S van der Berg "Apartheid's enduring legacy: Inequalities in education" (2007) 16 *Journal of African Economies* 849 850.

93 Bloomberg Editors "If Ramaphosa chooses SA over ANC it may be Good for Both" (2019) *Fin24* <https://www.fin24.com/Opinion/Columnists/opinion-if-ramaphosa-chooses-sa-over-anc-it-may-be-good-for-both-20190518-2> (accessed 30-05-2019).

94 Bloomberg Editors "If Ramaphosa Chooses SA over ANC it may be good for Both" (2019) *Fin24;* World Bank "The World Bank in South Africa" (2019) *The World Bank* <https://www.worldbank.org/en/country/southafrica/overview> (accessed 30-05-2019); A Baker "What South Africa can teach us as worldwide inequality grows" (2019) *TIME* <http://time.com/longform/south-africa-unequal-country/> (accessed 30-05-2019).

95 Baker "What South Africa can teach us as worldwide inequality grows" (2019) *TIME*.

96 Baker "What South Africa can teach us as worldwide inequality grows" (2019) *TIME*.

97 A 2017 study revealed that middle income earners fall in the R15 000 to R50 000 per month category which means that they can afford a residential property of R1,5 million. This is too low to enter the property market in the Cape Town Central Business District. See Property Wheel "Cape Town CBD's Middle Income Earners Unable to Afford Nearby Homes: (2017) *Property Wheel* <https://propertywheel.co.za/2017/08/cape-town-cbds-middle-income-earners-unable-to-afford-nearby-homes/> (accessed 3-06-2019).

spent on transport, which perpetuates economic hardship.[98] Education and health care service delivery are often lacking in these areas, which result in some parents sending their children to schools in other neighbourhoods with further transport expenses and financial pressure.[99]

The legacy of apartheid with regard to the quality of education in former black schools continues to be evident despite the fact that schools are now racially integrated. Research by Spaull reveals that race, geography and poverty remain interrelated, meaning that it is especially difficult for poor black learners from rural areas to escape the so-called poverty trap.[100] The majority of learners in former black schools are poor and do not perform well academically as these schools continue to be dysfunctional in comparison with previously white schools.[101] Jansen compares the education quality between previously black and white schools and states that:

> "It would be tempting at this stage to dismiss these contrasting analyses as nothing more than a reflection of the differential resourcing, by race, that apartheid imposed on schools. White schools function better because of accumulated resources and black schools do not because of historical levels of underfunding. Yet there is abundant evidence of schools underperforming even when resources are in abundance and of schools excelling when resources are severely limited. All kinds of equity interventions have been introduced since 1994 to favour black schools and yet the results remain the same. Clearly, the two school cultures do not simply reflect patterns of resourcing over time".[102]

Although there may be agreement on the origin of inequality between schools, almost 30 years into democracy there most definitely are a variety of reasons for the continued low quality of education delivered to the majority of learners in South Africa. This is discussed in greater detail in paragraph 2 5 below where the state of basic education is considered.

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98 Baker "What South Africa can Teach us as Worldwide Inequality Grows" (2019) *TIME*.

99 Baker "What South Africa can Teach us as Worldwide Inequality Grows" (2019) *TIME*; According to Gustafsson the most common reason given for learners not attending their closest school, is that schools in other areas provide higher quality education. See M Gustafsson "The When and How of Leaving School: The Policy Implications of New Evidence on Secondary Schooling in South Africa" (2011) *Stellenbosch Economic Working Papers No 09/11* 23 <https://ideas.repec.org/p/sza/wpaper/wpapers137.html> (accessed 25-06-2019).

100 N Spaull "Schooling in South Africa: How Low-Quality Education Becomes a Poverty Trap" in A de Lannoy, S Swartz, L Lake and C Smith (eds) *South African Child Gauge* (2015) 36.

101 Spaull "Schooling in South Africa: How Low-Quality Education Becomes a Poverty Trap" in *South African Child Gauge* 34.

102 Jansen "School quality in South Africa" in *The Search for Quality Education in Post-Apartheid South Africa* 84.

Aside from the many reasons for low-quality education, one thing that is clear is the value society attaches to an education and the desperate need for it. While the Fees Must Fall movement in 2015 concerned free tertiary education, it did send a clear signal about the value South Africans attach to education and the hope education provides for poor students to escape poverty and become part of the middle class.[103] In the 2019 ANC manifesto President Ramaphosa, in line with calls from academia,[104] emphasised that the availability of education has now shifted to a need for access to quality education and that "a skills revolution" through education is needed to address poverty, unemployment and inequality.[105] One reason for this societal desire for a university education is the stigma attached to vocational training and technical schools, which resulted from the approach of the apartheid government to these forms of education (in contrast to a liberal education).[106] The demand for a more academic education at school level followed by accessible tertiary education is the result of our history, the promise of our democratic dispensation and the ideals individuals and society associate with education.

2 3 3 3 The impact of education on economic growth

Having explored the aims of education, the psychological impact of education on learners' development and the historical and political context of education in South Africa, it is important to consider education as a driver of economic growth. Two aspects, the direct and indirect impact of education on economic growth deserve attention.

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[103] The discussion regarding the aims of education within the historical and political context inevitably leads to the question whether the demands for tertiary education for everyone is what the South African economy needs and has capacity for. Even though the focus of this research is on basic education, a demand for tertiary education is futile in the absence of the academic skills to successfully complete this task. As much as the education sphere has various aims, one of the main aims is to equip learners with the skills to contribute to the economy.

[104] J Beckmann & HP Füssel "The Labour Rights of educators in South Africa and Germany and Quality Education: An Exploratory Comparison" (2013) *De Jure* 557 558; U Fredriksson "Quality Education: The key role of teachers" (2004) *Education International Working Paper 14* 2 <http://glotta.ntua.gr/posdep/Dialogos/Quality/ei_workingpaper_14.pdf> (accessed 13-08-2018).

[105] This is also recognised by the 2009 Medium Term Policy Statement (MTSF) of government focusing on the connection between economic growth and quality education. See Gustafsson "The When and How of Leaving School" (2011) *Stellenbosch Economic Working Papers No 09/11* 5; Ramaphosa "The ANC's 2019 Election Manifesto" (2019) *Politcsweb;* See also *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) paras 45-46.

[106] See Chisholm (1983) *Comparative Education* 357-371 for an explanation of the apartheid government's approach to vocational versus academic education.

The direct impact of education on economic growth can be considered with reference to education levels and unemployment in South Africa. In the fourth quarter of 2020, South Africa's unemployment rate was at 32,5% with 7,2 million unemployed persons.[107] The age group with the highest unemployment is the group between 15 and 24 years of age, with an unemployment rate of 63.2%.[108] The link between education and economic activity becomes very clear when one considers that a mere 1,8% of graduates in South Africa are unemployed, compared to 52.3% of persons without matric.[109] These statistics paint a bleak picture for the basic education system and its capacity to retain and deliver employable individuals.[110] Investment in the human capital of a country through education is one of the drivers of economic growth. As noted by the World Education Forum, at the adoption of the Dakar Framework for Action in 2000, and in reaffirmation of the World Declaration on Education for All adopted in Thailand in 1990:

> "[Education] is the key to sustainable development and peace and stability within and among countries, and thus an indispensable means for effective participation in the societies and economies of the twenty-first century, which are affected by rapid globalization".[111]

[107] Statistics South Africa "Quarterly Labour Force Survey" (2020) *Statistics South Africa* 13-15 <http://www.statssa.gov.za/publications/P0211/P02114thQuarter2020.pdf>; Omarjee "SA's jobless number grows to 7.2 million as unemployment rate breaches new record" (23-02-2021) *News24.* The impact of the global Covid-19 pandemic on unemployment should be recognised. However, unemployment has steadily increased even before the pandemic. In the third quarter of 2019 the unemployment rate was at 29.1%. See Statistics South Africa "Unemployment rises slightly in third quarter of 2019" (29-10-2021) *Statistics South Africa* <http://www.statssa.gov.za/?p=12689> (accessed 16-10-2021).

[108] Omarjee "SA's jobless number grows to 7.2 million as unemployment rate breaches new record" (23-02-2021) *News24.*

[109] Statistics South Africa "Quarterly Labour Force Survey" (2020) *Statistics South Africa* 13; Omarjee "SA's jobless number grows to 7.2 million as unemployment rate breaches new record" (23-02-2021) *News24*.

[110] Statistics South Africa "Quarterly Labour Force Survey" (2020) *Statistics South Africa* 13; Omarjee "SA's jobless number grows to 7.2 million as unemployment rate breaches new record" (23-02-2021) *News24*.

[111] World Education Forum, Dakar, Senegal "The Dakar Framework for Action" (2000) *World Education Forum* <https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Dakar_Framework_for_Action_2000_en.pdf> (accessed 31-05-2021).

South Africa consistently spends more on education than all emerging market economies that are part of BRICS.[112] However, this financial investment in education does not necessarily translate into economic growth. According to Hanushek and Woßmann it cannot be assumed that the investment of financial resources will lead to quality education and high academic achievement or outcomes.[113] The determination of whether quality education positively impacts economic growth first requires a way in which to measure quality.[114] The cognitive skills of learners and their performance in standardised assessments have been used to measure the quality of education systems between countries.[115] Hanushek and Woßmann note that the cognitive development of a learner can be measured by academic achievement, which points to the quality of the education they received.[116] High academic attainment is connected with strong economic returns when the learner enters the labour market.[117] According to local research, this is also true in South Africa in that the quality of education, the years completed and the type of education received are directly connected to labour market outcomes.[118] The flipside of the coin is that low-quality education leads to intergenerational poverty and slim future prospects.[119] Education has the potential to impact unemployment as well as inequality in society.[120] The effect of low-quality education is discussed in more detail later in this chapter.[121]

Perhaps the most important indicator of the economic value of education is whether the system adequately provides learners with the necessary skills to fulfil the type of work driving economic growth – currently and into the future. South Africa cannot

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[112] Jansen "School quality in South Africa" in *The search for quality education in post-apartheid South Africa* 81; The share of public expenditure on education in South Africa was 6.9% of GDP in 2015, compared to India's 2.7% of GDP in 2017, Brazil's 6.2% of GDP in 2015, Russia's 3.7% of GDP in 2019 and China's 4.0% of GDP in 2019. See BRICS "BRICS joint statistical publication" (2020) *BRICS* 12 <https://eng.brics-russia2020.ru/images/132/34/1323459.pdf> (accessed 16-10-2021).

[113] EA Hanushek & L Woßmann "The Role of Education Quality in Economic Growth" (2007) *World Bank Working Paper Series No 4122* 6 <https://openknowledge.worldbank.org/handle/10986/7154> (accessed 4-07-2019).

[114] Hanushek & Woßmann (2007) *World Bank Working Paper Series No 4122* 6.

[115] 6-7.

[116] 13.

[117] 6, 13.

[118] Van Der Berg et al "Low Quality Schooling as a Poverty Trap" *Stellenbosch Economic Working Papers No 25/*2011 8-13; Spaull "Schooling in South Africa: How Low-Quality Education Becomes a Poverty Trap" in *South African Child Gauge* 37.

[119] Spaull "Schooling in South Africa: How Low-Quality Education Becomes a Poverty Trap" in *South African Child Gauge* 37.

[120] M Mlachila & T Moeletsi "Struggling to Make the Grade: A Review of the Causes and Consequences of the Weak Outcomes of South Africa's Education System" (2019) *International Monetary Fund Working Paper, African Department 19/47* 4.

[121] See paragraph 2 5 below.

remove itself from the effect of globalisation and the fourth industrial revolution on the skills necessary to make a living in an increasingly competitive labour market.[122] Even though commentators differ on the exact scope and effect of globalisation,[123] especially its effect on education systems,[124] the South African labour market is shifting to a knowledge-based economy requiring high-skilled workers. The HSRC notes that "[k]nowledge-based economies have the potential to stimulate economic growth, provide higher wages and greater employment opportunities, as well as enhance a country's competitiveness within the global environment".[125]

However, innovation is needed in order for a country to drive a knowledge-based economy which, in turn, requires research and development.[126] This further requires government involvement through the provision of resources, infrastructure and significant investment in human capital and skills.[127] Unfortunately, Blankley and Booyens from the HSRC observe that existing policies do not strike an adequate balance between the development of the knowledge economy and sustainable long-term growth.[128] Such a framework necessitates policies that will enhance innovation, which starts with education.[129] In a 2018 list compiled by the DHET, sixteen occupations in high demand were identified, all in the information technology sector.[130]

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[122] See generally FM Reimers *Educating Students to Improve the World* (2020); F Viljoen "Contemporary Challenges to International Human Rights Law and the Role of Human Rights Education" (2011) *De Jure* 207 226.

[123] See M Maguire "Towards a Sociology of the Global Teacher" in MW Apple, SJ Ball and LA Gandin (eds) *The Routledge International Handbook of the Sociology of Education* (2010) 58, 59 for a discussion on the meaning and effect of globalisation.

[124] See Winch & Gingell *Philosophy of Education* 90-91.

[125] W Blankley & I Booyens "Building a Knowledge Economy in South Africa" (2011) *HSRC Centre for Science, Technology and Innovation Indicators* <http://www.hsrc.ac.za/en/review/March-2011/knowledge-economy> (accessed 3-05-2019).

[126] Blankley & Booyens "Building a Knowledge Economy in South Africa" (2011) *HSRC Centre for Science, Technology and Innovation Indicators.*

[127] Blankley & Booyens "Building a Knowledge Economy in South Africa" (2011) *HSRC Centre for Science, Technology and Innovation Indicators.*

[128] Blankley & Booyens "Building a Knowledge Economy in South Africa" (2011) *HSRC Centre for Science, Technology and Innovation Indicators.*

[129] Blankley & Booyens "Building a Knowledge Economy in South Africa" (2011) *HSRC Centre for Science, Technology and Innovation Indicators.*

[130] Business Tech "16 South African Jobs that are in High Demand Right Now" (2019) *Business Tech* <https://businesstech.co.za/news/business/305558/16-south-african-jobs-that-are-in-high-demand-right-now/> (accessed 31-05-2019). The 16 occupations are: "ICT project manager, Data Management manager; Application Development manager; Information Technology manager; Information Systems director; ICT systems analyst; Software developer; ICT risk specialist; Programmer analyst; Developer programmer and Applications programmer".

This raises fundamental questions about the preparedness of the basic education system in South Africa for this challenge.[131]

In this regard, a report by Quacquarelli Symonds,[132] a UK company specialising in higher education and careers information, is one of the first to compare employer and student expectations of employment in the twenty-first century. The study was based on information from more than 11 000 participating companies and students, also from South Africa.[133] The report identified five skills employers expect globally. These are problem solving, teamwork, communication, adaptability and interpersonal skills.[134] The report also compares the expectation of the employer with their satisfaction of the level of the particular skill of graduate employees. The report shows that developed countries show the highest levels of satisfaction with the skills of their graduates.[135] The common perception among employers is that there is a "graduate skills gap", which suggests that university students do not have enough opportunity during their studies to develop skills vital to the workplace.[136] As is evident in the discussion on the state of education in South Africa, these expectations of employers are far removed from the reality of what happens in the majority of our classrooms at school level. Learners are struggling to grasp fundamental mathematical concepts and to master the basics of reading, let alone gain access to a university and a job that requires this high standard of personal development. To contribute sustainably to economic growth, it is necessary to move beyond an approach of the availability of education to one aimed at ensuring the right type of education at the required standard in order for school leavers to enter tertiary education or the labour market with relevant skills.

This brings us to the indirect impact of education on economic growth. One way in which education indirectly impacts on economic growth is through the development of autonomous learners who have or can gain access to information and can take responsible decisions. Learners can rely on this autonomy in regard to decisions that

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131 See MW Apple "Global Crises, Social Justice and Teacher Education" (2011) 62 *Journal of Teacher Education* 222–234; Maguire "Towards a Sociology of the Global Teacher" in *The Routledge International Handbook of the Sociology of Education* (2010) 62.

132 This report was compiled using the QS Global Employer Survey as well as the 2018 Applicant Survey and is supported by the UK Institute of Student Employers (ISE).

133 Quacquarelli Symonds "The Global Skills Gap in the 21st Century" (2019) *Quacquarelli Symonds* 5 <https://www.qs.com/portfolio-items/the-global-skills-gap-in-the-21st-century/> (accessed 23-05-2019).

134 Quacquarelli Symonds "The Global Skills Gap in the 21st Century" (2019) *Quacquarelli Symonds* 13.

135 Quacquarelli Symonds "The Global Skills Gap in the 21st Century" (2019) *Quacquarelli Symonds* 12.

136 Quacquarelli Symonds "The Global Skills Gap in the 21st Century" (2019) *Quacquarelli Symonds* 5.

affect their economic well-being. In this regard, Van der Vyfer mentions that education has the power to advance learners economically and socially, it promotes gender equality, empowers girls and women with regard to reproductive rights and teaches learners the ability to choose their futures.[137] In this regard, it is noteworthy that while the unemployment rate in South Africa is the highest amongst black Africans, a group that disproportionately suffers are black women, with an unemployment rate of 38,5%.[138] In a developing country such as South Africa, where the majority of the population is dependent on government resources and welfare assistance, reproductive rights are interconnected to the realisation and enjoyment of other rights.[139] More relevant to this particular study is the connection between education, reproductive rights and economic growth. First, equipping girls and women with the necessary information and providing an environment in which to exercise responsible choices regarding reproductive rights may lead to more female learners completing school and becoming economically independent.[140] Second, women are especially vulnerable to economic hardship since they are primarily burdened with child-rearing.[141]

It is acknowledged that various social factors influence female learners' right to choose whether and when to have children, including sexual norms, gender roles, social pressure, as well as religious and cultural convictions. As South Africa moves to a knowledge-based economy, children remain dependent on their parents for longer, which has an economic effect on the family structure.[142] A part of reproductive autonomy is a woman's freedom to choose whether or when to procreate.[143] At the core of these reproductive rights is the right to choose freely without discrimination, judgment or repercussion. Women's freedom to choose has historically been resisted,

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[137] Van der Vyfer (2012) *SAPL* 343.
[138] Omarjee "SA's Jobless Number Grows to 7.2 Million as Unemployment Rate Breaches New Record" (23-02-2021) *News24.*
[139] Van der Vyfer (2012) *SAPL* 326.
[140] FH Berhane "Women, Sexual Rights and Poverty: Framing the Linkage under the African Human Rights System" in C Ngwena & E Durojaye (eds) *Strengthening the Protection of Sexual and Reproductive Health and Rights in the African Region Through Human Rights* (2014) 343.
[141] Berhane "Women, Sexual Rights and Poverty" in *Strengthening the Protection of Sexual and Reproductive Health and Rights in the African Region Through Human Rights* 331; K Hall & Z Mokomane "The Shape of Children's Families and Households: A Demographic Overview" in K Hall, L Richter, Z Mokomane & L Lake (eds) *South African Child Gauge* (2018) 32 37.
[142] Anonymous "Adult Children can Sabotage Your Retirement" (2016) *Fin24* <https://www.fin24.com/Money/Retirement/adult-children-can-sabotage-your-retirement-20160713> (accessed 4-07-2019).
[143] Berhane "Women, Sexual Rights and Poverty" in *Strengthening the Protection of Sexual and Reproductive Health and Rights in the African Region Through Human Rights* 332.

undermined and attacked.[144] The realisation of reproductive rights is important in the context of education and the economy, because of the ripple effect it has on the economic and educational advancement of learners and their parents. Berhane emphasises that poor decisions surrounding reproductive health result in economic pressure as it reduces income, productivity and a parent's ability to invest in their children.[145] A quality education develops a child's capabilities to use their talents, skills and environment to make decisions they value and enhance their feelings of autonomy and control over their lives.[146] This, in turn, has the potential to positively impact the economy as more female learners are educated and access the labour market.

This discussion focused on ways in which education has a direct and indirect impact on economic activity and growth. The high unemployment rate, together with the so-called skills gap and low-quality education, directly constrains economic growth in South Africa. However, education also has an indirect impact on economic growth and a focus on, for example, equality and the education of girls can lead to more female learners accessing the labour market. This again reveals that education is a multi-faceted concept, and its impact is far-reaching.

2 4 The elements of education and the "quality" of basic education

2 4 1 The importance of a quality education

The earlier discussion in this chapter focused on the different dimensions and an understanding of a "basic education". In the course of this discussion some factors impacting on the delivery and outcomes of basic education were identified. In general, it is acknowledged that the factors impacting on basic education include, but is not limited to, competent management, qualified and committed educators,

[144] See The Guardian "Texas Governor Signs Extreme Six-Week Abortion Ban Into Law" (2021) <https://www.theguardian.com/us-news/2021/may/19/texas-abortion-ban-law-greg-abbott> (accessed 09-06-2021); N Chavez "The Wave of Abortion Restrictions in America" (18-05-2019) *CNN* <https://edition.cnn.com/2019/05/18/us/abortion-laws-states/index.html> (accessed 04-07-2019).

[145] Berhane "Women, Sexual Rights and Poverty" in *Strengthening the Protection of Sexual and Reproductive Health and Rights in the African Region Through Human Rights* 344.

[146] Dieltiens & Many-Gilbert "School Drop-Out: Poverty and Patterns of Exclusion" in *South African Child Gauge* 49.

infrastructure,[147] transport, safety at school, educational materials,[148] the socio-economic background of learners and the education level of parents.[149] Our society is not merely divided according to education level and the quality of such education, but continues to be divided along the underlying racial, cultural and language divide and, as discussed earlier, in terms of space and land.[150] However, Van der Berg et al make an interesting point when they say that addressing one of these issues will not necessarily solve the others.[151] They use the example of neighbourhoods and note that living in an affluent neighbourhood itself does not ensure success or wealth, it is the result of contributing cultural, social and economic factors.[152] Even so, education is one of the only societal equalisers that exist. In fact, as mentioned by Gustafsson:

> "It has been demonstrated that differences in the quality of learning in schools explain, more than any other development indicator, why certain countries perform better economically than others".[153]

It makes sense then to focus on improving the quality of education in impoverished countries with high youth unemployment, such as South Africa, in order to improve

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[147] See, eg, McConnachie & McConnachie's argument regarding the obligation of the state, as part of fulfilling the right to a basic education, to provide adequate school infrastructure. C McConnachie & C McConnachie "Concretising the Right to a Basic Education" (2012) 129 *South African Law Journal* 554-590; This is reiterated by the Minimum Uniform Norms and Standards for Public School Infrastructure GN R 920 in *GG* 37081 of 29-11-2013.

[148] The Limpopo textbook saga is an example where the Department of Basic Education failed to provide the necessary educational materials before commencement of the academic year. In terms of *Minister of Education v Basic Education for All* 2016 4 SA 63 (SCA) the Department failed in their duty to immediately realise the right to basic education and therefore infringed on s 29(1)(a) of the Constitution.

[149] N Spaull & E Pretorius "Still Falling at the First Hurdle: Examining Early Grade Reading in South Africa" in N Spaull & Jansen (eds) *South African Schooling: The Enigma of Inequality* (2019) 1-23; A Zoch "Life chances and class: Estimating Inequality of Opportunity for children and Adolescents in South Africa" (2015) 32 *Development Southern Africa* 57-75; C Ward, T Makusha & R Bray "Parenting, Poverty and Young People in South Africa: What are the connections?" in A de Lannoy, S Swartz, L Lake & C Smith (eds) *South African Child Gauge* (2015) 69-74.

[150] S Van Der Berg, C Burger, R Burger, M De Vos, G du Rand, M Gustafsson, E Moses, D Shepherd, N Spaull, S Taylor, H Van Broekhuizen & D Von Fintel "Low Quality Schooling as a Poverty Trap" (2011) *Stellenbosch Economic Working Papers No 25/*2011 1-22 <https://ssrn.com/abstract=2973766> (accessed 12-06-2019).

[151] Van Der Berg et al "Low Quality Schooling as a Poverty Trap" *Stellenbosch Economic Working Papers No 25/*2011 1.

[152] Van Der Berg et al "Low Quality Schooling as a Poverty Trap" (2011) *Stellenbosch Economic Working Papers No 25/*2011 1. The authors refer to "social mobility" as the combination of factors leading to wealth.

[153] Gustafsson "The When and How of Leaving School" (2011) *Stellenbosch Economic Working Papers No 09/11* 5.

economic performance.[154] It has the potential to provide children from different backgrounds with the skills necessary to become participants in the labour market and advance themselves economically. This does not imply that each and every child with an education will, to use the above example, gain access to the metaphorical affluent neighbourhood, but it gives each child a fighting chance. As O'Hare et al argue, education serves as a means to survival,[155] which emphasises the importance of a quality education, not only in terms of knowledge gained, but also to acquire the skills to survive and ultimately, to thrive. As mentioned, various factors contribute to a quality basic education, including the educator. However, it is necessary to define what is meant by a "quality" basic education before analysing whether South Africa reaches that standard and whether educators contribute to or interfere with the attainment of that standard.

2 4 2 Defining a "quality" basic education

To this point, the focus of this chapter has been on the meaning and import of "basic education". However, such a discussion will be incomplete without defining a "quality" basic education. What the earlier discussion also showed is that education is a multi-faceted concept and that the process of education has the potential to change and develop each learner. A "quality" basic education can be given greater meaning by considering the dimensions of "basic education" discussed thus far. However, one should also guard against insisting on a single, all-encompassing definition of "quality" basic education, simply because education remains a dynamic and ever-changing process.

The discussion of the aims of education showed one of its primary goals to be to ultimately add value to learners' lives and to offer them the skills to apply their knowledge in a way that advance and improve their lives. Education should not merely be designed to develop the cognitive ability of a person but also the emotional

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[154] Gustafsson "The When and How of Leaving School" (2011) *Stellenbosch Economic Working Papers No 09/11* 5; See also M Gustafsson, S Van der Berg, D Shepherd & C Burger "The Costs of illiteracy in South Africa" (2010) *Stellenbosch Economic Working Papers No 14/*10 1-47 <https://ideas.repec.org/p/sza/wpaper/wpapers113.html> (accessed 25-06-2019); See Anonymous "Unemployment Rate Rises to 27.6%, Nears 15-year High" (2019) *Fin24* <https://www.fin24.com/Economy/just-in-unemployment-rate-rises-to-276-in-first-quarter-of-2019-20190514> (accessed 4-07-2019).

[155] BAM O'Hare, EMM Bengo, D Devakumar & JM Bengo "Survival Rights for Children: What are the national and Global Barriers?" (2018) 18 *African Human Rights Law Journal* 508-526.

intelligence required to take informed and responsible decisions. It also challenges a learner's experiences, and in that way, education is the gateway between the reality learners find themselves in and greater possibilities.

Since education has a holistic impact on the development of a person, it is acknowledged that education does not only happen when a learner is at school but is also impacted by the influence of parents, peers, socio-economic circumstances and communities.[156] Apart from the value of education on the cognitive and emotional development of a learner, it also has a larger societal impact. The discussion of the historical and political reality in South Africa provided insight into the ideological objectives enforced through the education system. One of the primary economic objectives of education is to further the country's shift to a knowledge economy and to ensure sustainable economic growth. Education also indirectly impacts the economy by furthering equality and developing autonomy within each person which will ensure, for instance, that more female learners ultimately enter the workforce.

Taking these considerations into account, and in line with the United Nation's Sustainable Development Goal 4, "quality" education is defined by Education International and ASCD as "one that focuses on the whole child – the social, emotional, mental, physical, and cognitive development of each student regardless of gender, race, ethnicity, socioeconomic status, or geographic location. It prepares the child for life, not just for testing".[157] Ban Ki-moon, former secretary-general of the United Nations notes that "education must fully assume its central role in helping people to forge more just, peaceful and tolerant societies".[158]

The Constitution does not define "quality" basic education, but through its embrace of the democratic values of human dignity, equality and freedom, together with SASA that aims to "redress past injustices in educational provision [and] provide an education of progressively high quality for all learners",[159] the right to a basic education includes a "quality" education.[160] This is re-affirmed by the DBE's Action Plan to 2019:

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[156] Hanushek & Woßmann "The Role of Education Quality in Economic Growth" (2007) *World Bank Working Paper Series No 4122* 25.

[157] ACSD "ASCD and Education International Release Statement on Defining a Quality Education" (17-02-2016) *ACSD* <http://www.ascd.org/news-media/Press-Room/News-Releases/ASCD-and-Education-International-Release-Statement-on-Defining-a-Quality-Education.aspx> (accessed 10-08-2018).

[158] ACSD "ASCD and Education International Release Statement on Defining a Quality Education" (17-02-2016) *ACSD.*

[159] See the Preamble to SASA.

[160] See Arendse (2019) *LDD* 106.

Towards the Realisation of Schooling 2030.[161] This action plan commences by saying that from 2015 onwards, "the emphasis will be on [the] quality of schooling outcomes, and on better preparation of our young people for the life and work opportunities after they leave school".[162] The plan lists certain elements identified as crucial to delivering quality education. This includes punctual and consistent attendance by learners of a school that is accessible to them, adequately trained educators who continue to improve their capability and a responsible principal who assumes a leadership role, abundant learning and teaching materials and spacious, functional, safe and well-maintained school buildings and facilities.[163] Some of these prerequisites for a quality basic education have also been confirmed and enforced by and through litigation, which are discussed in greater detail in chapter 3. What the courts have confirmed is that the right to a basic education includes certain practical aspects such as transport to and from school,[164] textbooks[165] and infrastructure.[166] These, of course, are necessary to ensure that each learner receives a quality basic education. They are not, however, the only prerequisites for quality basic education.

These approaches to the quality of education focus on the wider societal impact of education from a human rights perspective. In contrast, the economic literature concentrates on the cognitive skills developed by learners through education.[167] According to this approach the level of cognitive skills, developed through literacy and numeracy, can be measured by way of assessments to determine whether the desired outcomes were reached.[168] The approach by Heyneveld and Craig assesses quality by looking at the input and outputs of education, that is, by considering the investment in education and subsequent returns on such investment.[169] Spaull follows a similar

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[161] Department of Basic Education "Action Plan to 2019: Towards the Realisation of Schooling 2030" (2015) *Department of Basic Education* <https://www.education.gov.za/Portals/0/Documents/Publications/Action%20Plan%202019.pdf?ver=2015-11-11-162424-417> (accessed 6-06-2021).

[162] See the Minister's Foreword in "Action Plan to 2019: Towards the Realisation of Schooling 2030" (2015) *Department of Basic Education* 2.

[163] Department of Basic Education "Action Plan to 2019" (2015) *Department of Basic Education* 9.

[164] See *Tripartite Steering Committee v Minister of Basic Education* 2015 5 SA 107 (ECG) paras 12-14.

[165] See *Minister of Basic Education v Basic Education for All* 2016 4 SA 63 (SCA).

[166] See *Equal Education v Minister of Basic Education* 2019 1 SA 421 (ECB).

[167] Mlachila & Moeletsi "Struggling to Make the Grade" (2019) *International Monetary Fund Working Paper, African Department 19/47* 12.

[168] 12.

[169] W Heyneveld & H Craig "Schools Count: World Bank Project Designs and the Quality of Primary Education in Sub-Saharan Africa" (1996) *World Bank Technical Paper No 303* 1-113 <http://documents.worldbank.org/curated/en/752881468742862189/pdf/multi-page.pdf> (accessed 5-07-2019); Mlachila & Moeletsi "Struggling to Make the Grade" (2019) *International Monetary Fund Working Paper, African Department 19/47* 12.

approach to determine what a quality education entails and says that it refers to the knowledge, skills and values that are important to society and are transmitted through the curriculum.[170] Van der Berg et al consider a quality education as one which results in the social mobility of the learner.[171] From the perspective of learners, it seems that a constructive learning environment is a key element to achieving their dreams of successfully completing school and becoming productive participants in the economy.[172] Drawing from and accounting for all these different approaches to the quality of education, the following definition of an objective "quality" education is one that can also be applied to the South African context and for purposes of this study:

> A quality education entails a holistic approach that develops a learner's individual personality and cognitive abilities in such a way that it provides each learner with relevant knowledge, skills and values within a constructive learning environment to contribute to the economy and ensures that the education received will serve as an equaliser in the face of existing socio-economic inequalities.

With this definition in mind, the following section considers the state of basic education in South Africa. This includes a discussion of a further contributing factor to the quality of education of central importance to this thesis – the educator. In this regard, the spotlight will also be on what happens in the classroom, with specific focus on current education outcomes and the indispensable role of educators in promoting the quality of education.

2 5 The state of basic education in South Africa

2 5 1 Background

At a recent conference on social justice and equal education, Madonsela emphasised the importance of quality education in the South African context. She mentioned that

[170] Spaull "Schooling in South Africa: How Low-Quality Education Becomes a Poverty Trap" in *South African Child Gauge* 36.
[171] Van Der Berg et al "Low Quality Schooling as a Poverty Trap" (2011) *Stellenbosch Economic Working Papers No 25*/2011 1.
[172] J Brickhill & Y Van Der Leeve "Transformative constitutionalism – Guiding light or empty slogan?" (2015) *Acta Juridica* 141 141.

the quality of education can be measured by the "three S test".[173] The first refers to the social context in which education takes place. Education needs to be adaptable to that changing context and develop the skills required for such a context. In this regard, she stated that the South African education system needs to consider whether it is ready for the fourth industrial revolution and its challenges. The second element of the test considers social justice and evaluates whether the education system is producing functional citizens or ones who are dependent on society and the government. The last element enquires whether the education system is sustainable and, more specifically, on its way to meet the sustainable development goals in education by 2030.[174]

An analysis of the state of basic education in South Africa reveals a myriad of challenges. This is especially true of schools in impoverished areas. One could go so far as to say that for a poor learner to escape poverty in South Africa through a basic education is nothing short of a miracle.[175] In anticipation of the further discussion in this chapter and subsequent chapters, the broad reasons for this failure can be categorised as follows. First, it is the result of a history of discrimination and inequality that precluded learners from accessing education. Second, it is a failure on the government's part to provide quality education. This includes policies regulating the sector as well as the proper implementation of policy to ensure that pro-poor expenditure in education is implemented effectively so that learners benefit from the resources. Third, education is politicised, which is a combination of a power-play between the government and trade unions active in the sector and, as Jansen

[173] T Madonsela "Social Justice and Education for the 21st Century: Towards a Decade of Equalising Opportunities and Optimising Social Justice Outcomes in and Through Education" paper presented at the *Conference on Education and Social Justice: A project of the Law Trust Chair in Social Justice*, Faculty of Law, Stellenbosch University, 3 June 2021.

[174] See, eg, the Department of Basic Education "Action Plan to 2019: Towards the Realisation of Schooling 2030" (2015) *Department of Basic Education* 3; See also United Nations "UN Sustainable Development Goal 4: Education" *Sustainable Development Goals* <https://sdg4education2030.org/the-goal> (accessed 6-06-2021).

[175] See N Spaull "Schooling in South Africa: How Low-Quality Education Becomes a Poverty Trap" (2015) *South African Child Gauge* 34-41.

describes it, "the gangsters running our communities".[176] Fourth, it is an issue of corruption, incompetence, abuse of authority and a complete disregard of the professionalism required of educators. The (in)adequacy of the legislative regulation of educator performance, which is the focus of this thesis, clearly links to the second and fourth factors of these factors.

These factors make it clear that the challenges experienced specifically in the public education sector in South Africa are multi-faceted and cannot be attributed to one single failure or one single role player. It is a result of many failures which manifest in each classroom and impact on the quality of education received by learners. The earlier discussion also alluded to the fact that many factors contribute to the quality of education. Some are easier to fix than others. Delivering textbooks on time is pure logistics, measuring the quality of education to identify shortfalls is more challenging. However, a factor that undeniably contributes to the delivery of a quality education is the educator.

Before analysing the role of the educator, it is necessary to illustrate the profound effect of low-quality education on the future prospects of learners. When the odds are stacked against learners, as specifically is the case with poor learners, it becomes increasingly hard to complete school successfully. When a school does not improve the future prospects of learners, the education system has failed that learner. Focusing specifically on the educator, the discussion shows just how important the quality and competence of educators are. In this regard, it may already be mentioned that in chapter 6 of this thesis some 138 ELRC arbitration awards relating to the conduct and capacity of educators are analysed. The facts of these disputes reveal the reality of what is happening in schools and classrooms in South Africa and the extent to which educators disregard their duties and make themselves guilty of misconduct. The facts of a few of these arbitrations are mentioned in the discussion below to provide a taste of what may be expected in the chapters to follow.

[176] Jansen was part of a project in rural Kwazulu-Natal where schools with pit latrine toilets were approached and given the option of having the pit latrine toilets at the schools replaced. There only was a 50% success rate, because some schools were unable to accept the offer as a result of the intimidation by community members who demanded that they be granted the money to employ other community members to replace the toilets and not the company employed for this purpose. This resulted either in the money disappearing or in a sub-standard service being delivered. Ultimately, the people suffering are the poor. J Jansen "Policy Aspects of Education" paper presented at the *Conference on Education and Social Justice: A project of the Law Trust Chair in Social Justice*, Faculty of Law, Stellenbosch University, 3 June 2021.

2 5 2 The impact of current education outcomes on the future prospects of learners

Turok, founder and chair of the AIMS South Africa (a mathematical institute), mentions that Africa as a continent has the youngest demographic in the world.[177] South Africa has a very young population which means that it has a lot of potential provided that learners have the opportunity to be educated to compete on a global scale. Unfortunately, the unemployment rate is highest among youths aged 15 to 24 in South Africa, with 63.2% of all unemployed persons falling in this age bracket.[178] What is more alarming is that around 3,1 million of the 10,3 million persons falling in the youth age bracket are not employed, but neither are they pursuing an education or other form of training.[179] The discussion below considers the quality of the basic education system for those youths who are, in fact, still pursuing an education.

It is difficult to definitively measure the value education adds to a learner's life, but one can use learners' achievement in cross-national assessments as a guideline on the transmission of knowledge and skills through the curriculum.[180] Results of the 2016 Progress in International Reading Literacy Study ("PIRLS"), which measured the reading ability of learners, revealed that 78% of grade 4 learners in South Africa cannot read for meaning in any of the eleven official languages.[181] There were 50 participating countries in the study of which South Africa scored the lowest in reading comprehension. The large majority of grade 4 learners do not understand what they are reading.[182] South Africa has also not been able to improve the reading ability of

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[177] N Turok "The role of mathematical science in transformative education" at the Conference on Education and Social Justice: A project of the Law Trust Chair in Social Justice, Faculty of Law, Stellenbosch University, 3 June 2021.

[178] Statistics South Africa "Quarterly Labour Force Survey" (2020) *Statistics South Africa* 13-15; Omarjee "SA's jobless number grows to 7.2 million as unemployment rate breaches new record" (23-02-2021) *News24*.

[179] Statistics South Africa "Quarterly Labour Force Survey" (2020) *Statistics South Africa* 14; Omarjee "SA's jobless number grows to 7.2 million as unemployment rate breaches new record" (23-02-2021) *News24.*

[180] Spaull "Schooling in South Africa: How Low-Quality Education Becomes a Poverty Trap" in *South African Child Gauge* 34.

[181] The primary data for PIRLS 2016 was not analysed for this research. These statistics are drawn from the following sources. N Spaull & E Pretorius "Still Falling at the First Hurdle" in N Spaull & Jansen (eds) *South African Schooling: The Enigma of Inequality* (2019) 146 148; See also S Howie, C Combrinck, K Roux, M Tshele, G Mokoena & N Mcleod-Palane "Progress in International Reading Literacy Study 2016" (2017) *Centre for Evaluation and Assessment* 73 <https://www.up.ac.za/media/shared/164/ZP_Files/pirls-literacy-2016_grade-4_15-dec-2017_low-quality.zp137684.pdf> (accessed 26-06-2019).

[182] Spaull & Pretorius "Still Falling at the First Hurdle" in *South African Schooling: The Enigma of Inequality* 148-149.

grade 4s between the two rounds of PIRLS in 2011 and 2016.[183] Being proficient in reading is imperative for success in any subject since it is the mechanism through which all subjects are taught, including mathematics.[184] A failure to master concepts in the foundational stages of education is evident in later years of education. In this regard, grade 9 learners ranked second-last in the Trends in International Mathematics and Science Study ("TIMSS").[185] The situation does not improve towards the end of learners' school career, as is evident from the high drop-out rate and low achievement in core subjects, such as mathematics, at the end of grade 12.

In order to qualify to write the NSC examination at the end of grade 12, learners must take seven subjects – four of which are compulsory and three electives which are chosen at the beginning of grade 10.[186] Learners are obliged to take two official languages, mathematics or mathematical literacy and life orientation.[187] The minimum requirements to pass matric require that a learner obtain at least 40% in their home language, at least 40% in two other subjects and at least 30% in four other subjects.[188] However, a learner is allowed to fail one subject and still pass matric if the other six subjects meet the above requirements. This can be illustrated using a fictional learner's results:

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[183] Mlachila & Moeletsi "Struggling to Make the Grade" (2019) *International Monetary Fund Working Paper, African Department 19/47* 13.

[184] Spaull & Pretorius "Still Falling at the First Hurdle" in *South African Schooling: The Enigma of Inequality* 148-150.

[185] The primary data for TIMSS 2015 was not analysed for this research. These statistics are drawn from the following source. Mlachila & Moeletsi "Struggling to Make the Grade" (2019) *International Monetary Fund Working Paper, African Department 19/47* 5.

[186] The DBE has a list of 25 approved optional subjects and learners can elect any three from the list of subjects offered at their school. All schools do not necessarily offer the complete list of subjects. The following subjects are considered "high credit subjects": Accounting, Agriculture Science, Business Studies, Consumer Studies, Dramatic Arts, Economics, Engineering Graphics and Design, Geography, History, Information Technology, Languages, Life Sciences, Mathematical Literacy, Mathematics, Music, Physical Science, Religion Studies, Visual Arts. A Fridie "UPDATE: What are the NEW matric pass requirements?" (2019) *Parent24* <https://www.parent24.com/Learn/Matric-past-exam-papers/what-is-a-matric-pass-20160106> (accessed 2-07-2019); C Engelbrecht "Passing matric: Requirements" (2018) *The Careers Portal* <https://www.careersportal.co.za/high-school/grade-12/studying-further/passing-matric-requirements> (accessed 2-07-2019); Department of Basic Education "Subject choice and career pathing" (2019) *Department of Basic Education* <https://www.education.gov.za/Informationfor/Learners/SubjectChoiceandCareerPathing.aspx> (accessed 2-07-2019).

[187] Department of Basic Education "Subject choice and Career Pathing" (2019) *Department of Basic Education.*

[188] Depending on the mark achieved in each subject there are four types of passes. The National Senior Certificate Pass which has the lowest requirements, the Higher Certificate Pass, Diploma Pass and Bachelor Degree Pass. See A Frisby "What are the Matric Pass Requirements" (29-09-2021) *Matric College* <https://www.matric.co.za/what-are-the-matric-pass-requirements/> (accessed 15-10-2021).

Table 1: Fictional learner's results in the National Senior Certificate ("matric") examination:[189]

Compulsory Subjects	Final Mark (%)	Meets pass requirement
1. Home Language (English)	40%	Yes
2. First Additional Language (Afrikaans)	40%	Yes
3. Life Orientation	40%	Yes
4. Mathematical Literacy	30%	Yes
Elective subjects		
1. History	30%	Yes
2. Visual Arts	30%	Yes
3. Consumer Studies	29%	Yes (allowed to fail one subject)

The above learner passes the NSC examination and obtains the matric certificate. The requirements for provisional access to university (bachelor's degree pass) or provisional access to an institution to study towards a diploma (diploma pass) are slightly different. For instance, to obtain a bachelor degree pass a learner must achieve at least 40% for their home language, at least 50% in four other high credit subjects[190] and at least 30% in two other subjects.[191] These are the absolute minimum requirements and (some) universities require prospective students to also pass the National Benchmark Test ("NBT") before being accepted into university.[192] It is fair to say that it should not be extremely challenging to pass matric considering how low the minimum requirements are. However, the NSC examination results reveal quite the contrary. Given the high demand for skilled workers in South Africa, it is worrying that so few learners elect mathematics (over mathematical literacy) as a subject and then how few of them are successful. One of the main reasons for this concern is that the majority of jobs in high demand require a tertiary qualification and mathematics is

[189] The results of the fictional learner is based on the pass requirements as of 29 September 2021.

[190] A list of high credit subjects can be accessed here <https://www.matric.co.za/what-are-the-matric-pass-requirements/>.

[191] A Fridie "UPDATE: What are the NEW Matric Pass Requirements?" (2019) *Parent24* <https://www.parent24.com/Learn/Matric-past-exam-papers/what-is-a-matric-pass-20160106> (accessed 2-07-2019); C Engelbrecht "Passing matric: Requirements" (2018) *The Careers Portal* <https://www.careersportal.co.za/high-school/grade-12/studying-further/passing-matric-requirements> (accessed 2-07-2019).

[192] The purpose of the NBT is to determine whether the learner is adequately prepared for university. See R Addinall "Matrics, here's all You Need to Know About the 2019 National Benchmark Tests (NBT)" (2019) *Parent24* <https://m.parent24.com/Learn/Matric-past-exam-papers/All-about-the-National-Benchmark-Tests-20110621> (accessed 2-07-2019).

compulsory for entrance to many university programmes.[193] In 2018, 512 735 learners wrote the NSC examination of which 400 761 passed (78.2%).[194] Of the 233 858 learners that wrote mathematics, only 135 638 reached the required 30% benchmark to pass, translating to 58% in total.[195] However, there is a stark decline in achievement as a mere 86 874 learners were able to achieve 40% in mathematics whereas the lowest threshold for mathematics for entrance into a university program in economics or accounting is 50%.[196] A mere 21,7% of the cohort who took mathematics were able to achieve a final mark above 50%, with only 2,5% of learners achieving a distinction (80% or above).[197] The above pass rate does not take into account the learners who dropped out of school before writing their NSC examination. One can conduct a lengthy analysis of the drop-out rate in South African public schools, but what it comes down to is that only around 40% of any cohort successfully complete secondary school and only around 5% of those learners go on to successfully complete tertiary education of at least three years, such as a bachelor degree at university.[198] What is more relevant to this study are the reasons for this high drop-out rate and what this implies for the quality of our basic education.

Using data collected through General Household Surveys and the National Income Dynamic Study ("NIDS") from learners on their reasons for dropping out of school, Gustafsson identifies the four main contributors to the drop-out rate.[199] These are financial hardship, pregnancy, searching for employment and academic

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[193] See, eg, how many Faculties at the University of Pretoria require mathematics as a subject for entrance to their programs. University of Pretoria "Make a smart grade 10 subject choice" (2018) *University of Pretoria* <https://www.up.ac.za/media/shared/360/Faculty%20Brochures%202015%202016/2018/grade-10-subject-choices_2018-pdf-7-06.12.2017.zp136586.pdf> (accessed 2-07-2019).

[194] Department of Basic Education "National Senior Certificate 2018: Examination report" (2019) *Department of Basic Education* <https://www.education.gov.za/Portals/0/Documents/Reports/NSC%202018%20Examination%20Report%20WEB.pdf?ver=2019-01-03-085338-000> (accessed 2-07-2019).

[195] Department of Basic Education "National Senior Certificate 2018 Diagnostic Report" (2019) *Department of Basic Education* 132.

[196] Department of Basic Education "National Senior Certificate 2018 Diagnostic Report" (2019) *Department of Basic Education* 132; Department of Basic Education "National Senior Certificate 2018: Examination report" (2019) *Department of Basic Education* 6.

[197] Department of Basic Education "National Senior Certificate 2018 Diagnostic Report" (2019) *Department of Basic Education* 133.

[198] Spaull "Schooling in South Africa: How Low-Quality Education Becomes a Poverty Trap" in *South African Child Gauge* 36; See also Gustafsson "The When and How of Leaving School" (2011) *Stellenbosch Economic Working Papers No 09/11* 11; Mlachila & Moeletsi "Struggling to Make the Grade" (2019) *International Monetary Fund Working Paper, African Department 19/47* 12.1.

[199] Gustafsson "The When and How of Leaving School" (2011) *Stellenbosch Economic Working Papers No 09/11* 21.

underperformance.[200] These reasons are also interlinked. As discussed above, spatial inequality in South Africa continues to be a challenge with well-resourced schools delivering quality education being located in more affluent neighbourhoods. Even though the national quintile system (to be discussed in greater detail in chapters 3 and 4) provide for no-fee schools, financial hardship continues to impact on learners even when they attend a no-fee school. Financial hardship and the need to search for employment may be linked since poor learners possibly also lack other basic resources which drive the need to drop out of school and search for a job to sustain themselves or their family financially. Furthermore, even where the reason for dropping out is ostensibly financial in nature, there may well be more complex socio-economic factors at play, such as the psychological impact of relative poverty impacting on the learner's experience and feelings of acceptance at school and their perspective on future prospects.[201] Research shows that around 42% of female learners who drop out of school, do so as a result of pregnancy.[202] As mentioned earlier, the importance of a quality education also impacts other, seemingly unrelated, decisions in a learner's life, since it provides a learner with the necessary information to make an informed decision about, for instance, reproduction.[203] This high drop-out rate among teenage female learners points to a failure by, among others, the education system to provide learners with the skills to make responsible decisions regarding family planning and future economic prospects.[204]

Lastly, dropping out as a result of underperformance is indicative of a system that does not adequately support struggling learners to improve their academic performance, as well as failures in the foundational phases of the education system to prepare learners to successfully complete their schooling career.[205] According to

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[200] 22.

[201] Dieltiens & Many-Gilbert "School Drop-Out: Poverty and Patterns of Exclusion" in *South African Child Gauge* 48.

[202] Gustafsson "The When and How of Leaving School" (2011) *Stellenbosch Economic Working Papers No 09/11* 21.

[203] Van der Vyfer (2012) *SAPL* 326-343; Berhane "Women, Sexual Rights and Poverty" in *Strengthening the Protection of Sexual and Reproductive Health and Rights In the African Region Through Human Rights* 331-348.

[204] 331, 343.

[205] According to Business Tech, 41.34% of the grade 10 class dropped out of school before reaching grade 12 in 2016. See Business Tech "Matric Pass Rate Obsession Masks South Africa's Real Education Crisis" (04-01-2017*)* *Business Tech* <https://businesstech.co.za/news/lifestyle/148791/matric-pass-rate-obsession-masks-south-africas-real-education-crisis/> (accessed 08-05-2018); Dieltiens & Many-Gilbert "School drop-out: Poverty and patterns of exclusion" in *South African Child Gauge* 48.

Spaull, this failure in the foundational phases of schooling makes it almost impossible for learners to counteract the effect in later grades.[206] This, together with the inequality between schools in educational resources, affects the success rate in the National Senior Certificate.[207] The inequality in education outcomes is clear and Spaull finds that:

> "[b]y grade 3, children in the poorest 60% of schools are already three years' worth of learning behind their wealthier peers and that this gap grows as they progress through school to the extent that, by grade 9, they are five years' worth of learning behind their wealthier peers".[208]

This is despite the shift to pro-poor spending in education and that the poorest fifth of schools receive six-fold the amount of government spending compared to the wealthiest fifth of schools.[209] Schools serving affluent communities usually charge school fees to supplement their budget and this gives them access to greater resources than in the case of schools serving poor communities.[210] However, only around 30% of learners attend fee-charging schools.[211] A smaller budget cannot justify the low-quality education of no-fee schools as South Africa spends more on education than any of the other BRICS developing economies, yet performs far worse in cross-

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[206] N Spaull "Education in SA: A tale of Two Systems" (2012) *Politicsweb* <http://www.politicsweb.co.za/news-and-analysis/education-in-sa-a-tale-of-two-systems> (accessed 07-08-2018).

[207] Spaull "Education in SA: A tale of two systems" (2012) *Politicsweb*.

[208] Spaull "Schooling in South Africa: How Low-Quality Education Becomes a Poverty Trap" in *South African Child Gauge* 36; See also N Spaull & J Kotze "Starting Behind and Staying Behind in South Africa: The Case of Insurmountable Learning Deficits in mathematics" (2015) 14 *International Journal of Educational Development* 13-24.

[209] This number is from Van Der Berg et al "Low Quality Schooling as a Poverty Trap" (2011) *Stellenbosch Economic Working Papers No 25/2011* 2. The following data pertains to spending by the Western Cape Department of Education in the 2021/2022 academic year. Quintile 1-3 schools in the Western Cape will receive R 1 631 funding per learner (the national average is R 1547 per learner), whereas Quintile 4 schools will receive R 818 funding per learner and Quintile 5 schools R 282 funding per learner. L Botha "WCED on Norms and Standards funding for Schools in Province" (26-05-2020) *Parliamentary Monitoring Group* <https://pmg.org.za/committee-meeting/30313/> (accessed 15-10-2021).

[210] Van der Berg et al "Low Quality Schooling as a Poverty Trap" (2011) *Stellenbosch Economic Working Papers No 25/*2011 2.

[211] N Spaull "Equity: A Too High Price to Pay?" in N Spaull & Jansen (eds) *South African Schooling: The Enigma of Inequality* (2019) 1 9; Department of Basic Education "General Household Survey: Focus on Schooling 2016" (2018) *Department of Basic Education* 33 <https://www.education.gov.za/Portals/0/Documents/Reports/General%20Household%20Survey%202016%20Focus%20on%20Schooling.pdf> (accessed 28-06-2019).

national assessments.[212] Financial resources are thus not necessarily the primary challenge in our education sector. In this regard, Van der Vyfer mentions that:

> "One can attribute this failure to comply [with the delivery of a basic education] to all sorts of reasons: incompetence of persons charged with the administration of public education, corruption within their ranks, the tremendous backlog in providing properly qualified teachers, adequate buildings, school books and other educational materials, and the like".[213]

Even with a pro-poor shift in expenditure,[214] many schools are still desperate for the most basic services and infrastructure such as running water, electricity, adequate buildings, classrooms and educational tools and materials. Drawing from information provided by the DBE's National Education Infrastructure Management System Report, Equal Education reports that:

> "3 544 schools do not have electricity, while a further 804 schools have an unreliable electricity source; 2402 schools have no water supply, while a further 2611 schools have an unreliable water supply; 913 do not have any ablution facilities while 11 450 schools are still using pit latrine toilets; 22 938 schools do not have stocked libraries, while 19 541 do not even have a space for a library; 21 021 schools do not have any laboratory facilities, while 1 231 schools have stocked laboratories; 2 703 schools have no fencing at all; and 19 037 schools do not have a computer centre, whilst a further 3 267 have a room designed as a computer centre but are not stocked with computers".[215]

Unfortunately, corruption in the education system has a negative influence on the quality of education as a corrupt system influences spending and the availability of

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[212] The share of public expenditure on education in South Africa was 6.9% of GDP in 2015, compared to India's 2.7% of GDP in 2017, Brazil's 6.2% of GDP in 2015, Russia's 3.7% of GDP in 2019 and China's 4.0% of GDP in 2019. See BRICS "BRICS joint statistical publication" (2020) *BRICS* 12 <https://eng.brics-russia2020.ru/images/132/34/1323459.pdf> (accessed 16-10-2021). See also Mlachila & Moeletsi "IMF Working Paper: Struggling to Make the Grade: A Review of the Causes and Consequences of the Weak Outcomes of South Africa's Education System" (2019) *International Monetary Fund* 4, 9. The authors note that "[i]n 2015, the South African government spent about 20 percent of the budget and 6 percent of the nation's GDP on education, exceeding many SSA countries and the OECD average of 5.2 percent".

[213] Van der Vyfer (2012) *SAPL* 342-343.

[214] Seekings (2004) *Review of African Political Economy* 301.

[215] See Equal Education "School Infrastructure" (2013) *Equal Education* <https://equaleducation.org.za/campaigns/school-infrastructure/> (accessed 6-06-2021).

resources necessary for service delivery.[216] The input of financial resources in the education system does not translate to education outcomes, especially for schools serving poor communities. According to Jansen, the primary problem of transforming education is not money, it is efficiency and the element obstructing efficiency are "the vultures" who interfere with implementation for their own benefit.[217] The "Jobs for Cash" scandal is an example of corruption within the education system.[218] Here a ministerial task team was appointed to investigate the selling of educator posts by members of trade unions and officials within the Provincial Departments of Education ("PDEs").[219] In other words, between the policy and practice, there are a number of role players that interfere with proper implementation and efficiency in the education system. This speaks to accountability within the system and is addressed throughout this research.

Apart from this, there is also a disconnect between the availability of basic education and the delivery of quality basic education.[220] As mentioned earlier in this chapter, President Ramaphosa applauded the government's progress in improving the availability of basic education from 51% in 1994 to 99% in 2018.[221] Compared to other middle-income countries, South Africa fares remarkably well with regard to secondary

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[216] The recent "Jobs for Cash" scandal is an example of the level of corruption within the education system. See J Volmink, M Gardiner, S Msimang, P Nel, A Moleta, G Scholtz & T Prins "Report of the Ministerial Task Team Appointed by Minister Angie Motshekga to Investigate Allegations into the Selling of Posts of Educators by Members of Teachers' Unions and Departmental Officials in Provincial Education Departments" (2016) *Department of Basic Education* 1-285 <https://www.gov.za/documents/report-ministerial-task-team-appointed-minister-angie-motshekga-investigate-allegations> (accessed: 22-03-2018); O'Hare et al (2018) *AHRLJ* 508-526 note that the drop-out rate is five times higher in corrupt countries as spending has a direct impact on the delivery of quality education.

[217] J Jansen "Policy Aspects of Education" paper presented at the Conference on Education and Social Justice: A project of the Law Trust Chair in Social Justice, Faculty of Law, Stellenbosch University, 3 June 2021.

[218] Volmink et al "Report of the ministerial task team appointed by Minister Angie Motshekga to investigate allegations into the selling of posts of educators by members of teachers' unions and departmental officials in provincial education departments" (2016) *Department of Basic Education* 1-285.

[219] Volmink et al "Report of the ministerial task team appointed by Minister Angie Motshekga to investigate allegations into the selling of posts of educators by members of teachers' unions and departmental officials in provincial education departments" (2016) *Department of Basic Education* 1-285.

[220] Gustafsson "The When and How of Leaving School" (2011) *Stellenbosch Economic Working Papers No 09/11* 6.

[221] For a comprehensive explanation of the progress made in terms of access to education see Department of Basic Education "Education for All: 2014 Country Progress Report" (2014) *Department of Basic Education* 7-40 <https://www.education.gov.za/Portals/0/Documents/Reports/2014%20Education%20For%20All%20(EFA)%20Country%20Progress%20Report.pdf?ver=2015-02-18-130341-697> (accessed 26-06-2019).

school enrolment and is above average for grade 12 enrolment.[222] However laudable this improvement may be, this number merely reflects the number of children to whom basic education is available and not the number who successfully complete their schooling career. Unfortunately, the grade 12 completion rate of around 40% is significantly lower than developing countries such as Turkey, with a completion rate of 53%, and Brazil with 67%.[223] South Africa also ranks significantly below average when it comes to post-school enrolment, with a rate around 40% less compared to eight other countries, including Brazil, Turkey and Mexico (performing better only against other Southern African countries).[224] In other words, we need to consider the quality of the basic education delivered and not the mere availability thereof.

There continues to be a correlation between affluence and academic achievement, which means that learners from impoverished backgrounds are more likely to underperform at school resulting in a perpetuation of poverty.[225] What is disheartening about the effect of low-quality education on poor learners is that regardless of learners' inherent ability and talent, they are unlikely to break the cycle of poverty.[226] According to a report for the Centre of Development and Enterprise ("CDE"), successful completion of secondary school in South Africa does not guarantee employment. In fact, it does not even significantly increase the prospect of employment.[227] It merely serves as a mechanism to pursue further training or tertiary education.[228] The fact that

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[222] Gustafsson "The When and How of Leaving School" (2011) *Stellenbosch Economic Working Papers No 09/11* 17. The middle-income countries referred to in the comparison are China, Indonesia, Turkey, Thailand, Philippines, Brazil, Chile, United States, United Kingdom, Japan, Korea and Germany.

[223] Spaull "Schooling in South Africa: How Low-Quality Education Becomes a Poverty Trap" in *South African Child Gauge* 36; Gustafsson "The When and How of Leaving School" (2011) *Stellenbosch Economic Working Papers No 09/11* 17.

[224] Gustafsson "The When and How of Leaving School" (2011) *Stellenbosch Economic Working Papers No 09/11* 18.

[225] Spaull "Schooling in South Africa: How Low-Quality Education Becomes a Poverty Trap" *South African Child Gauge* (2015) 34.

[226] Spaull "Schooling in South Africa: How Low-Quality Education Becomes a Poverty Trap" in *South African Child Gauge* (2015) 34.

[227] N Spaull "South Africa's Education Crisis: The Quality of Education in South Africa 1994-2011" (2013) *Centre for Development and Enterprise* 7 <https://www.section27.org.za/wp-content/uploads/2013/10/Spaull-2013-CDE-report-South-Africas-Education-Crisis.pdf> (accessed 12-06-2019).

[228] Spaull "South Africa's Education Crisis: The Quality of Education in South Africa 1994-2011" (2013) *Centre for Development and Enterprise* 7.

a matric certificate provides little chance of employment is indicative of a failing basic education system and a lack of trust by society in the school system as a whole.[229]

From a social justice perspective, the need for substantive equality in South Africa to truly address past injustices is recognised. Equal opportunity and economic prosperity are at the centre of this conversation.[230] In this regard, it is acknowledged that socio-economic circumstances and individual effort play a role in the life chances of an individual, but low-quality education almost guarantees intergenerational poverty and inequality.[231] Once again, various factors contribute to the delivery of low-quality education including, and focusing more on the educator, inadequate planning regarding the curriculum, wasted instructional time during school hours, inadequate content knowledge by educators about the subjects they teach and a failure by educators to challenge learners cognitively, all of which may lead to poor academic attainment and outcomes.[232] Research shows that there is a 52% chance that a learner from a disadvantaged household will complete grade 7 in time, compared to 88% for a learner from an upper middle-class household who has access to education of a higher quality.[233] The chances for the latter learner to complete grade 12 in time remains the same (88%) but there is a drastic decline for learners from disadvantaged households, in that a mere 17% will complete grade 12 in time.[234] The high drop-out rate in the final stages of secondary school during grades 10 to 12, as well as underperformance in both the NSC examinations and tertiary education, are indicative of low-quality education in the fundamental stages of school.[235] Gustafsson notes that low-quality education leads to underperformance at school which results in school

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[229] Interviews conducted by the Barriers to Education project revealed that learners are discouraged from attending school and do not see the value in education since matriculants from their communities with distinctions are unemployed. See Dieltiens & Many-Gilbert "School Drop-Out: Poverty and Patterns of Exclusion" in *South African Child Gauge* (2008) 48.

[230] An example that reflects this need for economic prosperity and equal opportunities is the founding of the Economic Freedom Fighters ("EFF") in 2013. See, <https://effonline.org/Abouteff> for more about this radical political party's stance on the economic advancement of the population.

[231] Zoch (2015) *Development Southern Africa* 57-75.

[232] Spaull "Schooling in South Africa: How Low-Quality Education Becomes a Poverty Trap" in *South African Child Gauge* 37; N Taylor, S van der Berg & T Mabogoane "What makes schools effective? Report of South Africa's National School Effectiveness Study" (2012) *Pearson Education* 1 8 <https://www.jet.org.za/resources/creating-effectives-schools-summary-1.pdf> (accessed 15-10-2021); H Venkat & N Spaull "What Do We Know About Primary Teachers' Mathematical Content Knowledge in South Africa? An analysis of SACMEQ 2007" (2015) 41 *International Journal of Educational Development* 121-130.

[233] Zoch (2015) *Development Southern Africa* 60.

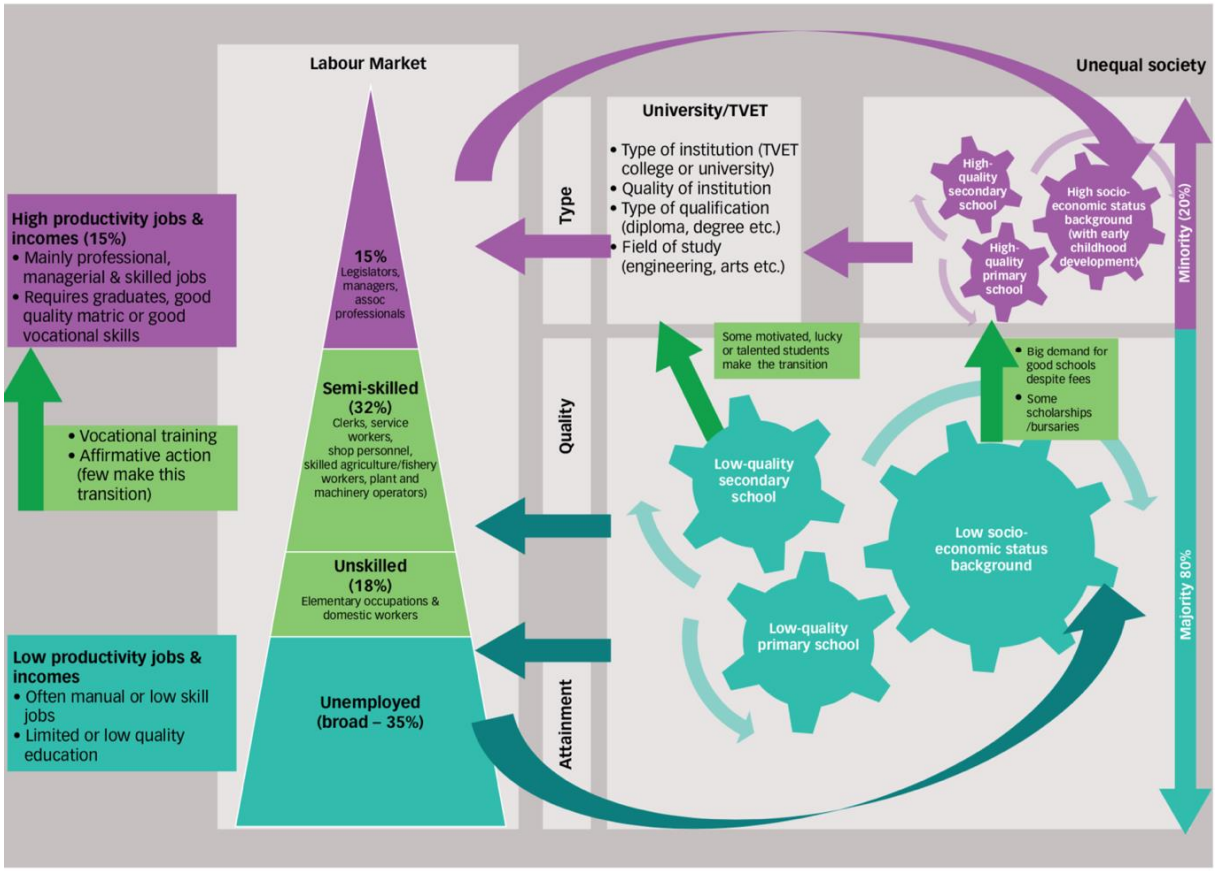
[234] 63.

[235] Gustafsson "The When and How of Leaving School" (2011*) Stellenbosch Economic Working Papers No 09/11* 4.

leavers struggling to perform at a tertiary level and ultimately negatively affects the economy as a whole.[236] This is as a result of the low number of matriculants who may perform well enough to gain access to, for example, university, but who then underperform because of a low-quality school education. This affects their performance in the labour market and their ability to contribute to the economy.[237]

Drawing from research done by the Department of Economics at Stellenbosch University, Spaull illustrates through the figure below that there is a connection between the quality of education received by learners and how they will ultimately slot into the labour market.[238]

Figure 2: The link between society, the education system and the labour market in South Africa[239]



236 4.
237 4.
238 Spaull "Schooling in South Africa: How Low-Quality Education Becomes a Poverty Trap" in *South African Child Gauge* 38.
239 38.

On the left, the figure depicts the composition of the labour market and, on the right, the composition of society. It also depicts how education contributes to which type of job can ultimately be held in the labour market.[240] This figure makes three important points regarding the effect of education on the future prospects of learners. First, a low socio-economic background together with low-quality education leads to poor academic performance at school, which perpetuates socio-economic status and more often than not, unemployment.[241] Second, very few students (and only those with exceptional talent or motivation) succeed in rising from their current socio-economic circumstances despite a low-quality education. The majority of learners with a low-quality education will have no other option but to (at best) enter the semi-skilled sector of the economy.[242] Lastly, the minority of learners, referring to the top 15% from a high socio-economic background with quality basic education (the type of education necessary to enable them to become skilled workers), enter the labour market in productive jobs and earn a high income.[243] This provides insight into the crisis that is the South African basic education system. Despite various factors influencing education quality, it boils down to a need for policy intervention, accountability and the proper management of resources to enable effectively managed schools and properly trained educators that are equipped to teach.[244] As emphasised by Spaull and Pretorius:

> "[w]hile schools cannot change the socioeconomic status of their learners' home backgrounds, they can change what happens in their schools and classrooms. Given that at least 75% of South African primary schools serve poor communities, making schools centres where children receive rich language and literacy input irrespective of their home background should be a priority. The status quo in South Africa is that children with the biggest backlogs attend schools with the least capacity. Thus the initial home disadvantage is compounded by a school literacy disadvantage".[245]

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[240] 37.
[241] 38.
[242] 38.
[243] 38.
[244] Spaull & Pretorius "Still Falling at the First Hurdle" in *South African Schooling: The Enigma of Inequality* 164-165.
[245] Spaull & Pretorius "Still Falling at the First Hurdle" in *South African Schooling: The Enigma of Inequality* 152; See also (as referenced by Spaull & Pretorius) N Spaull "Accountability and Capacity in South African education" (2015) 113 *Education as Change* 113-142; National Education, Evaluation and Development Unit "NEEDU National Report 2012: The State of Literacy Teaching and Learning in the Foundation Phase" (2013) *Department of Basic Education* <http://www.saqa.org.za/docs/papers/2013/needu.pdf> (accessed 26-06-2019).

The reality is that learners who fall behind by grade 4, never catch up and are excluded from meaningful future learning and, ultimately, work.[246] The only way to counteract the reality that the majority of children's life chances are determined before they are 10 years old, is by tirelessly focusing on the way in which our education system functions.[247] This includes – as this thesis aims to do – critically evaluating one factor that contributes to, or detracts from, the quality of education received by learners, namely the educator.

In this regard, it is a fact that the law regulates the performance of educators by regulating the conduct and capacity of educators. The regulation of educators' employment – specifically their conduct and capacity – is the first step to ensure their accountability. Since public schools are responsible for the education of the vast majority of learners in South Africa and are funded by government (and therefore taxpayers), there is a great need for accountability in these institutions. Accountability has been defined as a moral relationship between someone who is entrusted to do something and in return receives something from a person in authority.[248] Earlier in this chapter, it was mentioned that the education sector consists of various role players and, as a result, the enforcement of accountability requires the cooperation of all of them. Winch and Gingell note that society places a moral obligation on educators to be accountable towards the various role players involved in education as well as society as a whole, but there seems to be little consensus on what is sufficient for educators to discharge this obligation.[249]

The effectiveness of a school can be measured by the value the education adds to the lives of learners.[250] However, researchers have alluded to the fact that it is difficult to measure effectiveness and that statistical analysis is not always a reliable reflection of the effectiveness of a school.[251] Instead of focusing on the academic outcomes of a school, attention should be paid to the processes implemented to ensure effectiveness.[252] One of these processes is the regulation of the employment of educators and their individual performance. Before analysing the individual

[246] Spaull & Pretorius "Still Falling at the First Hurdle" in *South African Schooling: The Enigma of Inequality* 164-165.
[247] 164-165.
[248] Winch & Gingell *Philosophy of Education* (2008) 4-5.
[249] 4-5.
[250] 67.
[251] 67.
[252] 68.

performance of educators from a conduct and capacity perspective, a few preliminary remarks may be made regarding the role of the educator in delivering quality education.

2 5 3 Educators and their impact on the delivery of quality basic education

2 5 3 1 The role of school cultures

Jansen, an expert on education policy in South Africa, puts forward an interesting argument regarding the impact of school cultures on the delivery of quality education.[253] This is an important point to make, because it speaks to a problem that is not identified through statistics, academic outcomes or even case law. It also provides context to the discussion that follows regarding the capacity and conduct of educators. It provides one reason why some schools in South Africa provide education of an excellent standard, while some schools are completely dysfunctional. According to Jansen, the answer is rooted in the cultures that exist in and between schools that are ultimately informed by the political climate in South Africa. He notes that a political culture can exist outside of the state, which also is the premise for his argument that schools have their own cultures (which he refers to as "institutional expressions of political cultures").[254] This culture is informed by the "attitudes, values, beliefs and orientations that teachers, learners and parents in a society hold regarding the role and authority of government with respect to education".[255]

This translates into schools and the education system as a whole as an "adversarial culture", which does not welcome or trust authority or government intervention.[256] For this reason, trade unions (specifically SADTU) have occupied a fertile space in fostering this adversarial culture by rejecting interventions focused on performance evaluation and appraisal of the work of educators.[257] Even where negotiations lead to the acceptance of certain policies, the reality is that some schools with strong union affiliations oppose its implementation, often through intimidation tactics such as

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[253] Jansen "Personal reflections on policy and school quality in South Africa: When the politics of disgust meets the politics of distrust" in *The Search for Quality Education in Post-Apartheid South Africa* 81-95.
[254] Jansen "School quality in South Africa" in *The Search for Quality Education in Post-Apartheid South Africa* 86.
[255] 86.
[256] 86.
[257] 85-89.

refusing access to government officials.[258] What these insights mean for this study is that, entangled with educator performance, is a political paradigm. One way in which to address the many challenges education faces is through accountability measures in schools, but the adversarial culture will strongly resist such intervention.[259] It is important to take these school cultures into account when proposing measures to address, for instance, competence and professionalism. Failing to do so will result in any intervention failing at its implementation stage.[260]

2 5 3 2 Qualified, competent and professional educators

It should be acknowledged that educators often work in challenging circumstances. Educators are expected to have content knowledge of their subjects, understand the curriculum and have pedagogical knowledge as to how it should be implemented in the classroom through learning activities in a manner that conveys the content to learners in a way they understand.[261] There most certainly are outstanding educators in South Africa's public schools who go beyond the call of duty to ensure that learners have the best possible learning experience, despite obstacles and a challenging work environment.[262] The commitment of these educators to the teaching profession is praiseworthy and this research in no way aims to detract from the positive influence of these educators on learners. Unfortunately, the reality is that not all educators fall into this category of professionalism and competence.

The qualifications of educators are easy to measure, and the minimum qualifications required for educators to be appointed at a public school in South Africa are discussed in chapters 4 and 5. Unfortunately, the quality of different education qualifications is not so easy to measure[263] but will reveal itself in the competence of

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[258] Jansen "School Quality in South Africa" in *The Search for Quality Education in Post-Apartheid South Africa* 87.

[259] 90-91.

[260] One suggestion made recently by Jansen is to address certain issues through policy by following an approach he coins as "backward mapping". This requires of policy makers to go to the root of the problem and investigate it in practice. The approach is then to move backward from the problem to policy and to identify obstacles along the way which could ensure policy that recognizes and accounts for problems "on the ground". Jansen "Policy Aspects Of Education" at the Conference on Education and Social Justice: A project of the Law Trust Chair in Social Justice, Faculty of Law, Stellenbosch University, 3 June 2021.

[261] See N Taylor "Inequalities in Teacher Knowledge in South Africa" in N Spaull & J Jansen (eds) *South African Schooling: The Enigma of Inequality* 263 263.

[262] Jansen "School quality in South Africa" in *The Search for Quality Education In Post-Apartheid South Africa* 82-83.

[263] Arendse (2019) *LDD* 122.

the educator. One way of measuring competence is by considering the content knowledge of the educator in their chosen or assigned discipline, which is elaborated on below. The professional ethics of educators is determined by the Code of Professional Ethics of the South African Council for Educators ("SACE Code") which states that:

> "The educators who are registered or provisionally registered with the South African Council for Educators:
>
> 1. acknowledge the noble calling of their profession to educate and train the learners of our country;
> 2. acknowledge that the attitude, dedication, self-discipline, ideals, training and conduct of the teaching profession determine the quality of education in this country;
> 3. acknowledge, uphold and promote basic human rights, as embodied in the Constitution of South Africa;
> 4. commit themselves therefore to do all within their power, in the exercising of their professional duties, to act in accordance with the ideals of their profession, as expressed in this Code; and
> 5. act in a proper and becoming way such that their behaviour does not bring the teaching profession into disrepute."[264]

Despite clear guidelines on what is expected of educators in terms of professionalism, many educators do not meet this standard. The discussion that follows highlights a few areas of concern.

As far as the capacity of educators is concerned, Volmink aptly summarises the point of departure when he states that the quality of education cannot exceed the quality of our educators.[265] Spaull similarly comments that someone can only be held accountable for fulfilling a task they are equipped to do in the first place.[266] In this regard, results from SACMEQ III revealed that the subject content knowledge of grade 6 educators is alarmingly low.[267] Although this is cause for concern, Taylor contends that educators' poor English reading comprehension is an even greater challenge.[268]

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[264] See SACE "Code of Professional Ethics" <https://www.sace.org.za/pages/ethics-department> (accessed 26-06-2019).
[265] Billie et al (eds) "Do Teachers in South Africa Make the Grade?" (2018) *Human Factor* 13.
[266] Spaull "Equity: A Too High Price to Pay?" in *South African Schooling: The Enigma of Inequality* 9.
[267] The primary data for SACMEQ III was not analysed for this research. These statistics are drawn from the following sources. Taylor "Inequalities in Teacher Knowledge in South Africa" in *South African Schooling: The Enigma of Inequality* 265-268; Spaull "Education in SA: A Tale of Two Systems" (2012) *Politicsweb*.
[268] Taylor "Inequalities in Teacher Knowledge in South Africa" in *South African Schooling: The Enigma of Inequality* (2019) 269.

This is because a poor understanding of English by educators pose severe constraints on transferring difficult concepts to learners, in any subject.[269] The reason educator content knowledge is so important is because research has proven a link between the level of knowledge by the educator and learner achievement.[270] This effect is compounded by the fact that educators with the highest content knowledge are mainly employed by quintile 5 (the wealthiest) schools.[271]

It seems that educator training is a two-edged sword in the sense that South Africa requires a high graduate output, but do not necessarily attract candidates of the highest quality. To ensure a high output of graduate educators to cope with the high number of learners in South Africa, there are various bursaries and funding opportunities specifically aimed at education degrees. Unfortunately, Van der Berg notes that candidates who apply for education degrees are the lowest school performers across all degree programs.[272] The 2018 Teaching and Learning International Survey ("TALIS") conducted by the OECD revealed that more than 50% of educators do not view teaching as their first choice of career, which could explain the low level of commitment by many educators.[273]

Furthermore, under apartheid, the qualifications received by black educators were inferior to their white counterparts.[274] The government provided funding to the homelands to establish teaching colleges where black educators could be trained.[275] The problem was that the greater funding provided to colleges outside of the homelands resulted in differentiated resources and infrastructure support.[276] With the incorporation of teacher qualifications into the university system and the abolishment of teacher colleges came a reduction in the number of educators produced annually

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[269] 269.
[270] 271; N Spaull "A Preliminary Analysis of SACMEQ III South Africa" (2011) *Stellenbosch University Working Paper 11/11* 3.
[271] Taylor "Inequalities in Teacher Knowledge in South Africa" in *South African Schooling: The Enigma of Inequality* (2019) 278.
[272] Van Der Berg was interviewed by the DGMT Foundation for their publication Billie et al (eds) "Do Teachers in South Africa Make the Grade?" (2018) 1 *Human Factor* 10.
[273] OECD "TALIS 2018 South Africa Country Note" (2019) *OECD* 3 <https://www.oecd.org/education/talis/TALIS2018_CN_ZAF.pdf> (accessed 15-10-2021).
[274] M Lajewski "South Africa's teaching profession: A look at the past, present and future" in J Maserow & D Isaacs (eds) *Taking Equal Education into the Classroom* (2010) 19 <https://equaleducation.org.za/wp-content/uploads/2016/08/EE-in-the-classroom_EBook.pdf>.
[275] 18.
[276] 19.

to enter the profession.[277] This, coupled with the failure of the education system to retain adequately qualified and experienced educators, resulted in a mismatch of educator supply, especially to under-resourced schools.[278] The effect is that well-resourced schools that are in a position to charge school fees in addition to their government funding, attract experienced, well-qualified educators placing them in a position to deliver quality education, whereas the pool of candidates applying to under-resourced schools is smaller, less qualified and inexperienced.[279] Fee-charging public schools also have the power in terms of section 20(4) of SASA to appoint educators additional to the provincial posts created by the Member of the Executive Council, and to then remunerate these educators from the school budget prepared by the SGB.[280] The result is that these schools can offer a wider selection of subjects and have lower educator-learner ratios.[281] This is discussed in chapter 4.

In the SACMEQ III assessment, educators were given the same questions as their grade 6 learners and the discrepancies in the quality of educators were clear in their results. Only 20% of educators teaching at quintile 1[282] schools were able to answer the questions correctly compared to 80% of educators from quintile 5 schools.[283] The standard of education qualifications is also not comparable between universities. A report by the Council of Higher Education found stark differences in the quality of the programmes offered by different tertiary institutions.[284] A shortage of educators, the

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[277] 21; See also JD Jansen "Changes and continuities in South Africa's higher education system, 1994 to 2004" in L Chrisholm (ed) *Changing Class* (2004) 293 296:
"In a relatively short period of time, therefore, the higher (and further) education landscape in South Africa altered dramatically: 21 universities became 11 institutions; 15 technikons became five "stand-alone" technikons and six comprehensive institutions (combinations of universities and technikons); 150 technical colleges became 50 merged technical colleges. And 120 colleges of education eventually became (at the time of writing) only two colleges of education, with the rest either incorporated into universities or technikons (about 30 such incorporations) or 'disestablished'".

[278] Seekings (2004) *Review of African Political Economy* 305; Lajewski "South Africa's Teaching Profession: A Look at the Past, Present and Future" in *Taking Equal Education into the Classroom* (2010) 67; H van Broekhuizen "Teacher Supply in South Africa: A Focus on Initial Teacher Education Graduate Production" (2015) *No 07/2015, Working Papers from Stellenbosch University, Department of Economics* 83 <https://www.ekon.sun.ac.za/wpapers/2015/wp072015/wp-07-2015.pdf> (accessed: 07-08-2018).

[279] Lajewski "South Africa's teaching profession: A look at the past, present and future" in *Taking Equal Education into the Classroom* (2010) 25.

[280] See also ss 20(9) and 38 of SASA. This is discussed in chapter 4.

[281] J Deacon "Are Fixed-Term School Governing Body Employment Contracts for Educators the Best Model for Schools?" (2013) *De Jure* 63 64.

[282] Schools are divided into five national quintiles according to resources. The most disadvantaged schools fall in national quintile 1.

[283] Spaull "Education in SA: A tale of two systems" (2012) *Politicsweb.*

[284] Arendse (2019) *LDD* 122.

difficulty in attracting educators to poor schools, as well as the political power of trade unions in the education sector, influence accountability in the sector.[285]

To some extent, these challenges around the capacity of educators are not directly within their control. This, however, does not mean that it should not be addressed. To this end, the EOEA makes provision for an incapacity procedure. Chapter 6 reveals that this procedure is rarely utilised in the education sector, with the effect that low-quality educators continue to teach learners, providing them with low-quality education.

2 5 3 3 The conduct of educators

The professionalism of educators and their conduct within the bounds of the profession's ethics are, however, within the control of educators. The regulation, prevalence, and nature of misconduct by educators are considered in detail in chapter 6, also through the analysis of a host of arbitration awards concerning misconduct. At this stage, a few of these may be used to illustrate the very real challenge of misconduct in the education sector.

Misconduct may be divided into three categories. The first category of misconduct is directed at learners and affects them personally on a physical or emotional level. This includes attempted or threatened assault, serious assault with the intention to do grievous bodily harm, sexual assault, sexual harassment and rape.[286] It is clear from the facts surrounding incidents of assault that the type of assault in question is not what some will consider corporal punishment, which in any event is against the law,[287] but rather assault of a more direct violence-based nature, assault that will typically give rise to criminal proceedings in any setting. In one instance the educator hit learner A with a pipe on the arms, proceeded to grab learner B by the neck, threw him to the ground, kicked him and threatened to kill him. The same educator grabbed a parent by the throat, lifted her and threw her out of the room, sat on her with his knee, kicked her and hit her with his fists.[288] In another, the educator became involved in a fistfight

[285] Mlachila & Moeletsi "Struggling to Make the Grade" (2019) *International Monetary Fund Working Paper, African Department 19/47* 6.
[286] The categorisation of various forms of sexual misconduct are discussed in chapter 6.
[287] See s 10 of SASA which clearly views corporal punishment in a serious light by stating that the same sentence as for assault can be imposed on someone guilty of administering corporal punishment. See also s 18(5)(f) of the EOEA.
[288] *NAPTOSA obo Baatjies v Department of Education Western Cape* PSES391-17/18 WC para 5.

with a learner, punching him in the face and mouth, breaking the learner's teeth.[289] Learners are also abused sexually and subjected to sexual harassment. Even young learners who are entrusted to the supervision of educators are abused, as evidenced by the rape of an 8-year-old.[290] Other types of sexual misconduct by educators include text messaging learners,[291] sending pornographic images,[292] suggesting to meet outside of school hours,[293] luring learners to private places with promises of money or sweets,[294] speaking to learners in a sexual tone and touching them inappropriately.[295] These are only a few examples of sexual misconduct taking place in the sector. These are furthermore not isolated incidents. The discussion in subsequent chapters shows that there is a culture of abuse in South African schools, the existence of which is supported by extensive research on the topic.[296]

The second category of misconduct relates to the poor administration of schools, which also impacts on the quality of education received by learners. These seemingly "minor" or "administrative" types of misconduct greatly impact on the efficiency of schools. This includes providing learners with a memorandum while writing an examination,[297] failing to mark formal assessments or providing learners with

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[289] *SADTU obo Dempers v Department of Education Western Cape* PSES608-18/19WC para 4.
[290] *SADTU obo Nevthavhok v Department of Education Limpopo* PSES11-15/16LP para 7.
[291] See *Mara v Department of Education Limpopo* PSES71-13/14LP.
[292] See *SALIPSWU obo Zaula v Department of Education Western Cape* PSES224-16/17 WC.
[293] See *Xolani v Department of Higher Education* PSES160-19/20LP.
[294] See *Van Wyk v Department of Education Western Cape* PSES508-16/17WC; *Gwe v HOD Department of Education Western Cape* PSES708-16/17WC.
[295] See *Department of Education Western Cape v Abels* PSES947-18/19 WC; *Adams v Department of Education Western Cape* PSES501-19/20WC.
[296] See R Brock, E Brundige, D Furstenau, C Holton-Basaldua, M Jain, J Kraemer, K Mahonde, M Osei & N Gaffooor "Sexual Violence by Educators in South Africa: Gaps in Accountability" (2014) *Centre for Applied Legal Studies of the University of the Witwatersrand, Cornell Law School's Avon Global Centre for Women and Justice and the International Human Rights Clinic* 3-68 <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/Sexual%20Violence%20by%20Educators%20Size%20180270%20NEW.pdf> (accessed 19-05-2020); C Ward, L Artz, P Burton & L Leoschut "The Optimus Study on child abuse, violence and neglect in South Africa" *UBS Optimus Foundation* 7-133 <https://resourcecentre.savethechildren.net/node/9942/pdf/optimus_study_south_africa_2015.pdf> (accessed 19-05-2020); CSVR "The State of Sexual Tyranny: The Prevalence, Nature and Causes of Sexual Violence in South Africa" (2008) *CSVR* 14-111 <https://www.csvr.org.za/docs/study/3.Sexual_Violence_20_03_2009.pdf> (accessed 19-05-2020); SACE "Final Report on Research Trends Analysis of a 5-year Review Study on Disciplinary Cases Reported to SACE" (2017) *SACE* 9086 <https://www.sace.org.za/assets/documents/uploads/sace_38605-2017-04-12-TRENDS%20ANALYSIS%20OF%20A%205%20YEAR%20REVIEW%20STUDY%20ON%20DISCIPLINARY%20CASES%20REPORTED%20TO%20SACE%2015-12-2015.pdf> (accessed 19-05-2020).
[297] *Mulaudzi v Department of Education Free State* PSES818 -15/16FS para 8.

classwork to do,[298] failing to manage the school timetable and assessment schedules.[299] These failures prejudice the administration of the school, which negates accountability and sets a poor example for learners.[300] It should also be pointed out that this type of misconduct may well take place outside the classroom by persons not directly involved in the classroom, albeit still falling within the definition of educator, most notably the school principal.[301] There is a clear link between the delivery of a quality education in the classroom and what happens in the broader school environment. This is one reason why a consideration of the operationalisation of education through legislation in chapter 4 also serves to identify the different role players in education and their respective responsibilities.

The last category of misconduct simply is a complete disregard of the professional ethics and duties of the educator. This manifests in one of two ways. First, as poor performance (here used in the sense of blameworthy underperformance), absenteeism or prejudicing the administration of the school. One can only imagine the impact on the delivery of a quality education where an educator faced 28 counts of absence from work and ten counts of prejudicing the administration,[302] and then is not dismissed but receives a sanction of three months' suspension without pay, which is later reduced to two months' suspension without pay.[303] It would be interesting to know whether there was a provision of services during his suspension. Second, there are dishonesty, bribery, and fraud. Between 2014 and 2019 in the Western Cape, Eastern Cape, Free State and Limpopo there were 212 instances of financial mismanagement that led to formal disciplinary hearings.[304] Some instances involved serious dishonesty and fraud. The principal of a no-fee school (knowing very well that school fees are not to be charged) asked parents of learners to "donate" R50 to the school, upon which he used (stole) the money.[305] It also includes instances where the principal embezzled school funds by instructing the financial clerk to co-sign cheques even though there

[298] *SADTU obo Williams v Department of Education Western Cape PSES*487-16/17WC para 9.
[299] *SADTU obo Mandla v Department of Education Eastern Cape* PSES714-13/14 EC para 4.4.
[300] See Jansen "School quality in South Africa" in *The search for quality education in post-apartheid South Africa* 86.
[301] The definition of "educator" as contained in s 1 of the EOEA is discussed in chapter 4.
[302] *NAPTOSA obo Mohlala v Department of Education Limpopo* PSES539-14/15 LP para 1.8-1.9.
[303] Para 1.10-1.12.
[304] See Graph 3 in Chapter 6. The graph was compiled using the data from the annual reports of the Western Cape, Eastern Cape, Free State and Limpopo.
[305] *SADTU obo Davhana v Department of Education Limpopo* PSES89 -14/15LP. The arbitration award did not contain paragraph numbers.

was no supporting documentation for the requisition forms.[306] In one instance the circuit manager faced 14 counts of blackmailing educators into paying her amounts of money and providing her with gifts in exchange for keeping the pre-school on the conditional grants roll.[307]

These examples provide a glimpse of the types of challenges that are discussed in greater detail in chapter 6. They also do so in respect of the severity of misconduct within the sector and the far-reaching effects this may have on the effective functioning of the system and the delivery of quality basic education.

2 6 Conclusion

This thesis investigates the link between the regulation of educator performance and the delivery of quality basic education. The primary purpose of this chapter was to explore the meaning of a "quality basic education" as a yardstick for subsequent discussion. Attention was paid to all three constituent elements of the phrase "quality basic education".

As far as the meaning of "basic" is concerned, an overview was provided of the sometimes divergent use of terminology and approaches at international level and in different countries (South Africa included). At international level, the term "basic" is given content with reference to both the period of schooling as well as the content and outcomes of that education. In South Africa, and despite the use of the word "basic" in legal documents, the clearest indication of the meaning of the word "basic" is to be found in the organisation of the DBE around the delivery of education up to and including grade 12, which is also the approach this thesis takes. Furthermore, for the reasons discussed in the text, the primary focus of this thesis is on the delivery of basic education by public schools in South Africa.

Consideration of the meaning of the word "education" revealed that education is a process of development that goes beyond the availability of education and the transfer of knowledge, to the development of individual skills. As such, education is a process that shows a close link with the development of autonomous, responsible individuals with sound future prospects and with the prosperity of society through its direct and indirect impact on the economy. At the same time, education in South Africa – as is

[306] See *SAOU obo Rambele v Department of Education Free State* PSES489-12/13 FS paras 46, 65.
[307] *SADTU obo Kgaphola v Department of Education Limpopo* PSES448-13/14LP para 6.

the case with education in any society – cannot be divorced from its socio-economic context. In this regard, the discussion showed that continued structural inequality remains a fundamental challenge to the delivery and success of basic education. Closely connected to this reality, is the fact that education has also been politicised over the years, which may yet further hamper its delivery.

The meaning of "quality" in the phrase "quality basic education" is a reactive term and is largely determined by the needs and realities of the individual and of society. As such, its meaning is derived from the earlier discussion of "education" in the South African context and its importance – that is, the need to produce autonomous, responsible individuals as decision makers who can use their basic education as a platform to meaningfully engage in the economy or to acquire a tertiary education. However, the discussion also showed that the quality of basic education in South Africa, measured in terms of a number of indicators used in numerous studies, is poor, more so in so-called no-fee schools in poor areas. Many of the reasons for this were mentioned in the discussion, and some were considered in more detail. One of these reasons, which constitute the focus of this study, is the performance of educators. By "performance" – as explained in chapter 1 – is meant the capacity (qualifications, competence, content knowledge and skills) and conduct (professionalism) of individual educators in delivering basic education. Some initial challenges impacting on the continued capacity of educators were identified – including the legacy of apartheid, the fact that relatively low performers at school become (often reluctantly) educators, the disparity in quality between teacher qualifications offered by different institutions and the reluctance of management to deal with instances of identified incapacity. Focusing on the conduct (or lack of professionalism) of educators and in anticipation of the much more detailed discussion of this issue in subsequent chapters, some examples were provided of the sometimes egregious nature of misconduct by educators, all impacting on the delivery of quality basic education.

As such, this chapter described the essential elements of a "quality basic education" as well as the poor state of basic education in South Africa. It also introduced the capacity and conduct (individual performance) of educators into the mix. In the chapters to follow, the insights gained from this discussion form the basis for consideration of the appropriateness of the legal regulation of basic education in general, with specific emphasis on the regulation of the performance of educators.

CHAPTER 3: INTERNATIONAL AND CONSTITUTIONAL RECOGNITION OF THE RIGHT TO BASIC EDUCATION

3 1 Introduction

Chapter 2 focused on the meaning and importance of a quality basic education in general terms – as a societal phenomenon rather than as a legal concept. This chapter is the first of three designed to describe the legal framework within which basic education is delivered in South Africa. It focuses on the international and constitutional recognition of a right to basic education. Chapter 4 below describes the legislative framework of the system created for the delivery of basic education in South Africa, while chapter 5 considers the legal framework regulating individual educator performance within that system.

The discussion in paragraph 3 2 of this chapter illustrates the broad international consensus on and international legal recognition of the right to education.[1] In addition, the discussion shows that some guidance may be obtained from international legal instruments about the nature and content of a basic education as a legal concept and, by implication, the demanding role educators have to play in this process. Paragraph 3 3 considers the Constitution of the Republic of South Africa, 1996 ("Constitution"), which, in section 29(1)(a), provides for an unqualified right to a basic education. Attention is further paid to jurisprudence concerning the nature of the constitutional right to basic education, while the legal meaning of this constitutional right is contextualised using international instruments, the experience of the courts in dealing with violations of this right and the views of academics. Paragraph 3 4 expands on the discussion of section 29 by considering two additional and important factors that should not only influence any attempt at giving content to the right to basic education, but should also be borne in mind in evaluating the role of educators in delivering basic education – that the right to a basic education should also be seen as a children's right and that the rights of learners should be balanced with the rights of educators as employees, rights extensively protected at international and constitutional level and through legislation.

[1] The international instruments discussed in this chapter refers to "the right to education" whereas s 29(1)(a) of the Constitution refers to "the right to a basic education".

This discussion of South African developments shows that, despite the right to basic education coming before the South African courts on a number of occasions, the courts have not truly grappled with the legal meaning of the concept of a basic education, choosing rather to limit their enquiries to the specific alleged instances of violation (often egregious) of this right. In a way, this already illustrates one of the fundamental shortcomings of protection of basic education through a rights regime, which, in the final analysis, remains dependent on *ex post* litigation for enforcement. This reality is a further motivation for this study, as the analysis of the arguably deficient experience with rights adjudication in the sphere of basic education throughout this thesis may lead to changes in policy direction and appropriate *ex ante* regulation of the delivery of basic education through legislation.

3 2 Recognition of the right to education at international level

The right to education is internationally recognised and protected. The comprehensive international framework furthering the right to education attests to the importance society as a whole attaches to this right. While education has long been furthered by communities globally, attention at international level was first drawn to human rights after World War II.[2] At this time, there was general recognition of the need for an international organisation committed to maintaining international peace and cooperation, which resulted in the establishment of the United Nations ("UN").[3] On 24 October 1945, the Charter of the UN was signed as the organisation's founding document and serves as a guide for its decisions.[4] The establishment of the UN led to the first international legal instrument that emphasised the importance of human rights, namely the Universal Declaration of Human Rights ("UDHR").[5] This was also the first instrument forming part of the UN's International Bill of Human Rights ("IBHR")[6] and was followed by the International Covenant on

2 See T Buergenthal "The Evolving International Human Rights System" (2006) 100 *American Journal of International Law* 783 783.

3 785-786.

4 (adopted 24 October 1945) 1 UNTS XVI. See United Nations "United Nations Charter" (1945) *United Nations* <https://www.un.org/en/about-us/un-charter> (accessed 23-05-2021).

5 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 (III).

6 OHCHR "The International Bill of Human Rights" (undated) *United Nations* <https://www.ohchr.org/documents/publications/factsheet2rev.1en.pdf> (accessed 23-05-2021); The

Economic, Social and Cultural Rights ("ICESCR"), the International Covenant on Civil and Political Rights ("ICCPR"), the Optional Protocol to the International Covenant on Civil and Political Rights ("OP-ICCPR") adopted in 1966 and the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty adopted in 1989. For purposes of this research, those international instruments that protect the right to education specifically merit attention.

The purpose of the UDHR is to provide a universal benchmark of fundamental human rights that should be protected and promoted in each society.[7] Since its adoption, numerous international instruments, including 70 treaties, have reaffirmed and built on the foundation of human rights established by the UDHR.[8] The UDHR pioneered human rights globally, including the right to education. Article 26 provides that:

> "1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
> 2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
> 3. Parents have a prior right to choose the kind of education that shall be given to their children".[9]

The UDHR not only recognises that each person should have the right to education, but also provides that the early stages of education should be free and compulsory. These stages of education are referred to as the "elementary and fundamental" stages.[10] The UDHR is not a treaty, which means that it does not have international legal binding

five documents comprising the IBHR can be accessed at ESCR-Net "International Bill of Human Rights" available at <https://www.escr-net.org/resources/international-bill-human-rights>.

7 Preamble of the UDHR.

8 See United Nations "Universal Declaration of Human Rights" (undated) *United Nations* <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (accessed 23-05-2021).

9 Article 26 of the UDHR.

10 It is important to consider the terminology used in relation to education in international instruments. This will link to the discussion regarding the right to basic education in South Africa and whether it meets these international obligations.

power.[11] It remains a milestone in the recognition of rights by the international community and led to the reaffirmation of, amongst others, the right to education in other international instruments, as well as its incorporation into laws at a regional and national level.

A specialised agency of the UN, the United Nations Educational, Scientific and Cultural Organisation ("UNESCO") was also established in 1945 to promote the UN's objectives. The mission of UNESCO is also to contribute to international peace, but with its focus on the eradication of poverty and promotion of sustainable development.[12] The manner in which UNESCO aims to achieve these goals is through dialogue in the fields of education, the sciences and culture.[13] Following the UDHR, the General Conference of the UN adopted the UNESCO Convention against Discrimination in Education ("CADE") in 1960. CADE was the first international instrument dealing with education with binding power in international law.[14] The focus of the Convention is on promoting and protecting the right to education by eradicating discrimination.[15] To date, CADE has been ratified by 106 states, including South Africa.[16] CADE recognises the UDHR as laying the foundation for the right to education. Article 4 of the Convention promotes education by stating that:

> "The States Parties to this Convention undertake furthermore to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment in the matter of education and in particular:
> (a) To make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all; make higher education equally

[11] United Nations "The Foundation of International Human Rights Law" (undated) *United Nations* <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law> (accessed 19-10-2021); See also Amnesty International "Universal Declaration of Human Rights" (2021) *Amnesty International* <https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/> (accessed 19-10-2021).

[12] See UNESCO "Mission and Mandate" (2021) *UNESCO* <https://en.unesco.org/about-us/introducing-unesco> (accessed 24-05-2021).

[13] See UNESCO "Mission and Mandate" *UNESCO*.

[14] UNESCO "UNESCO's Convention against Discrimination in Education" (2021) *UNESCO* <https://en.unesco.org/themes/right-to-education/convention-against-discrimination> (accessed 24-05-2021).

[15] UNESCO "UNESCO's Convention against Discrimination in Education" (2021) *UNESCO* <https://en.unesco.org/themes/right-to-education/convention-against-discrimination> (accessed 24-05-2021).

[16] UNESCO Convention against Discrimination in Education (adopted 14 December 1960, entered into force 22 May 1962) 429 UNTS 93. Ratified by South Africa on 10 December 1998.

accessible to all on the basis of individual capacity; assure compliance by all with the obligation to attend school prescribed by law;

(b) To ensure that the standards of education are equivalent in all public educational institutions of the same level, and that the conditions relating to the quality of the education provided are also equivalent;

(c) To encourage and intensify by appropriate methods the education of persons who have not received any primary education or who have not completed the entire primary education course and the continuation of their education on the basis of individual capacity;

(d) To provide training for the teaching profession without discrimination".[17]

Article 4 mentions that "primary" education should be free and compulsory. Equality of opportunity in education is central to its vision. CADE, which is a binding legal instrument, was only ratified by South Africa on 10 December 1998. As also discussed in chapter 2, South Africa's education system prior to 1994 would not have met the requirements of article 4 since education was not available and accessible to all. Furthermore, the standard of education in public schools was not equivalent and there was discrimination in the schooling of black learners and the training of black educators.[18] These shortcomings of the education system under apartheid continue to hamper progress in relation to the quality of education delivered to all learners in South Africa.[19]

The right to education started gaining traction following the UDHR and CADE. Two further UN Covenants[20] promoting the right to education were adopted in 1965 and 1966 respectively. Both these international instruments confirm that states should adopt effective measures to promote education and further the development of the person to enable them to participate freely in society. The first of these is the International Covenant on the Elimination of All Forms of Racial Discrimination of 1965 ("ICERD") which states that everyone should have the opportunity to enjoy their human rights without distinction

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17 Article 4 of CADE.

18 See chapter 2.

19 See chapter 2.

20 The UN Office of the High Commissioner explain that
"[l]egally there is no difference between a treaty, a convention or a covenant. All are international legal instruments which, in international law, legally bind those States that choose to accept the obligations contained in them by becoming a party in accordance with the final clauses of these instruments". See OHCHR "Glossary of Technical Terms" (undated) *OHCHR* <https://www.ohchr.org/en/hrbodies/pages/tbglossary.aspx> (accessed 24-05-2021).

in terms of race, colour or ethnic origin.[21] This includes the opportunity to enjoy the right to education and training without fear of discrimination.[22] Article 7 of the ICERD requires that states parties assure everyone protection and remedies against any racial discrimination that violate human rights.[23] This includes that the courts, tribunals or other state institutions in each jurisdiction provide reparation or satisfaction to the victim of racial discrimination for damages suffered.[24] Unfortunately, the power of international instruments such as the ICERD is limited, should state parties refrain from signing and ratifying the instrument. Furthermore, the instrument will only have an impact once the state actually implements its provisions. South Africa signed the ICERD on 3 October 1994 and ratified it on 10 December 1998.[25] South Africa's racially discriminatory laws prior to 1994 would not have corresponded with the principles in the covenant. Only after these laws were abolished, was South Africa in a position to sign and ratify the instrument. This is an instance where international instruments only start having a significant effect in a specific state once there is a commitment by the state party to be bound by and implement its provisions. This does not negate the value of international instruments in providing a universal foundation for the protection of human rights.

A further instrument protecting the right to education and ratified by 160 states is the ICESCR.[26] Article 13(1) of the ICESCR reaffirms the importance of education by broadly describing the purpose of the right to education as follows:

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21 Article 5 of the International Covenant on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

22 Article 5(v) of the ICERD.

23 Article 7.

24 Article 7.

25 The difference between signing and ratifying an international instrument can be explained as follows: Where a state signs an instrument subject to ratification, acceptance, or approval, it is not bound to the instrument. In other words, the signature does not represent the state's consent to be bound to the instrument but is merely an expression of the state's willingness to be a part of the process, subject to the signature being ratified, accepted or approved. Only if the state ratifies the instrument, does it consent to be bound to the instrument. See United Nations "What is the Difference Between Signing, Ratification and Accession of UN treaties?" (16-09-2021) *UN Library* <https://ask.un.org/faq/14594> (accessed 24-05-2021). See also United Nations "UN Treaty Body Database" (undated) *United Nations Human Rights Treaty Bodies* <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=162&Lang=EN> (accessed 24-05-2021).

26 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

> "1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace".

Before describing the duties of states parties, the ICESCR first describes the purpose of education. This description elaborates on the foundation laid by article 26 of the UDHR mentioned above, in that the ICESCR envisages that education should go beyond the development of each person's personality and sense of dignity but should enable individuals to participate effectively in society with an understanding and tolerance of diversity. Article 13(2) then describes what is needed to fully realise the right to education:

> "(a) Primary education shall be compulsory and available free to all;
> (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
> (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
> (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
> (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.[27]

A few aspects of article 13(2) are noteworthy. First, the ICESCR provides requirements for each level of education. Compulsory and free primary education must be available to all, secondary education must be "generally available and accessible to all by every appropriate means" and higher education should be made "equally accessible to all, on the basis of capacity, by every appropriate means".[28] In the case of both secondary and

[27] Article 13(2).
[28] Articles 10 and 13 of the ICESCR.

higher education, states are to progressively introduce free education. Adults are to be afforded the opportunity to access primary education if they have not yet completed such education. Although progress has been made in providing education for all, these requirements have proven difficult to reach, particularly among emerging economies. South Africa signed the covenant in 1994 and only ratified it in 2015.[29] Chapter 2 already provided a taste of the successes and failures of South Africa in realising the right to education, something that is elaborated on in subsequent chapters. Lastly, the Convention on the Rights of the Child ("CRC") tailors the human rights found in the UDHR to the specific needs of children.[30] Article 28 of the CRC recognises the right to education, with the wording of the provision being similar to that of the ICESCR:

> "1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
> (a) Make primary education compulsory and available free to all;
> (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
> (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
> (d) Make educational and vocational information and guidance available and accessible to all children;
> (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates".[31]

This provision can be distinguished from the provisions relating to education in the UDHR and ICESCR in at least two ways. First, it requires that information on education and vocational training be made available to children and that they receive guidance in this regard.[32] This requires the state to actively engage with children about the availability of education and that guidance be provided on, for instance, the different options available

[29] United Nations "UN Treaty Body Database" (undated) *United Nations Human Rights Treaty Bodies* <.
[30] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
[31] Article 28.
[32] Article 28(1)(b).

to children. Second, states must encourage regular learner attendance at schools and reduce the number of learners who drop out of school before finishing.[33] In this regard, the CRC requires more from states than just to make education available. It requires that the state be accountable for learners attending school, that it actively monitors and encourage attendance as well as investigate the reasons for learners dropping out of school. This can be done by including provisions in domestic legislation aimed at operationalising these provisions and ensuring the implementation thereof by relevant officials.

It is significant that the right to education is not only protected generally in international instruments, as shown above, but is also promoted regarding specific vulnerable groups in society.[34] Apart from the CRC, which is aimed at protecting and advancing the rights of children in society, there are also other instruments. Equal rights for women in terms of education is protected by the Convention on the Elimination of all Forms of Discrimination Against Women ("CEDAW").[35] In terms of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("CRMW"), children of migrant workers have a basic right to access education, equal to the right of nationals of the country the migrant family find themselves in.[36] The most recent instrument protecting education rights is the Convention on the Rights of Persons with Disabilities ("CRPD").[37] This instrument includes a provision aimed at creating awareness for persons with disabilities by fostering an attitude of respect through the education system.[38] Furthermore, the right of persons with disabilities to education is

[33] Article 28(1)(e).

[34] These groups include women, children, refugees, migrants and persons with disabilities and their rights are protected by the following conventions: the Convention on the Elimination of all Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, the CRC, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 2 and the Convention on the Rights of Persons with Disabilities (adopted on 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

[35] Articles 5, 10, 14 and 16 of the CEDAW.

[36] Articles 30, 43 and 45 of the CRMW.

[37] The Convention on the Rights of Persons with Disabilities (adopted on 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

[38] See art 8(2)(b) of the CRPD.

emphasised in article 24 by ensuring an inclusive education system where persons with disabilities may fully develop their potential.[39]

These international instruments provide a framework regarding what is expected of states under international human rights law with regard to the provision of education. Each ratifying state will have to incorporate the standards found in international law into domestic legislation, according to the specific needs and the context of each country.[40] In addition, in the South African context, it is worth reminding oneself that section 39 of the Constitution demands consideration of international law when our Bill of Rights is interpreted, while section 233 requires interpretation of domestic legislation to be consistent with international law.

On a regional level, the African Charter on the Rights and Welfare of the Child of 1990 ("ACRWC") provides for the right to education in the African context and aims to account for the unique needs of the continent.[41] Article 11(1) of the ACRWC does not state what the minimum required level of education is, but simply provides that "every child shall have the right to an education".[42] Article 11(3) does however mention that states parties "shall take all appropriate measures with a view to achieving the full reali[s]ation of this right and shall, in particular, provide free and compulsory basic education". Secondary education is to be made progressively accessible and free to all. The provision relating to higher education is identical to that of the ICESCR. Article 11(3)(d) also includes the same provision regarding school attendance and drop-out rates as does the CRC. A unique provision is found in article 11(3)(e), which requires states to "take special measures in

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39 Article 24 of the CRPD.

40 Tomaševski "Primer No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable" *Right to Education* 12 <https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf> (accessed 22-10-2021).

41 The African Charter on the Rights and Welfare of the Child of 1990 ("ACRWC") (adopted on 1 July 1990, entered into force 29 November 1999) OAU Doc. CAB/LEG/153/Rev.2 (1990).

42 Article 11(1) of the ACRWC. Article 11(2) also includes the purpose of education as "(a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples' rights and international human rights declarations and conventions; (c) the preservation and strengthening of positive African morals, traditional values and cultures; (d) the preparation of the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples ethnic, tribal and religious groups; (e) the preservation of national independence and territorial integrity; (f) the promotion and achievements of African Unity and Solidarity; (g) the development of respect for the environment and natural resources; (h) the promotion of the child's understanding of primary health care".

respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community".

The international framework discussed above recognises, protects and promotes the right to education and serves as a global commitment to not only protect but also to implement the right. The UDHR, CADE, ICERD, ICESCR and the CRC all recognise free and compulsory primary education.[43] The above framework does not, however, define or give specific content to the right to basic education. They do, however, provide guidelines on the goals of the right to education and lay down certain minimum requirements for its fulfilment. This allows states to use the framework to regulate and implement the right to education in their unique contexts.

Katherina Tomaševski, the former Special Rapporteur of the Commission of Human rights at the UN, has provided valuable guidance in giving content to the right to education. Although progress had been made by the turn of the century, a statement she made in 2001 continues to ring true:

> "An essential prerequisite for human rights work is incurable optimism, which is needed in particularly large doses for tackling the right to education. Advances are few and far between, and fragile at that. Retrogression is frequent and self-reinforcing and – worse – it is not challenged as a human rights violation because the right itself is cloaked behind a conceptual confusion. Advances in conceptualizing human rights have been largely confined to civil and political rights, with economic and social rights lagging behind. Although the right to education cuts across this division, it has shared the ill fate of economic and social rights. Clarity in defining what the right to education is, when this right is violated, and how violations should be remedied and prevented in the future has yet to be attained".[44]

[43] See article 26 of the UDHR, article 4 of the CADE, article 7 of the ICERD, article 13 of the ICESCR and article 28 of the CRC.

[44] K Tomaševski "Primer no. 1: Removing Obstacles in the Way of the Right to Education" (2001) *Right to Education* <https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%201.pdf> (accessed 26-06-2021). In addressing the above issue, Tomaševski developed a series of eight primers to identify and clarify key dimensions of the right to education.

To this end, Tomaševski developed the "four A-scheme", which she first proposed in her preliminary report on the right to education in 1999.[45] She referred to the four A's as "a tentative analytical scheme" that set out the obligations of governments in realising the right to education.[46] This report led to the four A-scheme being included in General Comment 13 by the Committee on Economic, Social and Cultural Rights ("CESCR")[47] under the ICESCR.[48] Building on her preliminary report, Tomaševski published a series of eight Right to Education Primers to highlight crucial aspects of the right to education. Central to her research is that education be used as a means of enhancing human rights.[49] This has been the premise for subsequent research. For example, Verviava and Coomans also mention that education is a prerequisite to first understand all human rights and, second, to exercise such rights.[50]

A brief overview of the four A-scheme provides insight into what the right to education guarantees. Tomaševski divides education rights into three categories: the right to education, rights in education and rights through education.[51] The first category, the right to education, relate to the first two A's, namely the availability and accessibility of education.[52] Furthermore, with regard to the availability of education, two elements need to be fulfilled before it can be said that education is available. These are that governments make education available by either establishing or funding schools and allowing privately

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45 Tomaševski "Preliminary report of the Special Rapporteur on the Right to Education" (1999) *United Nations Digital Library* 42-74 <https://digitallibrary.un.org/record/1487535#record-files-collapse-header> (accessed 26-05-2021).

46 Tomaševski "Preliminary report of the Special Rapporteur on the right to education" (1999) *United Nations Digital Library* 42-74.

47 The CESCR consists of independent experts and is responsible for monitoring the ICESCR's implementation by states parties. See United Nations "Committee on Economic, Social and Cultural Rights" (2021) *United Nations* <https://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> (accessed 20-10-2021).

48 CESCR "General comment 13: The Right to Education (Article 13 of the Covenant)" (1999) *Right to Education* 2-3 <https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/CESCR_General_Comment_13_en.pdf> (accessed 26-05-2021). The CESCR advanced the idea of "minimum core obligations" that states parties have to fulfil in order to comply with its obligations under the ICESCR. These minimum core obligations are established in General Comments issued by the CESCR on each of the rights contained in the ICESCR.

49 K Tomaševski "Primer No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable" (2001) *Right to Education* 5.

50 F Veriava & F Coomans "The Right to Education" in D Brand & C Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 57.

51 Tomaševski "Primer No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable" (2001) *Right to Education* 12.

52 12.

run educational institutions to operate in the state.[53] The government's obligation to make education available entails a significant financial commitment. This occurs by providing the resources for the establishment of a sufficient number of schools to serve the number of learners.[54] It also requires that there are enough trained educators to teach the number of learners.[55] The training of educators requires regulation by the government, which regulation should apply to educators teaching at both public and private educational institutions. [56]

The accessibility of education requires that certain hurdles be eradicated to ensure that learners access education.[57] These hurdles can be of a legal, administrative or financial nature.[58] Often, and particularly in regard to female learners, the hurdle is discriminatory in nature.[59] The international framework is clear concerning compulsory education at the elementary or primary level. However, certain aspects related to education can interfere with the ability of governments to fulfil the obligation to ensure compulsory education. This includes school fees, distance from school and the school timetable.[60] The school timetable is particularly important when considering that in many instances each family member has certain duties in their household. Where the school timetable is of such a nature that household work cannot be completed, female learners usually suffer as it may result in an unwillingness by parents to send these learners to school.[61] In the South

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[53] Where the government establishes public schools or funds these schools, their obligation in regard to education as a socio-economic right is realised (in regard to the first A, which is availability). On the other hand, allowing that private actors establish schools realises the government's obligation in regard to education as a civil and political right. See Tomaševski "Primer No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable" *Right to Education* 13.

[54] Tomaševski "Primer No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable" (2001) *Right to Education* 12.

[55] In regard to educators, the availability requirement also refers to educator training, recruitment for educator positions, labour rights and trade union freedoms.

[56] Tomaševski "Primer No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable" (2001) *Right to Education* 18.

[57] Tomaševski "Primer No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable" (2001) *Right to Education* 12.

[58] Tomaševski "Primer No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable" (2001) *Right to Education* 12.

[59] Tomaševski "Primer No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable" (2001) *Right to Education* 12, 27-28.

[60] Tomaševski "Primer No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable" (2001) *Right to Education* 12.

[61] Tomaševski "Primer No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable" (2001) *Right to Education* 27.

African context obstacles precluding learners from accessing education are often also the financial cost[62] of school uniforms, stationery and transport to and from school.[63]

The second category of education rights identified by Tomaševski – rights in education – relates to the acceptability and adaptability of education.[64] The acceptability requirement focuses on the provision of education that is in line with the state's minimum standards and criteria in education, but at the same time is also acceptable to parents.[65] In other words, the state's education standards about the content, quality and safety of education may in certain instances be unacceptable to parents. This may be due to the language of instruction, religious observances or moral convictions of the parent which may not be in line with the government's education policy.[66] As far as the adaptability of education is concerned, the point of departure is that the content of what learners are taught at school and how teaching and learning takes place are dynamic aspects of education.[67] These should be subject to constant development and change to ensure that they align with the needs of the particular context. This includes adaptability in providing for children with specific needs, such as minority, indigenous, working, disabled or migrant children.[68] 'Rights through education' also relates to the adaptability of education in eliminating violence, child soldiering, child labour and child marriages.[69]

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[62] It should be noted here that the national quintile system in terms of s 35 of SASA (which provides for no-fee schools), does not address other expenses associated with accessing education. The courts have indicated a willingness to include these expenses within the government's obligation under the right to a basic education, but unfortunately these determinations are made on a case-to-case basis and are not generally available to all learners. This is discussed in part 3 below.

[63] See CA Spreen & S Vally "Education rights, education policies and inequality in South Africa" (2006) 26 *International Journal of Educational Development* 352 354, 358; See also V Dieltiens & S Many-Gilbert "School Drop-Out: Poverty and Patterns of Exclusion" in S Pendlebury, L Lake & C Smith (eds) *South African Child Gauge* (2008) 46.

[64] Tomaševski "Primer No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable" (2001) *Right to Education* 12.

[65] Tomaševski "Primer No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable" (2001) *Right to Education* 29.

[66] Tomaševski "Primer No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable" (2001) *Right to Education* 29.

[67] Tomaševski "Primer No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable" (2001) *Right to Education* 31.

[68] Tomaševski "Primer No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable" (2001) *Right to Education* 12.

[69] Tomaševski "Primer No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable" (2001) *Right to Education* 12, 37-39.

The four A-scheme developed by Tomaševski not only contains the guarantees included in the right to education, but also the obligations each government has to fulfil to adhere to these guarantees.[70] In other words, if governments do not ensure that education is available, accessible, acceptable and adaptable in the above terms, they will be in breach of the four A-scheme, meaning that they are in breach of their international obligations under General Comment 13 and the ICESCR. The right to education, as is the case with all human rights, is dependent on each government fulfilling its obligations and cannot meaningfully exist without a remedy to enforce the right.[71] The above principles provide states with the necessary guidance to ensure that the right to education is meaningfully protected and promoted within their jurisdiction.

3 3 Basic education as a South African constitutional imperative

3 3 1 Section 29 of the Constitution

As mentioned above, South Africa only ratified the international instruments that recognise the right to education as the country moved into a constitutional dispensation.[72] One factor that contributes to the successful functioning of any education system at a domestic level, is the legal framework regulating education including, as point of departure, the status of education in that legal framework. In chapter 2 the democratic government's focus on transforming the education system into one founded on the constitutional values of equality and dignity was touched on. From a legal point of view, the first step in achieving this was the recognition of the right to education. In this regard, section 29 of the Constitution states:

> "29. **Education**
> 1. Everyone has the right—
> a. to a basic education, including adult basic education; and

[70] Tomaševski "Primer No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable" (2001) *Right to Education* 13.

[71] Tomaševski "Primer No 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable" (2001) *Right to Education* 12.

[72] The first UN treaty ratified by South Africa was in 1993 (the CRC, CEDAW and Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment). The list of treaties that have been ratified by South Africa can be accessed here. United Nations "UN Treaty Body Database" *United Nations Human Rights Treaty Bodies*.

b. to further education, which the state, through reasonable measures, must make progressively available and accessible.

2. Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—
   a. equity;
   b. practicability; and
   c. the need to redress the results of past racially discriminatory laws and practices.

3. Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—
   a. do not discriminate on the basis of race;
   b. are registered with the state; and
   c. maintain standards that are not inferior to standards at comparable public educational institutions.

4. Subsection (3) does not preclude state subsidies for independent educational institutions."

The domestic legislative framework regulating education in South Africa, which gives effect to the right to a basic education in section 29(1)(a) of the Constitution, is discussed in greater detail in chapter 4. However, if one juxtaposes section 29(1) with the international legal framework discussed earlier, some preliminary remarks about the apparent differences in approach may be made. It should, however, be mentioned that this research does not intend to examine South Africa's compliance with international obligations.[73]

Section 29 of the Constitution does not explicitly provide for "free" and "compulsory" education. As mentioned, the UDHR has no binding power, but provided the foundation for the IBHR. Furthermore, South Africa has ratified the ICESCR, CADE, CRC and ACRWC. The first aspect that distinguishes the constitutional protection of the right to education from its international recognition is that section 29 does not state that basic

[73] For a discussion on South Africa's compliance with international obligations see A Strohwald *The Child's Rights to, in and Through Education: An Analysis of South Africa's International Obligations* LLD Thesis, Stellenbosch University (2020).

education will be free, whereas it is explicitly stated in each of the above instruments. Second, all the international instruments provide for compulsory primary/elementary/fundamental/basic education, whereas section 29 does not explicitly provide for compulsory basic education. However, despite these apparent shortcomings in the Constitution, the South African Schools Act 84 of 1996 ("SASA"), which is the piece of legislation that gives effect to section 29 of the Constitution, does address the "free" and "compulsory" dimensions of the right to education. The heading of section 3 of SASA is "compulsory attendance" and section 3(1) provides that:

> "[s]ubject to this Act and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first".[74]

Free education is not constitutionally guaranteed, but the legal framework does provide for learners or their parents who are unable to pay school fees.[75] Section 5(3) of SASA determines that "[n]o learner may be refused admission to a public school on the grounds that his or her parent is unable to pay or has not paid the school fees determined by the governing body under section 39". Section 39 provides the School Governing Body with the power to determine and charge school fees. This power is subject to a resolution being adopted by a majority of parents attending a general meeting of parents.[76] This resolution must provide for "equitable criteria and procedures for the total, partial or conditional exemption of parents who are unable to pay school fees".[77] The equitable criteria are determined by the Minister through regulations published in the *Government Gazette*.[78] Apart from this, the Minister will also determine, on an annual basis, the

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74 Section 3(1) of SASA.

75 For a detailed discussion regarding free basic education in South Africa, see L Arendse "The Obligation to Provide Free Basic Education in South Africa: An International Law Perspective" (2011) 14 *PELJ* 96-127.

76 Section 39(1) of SASA.

77 Section 39(2)(b).

78 Section 39(4). The Regulations for the Exemption of Parents from the Payment of School Fees GN 1149 in *GG* 29392 of 17-11-2006 provide for a procedure which the SGB must consider when deciding to exempt a parent from paying school fees. This formula takes into account the income of the parent and school fees as a proportion thereof and determines when the parent will qualify for exemption.

national quintiles for public schools which identify schools that may not charge school fees.[79] This system is discussed in more detail in chapter 4. For now, it is noteworthy that SASA not only gives effect to section 29 of the Constitution, but also addresses the two elements of the right to education included in international instruments but absent from section 29.[80]

Further differences between section 29 and the international framework include the use of terminology – the ICESCR, CRC and CADE all refer to primary education, the UDHR refers to elementary and fundamental education, with the only instrument, similar to section 29, that refers to "basic" education being a regional instrument, the ACRWC. Second, section 29(1)(b) does not distinguish between secondary and higher education as is the case in all the international instruments. The provision states that everyone has a right to "further education, which the state, through reasonable measures, must make progressively available and accessible".[81] A provision unique to section 29(2), that is not expressly included in any of the international instruments, is that the right to a basic education includes the right to receive education in an official language or languages of choice in public institutions. This provision is qualified to the extent that only "where that education is reasonably practicable" will learners be able to rightfully insist on it.[82] Seeing that South Africa has eleven official languages, the implementation of this provision will rely heavily on the feasibility of offering education in a specific, chosen language. Sections 29(3) and (4) are unique provisions in that they provide for the freedom to establish independent schools with specific guidelines they have to adhere to and do not preclude state subsidies to these institutions. This is in line with the availability requirement of the four A-scheme discussed above in the international context.

If nothing else, these preliminary remarks about section 29 of the Constitution and its right to a basic education in South Africa, confirm that there are various aspects to this right and that, despite the international recognition of the right, each state needs to

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79 Section 39(7) of SASA. The most recent list of schools that may not charge school fees was published on 18 December 2020. See National Norms and Standards for School Fundin"): List of Schools that may not charge School Fees GN 1376 in *GG* 44020 of 18-12-2020.

80 Whether this complies with the international framework and the government's obligations in this regard is beyond the scope of this research. See Strohwald *The Child's Rights to, in and through Education* 188-190.

81 Section 29(1)(b) of the Constitution.

82 Section 29(2).

evaluate the realisation of this right in its own context. At the same time, section 29 contains no more than the bare bones of the right to a basic education and requires interpretation. In this regard, the courts have provided some guidance.

3 3 2 The right to a basic education in the courts

In general, it may be said that the role of the courts in interpreting and applying section 29 and education legislation already echoes Tomaševski's position that a right cannot be meaningfully exercised without a remedy.[83] In South Africa, the courts have played a prominent role in reaffirming the duty of the state to provide basic education and identifying certain failures by the state in implementing this right.[84] The exercise of the functions of school governing bodies ("SGBs"), the Department of Basic Education ("DBE"), Provincial Departments of Education ("PDEs") and boards of independent schools have also on numerous occasions ended up in court. In this context, the courts have provided valuable guidance about the functions and decision-making powers of each of these role players.[85] These functions are revisited in chapter 4.

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[83] See paragraph 3 2 above.

[84] The following cases are examples of the court's stance in case of a failure by the state to implement the right to education in line with the legal framework. The most recent example can be found in *Equal Education v Minister of Basic Education* 2021 1 SA 198 (GP) where the court ordered the MEC's of eight provinces to ensure that the National School Nutrition Programme ("NSNP") proceed and provide eligible learners with a daily meal whether they are attending school or studying from home due to the COVID-19 pandemic. In *Centre for Child Law v Minister of Basic Education* 2013 3 SA 183 (ECG) the court found that a failure by the MEC to declare and fill posts by appointing non-teaching staff threatens the right to a basic education due to its impact on the functioning of schools. On separate occasions the court has found that the provision of school furniture, text books and transport to and from school is a duty of the state and a failure to fulfil this duty is a violation of the right to a basic education, see *Madzodzo v Minister of Basic Education* 2014 3 SA 441 (ECM) (furniture), *Minister of Basic Education v Basic Education for All* 2016 4 SA 63 (SCA) (textbooks); *Tripartite Steering Committee v Minister of Basic Education* 2015 5 SA 107 (ECG) (transport). Regarding school infrastructure, the court in *Equal Education v Minister of Basic Education* 2019 1 SA 421 (ECB), found a number of regulations under s 5A of SASA to be inconsistent with the Constitution. The court found that the Minister relied on budgetary constraints as a way to indefinitely postpone the provision of infrastructure to schools and that this was not justifiable in terms of s 36 of the Constitution. In *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC) and with regard to special needs or disabled learners' right to basic education, the court found the state's inadequate subsidy of these schools and the fact that less is spent on education for disabled learners compared to able bodied learners to be an unjustified violation of their right.

[85] See *Centre for Child Law v Minister of Basic Education* 2020 3 SA 141 (ECG) concerning the impact of a DBE policy excluding "undocumented children" from schools, which the court found to be unconstitutional; See also *Cassim NO v MEC, Department of Social Development, Free State* 2021 1 SA 184 (FB) concerning a discriminatory admission policy pertaining to special needs learners. See *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 2 SA

In *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*,[86] the Constitutional Court described the right to a basic education in the Interim Constitution[87] as "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".[88] In other words, the state must take positive steps to realise the right to a basic education. However, in the absence of a definition of a basic education, it is unclear which positive steps taken by the state will be sufficient to fulfil the positive obligation under section 29(1)(a) of the final Constitution. Although there is a wealth of case law on education law generally, the first time the Constitutional Court ventured into the nature of the right to education was in 2011 in *Governing Body of the Juma Musjid Primary School v Essay NO and others* ("*Juma Musjid*").[89]

In this case, the High Court granted an order for the eviction of a public school from private property (held by the Juma Musjid Trust).[90] The dispute between the trust and Member of the Executive Council ("MEC") arose from the department's failure to pay for rent and for expenses incurred by the trust for the benefit of the school.[91] The eviction application was granted in the High Court based on the common-law remedy of *rei vindicatio*.[92] Important legal questions arose from this case regarding the right to a basic education, including whether the MEC fulfilled its constitutional obligations with regard to learners' rights and whether the trust had any obligation in protecting such rights when defending its property rights.[93] The High Court did not find any such obligation on the side

228 (CC) concerning the validity of a school pregnancy policy; See *MEC for Education, Gauteng Province, v Governing Body, Rivonia Primary School* 2013 6 SA 582 (CC) regarding the authority to determine the capacity of a school; *Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart* 2017 6 SA 129 (GJ) regarding the school's approach to religious observances.

86 1996 3 SA 165 (CC).

87 Section 32 of the interim Constitution of the Republic of South Africa 200 of 1993.

88 *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) para 9; See S Liebenberg *Socio-economic Rights – Adjudication under a Transformative Constitution* (2010) 243; See also Arendse (2011) *PELJ* 115.

89 2011 8 BCLR 761 (CC).

90 *Governing Body of the Juma Musjid Primary School v Essay NO and Others* 2011 8 BCLR 761 (CC), paras 1, 5 and 15.

91 Para 11.

92 Para 7.

93 Para 7.

of the trust and approved the eviction application based on the trust's common-law remedy.[94] The Constitutional Court found that no primary positive obligation rested on the trust to realise the right to a basic education as this obligation rested on the MEC.[95] However, in terms of section 8(2) of the Constitution and with reference to *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*,[96] the court confirmed that socio-economic rights are protected against negative interference by private parties.[97] What this means is that the trust did in fact have a negative constitutional obligation towards learners not to interfere or diminish their right to a basic education. On the facts the court found that the trust at all times acted reasonably, even considering the negative obligation not to interfere or diminish learners' rights.[98] The MEC, on the other hand, had failed dismally in its positive obligation to realise the right to education, both in terms of its obligations under the Constitution and the provisions of SASA.[99]

What is important from *Juma Musjid* is that the court took the opportunity to consider the nature of the right to a basic education. Nkabinde J observed that the nature of the right in section 29(1)(a) of the Constitution differs from other socio-economic rights in that it is immediately realisable and not subject to progressive realisation or realisation within the state's available resources.[100] It should be noted that the unqualified nature of the right exists only in section 29(1)(a) which guarantees "a basic education" and not in respect of further education provided for by section 29(1)(b), which has to be made progressively available and accessible through reasonable measures. Whether there is legal certainty on the definition of a basic education is discussed later in this chapter.

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94 Paras 54-55.
95 Para 57.
96 1996 4 SA 744 (CC).
97 *Juma Musjid Primary School v Essay NO and Others* 2011 8 BCLR 761 (CC) paras 58-60.
98 Para 65.
99 Paras 45-53; For a comprehensive discussion on positive and negative obligations in terms of the constitution and what the *Juma Musjid* case contributed to the discourse, see L Arendse "Slowly but Surely: The Substantive Approach to the Right to Basic Education of the South African Courts Post-Juma Musjid" (2020) 20 *African Human Rights Law Journal* 285-314. See also, for the positive and negative dimensions of the right to a basic education, S Woolman & M Bishop "Education" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2013) 57-1 57-8, 57-9.
100 *Juma Musjid Primary School v Essay NO and Others* 2011 8 BCLR 761 (CC) para 37; This approach was also followed by the Supreme Court of Appeal in *Minister of Basic Education v Basic Education for All* 2016 4 SA 63 (SCA) para 36.

The approach in *Juma Musjid* was recently confirmed in *Equal Education v Minister of Basic Education* ("*Equal Education*"),[101] where the High Court recognised that the right to a basic education must be distinguished from other socio-economic rights.[102] The reason for this is because the right to a basic education in section 29 contains no "internal qualifiers" as is the case with other socio-economic rights under the Constitution.[103] The nature of the right to education is therefore different to the right to housing in section 26(1) or the right to health care, food, water and social services in section 27(1). The differences between these socio-economic rights are significant because it sheds light on the nature of the rights. The rights in section 26(1) and 27(1) are qualified by their subsections 26(2) and 27(2) in that the state is obliged to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [these] right(s)".[104] The effect of these qualifications is that beneficiaries of these rights are only entitled to their fruits insofar as the state is not unreasonably denying them the right.[105] In other words, the mere failure to immediately provide for the section 26 and 27 rights, or not to do so according to the expected standard, is not necessarily a violation of these rights.[106] This will only be the case where the state acts unreasonably in progressively realising these rights.

The fact that the right to a basic education in the Constitution is not subject to any internal qualification means the right to a basic education may only be limited in terms of section 36 of the Constitution. This requires the source of the limitation to be a law of general application and has to be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[107] Liebenberg mentions, as was confirmed in *Juma Musjid*, that the education clause therefore "imposes a direct and

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[101] 2019 1 SA 421 (ECB).
[102] *Equal Education v Minister of Basic Education* 2019 1 SA 421 (ECB) para 170-172.
[103] Para 170.
[104] Sections 26(2) and 27(2) of the Constitution.
[105] C McConnachie & C McConnachie "Concretising the Right to Basic Education" (2012) 129 *SALJ* 562; Arendse (2020) *African Human Rights Law Journal* 288.
[106] McConnachie & McConnachie (2012) *SALJ* 562; L Arendse "The South African Constitution's empty promise of "radical transformation": unequal access to quality education for black and/or poor learners in the basic education system" (2019) 23 *LDD* 100 104-105.
[107] Section 36 of the Constitution; Arendse (2020) *African Human Rights Law Journal* 287-288.

immediate obligation on the state" to realise the right to a basic education for everyone.[108] McConnachie notes that the *Juma Musjid* case gave some (perhaps overdue) guidance on the nature and content of the right to a basic education.[109] In short, due to the unqualified nature of the right, anything short of a basic education would be an infringement of that right, which may or may not be a justifiable limitation of that right.[110] A learner who can make out a *prima facie* case that they are not receiving a basic education will place the onus on the Minister and/or MEC to prove that the limitation of the right is sourced in a law of general application and passes the standard in section 36 of the Constitution.[111] In other words, whenever a learner is not receiving a basic education, there is an immediate violation of section 29(1)(a).[112]

The right to a basic education is not, as is the case with sections 26 and 27 in respect to housing, health care, food, water and social security about access to education, but the actual receipt of a basic education.[113] Reliance by the powers that be on the provision of access to education as sufficient will not pass constitutional muster.[114] The court in *Tripartite Steering Committee v Minister of Basic Education* ("*Tripartite Steering*")[115] was faced with a situation where education was available but learners could not access such an education, because they were without the necessary transport to get to school and receive their education. The question was whether part of the right to a basic education includes receiving (from the state) transport to and from school.[116] At first glance, the absence of transport may not seem to be pivotal in hampering access to education. However, this has a massive impact on some learners considering their distance from

[108] S Liebenberg "Equality Rights and Children: Moving Beyond a One-Size-Fits-All Approach" in K Hall, I Woolard, L Lake & C Smith (eds) *South African Child Gauge* (2012) 24 28.
[109] McConnachie & McConnachie (2012) *SALJ* 561.
[110] 561.
[111] 564.
[112] The exact content of a basic education is, however, still being debated. See, eg, S van der Merwe "How 'Basic' is Basic Education as Enshrined in Section 29 of the Constitution of South Africa?" (2012) 27 *SAPL* 365-378.
[113] Woolman & Bishop "Education" in *CLOSA* 57-10. The meaning of "access" to education is not used here in the context of Tomaševski's four A-scheme. It is compared to the other socio-economic rights in the Constitution where access to, for example, housing in the sense that legislative and other measures are in place, may be enough for the state to fulfil its obligations. The right to a basic education requires more, in that the state must provide the education itself, not mere access to it.
[114] Woolman & Bishop "Education" in *CLOSA* 57-10.
[115] 2015 5 SA 107 (ECG).
[116] *Tripartite Steering Committee v Minister of Basic Education* 2015 5 SA 107 (ECG) paras 12-18.

school, the time spent walking (in all forms of weather) and, perhaps most importantly, in a country where no one's safety is guaranteed.[117] Considering the impact of elements such as these on realising the right to a basic education, Plasket J said that:

> "The right to education is meaningless without teachers to teach, administrators to keep schools running, desks and other furniture to allow scholars to do their work, text books from which to learn and transport to and from school at State expense in appropriate cases".[118]

The PDE was ordered to provide the specific learners in question with transport at state expense and to adopt a new policy on learner transport.[119] The respondents were also to report to the court about their progress in this regard.[120]

From the guidance in *Juma Musjid*, we now know what the nature of the right to a basic education in section 29(1)(a) is compared to other socio-economic rights in the Constitution. The unencumbered right to a basic education has no internal qualification and can only be limited by section 36 of the Constitution, provided such limitation is reasonable. Cases such as *Tripartite Steering* also confirm that the right to a basic education requires more than the mere availability of a school and that the state will be held accountable where elements such as transport, crucial to realising the right, is not provided. The courts have not, however, interpreted or given an exact definition of 'a basic education'.[121] Arendse notes that the *Juma Musjid* judgment seems to suggest that the phrase refers to the compulsory segment of education in terms of section 3(1) of SASA (up to grade 9 or 15 years of age).[122] The discussion below evaluates this statement and consider the legal definition of a basic education with reference to the international framework, jurisprudence and academic discourse.

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[117] See paras 12-14.
[118] Para 18.
[119] Para 67.
[120] Para 67.
[121] See S Woolman & B Fleisch *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (2009) 127; Liebenberg *Socio-economic Rights* 243.
[122] See Arendse (2011) *PELJ* 117 in reference to *Juma Musjid Primary School v Essay NO and Others* 2011 8 BCLR 761 (CC), paras 38-39. See also Woolman & Fleisch *The Constitution in the Classroom* 127; Liebenberg *Socio-economic Rights* 243.

3 3 3 The legal position with regard to what constitutes a "basic" education in South Africa

What should be mentioned at the outset is that there is no legal consensus on the meaning of "basic" in the right to a basic education.[123] Chapter 2 emphasised the general importance of education and accepted, for purposes of this study, that basic education, in line with the approach of the South African government, includes grade R up to grade 12. That chapter, as well as the earlier discussion in this chapter, show that giving precise legal meaning to terms such as "education", "basic" and "quality" is not an easy feat. These are interrelated and mutually reinforcing concepts and often reactively derive their meaning from the various interests – individual and collective – that are promoted through the different stages of education and from the context in which education takes place. The legal discourse on the definition of a "basic" education can be divided into three categories – guidance provided by international legal instruments providing for the right to education, the approach of the courts and the views of academics.

After the World Conference on Education for All in Thailand in 1990, UNESCO published the World Declaration on Education for All as well as the Framework for Action to Meet Basic Learning Needs. This conference renewed a drive to realise the goal of providing universal primary education for all and improving the quality of such education.[124] While this was mentioned in chapter 2, it is worth repeating in this context. Article 1 of the World Declaration on Education for All describes basic learning needs and how these needs can be met:

> "Every person – child, youth and adult – shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue

[123] Strohwald *The Child's Rights to, in and through Education* 13-18.
[124] See the Preface to the World Declaration on Education for All.

learning. The scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time".[125]

Article 1, then, provides more specific guidance about the content of a basic education, even though it is recognised that the approach should be a flexible one and should be able to adapt and change over time, depending on the needs of the environment in which it takes place. What is also clear is that the goal of basic education is to ensure that the beneficiaries of education are "able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning".[126] Furthermore, this is to be done through a combination of "tools" and "content", with the former including at least literacy, oral expression, numeracy and problem solving and the latter knowledge, skills, values and attitudes. This also tells us a lot about the broad and important role of an educator in this process – one that goes beyond the transfer of knowledge and includes the development of appropriate learning tools and the transfer of skills, values and attitudes.

The courts have on numerous occasions had the opportunity to deliver judgments on the duty of the state to deliver basic education, the role of public schools and their SGBs as well as in case of conflict between the different role players in the education sector.[127] As discussed, *Juma Musjid* confirmed that the right to a basic education has no internal constitutional limitations and, as such, the court confirmed the importance society attaches to education in general and to the individual right to basic education specifically.[128] The cases that followed clarified specific aspects of the state's duty.[129]

[125] Article 1.
[126] Article 1.
[127] See paragraph 3 3 2 above. The functions of role players in the education sector as well as points of conflict between different role players are discussed in greater detail in chapter 4.
[128] *Juma Musjid Primary School v Essay NO and Others* 2011 8 BCLR 761 (CC) paras 38-39.
[129] See, eg, *Equal Education v Minister of Basic Education* 2021 1 SA 198 (GP); *Madzodzo v Minister of Basic Education* 2014 3 SA 441 (ECM); *Minister of Basic Education v Basic Education for All* 2016 4 SA 63 (SCA); *Tripartite Steering Committee v Minister of Basic Education* 2015 5 SA 107 (ECG); and *Equal Education v Minister of Basic Education* 2019 1 SA 421 (ECB).

These cases confirmed that a meaningful right to education includes factors such as nutrition,[130] furniture,[131] learning materials,[132] infrastructure[133] and transport.[134]

The courts have not, however, ventured into defining the word "basic" as mentioned in section 29(1)(a) of the Constitution. As mentioned, Arendse argues that Nkabinde J in *Juma Musjid* suggested that section 29(1)(a) of the Constitution refers to the compulsory part of schooling as provided for in section 3(1) of SASA.[135] As also mentioned, section 3(1) of SASA determines that schooling is compulsory between the ages of seven and fifteen or when the learner reaches grade 9, whichever occurs first. Liebenberg notes that it is unclear whether compulsory schooling in SASA can be considered the parameters of a basic education as envisioned by the Constitution.[136] According to Woolman and Fleisch a basic education can be interpreted in one of two ways, it either refers to a certain period of schooling (in line with section 3(1) of SASA) or a certain standard of schooling (that is, the quality of schooling).[137] McConnachie suggests that the latter is in line with the substantive interpretation of a basic education by the court in *Juma Musjid.*[138] It should be noted that the court in *Juma Musjid* was not specifically faced with a legal question concerning the definition of a basic education. However, Arendse mentions that when the opportunity arises for any court to analyse whether the state is meeting its obligation to provide a basic education to everyone, the court will have to at least define the "core content" of the right.[139] In the absence of this, it will remain difficult to challenge violations of the right to a basic education in section 29(1)(a) of the Constitution.

What Arendse refers to is that the CESCR developed the idea of "minimum core obligations" that states parties have to fulfil in order to comply with their obligations under the ICESCR. These minimum core obligations are established in General Comments

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[130] *Equal Education v Minister of Basic Education* 2021 1 SA 198 (GP).
[131] *Madzodzo v Minister of Basic Education* 2014 3 SA 441 (ECM).
[132] *Minister of Basic Education v Basic Education for All* 2016 4 SA 63 (SCA).
[133] *Equal Education v Minister of Basic Education* 2019 1 SA 421 (ECB).
[134] *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG).
[135] Arendse (2011) *PELJ* 117 in reference to *Juma Musjid Primary School v Essay NO and Others* 2011 8 BCLR 761 (CC) paras 38-39.
[136] Liebenberg *Socio-economic Rights* (2010) 243.
[137] Woolman & Fleisch *Constitution in the Classroom* 63, 127; McConnachie & McConnachie (2012) *SALJ* 565.
[138] *Juma Musjid Primary School v Essay NO and Others* 2011 8 BCLR 761 (CC) paras 42-43; McConnachie & McConnachie (2012) *SALJ* 565.
[139] Arendse (2011) *PELJ* 117.

issued by the CESC on each of the rights contained in the ICESCR.[140] However, the Constitutional Court has shown itself to be hesitant in ascribing a minimum core obligation or core content in relation to progressive rights such as those in sections 26 and 27 and have advanced reasonableness as the standard by which to assess whether the government is fulfilling its progressive obligations.[141] The court emphasised that it is difficult to determine a minimum core obligation in relation to a progressive right such as housing because needs will differ between communities, city and rural areas, and include land claims.[142] Instead, the court argued that the focus should be on whether the state's measures to realise the right to access to housing were reasonable.[143] What is worth noting, bearing in mind that the right to a basic education in section 29(1)(a) is not subject to progressive realisation, is that identification of a minimum core obligation would indeed be appropriate in giving effect to the right to basic education.[144] Unfortunately, enforcement of the right to a basic education depends on litigation, which means consideration of this right by the courts is reactive and fact-specific – in each case, a court is called on to deal with a specific instance of an alleged violation of the right to a basic education.[145] Especially in more egregious cases, it in all likelihood will not be necessary for a court to delve into the specifics of the right to a basic education. This means, for now, the best that can be hoped for is a case-by-case development of the different constituent elements of the right to a basic education, as has happened with respect to nutrition, furniture, learning materials, infrastructure, and transport.

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[140] Yacoob J in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 31 explained the concept as follows:

> "[A] minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. It is in this context that the concept of minimum core obligation must be understood in international law."

[141] *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 35; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 25; *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) para 8.

[142] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 33. See also Woolman & Bishop "Education" in *CLOSA* 57-10.

[143] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 33.

[144] McConnachie & McConnachie (2012) *SALJ* 580; C Simbo "The Right to Basic Education, the South African Constitution and the *Juma Musjid* Case: An Unqualified Human Right and a Minimum Core Standard" (2013) 17 *LDD* 477 478.

[145] In regard to the potential of enforcing the right to a basic education through litigation, see A Skelton "The Role of the Courts in Ensuring the Right to a Basic Education in a Democratic South Africa: A Critical Evaluation of Recent Education Case Law" (2013) *De Jure* 1-23; A Skelton "How Far Will the Courts Go in Ensuring the Right to a Basic Education?" (2012) *Southern African Public Law* 392-408.

What is problematic, however, is that when South Africa ratified the ICESCR on 18 January 2015,[146] it was done with reservation and with specific qualification of the right to education in the following terms: "[t]he Government of the Republic of South Africa will give progressive effect to the right to education, as provided for in Article 13(2)(a) and Article 14, within the framework of its National Education Policy and available resources".[147] This contradicts the wording of section 29(1)(a) of the Constitution. This apparent misconception on the part of government about its obligation in relation to the delivery of basic education is something that calls for close scrutiny in the future.

3 4 Two further considerations in giving content to the constitutional right to a basic education

3 4 1 Understanding the right to a basic education as a children's right

Paragraph 3 3 above focused on the constitutional protection and meaning of the constitutional right to a basic education, seen in isolation from other rights. In this pursuit, however, it is also necessary to consider the full array of rights learners are entitled to. A violation of the right to a basic education may also violate other rights. And, if one reverses the causal chain, it means the right to a basic education has to be given content mindful of these other rights. The beneficiaries of the right to a basic education are mostly children. This means the right to a basic education cannot be viewed in isolation, but is related – in a mutually reinforcing way – to the other rights children are entitled to.[148] In short, learners' rights are also children's rights.[149] This means that education rights must be interpreted in a way that takes cognisance of the vulnerable position of learners as children in society and by using the best interest of the child as the standard by which learners' rights are interpreted.[150]

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[146] Entered into force on 12 April 2015.

[147] ESCR "The government of South Africa ratifies ICESCR" (20-01-2015) *ESCR-Net* <https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr> (accessed 20-10-2021).

[148] Although s 29(1)(a) guarantees everyone, including adults, a right to basic education, the majority of learners are children.

[149] Kruger & McConnachie "Learners' Rights" in *Child Law* 537.

[150] 537; s 28(2) of the Constitution. See also *Phenithi v Minister of Education* 2008 (1) SA 420 (SCA), para 24.

The interaction between a learner's interrelated rights, such as section 9 (equality), section 10 (dignity), section 12 (freedom and security), section 24 (environment), section 27 (health), section 28 (children) and section 29 (education) of the Constitution, is significant, as it shows both that the right to education is dynamic and multi-faceted and that the meaningful realisation of the right to a basic education requires a broad consideration of the well-being of learners.[151] In *Government of the Republic of South Africa v Grootboom* ("*Grootboom*"),[152] the court explained that rights are not only mutually supportive but the fulfilment of each right enables everyone the enjoyment of the full array of human rights.[153] This is in line with General Comment 13 where the CESCR emphasised that the power of education lies in its ability to realise other human rights children are entitled to.[154] The converse, unfortunately, is also true. Where a learner's right to a basic education is violated, other rights may also be affected.

All of this in mind, one may consider human dignity as the point of departure for the fulfilment of the right to a basic education, especially if one considers South Africa's history of exclusion and denial, as well as the fact that basic education, in the first instance, recognises that each person is deserving of personal growth and intellectual development.[155] Human dignity, protected by section 10 of the Constitution, is also one of the cornerstones and founding values of our democratic dispensation.[156] It is an "overarching" [157] right intrinsic to all other children's rights and, in this context, the right to a basic education. It plays a vital role in the interpretation of other rights and will be impacted on when the right to a basic education is violated.

Human dignity is also inextricably linked to a learner's right to equality.[158] Assessing whether a learner's right to equality has been infringed upon requires the application of

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[151] Kruger & McConnachie "Learners' Rights" in *Child Law* 537.
[152] 2001 1 SA 46 (CC).
[153] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 23; Kruger & McConnachie "Learners' Rights" in *Child Law* 537; Veriava & Coomans "The right to education" in D Brand & C Heyns (eds) *Socio-economic Rights in South Africa* (2005) 60.
[154] UN Committee on Economic, Social and Cultural Rights CESCR "General Comment No. 13: The Right to Education (Art. 13 of the Covenant)" (8 December 1999) E/C.12/1999/10.
[155] See the Preamble of the South African Schools Act 84 of 1996.
[156] The Preamble of the Constitution of the Republic of South Africa, 1996.
[157] Kruger & McConnachie "Learners' Rights" in *Child Law* 538.
[158] There are large inequalities between schools as a result of historical racial segregation and even though most schools have been transformed, the poorest percentage of schools remain in rural areas and its learners are predominantly black. G Nonjinge "Education for black people in South Africa is in a terrible

the unfair discrimination test developed in *Harksen v Lane* ("*Harksen*").[159] Even in the absence of directly discriminatory conduct, and as a result of the unique historical context and continuing racial inequality in schools in South Africa, conduct may constitute indirect discrimination. The Limpopo textbook saga is an instance of indirect discrimination on the basis of race as the PDE's failure to ensure the timeous delivery of textbooks had a disproportionate effect on a certain group of learners.[160] In *Minister of Basic Education v Basic Education for All* ("*Education for All*")[161] the court found that the majority of learners who did not receive textbooks were black, poor and from rural areas and were therefore discriminated against based on their race.[162] As argued by Albertyn and Fredman, substantive equality requires a focus on the disadvantage connected to the different categories of exclusion.[163] This then is an example of how different rights interpreted together give effect to the right to a basic education. This holistic approach to children's and learners' rights show that the right to a basic education includes at least a basic education of an equal standard.[164] This, in turn, requires the provision of equal education opportunities and positively addressing continuing racial inequalities and disadvantages in the school system.[165]

However, if one takes substantive equality seriously, basic education for each learner requires something more. As Liebenberg argues, it requires "a move beyond a one-size-fits-all approach".[166] She emphasises that a "creative synergy" between equality and socio-economic rights should be embraced.[167] This requires that the rights framework be emphasised when developing policy. Where this approach is followed, it will address the

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state" (12-03-2018) *Huffington Post* <https://www.huffingtonpost.co.za/gugu-nonjinge/the-real-state-of-south-africa-s-education->system_a_23373107/> (accessed 25-01-2019).

159 1998 1 SA 300 (CC).

160 Kruger & McConnachie "Learners' Rights" in *Child Law* 540.

161 2016 4 SA 63 (SCA).

162 *Minister of Basic Education v Basic Education for All* 2016 4 SA 63 (SCA), para 50.

163 C Albertyn & S Fredman "Equality Beyond Dignity: Multi-dimensional Equality and Justice Langa's Judgments" (2015) 1 *Acta Juridica* 430 434.

164 This does not mean that the outcomes will be the same across schools as there are many elements impacting educational achievement, but there should at least be equal opportunity in terms of the quality of education delivered by all schools. See, eg, Arendse (2019) *LDD* 100-147.

165 McConnachie & McConnachie (2012) *SALJ* 571. McConnachie and McConnachie use state spending as an instance where equality has been furthered by adapting expenditure towards previously disadvantaged schools and learners

166 Liebenberg "Equality Rights and Children" in *South African Child Gauge* 24 30.

167 30.

shortcomings of policies that indirectly discriminate and perpetuate disadvantage in education.[168] The right to a basic education should also continuously be developed in line with this rights framework. The approach should be holistic, and consideration of this right should take place within the broader framework of children's rights.

3 4 2 Balancing the rights of learners with the rights of educators

A key element in realising the right to basic education is the educator. It is not enough to merely have an educator in the classroom. What is especially clear form the international guidelines discussed earlier is that this requires a competent and professional educator in each classroom,[169] one with the ability to effectively impart and develop learning tools and content that go beyond the transfer of knowledge. The role of educators in realising the right to a basic education has been highlighted on numerous occasions.[170] While the role of the educator in the delivery of a quality basic education forms the focus of this thesis and is explored in much more detail in subsequent chapters, for present purposes it is sufficient to recognise that the interests of learners and educators may come into conflict during the education process and that educators, as employees, also have rights. Immediately, however, it has to be recognised that schools are not traditional workplaces. Learners often may be collateral damage where the educator's labour rights are given preference over the rights of learners.[171] Already it may be said that employment policies (and legislation) applicable to educators should account for the uniqueness and triangular nature (employer, employee and learner) of the workplace to protect the rights of learners adequately.

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[169] JL Beckmann "Competent Educators In Every Class: The Law and the Provision of Educators" (2018) 43 *JJS* 1-31.

[170] *Tripartite Steering Committee v Minister of Basic Education* 2015 5 SA 107 (ECG) para 18.

[171] For instance, in the case of sexual misconduct by educators toward learners, learners were required to give evidence at multiple forums which could be psychologically traumatizing and could even discourage learners from reporting sexual misconduct. This is an instance where the educator's labour and employment rights were given preference over the learner's rights and the best interest of the child standard. This was the position until 2018 when a collective agreement was concluded at the ELRC to mitigate the impact on learner witnesses by requiring a section 188A Inquiry by Arbitrator in the case of sexual misconduct. See ELRC Collective Agreement 3 of 2018 Providing for Compulsory Inquiries by Arbitrators in Cases of Disciplinary Action Against Educators Charged with Sexual Misconduct in Respect of Learners <https://www.elrc.org.za/sites/default/files/documents/Collective%20Agreement%203%20of%202018%20Inquiry%20by%20Arbitrators.pdf> (accessed 20-10-2021).

There is, of course, international and constitutional support for the protection of educators' employment rights. While the right to work is internationally recognised and protected, there is no explicit inclusion of and elaboration on the rights of educators.[172] As mentioned above, the UDHR established the foundation for the right to education. The right to work is also included in article 23 of the UDHR.[173] The realisation and implementation of human rights – also the right to work – remain the responsibility of each state through, for example, inclusion in a constitution or bill of rights and regulation through legislation. However, at the bottom the right to work offers individuals the opportunity to realise their human rights which might be limited or only progressively realised due to governments' limited capacity and resources. In this way, the right to work enables individuals to economically support themselves and meaningfully participate in societal processes. Included in the right to work and in article 23(4) of the UDHR is the right to form and be part of a trade union.[174] This is an important aspect of the right to work as it also contributes to the protection of the rights and interests of employees. The International Labour Organisation ("ILO") also recognises the importance of protecting the rights of workers through, for example, the ILO Declaration on Fundamental Principles and Rights at Work ("DFPRW").[175] This Declaration identifies certain commitments that states must make to give effect to workers' rights.[176] This includes "the prohibition of forced labour and child labour,[177] freedom of association,[178] the right to organize and

[172] CJ Russo & J DeGroof "Introduction" in CJ Russo & J DeGroof (eds) *The Employment Rights of Teachers: Exploring Education Law Worldwide* (2009) 1.

[173] Article 23 of the UDHR determines that

"(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
(2) Everyone, without any discrimination, has the right to equal pay for equal work.
(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
(4) Everyone has the right to form and to join trade unions for the protection of his interests".

[174] See also article 20 of the UDHR that protects peaceful assembly; Russo & DeGroof "Introduction" in *The Employment Rights of Teachers* (2009) 2.

[175] ILO Declaration on Fundamental Principles and Rights at Work and Its Follow Up. Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010).

[176] ILO Declaration on Fundamental Principles and Rights at Work and Its Follow Up.

[177] ILO Forced Labour Convention, 1930 (No 29); ILO Abolition of Forced Labour Convention, 1957 (No 105); ILO Minimum Age Convention, 1973 (No 138) and ILO Worst Forms of Child Labour Convention, 1999 (No 182).

[178] ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87).

bargain collectively,[179] equal remuneration for work of equal value,[180] and the elimination of discrimination in employment".[181] Even though educators' rights are not expressly included in the conventions, these rights clearly extend to educators as employees.

In the South African context, the general protections envisaged by these international instruments are expressly included in the Constitution and are given effect to by different pieces of legislation.[182] In this regard, the right to work as envisaged by article 23 of the UDHR may be used as a point of reference to illustrate the extent to which the fundamental rights of employees are catered for by the South African Constitution and subordinate legislation. Three features of article 23 deserve particular emphasis.[183]

First, article 23(1) determines that everyone has the right to "just and favourable conditions of work". Section 23(1) of the Constitution provides everyone with the right to fair labour practices, a right elaborated on by different pieces of legislation in the South African context, such as the Labour Relations Act 66 of 1995 ("LRA") (through its protection of employees against unfair labour practices and unfair dismissal) and the BCEA (through its provision of minimum working conditions). Second, article 23(2) promotes non-discrimination in the workplace, including "the right to equal pay for equal work". Although the right to equal pay is not a fundamental human right included in the Constitution, section 9 of the Constitution does provide for protection against unfair discrimination and, against the backdrop of this section, the EEA regulates this protection in some detail (including, in section 6(4), an explicit prohibition on unfair discrimination in terms and conditions of employment). Lastly, article 23(4) determines that "everyone has the right to form and to join trade unions for the protection of his interests". These rights are included in the Constitution in section 17 ("assembly, demonstration, picket and petition"), section 18 ("freedom of association") and section 23 ("labour relations"). These different constitutional rights are regulated in much more detail by the LRA, which

[179] ILO Right to Organise and Collective Bargaining Convention, 1949 (No 98); ILO Collective Bargaining Convention, 1981 (No 154).
[180] ILO Equal Remuneration Convention, 1951 (No 100).
[181] ILO Discrimination (Employment and Occupation) Convention, 1958 (No 111). See also ILO Declaration on Fundamental Principles and Rights at Work and Its Follow Up 1, 7.
[182] For an overview of the employment relationship in education, see E Bray & J Beckmann "The Employment Relationship of the Public-School Educator: A Constitutional and Legislative Overview" (2001) 19 *Perspectives in Education* 109-122.
[183] Note that all the rights included in article 23 of the UDHR are protected in the South African context.

provides a framework for collective bargaining and collective dispute resolution.[184] As such, the LRA is the primary piece of legislation regulating the collective dimension of the employment relationship.

This broad framework of individual and collective rights applicable to the employment relationship in general also applies to the employment of educators. It may safely be said that educators in South Africa enjoy comprehensive protection of their employment- and labour rights.[185] Of particular importance for this thesis, given its focus on the capacity and conduct of educators, is the fact that Schedule 8 of the LRA – the Code of Good Practice for Dismissal ("Dismissal Code") – which is the primary source of principles relating to capacity and conduct in the workplace, also applies to educators, at least to the extent provided for by the EOEA.[186] The EOEA is the piece of legislation specifically tailored to regulate the rights of public school educators,[187] which includes regulation, *inter alia*, of conditions of service, appointments, promotion and transfers of educators, the termination of their services as well as specific provisions relating to misconduct and incapacity.[188] As far as collective rights are concerned, public sector educators are represented by trade (teachers') unions at the Education Labour Relations Council ("ELRC") where collective bargaining takes place with the Ministers of Basic Education, Public Service and Finance.[189] Educators therefore have the benefit of trade unions bargaining on their behalf in furthering their (employment) interests. Individual rights dispute resolution also takes place at the ELRC. Where educators are not employed by the state, their employment relationship is regulated by labour legislation generally applicable to the employment relationship, such as the minimum standards set out in the BCEA.[190] In this regard, Smit, Rossouw and Malherbe mention that the terms and conditions of these educators are usually much more favourable than the minimum

[184] See s 1 of the LRA.
[185] J Beckmann & HP Füssel "The Labour Rights of Educators in South Africa and Germany and Quality Education: An Exploratory Comparison" (2013) *De Jure* 557-582.
[186] The disciplinary procedures in Schedule 1 and 2 of the EOEA expressly refer to Schedule 8 of the LRA.
[187] Section 2 of the EOEA.
[188] See the Preamble of the EOEA.
[189] M Smit, JP Rossouw & R Malherbe "South Africa" in CJ Russo & J DeGroof (eds) *The Employment Rights of Teachers: Exploring Education Law Worldwide* (2009) 192.
[190] 192.

conditions in the BCEA as a result of a shortage of competent and qualified educators in South Africa.[191]

In anticipation of the further discussion in this thesis and specific consideration of the appropriateness of the regulation of the conduct and capacity of educators, this brief overview shows that labour rights recognised at an international level are also recognised by the Constitution and regulated in some detail by labour legislation. The fact that the performance of educators – measured in terms of both capacity and conduct – impacts on the fundamental right to a basic education calls for a balancing of employment rights and education rights. It is this potential (and sometimes real) conflict this thesis seeks to address.

3 5 Conclusion

This chapter sought to provide an overview of the recognition of the right to basic education at the international and constitutional levels as the first step in describing the legal framework applicable to the regulation of individual educator performance as part of the delivery of quality basic education. In doing so, several important insights – both legal and otherwise – were identified that should always inform any attempt at the appropriate regulation of educator performance. First, the discussion showed that the importance of basic education is embodied in its clear legal recognition – both in a number of international instruments and in the South African Constitution. Furthermore, international instruments provide guidelines for its promotion and implementation. In this regard, as confirmed by the Constitutional Court the right to basic education is included in the South African Constitution as an unqualified right not subject to progressive realisation by the state. Second, the discussion showed that South African courts have not really attempted to give meaning to at least the "minimum core obligation" (as envisaged by the CESCR) of the right to a basic education. Rather, the courts have dealt with specific instances of alleged violations of this right and, in doing so, have embarked on a case-by-case jurisprudence gradually giving content to the right to basic education. This insight

[191] 192. The Centre for Development & Enterprise also confirmed this shortage of educators. See A Bernstein (ed), J Hofmeyr, K Draper, C Simkins, R Deacon and P Robinson "Teachers in South Africa: Supply and Demand 2013 to 2025" (2015) *Centre for Development and Enterprise* <https://www.cde.org.za/teachers-in-sa-supply-and-demand-2013-2025/> (accessed 29-05-2021).

highlights one fundamental challenge of reliance on a rights regime to ensure a quality basic education – its reactive and individualised nature. This leads to a further insight, namely the importance of appropriate policies and legislation to adequately and upfront provide for this right. It is again worth mentioning that this thesis seeks to contribute to this debate by focusing on the appropriateness of the regulation of educator performance. Third, the discussion did show that in giving meaning to the content of the right to basic education, two further considerations should be borne in mind, both recognised at international and constitutional level – the rights of learners as children (children's rights) as well the rights of educators as employees. Again, this leads to a further insight, namely that a school is not a traditional workplace – it is a workplace where a triangular relationship exists between learner, educator and employer and where rights may come into conflict. Fourth, specifically as far as the role of the educator in delivering a basic education is concerned, an overview was provided of the array of rights – constitutional and legislative – educators are entitled to as employees. In the further chapters, the performance of educators as one aspect of the regulation of their employment is considered in detail. In this regard – and this is the fifth insight – this chapter not only served to emphasise the importance of basic education to learners as (a vulnerable group of) children, but also illustrated, through recognition at an international level, that the role of the educator encompasses more than a mere transfer of knowledge. Rather, the transfer of knowledge, while valuable in itself, is also merely a vehicle to transfer and develop the full array of tools and content (in the wide sense of these words) any learner needs to be successful in this world. It is with this yardstick and the preceding international and constitutional insights and imperatives in mind that the next chapter considers how delivery of a quality basic education is operationalised through legislation in South Africa.

CHAPTER 4: THE OPERATIONALISATION OF THE RIGHT TO A BASIC EDUCATION THROUGH LEGISLATION IN SOUTH AFRICA

4 1 Introduction

It was mentioned in chapter 2 that public schools serve the majority of learners in South Africa with only around 6% of learners attending independent schools.[1] The size of the public basic education sector and the number of role players involved, which include both national and provincial government, educators, parents, and learners necessitate a comprehensive legal framework to ensure the effective functioning of the system.

The previous chapters concentrated on the nature and importance of basic education generally, the current state of basic education in South Africa and also on the broad recognition – both internationally and in the Constitution of the Republic of South Africa, 1996 ("Constitution") – of the right to a basic education.

With these realities and international and constitutional obligations in mind, the purpose of this chapter is to provide an overview of the legislative framework through which the delivery of basic education is operationalised in South Africa. In the first instance, this requires an overview of the context in which the system must operate, a background provided in paragraph 4 2 below.[2] This background provides for a better understanding of some of the challenges experienced in the basic education sector, sometimes inevitably of a political nature. This context is important, as it also links with the specific individual employment law challenges in South Africa, which form the focus of this research, as well as with the comparative overview of the delivery of basic education in another jurisdiction.

Paragraph 4 3 of this chapter contains an overview of the legislation that provides the framework for the delivery of basic education in South Africa. This discussion shows that the Constitution, apart from establishing the right to a basic education, also provides the

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1 This is discussed in more detail in chapter 6. This percentage is calculated using the numbers in graph 1 in chapter 6. See also Department of Basic Education "Education Statistics in South Africa in 2016" (2018) *Department of Basic Education* 4-5 <https://www.education.gov.za/Portals/0/Documents/Publications/Education%20Statistic%20SA%202016.pdf?ver=2018-11-01-095102-947> (accessed 20-10-2021).

2 JL Beckmann "Enkele Gedagtes oor die Regsposisie en die Rol van Beheerliggame van Openbare Skole in die Nuwe Onderwysomgewing" (1999) 62 *THRHR* 108-143.

foundational principles for the governance of basic education. In this regard, Schedule 4 of the Constitution determines that school education is a matter of concurrent power between the national and provincial governments. As such, parliament has the power to enact legislation that applies to the education sector nationally. In this regard, the South African Schools Act 84 of 1996 ("SASA") and National Education Policy Act 27 of 1996 ("NEPA") are the two pieces of legislation that regulate the basic education system nationally and determine the different functions of national and provincial governments.[3] In particular, SASA provides the structure for education in South Africa and it is from SASA that the national Minister of Basic Education, Member of the Executive Council ("MEC"), Head of Department ("HOD"), School Governing Body ("SGB") and principal derive their powers. NEPA provides the Minister of Basic Education with the authority to determine national education policy on a wide range of topics, such as school finances and school property. Two other pieces of national legislation, namely, the South African Council for Educators Act 31 of 2001 ("SACE Act") and the National Qualifications Framework Act 68 of 2008 ("NQF Act") are also considered.

The different provincial legislatures are empowered to enact legislation applicable to education within their jurisdiction. The actual provision of education is vested in the MEC for the province who must, for instance, ensure that there are enough schools to cater for learners in the province. The obligation to deliver education and the respective powers vested in the MEC and Provincial Department of Education ("PDE") are elaborated on. The discussion also shows that the overall governance of schools is entrusted to each SGB, while the principal is responsible for the management of education at each school. Parents, learners and community members participate in the governance of schools by being elected to serve on the SGB.

The discussion further points out that the education sector is based upon a model of cooperative governance and participatory democracy which, in turn, requires relationships of trust. At the same time, given the magnitude of the number of role players involved it is not surprising that some aspects of the delivery of education, especially language- and admission policies, have been the topics of much academic debate and

[3] SASA and NEPA are not the only two pieces of national legislation applicable to education but are the focus of this research.

have, on occasion, led to disputes between the role players involved and even ended up in the Constitutional Court.[4] Various commentators, including Woolman and Fleisch,[5] Malherbe,[6] Bray,[7] and Jansen[8] have emphasised that cooperation in the education sector is a complex issue as a result of our heterogenous community and the history of education in South Africa.

At the heart of these disputes, whether it concerns language or other policies relating to the governance of schools, is the question about who has the ultimate responsibility and decision-making power. In this regard, the authority SASA gives to a number of role players central to the functioning of the basic education sector is explored. These role players include the Minister of Basic Education, MEC, HOD, Principal, SGB, parents and learners.

At the same time, it must be recognised that this research focuses on the role of educators in the delivery of quality basic education. As is seen throughout this chapter, educators do not play a central role in the governance and management of schools and, as such, are not assigned specific responsibilities by SASA. Even so, the preceding discussion of the structure and governance of basic education as mentioned above is necessary as it impacts in many ways on the effective management of educator performance – through, for example, provision of standards for educators, illustrating the dangers of a fragmented approach to the delivery of basic education and telling us a lot about who bears responsibility for the effective management of educator performance. But it also requires an extension of the discussion, which is done in paragraph 4 4 of this chapter, to include an overview of the principles applicable to the employment of educators within the broader school system, also as far as the management of educator

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4 The following cases are discussed in more detail below: *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC); *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 2 SA 228 (CC); and *MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School* 2013 6 SA 582 (CC).

5 See generally S Woolman & B Fleisch *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (2009) 1-245; S Woolman & B Fleisch "The Problem of the Other Language" (2014) 5 *CCR* 135-171.

6 R Malherbe "Centralisation of power in education: Have provinces become national agents?" (2006) 2 *J S Afr L* 237-252.

7 E Bray "Macro Issues of Mikro Primary School" (2007) 10 *PELJ* 1-20.

8 JD Jansen "Autonomy and Accountability in the Regulation of the Teaching Profession: A South African Case Study" (2004) 19 *Research Papers in Education* 51-66.

performance is concerned. While the EOEA is the piece of legislation specifically enacted to regulate the employment of educators in the public basic education system, the discussion shows that the principles in the Labour Relations Act 66 of 1995 ("LRA") remain important, as do the impact of collective agreements reached in terms of the LRA and the individual contract of employment. This discussion also takes place as a precursor to a consideration of the specific and detailed rules applicable to the incapacity and misconduct of educators (as the constituent elements of educator performance) in chapter 5.

4 2 Background to the regulation of education in democratic South Africa

Prior to 1994, schools were segregated on the basis of race but the education policy at the time was that, even though learners would receive separate education based on race, the standard of education would still be significantly similar or equal.[9] However, the reality was that schools serving black learners received substantially fewer resources and educational materials compared to schools serving white learners.[10] As discussed earlier, the transformation of the education system to address this situation and give effect to the constitutional guarantee of a basic education for all was one of the primary objectives of the new democratic government. One consequence of this transformation was the need for policies and legislation that would embody the values of the Constitution and lead to an equal education system.

The first step in reaching this goal was the White Paper on Education and Training 196 of 1995[11] which eventually led to the enactment of SASA. Up to this point, education law was not treated as an independent field of law, but rapidly developed as legal discourse on the connection between education and the law ensued.[12] This development led to a substantial body of knowledge in the field of education law.[13] One of the aims of this

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9 Malherbe (2006) *J S Afr L* 237; *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) paras 2, 46.

10 Malherbe (2006) *J S Afr L* 237.

11 Republic of South Africa *The White Paper on Education and Training* 196 of 1995.

12 IJ Oosthuizen & JL Beckmann "A History of Educational Law in South Africa: An Introductory Treatment" (1998) 3 *Australia & New Zealand Journal of Law & Education* 61 67.

13 For a background and discussion on the history of education law, see Oosthuizen & Beckmann (1998) *Australia & New Zealand Journal of Law & Education* 61-73.

research is to make a further contribution to the discourse on the intersection between apparently distinct disciplines – education and law. In particular and considering the current state of education as discussed in chapter 2, this thesis considers the appropriateness of what may be called the principles of labour law within the context of the developing field of education law.

With the transformation of the education system as the primary objective post-1994, the manner in which this was addressed was, first, through adoption of the principles of non-discrimination and participatory democracy. The two most prominent pieces of legislation, SASA and NEPA, are discussed in more detail below. What should be noted at this stage is that the approach used in SASA to promote transformation, non-discrimination and equality, is participatory democracy.[14] The nature of participatory democracy is that "the people" should have the power and autonomy to make decisions about issues that affect them – such as education.[15] This, together with the political compromise made in drafting education legislation,[16] led to a decentralised model of education in South Africa and to a "partnership model"[17] in SASA. The preamble to the Act expressly includes parents, educators and learners in the functioning of schools, together with the state.[18] The discussion that follows shows that the success of such a partnership model is by no means easily achieved in education.[19] For this reason, the discussion below considers the role and function of each one of the role players in the basic education system in some detail.

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[14] M Smit "Collateral Irony and Insular Construction – Justifying Single-Medium Schools, Equal Access and Quality Education" (2011) 27 *SAJHR* 398 405.

[15] C Gould Rethinking Democracy: Freedom and Social Co-operation in Politics, Economy and Society (1990) 146 as cited in Smit (2011) *SAJHR* 405.

[16] Malherbe notes that there was concern on the part of minority groups that a centralised government (mainly run by the ANC) would not protect minority interests in schools and would lead to an abuse of authority and power. Similarly, Beckmann explained that the parties arguing for decentralisation were worried that vesting power in national government meant that schools would lose their autonomy. On the other hand, the argument was that giving schools too much power could lead to an entrenchment of privilege and a continued divide between former black and white schools. See Malherbe (2006*) J S Afr L* 238 and JL Beckmann "The Emergence of Self-Managing Schools in South Africa: Devolution of Authority or Disguised Centralism?" (2002) 3 *Education and the Law* 153 156-157.

[17] The court in *Rivonia* referred to SASA as having a "partnership model". See *MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School* 2013 6 SA 582 (CC) para 49.

[18] Beckmann (2002) *Education and the Law* 159.

[19] See generally JS Maluleke, CMT Sehoole & E Weber "The Dilemmas of Cooperative Governance in the Department of Basic Education in South Africa" (2017) *Southern African Review of Education with Education with Production* 37-51.

It will become clear that the role players responsible for implementing the legislative framework are not responsible only to fulfil their assigned functions in providing basic education. Beckmann noted that these role players' obligation is much wider in that they are essentially called on to address an inherently political, economic and social issue when fulfilling their duties.[20] Later, Beckmann emphasised that there was a continuing "misalignment" between the legal framework in the education sector and the manner in which schools are governed, a state of affairs that calls for the role players to have a proper understanding of the intersection between the law and the implementation of education policies and rules.[21] It is clear then, that the partnership model envisaged by SASA is not easy to implement, especially taking into account our history and political climate.

A contentious issue, which is inherently a political and socio-economic concern, is the regulation of school fees in SASA and NEPA. This may serve as a practical example of how different role players need to cooperate to ensure proper implementation of the legal framework. A central question in this chapter is where the ultimate decision-making power in education lies. What is of particular interest (and which also helps to set the scene for the analysis in the chapters to follow) is the manner in which SASA regulates national quintiles and the charging of school fees. Chapter 4 of SASA regulates the funding of public schools. Section 34(1) determines that the state has an obligation to fund schools from public revenue and that this must be done "on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision".[22] To effect this funding, the Minister must determine norms and standards for school funding by, first, providing for different national quintiles for public schools.[23] Schools are divided into five national quintiles according to the poverty of the community in which the school is situated (quintile 1 schools being the most impoverished).[24] Second, a procedure for funding must be provided, to be applied by the

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[20] Beckmann (1999) *THRHR* 108.
[21] JL Beckmann "Aligning school governance and the law: Hans Visser on education cases and policy" (2007) 40 *De Jure* 205 207.
[22] Section 34(1) of SASA.
[23] Section 35(1) and (2)(b).
[24] Part 5 of the Amended National Norms and Standards for School Funding GN R 869 in *GG* 29179 of 31-08-2006.

MEC of each province according to the criteria developed by the Minister in relation to the fair and equitable distribution of state funding.[25] Despite sections 34 and 35 of SASA placing the responsibility of funding on the state, section 36(1) determines that the SGB "must take all reasonable measures within its means to supplement the resources supplied by the state in order to improve the quality of education provided by the school".[26] According to the prescriptions of the MEC, the SGB must prepare and approve an annual budget which must be presented at a general meeting of parents upon which it must be accepted by a majority vote of parents.[27]

Public schools are empowered by section 39 of SASA to charge school fees, provided that a resolution to this effect has been adopted by a majority of parents attending a general meeting.[28] This resolution must include the amount to be charged for school fees, the criteria (which must be equitable) in terms of which parents who are unable to pay the amount determined, may be exempted from paying school fees and, lastly, the school budget must reflect this information.[29] There is an obligation on the Minister to make regulations regarding the equitable criteria referred to above.[30] Despite the empowerment of SGBs in section 39(1) to charge school fees, the Minister must annually publish the national quintiles in the *Government Gazette* which MECs must use to identify schools in their provinces that are prohibited from charging school fees.[31] Interestingly, the Minister may only determine the different quintiles if sufficient funding has been allocated to the schools which will be affected by the determination.[32] In other words, the so-called no-fee schools must be allocated and receive adequate funding from the state. A portion of the

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25 Section 35(2)(d) of SASA.
26 Section 36(1).
27 Section 38.
28 See s 38(2).
29 Section 39(2).
30 Section 39(4). The Regulations for the Exemption of Parents from the Payment of School Fees GN 1149 in *GG* 29392 of 17-11-2006 provide for a procedure which the SGB must consider when deciding to exempt a parent from paying school fees. This formula takes into account the income of the parent and school fees as a proportion thereof and determines when the parent will qualify for total, partial or conditional exemption.
31 Section 39(7) of SASA. As mentioned in chapter 3, the most recent list of schools that may not charge school fees was published on 18 December 2020. See National Norms and Standards for School Funding (NNSSF): List of Schools that may not charge School Fees GN 1376 in *GG* 44020 of 18-12-2020.
32 Section 39(8) of SASA.

national budget must be allocated to education in each of the provinces as well as funds from the provincial legislatures to be used by the MEC for schools.[33]

It follows that fee-charging schools that have SGBs who effectively manage their funds, gain significant decision-making power with regard to the school, indicating a shift in the power dynamic. It is not surprising then that there have been landmark education court cases that pivot on exactly this aspect of power dynamics between the PDE and SGB. Even though this research is not primarily focused on, for instance, fees or language policies, the regulation of the relationships between the different role players involved in the education sector is of wider significance, as it also impacts on the responsibility and accountability of decision-making in the employment sphere, on which this thesis focuses.

4 3 Overview of the regulation of the system of basic education in South Africa

4 3 1 The role of the Constitution

The Constitution is the point of departure for the regulation of education in South Africa. As discussed in chapter 3, the right to a basic education is contained in section 29(1)(a) of the Constitution. The empowering nature of the right to education ensures that other basic human rights are given effect to. While it can be argued that education promotes most of the rights included in the Bill of Rights, the rights to equality (section 9), dignity (section 10) and freedom and security of the person (section 12) are promoted in a very direct manner.[34]

The obligation to give effect to the right to basic education falls, according to the Constitution, not only on national government, but provision is also made for a distribution of powers between the national, provincial and local spheres of government.[35] Local government, through municipalities, are however not directly responsible for the provision of education, but indirectly facilitates this service by providing other services, such as water.[36] This differs, for example, from the position in England (to be discussed in chapter

[33] See s 214 of the Constitution, s 12(1) of SASA; B Barry *Schools and the Law* (2006) 81.
[34] See chapter 3.
[35] Malherbe (2006) *J S Afr L* 238. See also Part A to Schedule 4 of the Constitution.
[36] E Bray "The Constitutional Concept of Co-Operative Government and Its Application in Education" (2002) 65 *THRHR* 514 516.

7). In England, public schools are referred to as maintained schools and the local authority are to a large extent responsible for its funding and management.[37]

As the provision of education is not assigned exclusively to one branch of government, chapter 3 of the Constitution provides for cooperative governance between the national, provincial and local spheres of government.[38] Sections 44(1), 45, 104 and 105 of the Constitution make provision for concurrent legislative power between national and provincial government, which also applies to the education sector.[39] In examining the principles of cooperative governance, Bray defines "concurrent" as "powers and responsibilities that exist alongside each other".[40] As such, the concurrent power between these spheres of government must be exercised in line with the provisions and spirit of the Constitution. In the context of education, Malherbe notes that cooperation between different spheres of government should be based on the important function of giving effect to the right to a basic education.[41] Basic education includes adult basic education, but tertiary education falls within the exclusive jurisdiction of the national government.[42]

Even though the national and the different provincial governments have concurrent jurisdiction over basic education, parliament may enact national legislation applicable to the entire education sector, which will prevail over provincial legislation.[43] The preamble to SASA emphasises the need for uniform norms and standards and SASA is therefore the central piece of legislation applicable to the entire basic education sector. Provincial legislation, however, remains an important source of regulation of education in the different provinces as it elaborates on the rights and obligations of the various role players (for example, the HOD) provided for in national legislation such as SASA.[44] Noteworthy is the fact that the existence of national legislation on a specific issue does not preclude

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37 A Ruff "England and Wales" in CJ Russo & J de Groof (eds) *The Employment Rights of Teachers: Exploring Education Law Worldwide* (2009) 75 77; See s 35 of the Education Act 2002, ch 32.

38 Section 40(1) of the Constitution.

39 Barry *Schools and the Law* 11.

40 Bray (2002) *THRHR* 516.

41 Malherbe (2006) *J S Afr L* 239.

42 See Part A to Schedule 4 of the Constitution of the Republic of South Africa, 1996; Malherbe (2006) *J S Afr L* 240.

43 Section 146(3) of the Constitution; See also ss 104 and 124 of the Constitution regarding the legislative authority of provinces.

44 For example, the powers of the HOD granted in terms of SASA is elaborated on in provincial legislation such as s 6 of the Western Cape Provincial School Education Act 12 of 1997 and s 6 of the Eastern Cape Schools Education Act 1 of 1999.

the provinces from enacting legislation on that same issue.[45] In the case of a conflict between these pieces of legislation, national legislation will prevail.[46]

Besides the power of legislating on concurrent issues, other powers between these role players often overlap, creating considerable room for conflict between the different spheres of government. The Constitution therefore provides guiding principles to promote peaceful cooperation between the different spheres of government.[47] Malherbe notes that cooperative governance requires of different spheres of government to recognise their distinct roles within the functioning of the system as well as their "interrelatedness and interdependence" with other spheres of government.[48] Each role player therefore has to fulfil its specific role and work together with other spheres to ensure the successful functioning of the system. While the constitutional framework as discussed seems clear, Malherbe points out that it has not translated into practice with the same clarity. In fact, according to him, national government views its role as one with exclusive legislative and policymaking power over the entire education system with the role of provincial government merely that of implementation.[49]

In this regard, the distinct roles of the national and provincial governments with regard to the provision of basic education have been emphasised on a few occasions, not only in an attempt to provide further clarity, but perhaps with the expectation that government will follow suit in the execution of their duties.[50] In the early days of our democracy, Bray identified three possible reasons for the lack of cooperation between different spheres of government in the education sector.[51] First, the role players are accustomed to their autonomy and individual power and had therefore not adjusted to working with different branches of government.[52] Second, government was traditionally a hierarchical system with a so-called "top-down" approach to governance, thereby excluding the opportunity

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45 Malherbe (2006) *J S Afr L* 242. See also Oosthuizen & Beckmann (1998) *Australia & New Zealand Journal of Law & Education* 67.

46 This is in line with with sections 146 to 150 of the Constitution. See Malherbe (2006) *J S Afr L* 242. See also Oosthuizen & Beckmann (1998) *Australia & New Zealand Journal of Law & Education* 67.

47 See ss 41(1), 195(1) and (2) of the Constitution; Barry *Schools and the Law* (2006) 14-15.

48 Malherbe (2006) *J S Afr L* 243.

49 249.

50 See 249-250; Oosthuizen & Beckmann (1998) *Australia & New Zealand Journal of Law & Education* 67; Beckmann (2002) *Education and the Law* 155, 164; Bray (2002) *THRHR* 516.

51 Bray (2002) *THRHR* 516.

52 516.

for cooperation.[53] Lastly, the traditional understanding of the law places role players in opposition to each other, thereby negating the spirit of the Constitution as promoting cooperation and teamwork.[54] As mentioned above, another reason for the friction in promoting cooperation in government is identified by Beckmann who notes that section 29 was a result of a compromise between the drafters of the Constitution.[55]

Ultimately, concurrent legislative power over education ensures that where a provincial legislature does not legislate on a specific issue, the national legislature may address the possible gap.[56] It does not warrant the national government to dominate and usurp the role of the provincial government.[57] Both spheres of government have the same goal – to fulfil their mandate in terms of section 29 of the Constitution.[58] Where the national legislature takes steps in the spirit of cooperation, both spheres of government's mandate is fulfilled.[59] However, in 2002 Bray noted that the goal of each sphere of government fulfilling their function successfully is one of the biggest challenges facing our democratic government.[60] It may be argued that 20 years later this continues to be one of the major obstacles in the successful functioning of the education system.

With the Constitution as a point of departure, education in South Africa is regulated by various pieces of legislation and policy documents. The reason for the intricacy of this regulatory framework is the many role players who contribute to the successful functioning of the education system. As noted by Beckmann:

> "The functions of the law include the regulation of relationships and activities so that harmony among the various role-players can result. In education law it is therefore logical that the objective of the legal framework will be to harmonise the roles (rights, duties and responsibilities) of, among others, the state, educators, learners and governing bodies to ensure that all the children of our country have access to quality education."[61]

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53 516.
54 516.
55 See Beckmann (2002) *Education and the Law* 156-157.
56 Bray (2002) *THRHR* 522.
57 527.
58 527.
59 527.
60 527.
61 Beckmann (2007) *De Jure* 208.

The possibility of conflict exists not only between different spheres of government, but also between other role players instrumental to the successful functioning of the education system. The importance of cooperative governance in the education sector, in line with sections 41(1), (3) and (4) of the Constitution, was emphasised by cases such as *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* ("*Ermelo CC*"),[62] *Head of Department, Department of Education, Free State Province v Welkom High School ("Welkom")*[63] and *MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School* ("*Rivonia*").[64] The issues in these cases and the guidance and interpretive insights provided by the Constitutional Court in them regarding the regulation of education are discussed in more detail below. The most significant pieces of legislation are discussed first to provide an understanding of how these pieces of legislation give effect to the right to basic education envisaged in the Constitution.

4 3 2 National legislation applicable to the education sector

Two pieces of legislation that regulate education at a national level are SASA and NEPA.[65] SASA can be described as the most important piece of legislation as it provides the framework for the "organization, governance and funding" of schools.[66] It focuses on the regulation of the functioning of schools as the vehicles to deliver basic education. This is in contrast to NEPA, which is concerned with education policy. Of importance to this research is the manner in which SASA regulates the governance of schools – especially as far as the powers of the MEC, PDE, HOD, principal and SGB are concerned.

As a point of departure, and to give a brief overview, each one of the nine provinces has an MEC for Education who is responsible for the provision of public schools in their province and must establish schools with the funds provided for this purpose by the provincial legislature.[67] Each province has a Department of Education ("PDE")

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62 *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) para 57.
63 Paras 140-141.
64 Paras 48-49, 77.
65 Oosthuizen & Beckmann (1998) *Australia & New Zealand Journal of Law & Education* 66.
66 Preamble to SASA; Barry *Schools and the Law* 15.
67 Section 12 of SASA.

responsible for education in the province that is represented by a HOD.[68] Within the PDE there are different departments/divisions/districts responsible for different aspects of the delivery of basic education.[69] The PDE's head office is responsible for and develops, for instance, the policy, planning, monitoring and evaluation related to school education.[70] The district has authority over education management and the circuit team is tasked with supporting schools.[71]

The employment relationship in the education sector involves the state, decentralised into nine provincial education departments responsible for the successful functioning of education within their jurisdiction. Furthermore, the principal of a school represents the HOD (employer) at the school and may therefore be delegated certain responsibilities and act as the employer.[72] Employees are divided between educators and non-educator staff appointed under the Public Service Act 103 of 1994 ("PSA"). From a collective bargaining and dispute resolution perspective, these employees fall under the jurisdiction of the Public Service Bargaining Council (non-educators) and the Education Labour Relations Council (educators), which are discussed below.

4 3 2 1 National Education Policy Act

(a) The role of the Minister of Basic Education

Even though the education system is decentralised, there continues to be a unified national education system and the Minister of Basic Education ("Minister") has the authority to determine uniform norms and standards applicable to all public schools.[73] To the extent that national policy is in conflict with provincial policy, national policy prevails, provided it is not in conflict with the Constitution or SASA.[74] The Ministry derives its policy-making power from NEPA and there are certain specific empowering provisions in SASA – these are discussed below. The power of the Minister to determine policy that is

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68 Section 7 of the PSA.
69 See, eg, Western Cape Education Department "Western Cape Education Districts in Brief" (2019) *WCED* <https://wcedonline.westerncape.gov.za/branchIDC/Districts/briefly.html> (accessed 20-10-2021).
70 Western Cape Education Department "Western Cape Education Districts in Brief" (2019) *WCED.*
71 Western Cape Education Department "Western Cape Education Districts in Brief" (2019) *WCED.*
72 See paragraph 4 3 2 2 (iv) below.
73 Section 3 of NEPA.
74 Section 3(3).

applicable to the education system nationally relates to various aspects of education. In terms of section 3(4) of NEPA, policy may cover the "planning, provision, financing, co-ordination, management, governance, programmes, monitoring, evaluation and well-being of the education system". This provision is intentionally general as it leaves room for the determination of policy over time and as the need arises. The manner in which the Minister exercises this power is by giving notice in the *Government Gazette* of the fact that policy has been determined on a certain matter and thereafter tabling the matter in parliament.[75]

(b) NEPA regulations important for this research

An overview of a few regulations provide insight into the topics dealt with under NEPA. The policies issued since the enactment of NEPA, to name but a few, focused on matters such as admission,[76] language and religion policies, home education, management of HIV/AIDS, learner drug abuse, instructional time, educator norms and standards, recognition and evaluation of qualifications, curriculum statements, subject offerings and educator development.[77]

Some regulations, such as the admission policy for ordinary public schools,[78] pertain to general management at public schools. Other policies are more specific in regard to what is expected of educators and are important for this study. For instance, the national policy regarding instructional time for school subjects provide uniform rules related to the time educators should spend at school and per subject according to school phases (for example, foundation phase is grade 1 and 2).[79] School principals are to implement this policy at their respective schools which ensures that nationally each grade 1 learner, for instance, receives the same amount of instructional time on a specific subject such as numeracy.[80] Furthermore, the Norms and Standards for Educators ("NSE") issued by the

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75 Section 7.
76 The policy provides PDEs and SGBs with a framework to develop the admission policies of schools. See Item 4 of GN 2432 in *GG* 19377 of 19-10-1998.
77 The full list of regulations under NEPA can be accessed on Juta and are available at <https://jutastat-juta-co-za.ez.sun.ac.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu> (accessed 20-10-2021).
78 GN 2432 in *GG* 19377 of 19-10-1998.
79 GN 1473 in *GG* 20692 of 10-12-1999.
80 See Item 1 of GN 1473 in *GG* 20692 of 10-12-1999.

Minister under NEPA in 2000 regulated educator competence.[81] As discussed earlier in this chapter, transformation of the education sector after apartheid required that every single education matter be reviewed in line with constitutional values. This particular policy was based on the final report of the Committee on Teacher Education Policy on the Revision of Norms and Standards for Educators in 1998.[82] The policy described the roles of educators and the required set of "applied competences" (norms) and "qualifications" (standards) needed for the development of South African educators.[83] The purpose of the policy was to provide a framework for educational institutions to develop programmes and qualifications for educators that could be recognised by the then Department of Education.[84] It has since become necessary to develop a new policy on education qualifications due to the impact of the NQF Act and the revised Higher Education Qualifications Sub-Framework ("HEQSF") in 2013.[85] As a result, in 2015, the Revised Policy on the Minimum Requirements for Teacher Education Qualifications ("MRTEQ"),[86] was published in terms of section 8(2)(c) of the NQF Act. To respond to the aforementioned changes, the National Education Policy on Recognition and Evaluation of Qualifications for Employment in Education was published under NEPA in 2017.[87] The policy prescribes minimum requirements for the evaluation and recognition of educational qualifications. These policies, which are discussed in chapter 5, are important to take note of since the capacity of educators (as part of their performance) forms the focus of this thesis.

Of further importance is the Policy on the South African Standard for Principals.[88] The purpose of the policy is to provide clarity about what is expected of school principals.[89] It defines the role of principals, key aspects of their expected professionalism, image and

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81 GN 82 in *GG* 20844 of 4 February 2000. This policy was followed by the issuing of a revised Higher Education Qualifications Sub-Framework ("HEQSF") in 2013. See GN 549 in *GG* 36721 of 2 August 2013. The NSE has been replaced by the "Revised Policy on the Minimum Requirements for Teacher Education Qualifications" GN 111 in *GG* 38487 of 19 February 2015, published in terms of s 8(2)(c) of the NQF Act.

82 See Item 1 of GN 82 in *GG* 20844 of 04-02-2000.

83 See Item 3.

84 See Item 3.

85 See GN 549 in *GG* 36721 of 02-08-2013.

86 GN 111 in *GG* 38487 of 19-02-2015.

87 GN 108 in *GG* 40610 of 10-02-2017.

88 GN 323 in *GG* 39827 of 18-03-2016.

89 Item 1.

competency.[90] The policy also identifies areas of professional leadership and management needs that should be addressed.[91] The policy is comprehensive in what is expected of school principals in South Africa, including that "[t]he school principal needs to have knowledge of labour law and its application in the school context".[92] However, what this thesis progressively shows, is that there sometimes is a divergence between the legal framework (which includes the policy mentioned above) and its implementation in practice. Focusing specifically on the required knowledge of labour law, one recurring theme in the later chapters of this thesis, for example, is the failure to appreciate the nature and seriousness of misconduct. The legal framework, while fragmented,[93] is comprehensive and covers the necessary needs of the education sector. To address challenges around the implementation of policy, it is necessary to assess the duty placed on principals in terms of the applicable policy. Principals can only be expected to fulfil their duties if educational institutions (for example, universities) incorporate the standard expected of principals as outlined in the policy into their education qualification curriculum. It also requires of the Department of Basic Education ("DBE") and PDE to develop educators into principals, to provide them with the necessary leadership skills and to also teach them the practical implementation of labour law in their schools. This once again emphasises that the effective functioning of the education system requires a concerted approach.

A further policy that outlines the duties of role players in the education system is the Amended Policy on the Organisation, Roles and Responsibilities of Education Districts issued in 2018.[94] This policy emphasises the importance of education district offices in that they have "a pivotal role in ensuring that all learners have access to education of progressively high quality since district offices are the link between Provincial Education Departments, their respective education institutions and the public".[95] The policy was adopted in response to the National Development Plan 2030: Our Future – Make It Work,

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90 Item 1.
91 Item 1.
92 Item 5.1.2.
93 The effect of this fragmentation in the legal framework on proper implementation is discussed in chapter 5.
94 GN 111 in *GG* 41445 of 16-02-2018.
95 Item 1.1.

which aims to address the need for a capable, professional and responsive public service.[96] It explains that the role of education district offices are to be the local PDE points of contact which should foster communication between the PDE and educational institutions (schools).[97] As such, item 2.25 of the policy explains that education districts consist of the following offices and role players.[98] The "education district" is an area within a province as determined by the MEC and is the first sub-division of the PDE.[99] The "district office" is the head office of the education district and is responsible for the management of schools[100] within its jurisdiction. The "district director" heads the district office and the MEC delegates functions and powers to this official. The "education circuit" is the second sub-division of the PDE.[101] The "circuit office" is a sub-division of the district office (in the education district) and is responsible for the management of schools within its jurisdiction. The "circuit manager" heads the circuit office and has prescribed functions allocated by the District Director or HOD. The "subject adviser" is a specialist educator who works either at the district or circuit office and facilitates curriculum implementation by visiting schools and advising on curriculum matters.

The policy is clear on the expectations of the above role players forming part of the administration of the PDE. It is valuable in the sense that it provides a clear structure for each education district, ensuring in principle that the PDE reaches each school or educational institution in its jurisdiction and, ultimately, each learner. If this structure functions optimally, educators receive the necessary support to effectively implement the curriculum. It also reveals that the education sector is an eco-system which requires all role players to fulfil their functions. Where one role player fails in his or her duty, the entire system suffers, which inevitably includes learners. NEPA and the policies issued in terms thereof are supplemented by SASA, which further expands on the function of role players and is discussed below.

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96 Item 1.10.
97 Item 2.26.
98 See item 2.25. The notice contains the full explanation of each role player and office.
99 This district can refer to an administrative unit or geographic area. See item 2.25.1 of GN 111 in *GG* 41445 of 16-02-2018.
100 This also includes other educational institutions within the district office's jurisdiction.
101 The circuit also refers either to an administrative unit or geographic area. See item 2.25.4 of GN 111 in *GG* 41445 of 16-02-2018.

4 3 2 2 The South African Schools Act

(a) Overview of the function and obligations of different role players involved in the administration and management of education

In analysing the provisions of SASA relevant to this research, the view of Woolman and Fleisch regarding the core of SASA serves as a useful point of departure. The authors note that the structure of SGBs in schools, as provided for in SASA, is a combination of "representative, participatory and direct" democracy.[102] Elsewhere, the authors, with reference to *Rivonia*, have also described SASA as embodying a partnership model.[103] SASA places the governance of public schools in the hands of the SGB.[104] The Constitutional Court in *Rivonia* confirmed this by saying that there is a "three-tiered partnership" governing schools.[105] In saying this the court referred to, first, the role of national government in education, second, the provincial government's function in governing schools within their relevant province and lastly, the role of learners, parents and members of the community (by serving on the SGB).[106] This cooperation between the different role players was summarised in *Ermelo CC* as follows:

> "An overarching design of the Act is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the school governing body which exercises defined autonomy over some of the domestic affairs of the school".[107]

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[102] Woolman & Fleisch *The Constitution in the Classroom* 165.
[103] *MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School* 2013 6 SA 582 (CC) para 49*;* See also Woolman & Fleisch (2014) *CCR* 141, n 12.
[104] Barry refers to a "decentralisation" of public-school governance through SGBs. See Barry *Schools and the Law* (2006) 65.
[105] *MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School* 2013 6 SA 582 (CC) para 36.
[106] Para 36.
[107] *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) para 56 (footnotes omitted).

The functions of each one of these role players as determined by SASA are discussed in turn. The purpose of this discussion is to establish the authority of each role player and the extent of their decision-making power. This is an important building block for this thesis, because it by implication also delineates responsibility in the effective management of capacity and conduct in public schools.

(i) Minister of Basic Education

The powers of the Minister in terms of SASA are structured and can be divided into three broad categories. First, benchmark policies,[108] second, finance related matters and lastly, administrative arrangements. Benchmark policies refer to the power of the Minister to provide guidelines on the acceptable standard at all schools with regard to infrastructure, capacity and learning and teaching support material,[109] the national curriculum and assessment processes and procedures.[110] The Minister will give effect to these specific obligations in SASA by making regulations in terms of the Act (and the same applies to NEPA). An example of this is the regulation relating to Minimum Uniform Rules and Standards for Public School Infrastructure.[111]

Finance related matters refer to the making of regulations regarding equitable criteria and procedures for charging school fees at public schools,[112] granting subsidies to independent schools[113] and school funding in general.[114] Administrative arrangements

[108] This includes minimum norms and standards, but because this is not a reference to a specific policy, but rather to the general power granted by SASA to determine policy on these matters, it is referred to in this research as benchmark policies.
[109] Section 5A(1) of SASA. Section 5A was amended by the Basic Education Laws Amendment Act 15 of 2011 which now includes that the Minister may determine the minimum norms and standards in relation to s 5A(1) but has to do so after consulting with the Minister of Finance and the Council for Education Ministers. The Council for Education Ministers is established in terms of s 9 of the National Education Policy Act 27 of 1996 and includes the Minister, Deputy Minister of Education and each political head of the province (referring to the MEC).
[110] Section 6A of SASA.
[111] GN R 920 in *GG* 37081 of 29-11-2013.
[112] Section 39(4) of SASA. In determining the criteria and procedures that SGB's must follow before implementing a resolution to charge school fees, the Minister must consult with the Minister of Finance and the Council for Education Ministers.
[113] Chapter 5 of SASA.
[114] Section 35(2)(a).

related to the age for compulsory school attendance,[115] language policy,[116] providing guidelines to SGBs in adopting codes of conduct,[117] and lastly, making regulations to give effect to the duties determined in SASA.[118]

(ii) Member of the Executive Council

In terms of section 2(2) of SASA, the MEC of each province must exercise any power provided for in SASA. These powers are of a supervisory nature in that the MEC has to ensure that schools in the province adhere to the national policies determined by the Minister. The MEC is responsible for compliance with norms and standards (for example, infrastructure) determined by the Minister, that schools attain minimum outcomes and standards with regard to the curriculum and that educators achieve their work performance standards in terms of the EOEA.[119]

There are instances provided for in SASA where parents, learners or SGBs can appeal to the MEC should they be dissatisfied with a determination of the HOD. This may happen where a learner was refused admission to a public school,[120] a learner was expelled,[121] a member of the SGB was suspended or their membership terminated[122] and lastly,

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[115] Section 3(2) and 45A. See also s 5(4)(c) and 45A(c) of SASA in terms of which the Minister can amend the criteria of the school's admission policy to admit a learner younger than the prescribed age. The prescribed age determined by the Minister is also applicable to independent schools. Independent schools are defined in s 1 of SASA as "a school registered or deemed to be registered in terms of section 46". S46 states the requirements for an independent school to be registered by the HOD.

[116] Section 6 of SASA.

[117] Section 8(3).

[118] Section 61 determines that:
"The Minister may make regulations *(a)* to provide for safety measures at public and independent schools; *(b)* on any matter which must or may be prescribed by regulation under this Act; *(c)* to prescribe a national curriculum statement applicable to public and independent schools; *(d)* to prescribe a national process and procedures for the assessment of learner achievement in public and independent schools; *(e)* to prescribe a national process for the assessment, monitoring and evaluation of education in public and independent schools; *(f)* on initiation practices at public and independent schools; *(g)* to prescribe the age norm per grade in public and independent schools; *(h)* to provide for norms and minimum standards for school funding; and *(i)* on any matter which may be necessary or expedient to prescribe in order to achieve the objects of this Act."

[119] See s 58C(1)(c) of SASA and Item 2(2) of Schedule 2 of the EOEA which determines that "the performance of educators must be evaluated according to performance standards which may be prescribed by the Minister". The policies that regulate educator performance are discussed in chapter 5.

[120] Section 5(7)-(9).

[121] Section 9(4). In terms of S9(11) of SASA, the MEC must impose an alternative sanction to expulsion should the appeal against the decision of the HOD be upheld.

[122] Section 18A(6).

where, upon application by the SGB to be allocated the functions listed in section 21(1) of SASA, the HOD refused the application[123] or withdrew the functions of the SGB.[124]

Section 62 makes provision for the delegation of powers by the MEC.[125] SASA allows for the MEC to delegate any power to the HOD, except the power to publish a notice in the provincial *Government Gazette*, on the specific issues set out in SASA which fall exclusively within the power of the MEC, as well as the power to hear and decide appeals in terms of the Act.[126] While this seems a fairly harmless provision in the Act, it has required the attention of the courts on a few occasions.

For instance, admission policies fall within the jurisdiction of the SGB.[127] However, the decision to admit a learner to the relevant school is made by the principal of the school, under the delegated authority of the HOD.[128] The reason for conflict arising in the implementation of this provision is that decision makers are less clear on who has the final say, for instance, to refuse a learner or amend an admission, when these decisions may be overturned, as well as by whom. There have been three Constitutional Court cases dealing with the authority of the PDE over school policies and more specifically, whether the HOD may interfere with policy adopted by the SGB.[129] In *Rivonia*, with reference to both *Ermelo* and *Welkom*, the court used the opportunity to provide four guidelines on the powers of the different decision makers.[130] First, the default position is that SASA empowers SGBs to make policy regarding school governance matters and as such, this power cannot be overridden or disregarded by any other decision maker.[131] Second, and only if expressly empowered by SASA or other legislation, may another decision maker interfere with the policy of a SGB where the policy is in conflict with SASA or the Constitution.[132] Third, interference with SGB policy has to be reasonable and fair.[133]

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[123] Section 21(5).
[124] Section 22(5).
[125] Beckmann (2002) *Education and the Law* 156.
[126] Section 62(1) of SASA.
[127] Section 5(5).
[128] Woolman & Fleisch (2014) *CCR* 141; see the text to n 12.
[129] *MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School* 2013 6 SA 582 (CC) para 46.
[130] Para 46-49.
[131] Para 49.
[132] Para 49.
[133] Para 49.

Lastly, cooperative governance requires of decision makers to engage with one another in good faith and always with the interests of learners in mind.[134]

Besides these supervisory powers, the MEC also has powers that directly impact learners and SGBs. With regard to learners, the MEC must ensure the provision of enough schools in each province so that every learner, including learners with special needs,[135] can attend school.[136] Should there be a lack of capacity in the relevant province, the MEC is obliged to report to the Minister annually on the progress made in meeting this obligation.[137] Other powers include the determination by notice in the Provincial Gazette of behaviour of learners that will be considered serious misconduct, as well as disciplinary proceedings to address such behaviour (including measures to protect the learner and any other parties involved).[138] A representative council of learners ("RCL") must be established at each school and the MEC is responsible for determining the function and election procedure of the RCL.[139]

With regard to SGBs, it is required by SASA that each SGB must have a constitution that meets the minimum conditions provided for by the MEC.[140] Furthermore, the SGB must adhere to the code of conduct[141] and upon direction by the MEC, a SGB can serve two schools provided that it is in the interest of education at both of these schools.[142] The MEC must also determine the procedure and arrangements applicable to the election, appointment and removal of SGB members.[143] The powers of the SGB with regard to the management of school resources and funds are subject to the prescriptions and approval of the MEC.[144] This includes the power to charge school fees. As mentioned above, the

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[134] Para 49.
[135] In terms of s 24 of SASA the composition of a SGB at a school serving learners with special needs is different than that of SGBs at other public schools. The MEC must determine the number of SGB members in each category and the procedure for their election.
[136] Section 3(3)-(4) and 12 of SASA. This includes the power to make decisions about schools on state and private property. In terms of s 13 the MEC can restrict the rights of the school with regards to state property if it is not used for education purposes. Furthermore, the MEC can, in terms of s 14, conclude an agreement with a private owner of property to run a public school on such property.
[137] Section 3(4) of SASA; Woolman & Fleisch (2014) *CCR* 141; see the text to n 12.
[138] Section 9(3) of SASA.
[139] Section 11.
[140] Section 18.
[141] Section 18A.
[142] Section 17.
[143] Section 28.
[144] See ss 36(4), 38.

MEC must identify the schools in the province that fall in the national quintiles prohibited from charging school fees. The SGB is then bound by such a determination by the MEC, and that school may not charge school fees regardless of the obligation on SGBs in terms of section 36(1) of SASA that it must "supplement the resources supplied by the state".

(iii) The Head of Department

The HOD at each PDE has wide-ranging powers in terms of SASA relating to control over schools in the relevant province.[145] Each one of these powers is focused on ensuring that schools meet the requirements and fulfil their function as envisaged in SASA. Broadly, these powers relate to facilitating the admission and attendance of learners at school[146] and considering recommendations from SGBs to expel learners found guilty of serious misconduct.[147] Furthermore, the HOD must fund the training of SGB members[148] and ensure that the members of SGBs are equipped for their task.[149] Even though the HOD exercises control over every school in a province,[150] the HOD is represented by the relevant principal of each school and provides the principal with the authority to manage a school.[151] In short, all powers relating to the management of the school is delegated to the principal who must report back to the HOD regarding the implementation of policies, programmes and curriculum activities.[152]

SASA determines that the HOD admits learners to schools, but the principal represents the HOD and will therefore attend to the admission of learners to a school.[153] Woolman and Fleisch note that the principal acts under the authority of the HOD, meaning that admissions by the principal are only provisional and that the HOD has the final say in the

[145] Section 2(2).
[146] Sections 3, 4 and 5. In terms of s3(1) of SASA the primary obligation to ensure school attendance is on the parent of a learner. However, where a learner subject to compulsory school attendance is not enrolled or fails to attend school, the HOD, may take steps in terms of s 3(5).
[147] Section 9(1D) of SASA.
[148] Funds must be allocated for this purpose from the budget provided for by the provincial legislature. See s 19 of SASA.
[149] Section 19 of SASA. Whether this obligation on HODs has translated into practice is debatable. See J Heystek "School governing bodies – the principal's burden or light of his/her life?" (2004) 24 *South African Journal of Education* 308-312.
[150] For instance, in terms of s 16 the HOD may decide to close schools in case of emergency and may similarly decide when to reopen said schools.
[151] Section 16(3) of SASA.
[152] See s 16.
[153] Barry *Schools and the Law* (2006) 42.

matter.[154] The HOD still has to ensure that every learner in a province is admitted to a school (whereas the MEC has to ensure capacity in schools to accommodate every learner).[155] However, the SGB determines the admission policy for a school and, as such, both the principal and HOD must adhere to the policy when admitting learners to the school.[156] The roles of the principal and SGB (and their differences) are discussed in more detail below, but it is important to note that the principal, as a representative of the HOD, is responsible for the professional management of the school,[157] whereas the SGB governs the school.[158]

The SGB acquires authority to govern a school by applying in writing to the HOD to be allocated the functions listed in section 21 of SASA.[159] The HOD may then approve (with or without conditions) or refuse such application, but only where the SGB "does not have the capacity to perform such function effectively".[160] Even where the application is refused, the SGB may still appeal to the MEC who may then determine that the SGB does in fact have the capacity to perform the relevant functions.[161] However, the HOD may also withdraw any of the functions of the SGB should there be reasonable grounds to do so.[162] The HOD may also appoint alternative persons to govern the school where the SGB has ceased to perform its functions.[163]

The case of *Ermelo* shows that cooperation between the HOD and SGB envisaged by SASA does not always translate into practice. In this case, which ended up before the Constitutional Court, the school's language policy determined that Ermelo Hoërskool is a single-medium Afrikaans school.[164] Due to a lack of capacity in neighbouring schools, the HOD at the beginning of 2006 requested the school to admit English learners.[165] The SGB was willing to admit the additional learners provided they agreed to receive

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[154] Woolman & Fleisch (2014) *CCR* 141, see the text to n 12.
[155] Barry *Schools and the Law* (2006) 42.
[156] 42.
[157] Section 16(3) of SASA.
[158] Section 16(1).
[159] See paragraph 4 3 2 2 (v) below for a detailed discussion of the functions of SGBs.
[160] Section 21(2) and (3) of SASA.
[161] Section 21(5) and (6).
[162] Section 22.
[163] Section 25.
[164] *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) para 1.
[165] Para 12.

instruction in line with the school's language policy (in Afrikaans).[166] The SGB argued that amending the language policy to become a dual-medium school would impact the current curriculum – as classrooms would then have to be used for English instruction, the amount of subjects offered by the school would have to be reduced because of increased occupation of classrooms.[167] The SGB had earlier appointed additional educators to enable the curriculum and argued that, in terms of the number of educators and classrooms, the school was at capacity.[168] The HOD was of the view that the educator-learner ratio of 1:23 provided room for additional learners, as the national average was 1:35.[169]

Statistically, the school did have capacity to admit more learners. A public school operating at almost half its capacity due to a language policy that effectively excludes the majority of learners from the community is contrary to section 29(2) of the Constitution. This section, which provides for education in a learner's language of choice, foresees the use of single-medium institutions, but subject to "equity, practicability and the need to redress the results of past racially discriminatory laws and practices". The finding of the Constitutional Court that the school had the necessary infrastructure to accommodate more learners and should therefore take steps to admit these learners, is in line with the spirit of section 29(2).[170] Moseneke DCJ emphasised that:

> "The case arises in the context of continuing deep inequality in our educational system, a painful legacy of our apartheid history. The school system in Ermelo illustrates the disparities sharply. The learners per class ratios in Ermelo reveal startling disparities which point to a vast difference of resources and of the quality of education. It is trite that education is the engine of

[166] Para 17.
[167] Para 10.
[168] The numbers were as follows:
> "In 2007, the school had 44 educators and 32 classrooms and an enrolment of 685 learners. Thirty-one of the educators were appointed and paid by the Department of Education (Department) and the rest (23%) were appointed and paid by the school as it is entitled to do under the applicable statute".

See *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) para 7.
[169] Para 8.
[170] Section 29(2) of the Constitution determines that
> "[e]veryone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account (a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices".

> any society. And therefore, an unequal access to education entrenches historical inequity as it perpetuates socio-economic disadvantage".[171]

The finding of the court necessitated that the language policy be amended to provide for English learners to attend the school. The constitutional and societal need for the extension of access to education is clear and the judgment is in line with the transformative vision of South Africa's education system.

However, the manner in which the HOD went about effecting this change and the resultant dispute that gave rise to the decision in *Ermelo* is an unfortunate example of how these kinds of issues are dealt with by government. First, the facts show the inclination of the PDE to abdicate its responsibilities to private persons. As mentioned above, the obligation is on the MEC to ensure enough capacity to admit every learner to a school in their province and the HOD has to ensure that every child is admitted to a school. Should these decision makers establish that there is a lack of capacity, section 3(4) of SASA requires that the MEC must take steps to remedy the situation as soon as possible and report annually to the Minister in regard to the progress made. The lack of capacity in Ermelo schools was not due only to the language policy of Hoërskool Ermelo. In fact, Moseneke DCJ mentioned that:

> "I have earlier expressed dismay at the fact that the Department has not taken adequate steps to ensure that there are enough school places so that every child in the Ermelo circuit can attend school as required by sections 3(1) and (2) of the Schools Act. Procuring enough school places implies proactive and timely steps by the Department. The steps should be taken well ahead of the beginning of an academic year. On all accounts, it is highly probable that there will be an increased demand for grade 8 school places at the beginning of the year 2010. And in any event, I have already alluded to the unacceptably high level of crowding in high schools in Ermelo other than at Hoërskool Ermelo. Additional places at Hoërskool Ermelo will afford only partial alleviation".[172]

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[171] *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) para 2.

[172] Para 103 (footnotes omitted).

Furthermore, it is not the responsibility of the SGB to ensure that section 29(1)(a) of the Constitution is realised. Ensuring access to a basic education falls squarely on government. The HOD cannot use the legislative framework to compel an effectively functioning SGB to change policies (that it is obliged to make in terms of SASA) in order to compensate for the failure on the side of the state to make education available. A similar failure occurred in the case of *Governing Body of the Juma Musjid Primary School v Essay NO and Others* ("*Juma Musjid*"), where the PDE failed to pay rent for the use of private trust property where a public school was located.[173] When the trustees sought to evict the tenant (MEC), it was argued (on behalf of the school) that the trust was infringing upon the constitutionally protected right to a basic education of learners attending the school on the trust's property.[174]

These two instances of the state failing its obligation in terms of the Constitution and SASA and then using the legislative framework to abdicate its responsibilities onto private persons, bring us to the second issue raised by the facts in *Ermelo* – the abuse of power, disregard for cooperative governance and misapplication of the legislative framework by the HOD and other government officials.

First, the HOD compelled the principal to admit the learners contrary to the existing language policy. An admission dispute occurred in 2006 but English learners were temporarily accommodated.[175] A year after this admission dispute, the HOD invited the principal to a meeting a day before the first school day of 2007. The HOD failed to attend the meeting and a letter was given to the principal which stated that:

> "if the school did not admit these learners, they would "receive no education at all in the year 2007" and that the principal was "instructed" to admit the learners to the school from the

[173] 2011 8 BCLR 761 (CC) para 11-14.
[174] Para 16.
[175] See *Hoërskool Ermelo v Head of Department of Education: Mpumalanga* 2009 3 All SA 386 (SCA) para 6:
> "At the beginning of 2006 the department approached the school to enrol[l] 27 grade 8 learners who had to be taught in English. A compromise was reached: the learners were enrolled at a neighbouring English medium school but accommodated on the premises of the school. At the beginning of 2007 those learners were all accommodated in English medium schools in the area".

However, the Constitutional Court was critical of the manner in which the learners were accommodated. See *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) para 13.

following day and that if he did not do so "disciplinary action" would be taken against him "without further notice"".[176]

A principal acts under the authority of the HOD who delegates the power to admit learners to the principal in terms of section 62 of SASA. Any HOD is aware that the principal (and by implication the HOD) must adhere to the language policy of the SGB. The letter mentioned above attempted to circumvent the framework of SASA. On the first school day of 2007 (seemingly in an attempt to intimidate the principal), departmental officials accompanied parents and learners who wished to be admitted to the school.[177] The principal explained that they were eligible for admission provided they agreed to receive instruction in Afrikaans as per the school's language policy.[178] Unsatisfied with the arrangement, none of the learners was admitted to the school that day.

Second, the HOD unlawfully withdrew the functions of the SGB to circumvent the language policy. Two weeks after the incident described above, the HOD directed a letter to the SGB informing it that its functions have been withdrawn in terms of sections 22(1) and (3) and 25(1) of SASA and that an interim committee has been appointed to adopt a language policy that includes English as an instruction language.[179] As mentioned, SASA provides that an HOD is entitled to withdraw the functions of an SGB where there are "reasonable grounds" to do so and may appoint alternative persons only where the SGB had "ceased to perform its functions".[180] The "reasonable grounds" relied on in *Ermelo* was the fact that the SGB did not agree to change the school's language policy.[181] However, section 22(2) of the Act requires procedural fairness for withdrawal of the functions of the SGB – the SGB must be informed and receive the opportunity to make representations and due consideration must be given to these representations by the HOD. In *Ermelo,* well aware of the failure to follow the procedure required by section 22(2), the HOD declared, in terms of section 22(3), that the removal of the SGBs functions

[176] Para 16.
[177] Para 18.
[178] Para 18.
[179] Para 21.
[180] See s 22(1) and (3), 25(1) of SASA.
[181] *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) para 21.

was a "case of urgency".[182] The interim committee was appointed without giving the SGB a reasonable opportunity to make representations and giving due consideration to these representations, as required by section 22(3).[183]

The Constitutional Court in *Ermelo* confirmed that section 22 does grant the HOD the power to withdraw a function of the SGB (and according to this judgment it not only includes the functions referred to in section 21 but any function exercised by the SGB).[184] The court noted that the power to withdraw the SGB's function to determine the language policy of the school arose as the HOD on "numerous" occasions requested the SGB to amend the policy, which it refused to do.[185] Unfortunately, the court did not delve into the reasonableness requirement and merely determined that as a result of this failure by the SGB and based on the interpretation of section 22 in the *Minister of Education (Western Cape) v Mikro Primary School Governing Body* ("*Mikro*"),[186] the HOD was entitled to withdraw the SGBs function.[187]

In line with its mandate, the Constitutional Court combined the constitutional issue of receiving education in a language of choice with the question of whether the HOD adhered to the principle of legality and administrative justice when withdrawing the SGB's functions.[188] The court went on to mention that the reasonableness of the HOD to withdraw a function must be determined on a case to case basis.[189] In this regard, the Supreme Court of Appeal judgment in *Hoërskool Ermelo v Head of Department of Education: Mpumalanga* ("*Ermelo SCA*")[190] provides a comprehensive overview of the events leading up to the withdrawal of the SGBs function in terms of section 22 of

[182] Para 63.
[183] Para 21.
[184] This finding by the Constitutional Court overrules the interpretation of s 22 of SASA by the SCA. The SCA reversed the finding of the High Court which relied on *Mikro Primary School* in regard to the interpretation of s 22 of SASA. Effectively, the CC confirms the *Mikro* interpretation of s 22. See *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) paras 30-36, 64 and 71.
[185] *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) para 82.
[186] 2005 3 All SA 436 (SCA).
[187] *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) para 83.
[188] Paras 39-40, 44.
[189] Para 74.
[190] 2009 3 All SA 386 (SCA).

SASA.[191] This shows that the HOD's dispute with Hoërskool Ermelo's language policy had already started in 2001 when the HOD suspended the principal of the school, disbanded the SGB and instructed the acting principal to change the language policy of the school.[192] There were 133 charges laid against the principal which the PDE did not pursue and in *Schoonbee v MEC for Education, Mpumalanga*[193] the court ordered the principal and SGB to be reinstated,[194] only for the dispute to resurface as the issue of capacity in Ermelo schools again arose in 2006.

What was clearly absent during this saga, was deliberation, negotiation, and partnership between the HOD and SGB (as envisaged by the very statute that empower these decision makers). In this regard, the Constitutional Court mentioned that the HOD was quick to rely on the statistical excess capacity of Hoërskool Ermelo[195] without any evidence that the PDE provided a timeframe and support to the school to ensure a smooth transition from a single to a dual-medium school.[196] It is clear that reliance on the reasoning of the Constitutional Court (that the HOD is entitled to withdraw the function of the SGB to determine the language policy provided there are reasonable grounds), means that this should happen in terms of section 22(1) and (2), which requires a fair procedure and deliberation between the HOD and SGB in case of a dispute. However, the HOD's abuse of statutory power and manipulation of the legislative framework in SASA to unlawfully remove an effectively functioning SGB (and earlier, the principal) is evidence of the complete disregard for cooperative governance. Considering that the HOD expected the school to implement a new language policy immediately (when the school year had already commenced) goes to show that the effective functioning of the school and the continued delivery of quality education was secondary to the show of

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[191] *Hoërskool Ermelo v Head of Department of Education: Mpumalanga* 2009 3 All SA 386 (SCA) paras 4-14.

[192] It should be noted that the principal does not have the authority to determine the language policy. See s 6(2) of SASA.

[193] 2002 (4) SA 877 (T).

[194] *Hoërskool Ermelo v Head of Department of Education: Mpumalanga* 2009 3 All SA 386 (SCA) para 5.

[195] Para 8.

[196] In this regard Moseneke DCJ emphasised that:

> "In the case of language policy, which affects the functioning of all aspects of a school, the procedural safeguards, and due time for their implementation, will be the more essential. It goes without saying that excellent institutional functioning requires proper opportunity for planning and implementation."

Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 2 SA 415 (CC) para 75.

power exercised by the HOD. As such, *Ermelo* demonstrates the complex power dynamics present in the education sector. In the chapters that follow these relationships and their impact on the delivery of basic education and the effective management of educator performance are considered in more detail.

The dispute in *Ermelo* concerned the different roles of the HOD and SGB with regard to school policies. Besides this, there are a number of other functions these decision makers must exercise cooperatively. The SGB is obliged to adopt a constitution that must be submitted to the HOD and must also make its minutes of meetings available for inspection by the HOD.[197] The HOD is empowered by section 18A of SASA to suspend or terminate the membership of a SGB member should the member breach the code of conduct determined by the MEC.[198] Even though the SGB governs the funds received by the school (whether allocated by the provincial legislature or raised through school funds), the HOD still has oversight and the SGB has a responsibility to submit the annual financial statements of the school to the HOD.[199]

The HOD also plays a role in establishing independent schools. These schools have to be registered by the HOD and the MEC determines the grounds for the granting or withdrawal of independent schools' registration by the HOD.[200] The HOD's powers regarding education also extend to registering learners to receive education at home ("home schooling").[201]

The HOD must annually identify schools in the province that are underperforming and must take reasonable steps to assist the school in remedying poor performance.[202] The HOD must also ensure compliance with the norms and standards determined by the MEC and report to the MEC on the progress of the province in regard to compliance.[203] Finally, the HOD may delegate any powers to an officer,[204] which, in terms of the definition of

[197] Section 18 of SASA.
[198] Section 18A(1) provides that the MEC must by way of a notice in the Provincial Gazette determine a code of conduct that is applicable to all SGBs in that province.
[199] Section 43(5).
[200] Section 46(1)-(2).
[201] Section 51.
[202] Section 58B(1)-(4).
[203] Section 58C(5).
[204] Section 62(2).

"officer" in section 1 of SASA "means an employee of an education department appointed in terms of the EOEA or the PSA".

(iv) Principal

As mentioned above, the principal of a public school is responsible for the professional management of the school. The duties of a principal include implementation of the educational programme and curriculum, management of staff, the use of learning support material and equipment of the school, other functions delegated to the principal by the HOD,[205] keeping of school records and lastly, implementation of policy and legislation.[206] The Policy on the South African Standard for Principals under NEPA mentioned above also determines the scope of the principal's role.[207]

The principal serves in the SGB as a representative of the HOD and has to attend and participate in the meetings of the SGB, which includes providing the SGB with a report on the professional management of the school.[208] The principal assists the SGB in its functions, such as the management of the school's funds.[209] Furthermore, the principal assists the SGB in handling disciplinary matters of learners and assists the HOD with disciplinary matters of educators and other staff members employed by the HOD.[210] The HOD is the employer of educators and other staff members employed by the PDE (while the SGB is the employer of educators appointed additional to the provincial post establishment).[211] Section 62 provides that the HOD may delegate any powers to, for instance, the principal, which means that the principal may be given the authority to deal with disciplinary matters relating to educators or other staff.[212] More specifically, item 4 of Schedule 2 of the EOEA determines that the employer (HOD) must delegate to the principal the power to deal with "less serious" misconduct and "must determine in writing

[205] Section 62(2).
[206] Section 16A(2).
[207] See paragraph 4 3 2 1 (b) above. Item 3 of Annexure A.7 of PAM determines that the core duties and responsibilities of principals fall in seven categories, namely general or administrative duties, personnel management, academic performance of the school, teaching responsibilities, extra- and co-curricular duties, interaction with stakeholders and communication.
[208] Section 16A(1), 2(b)-(c).
[209] Section 16A(2)(h)-(k) and (3).
[210] Section 16A(2)(d)-(e).
[211] See the discussion in paragraph 4 4 2 1 (a) below.
[212] See paragraph 4 3 2 2 (iv) and chapter 5 for a discussion of the delegation of powers.

the specific acts of misconduct to be dealt with under the delegation". The role of the principal in regard to this specific aspect of delegation is discussed in chapter 5.

With regard to disciplinary proceedings against educators, the roles of the HOD and principal are provided for in greater detail in Schedule 2 of the EOEA. According to Heystek, educators appointed by the SGB (in terms of section 20(4) of SASA) fall exclusively under the principal's authority (and not the HOD) with regard to their professional activities at the school (for example, teaching).[213] The manner in which this relationship operates is indicative of the principal's role as *quasi*-employer even though the educator is appointed by the SGB.[214]

SASA does not define "professional management" and the extent of the principal's duties in this regard. Beckmann notes that the scope and content of the managerial role to be fulfilled by the principal is not always clear, besides that section 16(3) of SASA determines that the principal fulfils his or her role under the authority of the HOD.[215] The Policy on the South African Standard for Principals issued under NEPA in 2016 may assist in clarifying the managerial role of the principal. However, as is the case with policies, it is written in broad terms meaning that it may create even more overlap between the exact functions of the principal and those of the SGB. For instance, the policy states that actions related to managing the school include that the principal should "manage the school's financial and material resources and all assets efficiently and effectively in accordance with departmental and SGB policies to achieve educational priorities and goals".[216] Overall, the professional management in a school includes "the daily teaching and learning activities and the support activities needed in the school".[217] However, the uncertainty regarding the exact functions of the principal and SGB creates conflict.

This, in turn, creates a situation where each school attempts to give meaning to the legislation in order to promote a working relationship between the SGB and principal.[218]

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[213] Heystek (2004) *South African Journal of Education* 308.
[214] 308.
[215] Beckmann (1999) *THRHR* 111; See also Woolman & Fleisch *The Constitution in the Classroom* 12.
[216] Item 5.1.3 of the Policy on the South African Standard for Principals GN 323 in GG 39827 of 18-03-2016. As is often the case with government notices, the numbering and formatting of the notice is incorrect leading to confusion as to which item is referenced. It is therefore quoted in full to attempt to address this shortcoming.
[217] Heystek (2004) *South African Journal of Education* 308.
[218] 311.

Interviews conducted by Heystek show that schools create their own system of "living law" regulating the different functions of decision makers.[219] There are also instances where the functions of the principal and SGB overlap. Squelch uses the example of sexual misconduct by an educator (appointed by the PDE) towards a learner.[220] In such a case the principal is responsible for taking disciplinary steps against the educator, but the SGB has an obligation to ensure safety at the school and must therefore safeguard the rights of learners and educators.[221] The situation becomes increasingly complicated when considering the principal's role in addressing misconduct if the educator is appointed by the SGB (which means the SGB is the employer).[222] The interaction in the functions of these decision makers, as well as issues with implementation, are discussed in subsequent chapters.

(v) The School Governing Body

SASA makes provision for democratic SGBs and grants the SGB far-reaching powers with regard to the governance of schools.[223] The SGB consists of parents, educators, as well as non-educator staff, learners from grade 8 upwards elected by the Representative Council of Learners ("RCL") and the principal of the school (*ex officio)*.[224] As mentioned above, the SGB is responsible for the governance of the school and derives its functions from SASA.[225] The SGB has a duty towards the school it serves and section 16(2) of SASA expressly states that it "stands in a position of trust toward the school". As such it is expected that the SGB fulfils its duties in the interest of the school and exercises its functions with care and diligence.[226]

Barry divides the functions of SGBs into four categories: policy making, general powers and functions, allocated powers and functions and lastly, financial powers and

[219] 308-312.
[220] J Squelch "Do governing bodies have a duty to create safe schools? An education law perspective" (2001) 19 *Perspectives in Education* 137 142.
[221] Squelch (2001) *Perspectives in Education* 142.
[222] See paragraph 4 4 2 1 (a) and chapter 5.
[223] Section 16(1) of SASA.
[224] Section 23(1)-(3).
[225] The SGBs duties are set out in ss 5, 6, 7, 9, 20, 21, 36, 38, 39, 41, 42 and 43 of SASA; Beckmann (1999) *THRHR* 111.
[226] Barry *Schools and the Law* 65.

functions.[227] The policy-making function of SGBs is a contentious issue and may give rise to conflict as the earlier discussion of *Ermelo* revealed. The areas over which SGBs have policy-making power are adopting a constitution,[228] developing a mission statement for the school,[229] and setting the school's admissions policy,[230] language policy,[231] religious observances rules[232] and a code of conduct for learners.[233]

The general powers of SGBs refer to those set out in section 20 of SASA. The SGB must promote the best interests of the school,[234] in line with its duty in terms of section 16(2) referred to above. The SGB must support the principal and staff with their duties,[235] determine the school hours,[236] administer school property and encourage parents, learners and educators to volunteer their services and time to the school.[237] The following functions may be exercised at the discretion of the SGB. The SGB may suspend learners,[238] recommend to the HOD that an educator or non-educator staff be appointed,[239] allow the use of school facilities for educational programmes not conducted by the school or for community purposes,[240] employ additional educators and staff[241] and

[227] 78.
[228] Section 20(1)(b) of SASA determines that the admission policy is subject to SASA and provincial law.
[229] Section 20(1)(c).
[230] Section 5(5).
[231] Section 6(2) determines that the language policy is subject to the Constitution, SASA and any provincial law. The reference to the Constitution in this section is to ensure that language policies do not discriminate on the basis of race. See s 6(3) of SASA.
[232] Section 7 of SASA provides that learners may practice their religious observances at school provided that it is in line with the rules of the SGB in this regard and that such rules do not contravene the Constitution or any provincial law.
[233] In terms of S8(1) of SASA the SGB must adopt a code of conduct for learners but only after it has consulted with learners, parents and educators of the school. Furthermore, in terms of s 8(3) of SASA the Minister may determine guidelines for codes of conduct which SGBs must consider when determining the code of conduct for the school.
[234] Section 20(1)(a) of SASA.
[235] Section 20(1)(e).
[236] Section 20(1)(f). This should be in line with, for instance, National Policy regarding Instructional Time for School Subjects in GN 1473 in *GG* 20692 of 10-12-1999 (issued under NEPA).
[237] Section 20(1)(h) of SASA.
[238] Section 9(1).
[239] Section 20(1)(i). This power of SGBs to recommend appointments includes that the HOD and DOE may not appoint or transfer educators to a school unless the SGB has made a recommendation in regard to such appointments. See M Smit, JP Rossouw & R Malherbe "South Africa" in CJ Russo & J de Groof (eds) *The Employment Rights of Teachers: Exploring Education Law Worldwide* (2009) 194. The authors refer to *FEDSAS, Limpopo v Departement van Onderwys, Limpopo* unreported case no 30801/2003 (TPD) as the case that illustrates this requirement.
[240] Section 20(1)(k) and s 20(2) of SASA.
[241] Section 20(4).

lastly, perform any other function in line with SASA or determined by the Minister or MEC.[242]

Section 21 of SASA makes provision for further powers which may be allocated to the SGB upon application to the HOD. This includes determining the extra-mural curriculum, maintaining school property, purchasing educational material and equipment as well as paying for any other services rendered to the school.[243] In the *Ermelo SCA* judgment, Snyders JA gave guidance on the nature of section 21 of SASA.[244] According to the court, the PDE is usually responsible to fulfil the functions in section 21 and may only approve that the SGB fulfil these functions where the SGB has the necessary capacity to perform it effectively.[245] The court went on to say that the structure of the Act indicates that section 22 of SASA (which regulates withdrawal of the functions of the SGB) only refers to those functions approved by the HOD in terms of section 21.[246] The effect of withdrawing these functions from the SGB would be that it reverts to the PDE.[247] This interpretation of section 22 is in contrast with the *obiter dictum* expressed in *Mikro*. This case, as in *Ermelo*, dealt with the power of the HOD to withdraw the SGB's function in terms of section 6(2) of SASA to determine the language policy of the school. The court in *Mikro* found that the HOD acted unlawfully in withdrawing this function of the SGB.[248] The appellants argued that this situation leaves the HOD without a remedy in the case where the SGB unreasonably refuses to amend the language policy of the school.[249] The court then expressed the (*obiter dictum*) view that this situation would not arise since the HOD can rely on sections 22 and 25 to withdraw the language policy-making function of a SGB.[250] The finding in *Ermelo SCA* departed from this view with the court emphasising that determination of the language policy of a school falls exclusively within the SGB's

[242] Section 20(1)(m).
[243] Section 21.
[244] *Hoërskool Ermelo v Head of Department of Education: Mpumalanga* 2009 3 All SA 386 (SCA) paras 17-18.
[245] Para 18.
[246] Paras 21-22.
[247] Para 22.
[248] See para 23; *Minister of Education (Western Cape) v Mikro Primary School Governing Body* (2005) 3 All SA 436 (SCA) para 43.
[249] *Hoërskool Ermelo v Head of Department of Education: Mpumalanga* 2009 3 All SA 386 (SCA) para 23.
[250] Para 23.

jurisdiction and cannot be withdrawn by the HOD or exercised by anyone else.[251] The Supreme Court of Appeal proceeded to state that should the SGB act unreasonably in exercising the function to determine the language policy, such administrative action by a SGB will be subject to review by a court under the Promotion of Administrative Justice Act 3 of 2000.[252]

The Constitutional Court in *Ermelo*, however, disagreed with this interpretation and held that the withdrawal of functions in terms of section 22 refers to any function of a SGB in SASA and not only the functions listed in section 21.[253] Smit argues that the finding of the CC in *Ermelo* created uncertainty with regard to the scope of the HOD's power and that the judgment effectively places all power in the hands of the government, in contrast with the partnership model in SASA.[254] This uncertainty has sparked further debate among academics with Woolman and Fleisch arguing that the ultimate authority to determine language policy vests in the HOD.[255] Malherbe, Colditz and Deacon maintain that the SGB has exclusive language policy-making power.[256]

The last function of the SGB relates to the financial governance of the school. In terms of section 36(1) the SGB is obliged to "take all reasonable measures" to supplement the school's resources. This refers to, for instance, the charging of school fees, provided that it is a quintile 4 and 5 school which is allowed to charge school fees.[257] The financial functions are extensive and require that the SGB administer a school fund and banking account, prepare an annual budget, keep financial records, draw up financial statements, appoint a professional to examine and report on the financial statements and finally, submit these financial statements to the HOD annually.[258]

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[251] Para 21.
[252] Para 32.
[253] *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) paras 70-72.
[254] Smit (2011) *SAJHR* 404.
[255] 404-405; See also Woolman & Fleisch (2014) *CCR* 135-171.
[256] Smit (2011) *SAJHR* 405; See also EFJ Malherbe "Taal in Skole Veroorsaak nog 'n Slag Hoofbrekens; Regspraak" (2010) 3 *Tydskrif vir Suid-Afrikaanse Reg* 609-122; P Colditz & J Deacon "Die Statutere Raamwerk van Taalbeleid in Openbare Skole en die Implikasies van die Twee Ermelo-Uitsprake" (2010) *JJS* 123-139.
[257] Section 39(1) and (7) of SASA.
[258] Sections 37(1) and (3), 38(1)-(2), 42, 43(1)-(2), (5).

The wide-ranging governance function of SGBs, the partnership model in SASA and cooperative governance envisaged by the Constitution reveal that reconciling the functions of different decision makers involved in basic education is challenging. Section 20(1)(a) of SASA determines that the SGB must "promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners at the school". However, not all members of the SGB are directly involved with teaching. It shows that effective compliance with the broad functions of the SGB requires an extraordinary relationship of trust and cooperation between the SGB, principal, educators and the PDE.

(b) SASA regulations important for this research

Elaborating on the earlier discussion on the provisions in legislation, a few regulations applicable to the functions of role players in the provision of basic education should be mentioned. Regulations issued under SASA provide guidance regarding certain issues at schools and ensure that there is a uniform approach to regulating these matters in each school. This includes that the decisions of the SGB with regard to a school's language policy need to be in line with the Norms and Standards for Language Policy in Public Schools.[259] The function of the SGB with regard to safety at schools is addressed by the Regulations for Safety Measures at Public Schools.[260] A recently promulgated regulation is the National Norms and Standards for School Funding ("NNSSF"): List of schools that may not charge school fees.[261] In terms of this regulation, an updated list of schools that may not charge school fees has been compiled by each PDE. Each school that may not charge school fees must be notified in writing that they are a no-fee school.

Landmark regulations were promulgated in 2013 to address the dire need for rules regarding uniform school infrastructure. The Regulations relating to Minimum Uniform Norms and Standards for Public School Infrastructure aim to address inequality between schools with regard to the provisioning of infrastructure by the state.[262] It is the responsibility of the state to provide basic school infrastructure to public schools with a

[259] GN 1701 in *GG* 18546 of 19-12-1997.
[260] GN 1040 in *GG* 22754 of 12-10-2001.
[261] GN 1376 in *GG* 44020 of 18-12-2020
[262] GN R920 in *GG* 37081 of 29-11-2013.

special focus on schools that were disadvantaged under apartheid. The norms and standards include minimum requirements with regard to classrooms, electricity, water, sanitation, a library, laboratories, sport and recreation facilities, electronic connectivity and security.[263] Ensuring that the state provides resources and complies with the above norms and standards remains an ongoing process.[264]

4 3 2 3 South African Council for Educators Act

SACE is a statutory professional body for educators and functions in terms of the South African Council of Educators Act ("SACE Act"). The SACE Act provides for the registration of educators to promote professionalism in the sector and aims to ensure ethical and professional standards for educators, maintained by the appointed council.[265] Educators have to be registered with SACE, are then placed on the professional register of educators and issued with a registration certificate.[266] It should be noted that in terms of section 21(2) of the SACE Act "[n]o person may be employed as an educator by any employer unless the person is registered with the council". This registration requirement is therefore not only applicable to educators appointed at public schools, but also applies to educators, lecturers and management staff of colleges appointed in terms of the EOEA, SASA, PSA and the Further Education and Training Colleges Act 16 of 2006.[267] This therefore includes educators appointed by SGB's in terms of section 20(4) of SASA. Furthermore, educators appointed at independent schools or adult learning centres are also required to be registered with SACE.[268]

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[263] GN R920 in *GG* 37081 of 29-11-2013.

[264] This regulation has been a topic of dispute and has led to litigation such as *Equal Education v Minister of Basic Education* 2018 3 All SA 705 (ECB). The issue regarding school infrastructure is beyond the scope of this research. For interest, Equal Education provides a thorough background regarding school infrastructure and the progress that has been made as well as the failure by the state to ensure compliance with the norms and standards. See Equal Education "School Infrastructure" (2020) *Equal Education* <https://equaleducation.org.za/campaigns/school-infrastructure/> (accessed 22-05-2021).

[265] Section 2 of the SACE Act. See s 6 of the SACE Act for the composition of the council.

[266] See s 5 of the SACE Act for the powers and duties of the council; Bray & Beckmann (2001) *Perspectives in Education* 112.

[267] Section 3 of the SACE Act.

[268] Section 3; Bray & Beckmann (2001) *Perspectives in Education* 112.

Before discussing the registration requirements of SACE, it is necessary to take note of the NQF Act.[269] Education qualifications must be registered on the National Qualifications Framework, which is a system approved by the Minister of Higher Education that classifies, registers, publishes and articulates quality assured national qualifications in South Africa.[270] The NQF Act is therefore the overarching legislation determining the requirements for qualifications, including education qualifications, in South Africa. The South African Qualifications Authority[271] and Quality Councils[272] established by the NQF Act must ensure that the quality of qualifications offered in South Africa are acceptable.[273]

In 2015 regulations were issued in terms of the NQF Act which revised the policy on the minimum requirements for teacher education qualifications.[274] This was followed by regulations issued in terms of NEPA, namely the National Education Policy on Recognition and Evaluation of Qualifications for Employment in Education.[275] Based on the NQF and NEPA regulations, SACE is able to determine what the quality of and standard for an education qualification are and can set minimum qualification requirements for registration. In order for an educator to be registered with SACE, the applicant must have a valid NSC ("matric") certificate and at least a diploma in education

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[269] The NQF Act was amended in 2019 by the National Qualification Framework Amendment Act 12 of 2019. Also note that the South African Qualifications Authority Act 58 of 1995 has been repealed by s 37 of the NQF Act.

[270] Section 4 of the NQF Act.

[271] The South African Qualifications Authority ("SAQA") functions in terms of the NQF Act and oversees the development and implementation of the NQF. See Chapter 4 of the NQF Act.

[272] According to s 24 of the NQF Act, Umalusi is the Quality Council for General and Further Education and Training. See generally chapter 5 of the NQF Act.

[273] See s 5(3) of the NQF Act.

[274] GN 111 in GG 38487 of 19 February 2015. Item 9.3 of the notice determines that the qualifications selected for teacher education are:

"Qualifications for Initial Teacher Education: Bachelor of Education degree (NQF Level 7) or Postgraduate Certificate in Education (NQF Level 7); Qualifications for the Continuing Professional and Academic Development of Teachers: Advanced Certificate (NQF Level 6) or Advanced or Diploma (NQF Level 7) or Postgraduate Diploma (NQF Level 8) or Bachelor of Education Honours degree (NQF Level 8) or Master of Education degree/Master's degree (Professional) (NQF Level 9) or Doctoral degree/Doctoral degree (Professional) (NQF Level 10); Qualification for Grade R Teaching: Diploma in Grade R Teaching (NQF Level 6)".

[275] GN 108 in GG 40610 of 10 February 2017. This policy supplements the NQF minimum requirements for teacher education qualifications above in that it adds a "Relative Education Qualification Value ("REQV") to each qualification. The reason for this is because there are many different qualifications and institutions providing education qualifications. The REQV standardises all qualifications by allocating a value to different qualifications according to the number of credits per qualification and its NQF level. For instance, a Bachelor of Education degree is allocated a REQV of 14.

at NQF level 6 (which is an advanced certificate) or Relative Education Qualification Value ("REQV") 13.[276] For pre-primary education, the requirements are a valid NSC ("matric") certificate and a two-year certificate in teacher education or REQV 12.[277] Applicants with any other qualification recognised by SACE can also be registered.[278]

Registration criteria for educators are determined by SACE, as are the grounds justifying deregistration of an educator.[279] In terms of section 23(1) of the SACE Act:

"The council may direct the chief executive officer to remove the name of an educator from the register if—

(a) after having been registered, the relevant qualification of the educator is withdrawn or cancelled by the higher education institution which issued it;
(b) the educator was registered by error or by means of fraud;
(c) the educator was found guilty of a breach of the code of professional ethics;
(d) the educator requests de-registration, permanently or for a specified period;
(e) the educator fails to pay the fees prescribed by the council within a specified period; or
(f) the educator dies".

The possible deregistration of an educator is important for this research as it includes deregistration for a breach of the code of professional ethics. Anyone may lodge a complaint with SACE against an educator.[280] Where SACE receives a complaint, a case file is opened, and a case number is allocated. The person against whom the complaint has been lodged is contacted for a written response to the allegations.[281] Such a response must usually reach SACE within ten days, but the time period may be shorter depending on the nature of the allegations. As soon as the response is received, the Ethics

[276] As mentioned above, the REQV standardises all qualifications by allocating a value to different qualifications according to the number of credits per qualification and its NQF level. A REQV 13 refers to either a diploma in Grade R teaching, an approved general first degree or an approved diploma. See item 9 of GN 108 in GG 40610 of 10 February 2017 (Recognition and Evaluation of Qualifications in Education); See also SACE "Registration Criteria and Procedures" (2020) *SACE* 3, 3.1, 3.2 and 8 <https://www.sace.org.za/pages/registration-criteria-and-procedures>.

[277] See GN 108 in GG 40610 of 10 February 2017 (Recognition and Evaluation of Qualifications in Education); See also SACE "Registration Criteria and Procedures" (2020) *SACE* 3, 3.1, 3.2 and 8.

[278] This is applicable to non-citizens whose qualifications differ from those offered in South Africa. SACE does provide a registration process for these educators.

[279] Section 23 of the SACE Act; See also SACE "Registration Criteria and Procedures" (2020) *SACE* 3, 3.1, 3.2 and 8.

[280] SACE "How to lodge a complaint" (undated) *SACE* < https://www.sace.org.za/pages/how-to-lodge-a-complaint>.

[281] SACE "How to lodge a complaint" (undated) *SACE*.

Committee determines whether the nature of the complaint requires an investigation, mediation, discipline or referral to the PDE, ELRC or SAPS.[282] Should the Ethics Committee determine that discipline is warranted in the circumstances, the SACE disciplinary procedure will be followed.[283] The Disciplinary Committee investigates the possible breach of professional ethics.[284] Should the Disciplinary Committee find reasonable grounds, it will refer the matter to the Disciplinary Panel for a hearing.[285] After the hearing, the Disciplinary Panel must give the committee its recommendation with regard to a sanction, which can be a warning, a fine or deregistration for a specified time or indefinitely.[286]

The complaint procedure explains that a distinction must be drawn between employment-related and ethical matters. Ethical matters are those which violate the code of professional ethics whereas employment matters are related to the conditions of service of educators.[287] In case of misconduct there is often an overlap between employment and ethical matters. This is not problematic, seeing as SACE and the PDE should work together in addressing misconduct and incapacity and, as are seen in chapters 6 and 7, there is value in having two mechanisms of accountability (in England, it is the employer and Teaching Regulation Authority). Unfortunately, considering the important role of SACE, the council's activity in addressing misconduct and incapacity in the sector (public and independent schools) is quite low. One reason for this is that reporting between the PDE and SACE (and vice versa) is not effective. For example, between 2008 and 2012 the Western Cape PDE on average reported 30% of all disciplinary cases to SACE (out of all nine PDEs) compared to an average of 6% for the Eastern Cape and 5% for the Free State.[288] Even though reporting by the Western Cape

[282] SACE "How to lodge a complaint" (undated) *SACE.*
[283] SACE "Disciplinary Procedures" (undated) *SACE* <https://www.sace.org.za/pages/disciplinary-procedures> (accessed 08-11-2021).
[284] SACE "Disciplinary Procedures" (undated) *SACE.*
[285] SACE "Disciplinary Procedures" (undated) *SACE.*
[286] SACE "Disciplinary Procedures" (undated) *SACE.*
[287] See SACE "How to lodge a complaint" (undated) *SACE.*
[288] SACE "Final report on research trends analysis of a 5 year review study on disciplinary cases reported to SACE" (2012) *SACE* 23 <https://www.sace.org.za/assets/documents/uploads/sace_38605-2017-04-12-trends%20analysis%20of%20a%205%20year%20review%20study%20on%20disciplinary%20cases%20reported%20to%20sace%2015-12-2015.pdf> (accessed 08-11-2021).

PDE is much higher than the other PDEs, section 26 of the SACE Act and the EOEA requires that the employer provide SACE with the record of disciplinary hearings conducted in each case, except where "caution or reprimand" was the sanction (which is in any event not listed as a possible sanction in terms of the EOEA). Despite its comparatively high reporting, in 2012 the Western Cape PDE finalised 547 disciplinary hearings,[289] but only 204 cases were referred to SACE in the same year.[290] With regard to section 26 of the SACE Act and the EOEA, the SACE annual report of 2018/2019 stated that "SACE has in the past always complained that some [p]rovincial [d]epartments of education were not [r]eporting their cases as required".[291]

This can also be illustrated by comparing the number of disciplinary hearings conducted by all nine PDEs over a five-year period with the number of complaints received by SACE, as well as by considering the outcome of these hearings. Between 2014 and 2019, the nine PDEs conducted 7987 formal disciplinary hearings.[292] Over the same period, SACE received 2766 complaints for a breach of the SACE Code of Professional Ethics.[293] It is important to note that not every complaint received by SACE results in a disciplinary hearing. In fact, considering that 1226 "advisory letters" were sent to educators over this period (44% of complaints received), it is clear that a complaint to SACE does not necessarily lead to disciplinary steps being taken against the educator. Where the employer (HOD, SGB or boards of independent schools) institutes disciplinary proceedings against educators which result in a sanction, SACE sends an advisory letter to the educator and does not pursue a separate disciplinary hearing.[294] Only once the

[289] This number is 519 if one deducts the number of hearings where the educator was found not guilty, the case was withdrawn, or counselling was the outcome. See Western Cape Department of Education Annual Report 2012/2013, 149.

[290] SACE "Final report on research trends analysis of a 5-year review study on disciplinary cases reported to SACE" (2012) *SACE* 23.

[291] South African Council for Educators Annual Report 2018/2019, 28.

[292] See Graph 2 in chapter 6. The data is drawn from the annual reports issued by PDEs from 2015 to 2019.

[293] The data is drawn from the annual reports issued by SACE from 2015 to 2019. See South African Council for Educators Annual Report 2014/2015, 26-27; South African Council for Educators Annual Report 2015/2016, 30; South African Council for Educators Annual Report 2016/2017, 21; South African Council for Educators Annual Report 2017/2018, 19; South African Council for Educators Annual Report 2018/2019, 20. These reports are available at <https://www.sace.org.za/#>.

[294] See SACE "South African Council for Educators Annual Report 2017/2018" (2018) *SACE* 26 <https://www.sace.org.za/assets/documents/uploads/sace_63207-2018-10-15-SACE%20-%20Annual%20Report.pdf> (accessed 4-11-2021).

same educator repeats the misconduct, will SACE pursue disciplinary proceedings.[295] The effect is that very few educators are struck off the SACE register of educators. Only 93 educators were indefinitely struck off the SACE register between 2014 and 2019.[296] This number is low considering that there are around 410 000 educators employed in the public basic education sector alone.[297] Chapter 7 considers SACE's counterpart in England, the Teaching Regulation Agency which has proved to be highly effective in ensuring educators are prohibited from teaching in case of serious misconduct. The impact of SACE on safeguarding professional ethics in education seems weak in comparison, as becomes clear in that later discussion.

It is important to note that even where an educator resigns amidst allegations of, for instance, misconduct, a complaint may still be lodged with SACE. One challenge with this process is that deregistration of an educator remains dependent on a complaint being lodged with SACE regarding a possible breach of the code of professional ethics.[298] The issue of re-employment in education is problematic in South Africa. Although the public service has certain measures in place to ensure that dismissed educators are not re-employed by the PDE or DBE, a dismissed educator, whose name is still on the SACE register may be employed by the SGB of a public school (additional to the provincial post provisioning) or by the board of an independent school. Where the professional body functioning in the sector does not ensure dismissed educators are removed from the sector completely, questions arise about the purpose of that body. Chapter 6 shows that around 12% of formal disciplinary hearings resulted in dismissal between 2014 and 2019 in the four provinces selected for analysis in that chapter.[299] This translates to 420 dismissed educators in only four provinces, which means across all nine PDEs this

[295] SACE "South African Council for Educators Annual Report 2017/2018" (2018) *SACE* 26.

[296] The data is drawn from the annual reports issued by SACE from 2015 to 2019. See South African Council for Educators Annual Report 2014/2015, 26-27; South African Council for Educators Annual Report 2015/2016, 34; South African Council for Educators Annual Report 2016/2017, 24; South African Council for Educators Annual Report 2017/2018, 16; South African Council for Educators Annual Report 2018/2019, 26.

[297] South African Government "Basic Education on increased number of qualified teachers in education system" (2018) *South African Government* <https://www.gov.za/speeches/pubilc-education-system-1-oct-2018-0000#https://theconversation.com/south-africa-must-up-its-game-and-produce-more-teachers-125752> (accessed 28-01-2021).

[298] See SACE "Registration Criteria and Procedures" (2020) *SACE* 3, 3.1, 3.2 and 8.

[299] See graph 4 in chapter 6.

number will be much higher.[300] It also places in perspective how few educators are struck off the SACE register indefinitely. Even where SACE receives a complaint and the educator's name is struck from the register as a result, the PDE must implement SACE's decision which will require that the educator be dismissed (since SACE registration is a prerequisite for employment as educator).

4 4 The sources of rules applicable to the employment of educators

4 4 1 General labour legislation applicable to the employment relationship in education

For present purposes, the LRA is perhaps the single most important piece of generally applicable labour legislation as it extends a number of labour rights to employees[301] – including the right not to be unfairly dismissed,[302] the right to fair labour practices[303] and the right, through trade unions, to participate in collective bargaining.[304] While educators are, in principle, included under the scope of application of the LRA, the EOEA remains the primary piece of legislation regulating the individual employment relationship of educators employed by the state (PDE or DBE). The collective rights of educators are, however, regulated by the LRA. In this regard, section 35 of the LRA provides for bargaining councils in the public service and section 37(2) determines that bargaining councils be established within sectors of the public service. The constitution of the Public Service Co-Ordinating Bargaining Council ("PSCBC") established the Education Labour Relations Council ("ELRC") which is the bargaining council functioning in the public education sector.[305] Collective bargaining in this sector takes place at the ELRC, as well as dispute resolution of individual rights disputes (such as dismissal and unfair labour practice disputes).

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[300] See graph 2 in chapter 6. The total number of disciplinary hearings conducted by the Western Cape, Eastern Cape, Free State and Limpopo was 3501 between 2014 and 2019.

[301] Smit, Rossouw & Malherbe "South Africa" in *The Employment Rights of Teachers* 192. The authors mention that "[t]his Act codified the labour rights of all workers, including educators, and includes collective rights such as the right to organise as unions, negotiate employment conditions by collective bargaining, resolve disputes, and, ultimately, take recourse to strike actions".

[302] Chapter VIII of the LRA.

[303] Chapter VIII of the LRA.

[304] Chapter III of the LRA.

[305] Item 3(2) of Schedule 1 of the LRA.

The LRA applies to the individual employment relationship of educators employed by the state insofar as it is provided for in the EOEA. In this regard, the EOEA refers to the LRA in four instances. First, section 4 of the EOEA states that the Minister determines the salaries and other conditions of employment of educators.[306] However, this power of the Minister is made subject to the EOEA, the LRA or any collective agreement(s) concluded by the ELRC.[307] In other words, the Minister is empowered to determine, for instance, the salaries of educators, but this has to take into account collective negotiation and agreements on the matter as well as the procedures provided for in the LRA.[308] Second, the Minister may, in terms of sections 6 and 8 of the EOEA, determine the procedure and requirements for the appointment, promotion or transfer of an educator. Again, this power is made subject to chapter 2 of the EOEA, the LRA or any collective agreement(s) concluded by the ELRC.[309]

Third, the relevant employer of an educator may, in terms of section 11 of the EOEA, discharge an educator from service,[310] should the employer have considered the provisions of the LRA before making such a decision. Lastly, different types of misconduct are listed in sections 17 and 18 of the EOEA and, where disciplinary proceedings are instituted by the employer against the educator, the Act makes it clear that it must be in line with the code and procedure provided for in Schedule 2 of the EOEA. In this regard, item 3 of Schedule 2 expressly includes the Code of Good Practice: Dismissal in Schedule 8 of the LRA ("Dismissal Code") as part of the code and procedure in Schedule 2 of the EOEA. Put differently, where disciplinary action is taken against an educator for any of the types of misconduct listed in sections 17 and 18 of the EOEA, regard must be had of

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[306] These terms and conditions are discussed in greater detail in paragraph 4 4 2 1 (c) below.
[307] Section 4(1) of the EOEA.
[308] Smit, Rossouw & Malherbe "South Africa" in *The Employment Rights of Teachers* 192.
[309] Section 6(2) of the EOEA.
[310] The reasons for discharge as listed in s 11 of the EOEA are as follows,
"(a) on account of continuous ill-health; (b) on account of the abolition of the educator's post or any reduction in, or reorganisation or re-adjustment of the post establishments of, departments, schools, institutions, offices or centres; (c) if, for reasons other than the educator's own unfitness or incapacity, the educator's discharge will promote efficiency or economy in the department, school, institution, office or centre in which the educator is employed, or will otherwise be in the interest of the State; (d) on account of unfitness for the duties attached to the educator's post or incapacity to carry out those duties efficiently; (e) on account of misconduct; (f) if the educator was appointed in the post in question on the grounds of a misrepresentation made by the educator relating to any condition of appointment; and (g) if, in the case of an educator appointed on probation, the educator's appointment is not confirmed".

the Dismissal Code provided for in the LRA. Similarly, the incapacity code and procedures for poor work performance in Schedule 1 of the EOEA also refer to and includes the LRA's Dismissal Code, insofar it deals with incapacity based on poor work performance.[311]

The Dismissal Code is more comprehensive than the codes and procedures included in the schedules to the EOEA. Incorporating the principles of the LRA applicable to misconduct and incapacity in this manner ensures that educators have the same protection as other employees to whom the LRA applies and also provides guidance to employers about the procedures they are expected to follow. The interaction between the EOEA and the LRA is, for example, illustrated by the fact that in case of misconduct, item 3 of Schedule 2 to the EOEA provides that the conduct warranting disciplinary action is listed in sections 17 and 18 of the EOEA, but the requirements for such action – both substantive and procedural – are contained in the Dismissal Code.

The procedures in the EOEA itself are designed for the education context in that it mentions the person responsible for dealing with a disciplinary matter (for example, the HOD or principal), as well as the broad approach to be followed depending on the gravity of the misconduct. The detail of this framework and the extent to and manner in which the LRA is taken into account in instances of misconduct are discussed in the chapters to follow.

4 4 2 Specific legislation applicable to the employment relationship in education

4 4 2 1 Employment of Educators Act 76 of 1998

(a) Definition of educator and employer

The EOEA is the piece of legislation that regulates the employment of educators in the public education sector in South Africa. The Act applies to the employment of educators at public schools and departmental offices.[312] An "educator" is defined by the Act as:

> "any person who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at

[311] See item 1 of schedule 1 of the EOEA.
[312] Section 2.

any public school, departmental office or adult basic education centre and who is appointed in a post on any educator establishment under this Act".[313]

The conditions of service, discipline, retirement and discharge of educators employed by the PDE are regulated by the EOEA.[314] The chapters to follow focus on the implementation, and the adequacy of that implementation, of the regulatory framework concerning the performance of individual educators (inclusive of incapacity and misconduct).

Establishing who the employer of an educator is, is somewhat challenging. This is an important issue for this research, for three reasons. First, the effective management of incapacity and misconduct (educator performance) remains subject to the exercise of a discretion by the employer. Second, identification of the responsibility for poor decision-making about incapacity or misconduct is a prerequisite for reaching clarity about the location of accountability and possible failings in the system. Third, the earlier discussion in this chapter already highlighted the many different role players involved in the delivery of basic education, the fragmentation of responsibility, the possible abuse of power which in effect constitutes an abdication of responsibility, as well as tensions that may arise between the different role players.

In this regard, and as a point of departure, the employer of an employee of the DBE is the Director-General, whereas the HOD is the employer of employees appointed by the Department of Education ("DOE") (referring to the provincial departments of education ("PDEs")).[315] These educators will be referred to as "departmental educators". Two specific exceptions are made in relation to the determination of educators' salaries and the creation of posts.[316] In these two cases the Minister is the employer of DBE employees and the MEC of PDE employees.[317]

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[313] Section 1.
[314] See Preamble.
[315] Section 3(1); See also s1 of the EOEA. The Department of Basic Education (DBE) is the national department whereas the Department of Education (DOE) refers to each of the nine provincial departments responsible for education in their province. Note that the EOEA refers to "provincial department of basic education", whereas this research refers to it as provincial department of education (PDE), in line with the manner in which it is used in practice. See, eg, the website of the Western Cape Education Department, <https://wcedonline.westerncape.gov.za/> (accessed 19-02-2020).
[316] Section 3(2) and (3) of the EOEA.
[317] Section 3.

In terms of section 3(4) of the EOEA, a public school is the employer of educators appointed in terms of section 20(4) and (5) of SASA.[318] Section 20(4) authorises public schools to appoint educators additional to the posts created by the MEC (departmental posts), and to then remunerate these educators from the school budget prepared by the SGB.[319] Section 15 of SASA determines that "each public school is a juristic person, with legal capacity to perform its functions in terms of [the] Act". Section 3(4) of the EOEA does not elaborate on who the representative of the public school is in its relationship with additionally appointed educators. SASA makes it clear that the principal is a representative of the HOD[320] and that section 20(4) and (5) appointments are not made by the HOD (these educators are therefore not employees of the PDE). In this regard, the SGB represents and is responsible for the governance of the school.[321] Where section 3(4) of the EOEA refers to the public school as the employer of educators employed in addition to departmental educators, it should be understood that the SGB will make such appointments and be the employer of these educators. The principal represents the HOD in the SGB of the school. The principal is therefore also part of the SGB who may decide to appoint additional educators and will then be the employer of such educators. However, the principal serves the SGB in a representative capacity. Therefore, the principal is not the employer of educators employed in terms of section 20(4) of SASA.

It should also be noted that the EOEA is applicable to educators appointed in public schools by the PDE (against the provincial post establishment).[322] Although educators appointed by the SGB in terms of section 20(4) of SASA also work in public schools, their employment does not fall within the ambit of the EOEA. If one considers the definition of an educator in the EOEA mentioned above, it states that "any person who teaches … at any public school … *and* who is appointed in a post on any educator establishment under this Act" (own italics).[323] With regard to educator establishments referred to in the

[318] Section 3(4).
[319] See s 20(9) and 38 of SASA.
[320] Section 16A(1)(a).
[321] Section 16(1).
[322] Exactly who the representative is of public schools employing educators is discussed in more detail in paragraphs 4 4 2 1 (b) below. However, what should be noted at this stage is that 'additional' educators directly employed by public schools are not employees of the PDE. In fact, s 20(10) of SASA expressly excludes the liability of the state for any possible claims arising from employment contracts concluded between public schools and educators.
[323] Section 1 of the EOEA.

aforementioned definition, section 5(1)(b) of the EOEA determines that "the educator establishment of a provincial Department of Basic Education shall consist of posts created by the Member of the Executive Council". In other words, educators appointed to additionally created posts by the SGB (and not posts created by the MEC) do not fall in the definition of "educator" under the EOEA and are excluded from the ambit of the Act.[324] The same applies to educators appointed by the boards of independent schools.[325] These employees' conditions of employment are subject to the LRA, the Basic Conditions of Employment Act 75 of 1997 ("BCEA"), as well as the individual employment contracts concluded between them and their employers (either the relevant SGB or board of an independent school).[326] This creates further fragmentation in the system of regulation of the employment of educators employed at public schools.

As mentioned, Schedule 1 of the EOEA deals with the procedure the employer has to follow in case of incapacity due to poor work performance and Schedule 2 deals with the procedure for misconduct.[327] Considering the preceding discussion, the question then arises who is the employer for purposes of dealing with incapacity and disciplinary matters? As mentioned, for purposes of the procedures provided for in Schedules 1 and 2 and in respect of departmental educators, the employer is the HOD,[328] In respect of educators employed directly by the school in addition to departmental posts determined by the MEC, it is the SGB. In the latter case, the EOEA (and its Schedules 1 and 2) is not applicable to educators appointed by SGBs.

However, the EOEA and SASA also make provision for the delegation of powers by role players. Section 36 of the EOEA empowers the Minister, Director-General, MEC and HOD to delegate any of their powers except for powers that can only be exercised by the specific role player. Similarly, section 62 of SASA makes provision for the delegation of powers by the MEC and HOD. This legal framework makes provision for a delegation of powers in dealing with incapacity and disciplinary matters in public schools. As far as

[324] This was confirmed by the Labour Court in *Barkhuizen v Laerskool Schweizer-Reneke* (2019) 40 ILJ 1320 (LC) para 9.
[325] Section 2. However, the employment matters regulated by the EOEA must be in line with the provisions of the LRA. In terms of s35 of the EOEA, the Minister may make regulations regarding the conditions of employment of educators, but such regulations may not be inconsistent with any other law.
[326] Smit, Rossouw & Malherbe "South Africa" in *The Employment Rights of Teachers* 192.
[327] 204.
[328] 203.

departmental educators are concerned, the default position in terms of Schedules 1 and 2 of the EOEA is that the HOD is the employer. However, to complicate matters, item 4 of Schedule 2 specifically mentions that in case of disciplinary action "pertaining to less serious misconduct", the employer (HOD) must delegate the function to "the head of the institution or office where the educator is employed or the immediate superior of the educator where the educator concerned is the head of the institution or office".[329] If the employee is a departmentally appointed educator at a public school, the head of the institution, referred to above, is the principal.

From this discussion, it should be clear that the legal framework regulating the employment of educators is intricate and, in order to be implemented effectively, expects of role players to have, as a point of departure, a sound understanding of and ability to interpret statutes. Cases such as *Ermelo* already show that HODs do not always implement the legal framework in the intended manner. Subsequent chapters elaborate on this point and discuss whether the issues experienced in the education sector around incapacity and misconduct are due to the intricacy of the legal framework, or due to its inadequate implementation.

(b) Employees excluded from the definition of "educator"

As mentioned above, the EOEA applies to the employment of educators at public schools and departmental offices (DBE and PDEs). As also discussed above, employees appointed as educators to additionally created posts by SGBs do not fall within the definition of educator in the EOEA, although they are considered educators in the general sense of the word. This discussion focuses on non-educator employees working at public schools. The EOEA also excludes employees working at public schools and departmental offices who do not fall within the EOEA's definition of "educator" (for example, an administrative assistant). The employment of employees other than educators is regulated by the PSA. In terms of section 2 of the PSA all officers and employees employed in the public service fall within the application of the Act. Educators are not excluded from the PSA, but the provisions of the Act apply only insofar as they are not

[329] Item 4(1)(a) of Schedule 2 of the EOEA.

contrary to the EOEA.[330] The conditions of service of employees covered by the PSA are determined by a committee of Ministers, subject to the LRA and any collective agreement.[331] Collective agreements applicable to public servants (excluding educators) are concluded at the PSCBC. This bargaining council promotes labour peace through collective bargaining and dispute management.[332] The PSCBC is established in terms of section 35 of the LRA, read together with sections 36 and 37. While the PSCBC is the overarching bargaining council for the public service, there are also designated bargaining councils for different sectors in the public service in terms of section 37 of the LRA.[333] The ELRC functioning in the public education sector is one of these designated bargaining councils.[334] The PSCBC consists of the state as employer and a number of trade unions representing the various public service sectors.[335]

(c) EOEA regulations important for this research

The EOEA regulates the overarching principles applicable to the employment of departmental educators in public schools. Two sets of regulations issued in terms of the EOEA are important for this research, mindful that this research aims to address the regulation of the individual performance of educators. First, the conditions of employment of public sector educators (excluding educators appointed by SGBs), are found in regulations promulgated in terms of the EOEA, namely the regulations regarding Terms and Conditions of Employment of Educators.[336] The terms and conditions of employment contained in these regulations are similar to the typical terms and conditions found in

[330] Section 2(2) of the PSA.
[331] Section 2(2A).
[332] PSCBC "Information Brochure" (2019) *PSCBC* 2-3 <https://www.pscbc.co.za/index.php?option=com_docman&view=document&slug=pscbc-information-brochure&Itemid=113> (accessed 20-05-2021).
[333] PSCBC "Information Brochure" (2019) *PSCBC* 2-3.
[334] See s 27(3)(b) of the LRA and item 3(2) of Schedule 1 of the LRA.
[335] According to the PSCBC the state as employer is represented by "all spheres of government at National and Provincial level represented by the Department of Public Service and Administration (DPSA)". PSCBC "Information Brochure" (2019) *PSCBC* 2-3.
[336] GN 1743 in *GG* 16814 of 13 -11-995. The terms and conditions of employment of educators have been updated a number of times since its first publication. See for instance, "Improvement in Conditions of Service: Equalisation of Notches for Pay Progression for Educators" published under GN 381 in *GG* 42304 of 15-03-2019. The most recent amendment are discussed in chapter 7 which is the Regulations regarding Terms and Conditions of Employment of Educators in terms of Section 4 of the Act GN 331 in *GG* 44433 of 09-04-2021.

employment contracts. Amongst other matters, provision is made for the general conditions of service and salaries of educators, their appointment, promotion, transfer and termination of services.[337] Second, and closely related, the Personnel Administrative Measures ("PAM")[338] which was revised in 2016, include details regarding the content of educators' employment such as job descriptions,[339] post structure, workload and core duties.[340] PAM deals with general administrative aspects of educators' employment which includes various types of leave, awards, benefits and allowances.[341]

4 4 2 2 Provincial legislation

In terms of Schedule 4 of the Constitution, education is a matter of concurrent legislative competence.[342] This means that both the national and provincial legislature may legislate on the same matter regarding education and also has the power to implement such legislation.[343] Education is decentralised into nine provincial education departments, and the different provinces therefore have exclusive and concurrent legislative authority.[344] It is important to note, as explained by Bray, that provinces will only have executive authority over national education laws where the relevant province has the administrative capacity to adequately implement the law.[345] In other words, provinces may implement national education laws, such as SASA or NEPA, but only insofar as the province has capacity to effectively administer and implement the provisions of that piece of legislation.[346] Provinces should therefore be capable of administering education according to the unique needs of that particular province, while still adhering to national standards regarding education.[347] Where the province lacks such capacity, there is an obligation on the

[337] See chapter 2 of GN 1743 in *GG* 16814 of 13-11-1995.
[338] GN 222 in *GG* 19767 of 18-02-1999.
[339] In regard to the core duties and responsibilities of educators, the provisions of PAM are discussed in chapter 5 to elaborate on the expected competences of educators.
[340] GN 222 in *GG* 19767 of 18-02-1999.
[341] GN 222 in *GG* 19767 of 18-02-1999.
[342] See schedule 4 of the Constitution. This includes education on all levels, except for tertiary education which falls under the jurisdiction of national government.
[343] Malherbe "Centralisation of power in education: Have provinces become national agents?" (2006) 2 *J S Afr L* 249.
[344] See Malherbe (2006) *J S Afr L* 241.
[345] Bray (2002) *THRHR* 526.
[346] 526.
[347] Bray (2007) *PELJ* 13.

national government to support the province to become capable (and competent) to effectively implement national legislation.[348]

However, this implies that there should be cooperation between national and provincial government.[349] Unfortunately, Malherbe notes that this is not always the case.[350] He identifies a number of instances that show a lack of cooperation between these spheres of government and which might even be described as a stronghold by national government over provincial governments.[351] First, provinces are financially dependent on their share of national revenue.[352] As such, national government has substantial power over the provinces' ability to provide basic education.[353] Second, the national legislature has made "sweeping education laws" that it expects provinces to implement.[354] This, in turn, effectively usurps the province's autonomy to legislate on education in an innovative manner that addresses the issues experienced by that specific province and PDE.[355] Third, the approach of national government to education has been that it is the responsibility of national government to legislate on education and the responsibility of provincial governments to merely implement that which is decided by national government.[356] Even where provinces consent to the legislation being passed, the matters being legislated on are often at a micro level, which could be dealt with by the relevant PDE (or SGBs).[357] This would also be more in line with the decentralised approach envisioned by the Constitution. Lastly, according to Malherbe, the reason for provinces accepting that the national government usurp their functions might be

[348] Bray (2002) *THRHR* 526.
[349] Malherbe (2006) *J S Afr L* 243; Bray (2007) *PELJ* 13.
[350] See Malherbe (2006) *J S Afr L* 237-252.
[351] See 237-252; See also Bray (2002) *THRHR* 527-531 where she discusses the challenges experienced in the governance of education with specific reference to co-operative governance.
[352] Malherbe (2006) *J S Afr L* 242-243. See also s 228(2)(b) of the Constitution placing a restriction on provincial government to raise taxes and supplement their budget received from the national government.
[353] According to Malherbe, the national government has in the past allocated to provinces certain responsibilities without giving the necessary financial support to ensure that the provinces fulfil their role. The author refers to this situation as the "so-called unfunded mandate" problem. Malherbe (2006) *J S Afr L* 242-243; See also Bray (2002) *THRHR* 526.
[354] Malherbe (2006) *J S Afr L* 246, 247. The author lists the education laws and includes NEPA and SASA as pieces of legislation that have effectively usurped provinces' power to develop education specific to their context.
[355] Malherbe (2006) *J S Afr L* 247.
[356] 248-249.
[357] 248.

political.[358] Certain provincial political appointments are determined by the national government, which may indicate why role players would prefer not to intervene in the exercise of the national government's power over what should be concurrent matters.[359]

Of course, this practice of the national government taking over functions meant to be exercised by the provinces can similarly apply to the relationship between the PDE and SGBs. The obligation of the SGB to fulfil its (public school) functions in terms of SASA can only be complied with effectively without undue influence and pressure from the PDE. Where the PDE (through the HOD) abuses its power to enforce its agenda, it jeopardises the autonomy of public schools.[360] Amendments to education legislation progressively restricting the powers of SGBs show that government is leaning towards a centralised approach in education, an approach contrary to the partnership model and participatory democracy envisioned by SASA.[361] This approach was noted by Bray and Malherbe around 2007 and the recently suggested amendments to SASA continue this trend.[362]

This does not mean that provinces do not legislate on the matter of education. To use the Western Cape as an example, the province passed the Western Cape Provincial School Education Amendment Act 4 of 2018. This Act amends the Western Cape Provincial School Education Act 12 of 1997. There are a number of amendments, but one specific amendment illustrates the Western Cape PDEs commitment to improving the delivery of quality basic education over and above what is already contained in national legislation. Section 11A to 11H were inserted in the 1997 Act to provide for the establishment of the Schools Evaluation Authority ("SEA"). The SEA is designed to be an independent body to evaluate schools in the province. This is a milestone for the Western Cape PDE and the first reports from SEA on the performance of certain schools in the

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[358] 250.

[359] Malherbe (2006) *J S Afr L* 250.

[360] Bray (2007) *PELJ* 15.

[361] With the transformation of the education system in the 1990's, the ANC favoured a centralised approach because they believed that decentralisation would re-enforce the privileges of the previous model C (white) schools. On the other hand, decentralisation was favoured by other parties for fear of an abuse of power and minority oppression by national government, should all the power be vested in the national government. See Malherbe (2006) *J S Afr L* 237-238.

[362] Bray (2007) *PELJ* 16-17; (2007) *De Jure* 216; C du Plessis "Regering Wil Groter Houvas op Skole Hê" (21-12-2019 *Die Burger* <https://www.pressreader.com/south-africa/die-burger/20191221/281513638055345> (accessed 18-02-2020). Du Plessis questions the timing of the suggested amendments, as it was made during a time where schools were closed for the annual break making it difficult for trade unions and FEDSAS to deliver their comments timeously.

province were released in 2021.[363] These reports provide valuable information to all role players in the provincial education system as to the performance of schools and the standard of education delivered.[364] Such an innovative intervention is a positive contribution to ensure accountability in the system.[365] As is seen in chapter 6, the Western Cape also consistently addressed more matters of misconduct between 2014 and 2019 than any of the other provinces evaluated. This is an indication that the Western Cape utilises its provincial legislative authority in education and, perhaps more importantly, implements legislation to improve performance and accountability in education.

The power dynamic that exists between the national and provincial government in the provision of basic education, as well as between the PDEs and SGBs, is not always easy to balance. It is therefore imperative that the legislative framework facilitating dispute resolution in the education sector adequately addresses these issues and provides effective remedies in cases of an abuse of power.

4 4 3 The employment contract

The SGB is obliged to take all reasonable measures to supplement the budget provided to the school by the state.[366] The SGB must annually prepare a budget for approval at a general meeting of parents.[367] At such a meeting a majority of parents may adopt a resolution that school fees (and the agreed amount) will be charged. The SGB may then utilise the budget, as supplemented by school fees to, in terms of section 20(4) of SASA,

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[363] K Mauchline "Western Cape Education release first Schools Evaluation Authority reports" (28-01-2021) *South African Government* <https://www.gov.za/speeches/western-cape-minister-education-28-jan-2021-0000> (accessed 25-10-2021).

[364] See T Thembo "Schools Evaluation Authority publishes first eight reports on how Cape schools are performing" (2-02-2021) *IOL* <https://www.iol.co.za/capeargus/news/schools-evaluation-authority-publishes-first-eight-reports-on-how-cape-schools-are-performing-febbb404-06ec-42cc-9fda-10d9dc1b3d9e> (accessed 25-10-2021).

[365] The reports reveal the following areas of evaluation "learner achievement, teaching and learning, behaviour and safety, leadership and management and governance, parents and community". A score from 1 to 4 (1: Inadequate; 2: Requires Improvement; 3: Good, 4: Outstanding) is given for each area of evaluation. A score is then given for the overall performance of the school which provides the PDE with valuable feedback regarding intervention that is needed to improve the performance of schools in the province. See, eg, SEA "San Souci Girls' High School Report" (2020) SEA <http://seawc.gov.za/wp-content/uploads/2021/01/School-Evaluation-Report-Sans-Souci-Girls-HS-21-January-2021.pdf> (accessed 25-10-2021). This school received an overall performance rating of 3 which is "good".

[366] Section 36 of SASA.

[367] Section 38(2).

appoint educators additional to the educator posts provided for by the MEC. In other words, fee-paying schools in South Africa may appoint more educators than the post provisioning by the MEC.[368] It is therefore possible that certain educators conclude employment contracts with the public school itself, represented by the SGB. These educators are not employees of the PDE, but of the SGB and the EOEA does not apply to their employment. The SGB may only appoint educators (or non-educator staff) where there are sufficient funds in the school budget to remunerate these employees. The PDE is not responsible for the remuneration of employees other than the posts determined by the MEC.[369]

According to the Federation of Governing Bodies of South African Schools ("FEDSAS"), around 30% of educators employed at public schools are SGB appointments.[370] SGBs may elect to appoint additional educators to reduce the educator-learner ratio in the relevant school or to expand the subject offering at the school. These educators may be appointed on a permanent employment contract or fixed-term employment contract, depending on what the school's need is for additional educators.[371] These educators add value to the schools they are employed at and are often experts in their subject field, providing learners with a wider selection of subjects and increasing the quality of education delivered.[372]

Such appointments must comply with the same requirements as educators employed by the PDE and are subject to SASA, the LRA, and any other applicable law.[373] Educators appointed by the SGB in terms of section 20(4) of SASA must also be registered with the SACE.[374] Contract educators are not less qualified than their counterparts appointed by the PDE – section 20(6) and (7) of the EOEA requires that persons appointed in additional posts comply with the requirements of any other applicable law and are registered with SACE.[375] To be registered with SACE, these educators have to comply with the minimum

[368] See also J Deacon "Are fixed-term school governing body employment contracts for educators the best model for schools?" (2013) *De Jure* 63.
[369] Section 20(9) of SASA.
[370] FEDSAS "FEDSAS Environmental Analysis Research Report" (2014) *FEDSAS* 1,4, 9.
[371] Deacon (2013) *De Jure* 64.
[372] 64.
[373] Section 20(6) of SASA.
[374] Section 20(7).
[375] Deacon (2013) *De Jure* 64.

requirements for qualifications of educators.[376] The terms and conditions of service of educators employed by public schools (represented by SGBs) are contained in their employment contracts and must be negotiated on an individual basis.[377] However, the labour rights of these educators continue to be regulated by the LRA and their conditions of employment must be in line with the minimum requirements of the BCEA. This is also the case with the terms and conditions of educators employed by the boards of independent schools, as their employer is not the state (PDE), but the independent school, represented by the board of the school.

Educators appointed by the SGBs of public schools are mainly appointed on fixed-term contracts, for two reasons.[378] First, in terms of section 38 of SASA, the budget of the school is approved annually, which means that the SGB can only conclude fixed-term contracts while and when funds for the positions are available.[379] Second, the post provisioning for each school by the PDE may change from year to year, meaning that an appointment by the PDE may effectively render the fixed-term employee redundant. This, in turn, means that SGBs can only employ fixed-term contract employees after the post provisioning has been provided.[380]

The widespread use of "contract" educators appointed by SGBs in South Africa has a potential positive impact on the delivery of quality basic education. Apart from the fact that SASA and SACE require contract educators to be adequately qualified, one important reason for this is the proper regulation of indefinite and especially fixed-term employment

[376] See the discussion on qualifications in chapter 5.
[377] Smit, Rossouw & Malherbe "South Africa" in *The Employment Rights of Teachers* (2009) 192.
[378] Deacon identifies these two reasons in: Deacon (2013) *De Jure* 67,
[379] The utilisation of fixed term contracts in this regard falls within the ambit of s 198B(4)(h) of the LRA which determines that the employee "is employed in a position which is funded by an external source for a limited period".
[380] The utilisation of fixed term contracts in this regard falls within the ambit of s 198B(4)(b) of the LRA which determines that the employee "is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months".

contracts[381] by the LRA. It may also be mentioned that the use of contract educators in the South African education system requires further investigation, but this falls beyond the scope of this research. Of particular interest would be whether SGBs provide competitive remuneration and benefits compared to the educators appointed by the relevant PDEs and, if not, whether it is possible to treat them on an equal basis. A further question relates to whether the use of contract educators widens the gap between fee-paying and no-fee schools in South Africa as far as the quality of education is concerned, seeing that learners at fee-paying schools have the benefit of additional educators.

4 4 4 Collective agreements

As mentioned above, the PSCBC has, in terms of section 37 and Schedule 1 of the LRA, established a number of bargaining councils for different sectors of the public service. The ELRC is where collective bargaining in the public education sector takes place and also exercises jurisdiction over employment disputes involving public sector educators.[382]

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[381] In terms of the common law, it is easy for employers to terminate employees appointed on fixed term contracts as the employer can simply rely on expiry of the fixed term. The LRA, as amended by the Labour Relations Amendment Act 6 of 2014, now provides comprehensive protection to employees employed by way of fixed term contracts. These amendments took effect on 1 January 2015. In terms of s 186(2)(b)(i) of the LRA an employee on a fixed term contract who had a reasonable expectation of renewal of their fixed term contract on the same or similar terms and whose contract is not renewed or renewed on less favourable terms, may claim unfair dismissal against the employer. Similarly, s 186(2)(ii) protects fixed term employees who reasonably expected the employer to retain them indefinitely on the same or similar terms and where the employer offers to retain them on less favourable terms, the employee may also claim unfair dismissal against the employer. Section 198B also regulates the use of fixed term employment contracts and specifically protects employees who earn an annual salary below R211 596.30, which is the so-called "threshold" amount determined by the Minister of Employment and Labour in terms of the BCEA (as at 1 March 2021). In other words, employees earning above R 211 596.30 per year, do not enjoy the protection of s 198B of the LRA. For those falling within the ambit of the provision, a fixed term contract is defined as an employment contract that terminates when a specified event occurs, when a specific task or project is completed or on a fixed date, other than the employee's normal or agreed retirement age. This provision limits the use of fixed term employment contracts by stating that employers may only appoint employees for longer than three months if the work for which the employee is employed is for a limited time or if the employer can demonstrate a justifiable reason for the fixed term of the contract. Apart from possible justifications provided for in s 198B(4) of the LRA, employers are therefore limited by these provisions from using, or at least abusing, fixed term employment contracts.

[382] Some of the first collective agreements concluded by the ELRC included agreements on the acceptance of an ELRC Constitution, creation of the nine provincial chambers of the ELRC through which collective bargaining can take place and the establishment of the South African Council for Educators ("SACE"). These collective agreements can be accessed on the ELRC website. See ELRC "Collective Agreements" (1993-2021) *ELRC* <https://elrc.org.za/national-agreements/> (accessed 19-05-2021).

Collective bargaining takes place annually at the ELRC with the inclusion of the Ministers of Basic Education, Public Service and Finance.[383] Educators who are not employed by the state (PDE), but directly by public schools (SGBs) or independent schools, have to negotiate their employment conditions and are not covered by collective agreements concluded at the ELRC.[384] However, as mentioned above, these terms and conditions have to at least meet the requirements of the BCEA and these educators are entitled to the labour rights contained in the LRA.

Collective agreements concluded at the ELRC play an important role in determining the rules applicable to the employment of educators. In terms of section 4 of the EOEA, the Minister determines educators' salaries and other conditions of service. The collective bargaining process will therefore impact this determination by the Minister, as any collective agreements on the matter will have to be adhered to.[385] Furthermore, section 6(2) of the EOEA requires that the procedure and requirements determined by the Minister with regard to appointments, promotions or transfers, must also take into account any collective agreement on the matter.

Collective agreements that have been concluded at the ELRC and are important to this research are discussed in more detail in subsequent chapters, but it should already be noted that collective agreements concluded at the ELRC cover a range of possible employment issues and often operate in a preventative manner. This includes a collective agreement on a grievance procedure.[386] Should a complaint surface that affects the employment relationship and may be a violation of educators' rights, this agreement provides guidelines on how the grievance should be resolved.[387] There is also a collective agreement for the resolution of disputes.[388] A collective agreement that directly protects the rights of learners in the context of sexual misconduct by educators was agreed on in

[383] Smit, Rossouw & Malherbe "South Africa" in *The Employment Rights of Teachers* 192.
[384] 192.
[385] See s 4(1) and (3) of the EOEA. A decision by the Minister on the topic of expenditure must be made together with the Minister of Finance.
[386] See ELRC Resolution 13 of 1996 "Grievance Procedure" which can be accessed at <https://elrc.org.za/wp-content/uploads/2020/10/No-13-of-1996.pdf> (accessed 20-10-2021).
[387] See ELRC Resolution 13 of 1996 "Grievance Procedure".
[388] See ELRC Resolution 7 of 1997 "Dispute resolution procedures of council" which can be accessed at <https://elrc.org.za/wp-content/uploads/2020/10/No-7-of-1997.pdf> (accessed 20-10-2021).

2018.[389] The agreement mentions that the parties to the council are concerned that learner victims of sexual misconduct are often required to give the same evidence more than once, seeing that different hearings at different forums may take place.[390] This exposes learners to unnecessary mental trauma. The purpose of the agreement is to avoid this by requiring that any alleged sexual misconduct be addressed by way of a section 188A (of the LRA) inquiry by an arbitrator.[391] The disciplinary hearing is then replaced by an arbitration.

Collective agreements also regulate certain administrative aspects of the employment of educators, such as the time taken by educators during working hours to conduct employee organisation activities.[392] The ELRC has also played a significant role in protecting educators who, as a result of apartheid laws, were unable to gain access to and complete a recognised education qualification. In this respect, a collective agreement was concluded to provide for the permanent appointment of underqualified educators who completed a certain minimum number of years of service in education.[393] The ELRC was also responsible for the creation and initial funding of SACE, which plays an important role in ensuring professional ethics in education.[394]

The collective agreement on the duties and responsibilities of educators (which forms part of PAM) provides certainty with regard to the aim of different positions at public

[389] ELRC Resolution 3 of 2018 "Providing for compulsory inquiries by arbitrators in cases of disciplinary action against educators charged with sexual misconduct in respect of learners" which can be accessed at <https://elrc.org.za/wp-content/uploads/2020/10/Collective-Agreement-3-of-2018-Inquiry-by-Arbitrators.pdf> (accessed 20-10-2021).

[390] See ELRC Resolution 3 of 2018 "Providing for compulsory inquiries by arbitrators in cases of disciplinary action against educators charged with sexual misconduct in respect of learners".

[391] Item 3.1. of ELRC Resolution 3 of 2018 "Providing for compulsory inquiries by arbitrators in cases of disciplinary action against educators charged with sexual misconduct in respect of learners".

[392] See ELRC Resolution 8 of 1995 "Payment for time off" which can be accessed at <https://elrc.org.za/wp-content/uploads/2020/10/No-8-of-1995.pdf> (accessed 20-10-2021).

[393] See ELRC Resolution 4 of 2001 "Permanent appointment of under-qualified educators" which can be accessed at <https://elrc.org.za/wp-content/uploads/2020/10/No-4-of-2001.pdf> and ELRC Resolution 5 of 2001 "Amendment of measures in order to extend and clarify the provisions for the appointment of educators who are not professionally qualified" which can be accessed at <https://elrc.org.za/wp-content/uploads/2020/10/No-5-of-2001.pdf> (accessed 20-10-2021).

[394] See ELRC Resolution 3 of 1998 "The South African Council for Educators" which can be accessed at <https://elrc.org.za/wp-content/uploads/2020/10/No-3-of-1998.pdf> and ELRC Resolution 7 of 2000 "Termination of levies payable to SACE" which can be accessed at <https://elrc.org.za/wp-content/uploads/2020/10/No-7-of-2000.pdf> (accessed 20-10-2021). The funding of SACE was later removed from the responsibility of ELRC and SACE is now funded by statutory levies collected on a monthly basis from the salaries of registered educators.

schools and the responsibilities of each role player to ensure the delivery of quality education.[395] Lastly, collective agreements also directly impact the expected performance of educators in the public sector. In this regard, a number of collective agreements have been concluded. This includes an agreement on evaluation procedures, processes and performance standards for educators.[396] The purpose of this agreement is to provide a basis for possible salary increases, rewards and other measures that may require a certain standard of performance. It furthermore ensures that the performance of educators is evaluated fairly and objectively. The purpose of this agreement is to improve the quality of the teaching profession and education management in the sector.[397] The most comprehensive collective agreement concluded to provide a standardised framework in this regard (which also incorporates earlier agreements regarding the performance of educators) is the Quality Management System ("QMS") adopted in 2020.[398] Collective agreements that impact the individual performance of educators are discussed in more detail in subsequent chapters.

4 4 5 The role of administrative law

The focus of this research primarily is on the regulation of public education in South Africa. As part of the public administration, the DBE and PDE are subject to section 195(1) and (2) of the Constitution and must adhere to the principles governing the public administration. The functions exercised by the DBE and PDE (through their representatives) are of an administrative nature, falling within the ambit of administrative action provided for in section 33 of the Constitution. Section 33(1) and (2) of the

[395] See ELRC Resolution 8 of 1998 "Duties and responsibilities of educators (school and office based)" which can be accessed at <https://elrc.org.za/wp-content/uploads/2020/10/No-8-of-1998.pdf> (accessed 20-10-2021).

[396] ELRC Resolution 1 of 2001 "Evaluation procedures, processes and performance standards for institution-based educators" which can be accessed at <https://elrc.org.za/wp-content/uploads/2020/10/2003-No-1.pdf>.

[397] See ELRC Resolution 1 of 2001 "Evaluation procedures, processes and performance standards for institution based educators".

[398] ELRC Resolution 2 of 2020 "Quality Management System (QMS) for school-based educators" which can be accessed at <https://elrc.org.za/wp-content/uploads/2020/10/Collective-Agreement-No.-2-of-2020_compressed-1.pdf>. Note that this agreement repeals the agreement concluded in 2014, ELRC Resolution 2 of 2014 "Quality Management System (QMS) for school-based educators" which can be accessed at <https://elrc.org.za/wp-content/uploads/2020/10/CA-2-of-2014-compressed.pdf> (accessed 20-10-2021).

Constitution provides that "everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons". Against this background, the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") regulates the exercise of public power or performance of a public function.[399] The purpose of PAJA is to promote efficient administration, good governance and to ensure accountability, openness, and transparency in the public sector, which includes the public education sector.[400]

The implication is that decisions made by representatives of the DBE or PDE are subject to the standard for administrative action as provided for in PAJA. In terms of section 15 of SASA, every public school is a juristic person with legal capacity to perform its functions in terms of SASA and as mentioned, the public school is represented by the SGB with regard to the governance of the school.[401] A public school is brought into existence by SASA and is an organ of state, as it forms part of the public administration.[402] Bray mentions that this is the case because public schools exercise public powers and functions in terms of SASA.[403] Specific functions are allocated to the public school and its representative SGB, meaning that, as part of the public administration, there is a duty to adhere to the Constitution.[404] The SGB is required to fulfil its functions in terms of SASA but its decisions must also adhere to the general principles of administrative law and, therefore, PAJA.[405] What this means for role players in the education sector such as the Minister, MEC, HOD and SGBs is that their decisions must be reasonable. In order for their decisions to be reasonable, they have to give reasons for their decisions, which is a fundamental principle of administrative justice.[406] Similarly, an arbitration award made by

[399] See the Preamble of PAJA.
[400] See the Preamble.
[401] See Squelch (2001) *Perspectives in Education* 139; Bray (2007) *PELJ* 14.
[402] Squelch (2001) *Perspectives in Education* 139; s 15 of SASA.
[403] Bray (2007) *PELJ* 6; See also s 239(b)(i) and (ii) of the Constitution.
[404] Squelch (2001) *Perspectives in Education* 139.
[405] Beckmann (1999) *THRHR* 112.
[406] See F Erasmus & G Kinghorn "Understanding Deemed Dismissal in State Departments" (2015) *De Rebus* <https://www.derebus.org.za/understanding-deemed-dismissal-in-state-departments/> (accessed 12-06-2021); See also *Weder v Member of the Executive Council for the Department of Health, Western Cape* 2013 1 BLLR 94 (LC) para 35.

the ELRC also constitutes administrative action and must therefore be "procedurally fair, lawful and reasonable".[407]

The reason the above role players' decisions is subject to PAJA is that their decisions potentially impact the public. Administrative law ensures that the vertical relationship between citizens and the state (or its representatives) adhere to the principles of administrative justice. Of importance to this research, of course, is the question of whether decisions by the state as employer regarding public servants such as educators constitute administrative action. In this regard, the court in *Gcaba v Minister of Safety and Security* ("*Gcaba*")[408] mentioned that there are different opinions regarding the implementation of the principles of constitutional, administrative and labour law where these branches of law overlap and intersect in the context of the employment of public servants (which includes public educators).[409] The view of the court was that an employment decision by the state as employer ordinarily is not administrative action that falls within the scope of PAJA.[410] This does not leave public servants as employees without a remedy, but the remedy does not lie in PAJA, it lies in the LRA which regulates employment relationships.[411] What this means is that a decision to dismiss a public servant[412] or the failure to promote and appoint a public servant is an employment-related issue that is based on the right to fair labour practices covered by the LRA, not PAJA.[413] The effect of this is that adverse employment decisions by the state as employer, such as dismissal, is not subject to review in terms of PAJA, because remedies are provided for in the LRA.[414] However, with regard to the employment rights of public school educators, the EOEA incorporates a duty on the state as employer to provide reasons where the rights

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[407] MJ van Staden "An update of recent labour law developments from South African courts" (2019) *TSAR* 728 744. Van Staden did not mention this in the context of the education sector or the ELRC, but it is similarly applicable to arbitration awards made by the ELRC.

[408] 2009 12 BLLR 1145 (CC).

[409] *Gcaba v Minister of Safety and Security* 2009 12 BLLR 1145 (CC) para 3.

[410] Para 64.

[411] Para 65.

[412] See *Chirwa v Transnet Limited* 2008 (4) SA 367 (CC) as discussed in *Gcaba v Minister of Safety and Security* (2009) 12 BLLR 1145 (CC) para 66.

[413] *Gcaba v Minister of Safety and Security* (2009) 12 BLLR 1145 (CC) para 66.

[414] Erasmus and Kinghorn mention that even though decisions by the state as employer are not considered administrative action, there are certain exceptions, as in the case of *Mogola v Head of the Department: The Department of Education NO* 2012 6 BLLR 584 (LC) where the MEC's discretion not to reinstate an employee was improperly exercised. See Erasmus & Kinghorn "Understanding deemed dismissal in state departments" (2015) *De Rebus*.

of educators are adversely affected, for instance by way of disciplinary action against the educator.[415] Regulation of the employment relationship between the state as employer and the educator as public servant/employee is through the LRA and EOEA. As such, remedies in case of an employment dispute are to be found in these pieces of legislation and not in PAJA.

4 5 Conclusion

This chapter provided an overview of the legislative structure for the delivery of quality basic education designed to give effect to the constitutional right to a basic education. The analysis showed that the Constitution considers education a matter of concurrent power between national and provincial governments and that there are many role players required to fulfil their functions in order for the education system to operate effectively. The authority of each role player was discussed, including, at national level, the Minister of Basic Education and, at provincial level and the level of specific schools, the MEC, HOD, SGB, principal, parents and learners. The discussion also showed that the Constitution and SASA's vision of cooperative governance and participatory democracy in education is not without its challenges. Consequently, there often is a divergence between the law and its implementation in practice. This typically is due to the heterogeneous nature of our community and the political history of education in South Africa. There continues to be a power struggle between role players as to where the ultimate decision-making power lies and, if anything, the discussion shows that implementation of legislation depends on individual exercises of discretion within a complicated legislative fragmentation of authority, which may well have a detrimental effect on the delivery of basic education. If one places the management of educator performance at the centre of the enquiry, it requires consideration of the Constitution and SASA, NEPA, the LRA, the EOEA, collective agreements and the employment contract. This is no easy task. However, consideration of this structure is a necessary building block for consideration of the detailed rules applicable to educator performance in chapter 5,

[415] See Schedule 2 of the EOEA; See also E Bray & J Beckmann "The employment relationship of the public-school educator: A constitutional and legislative overview" (2001) 19 *Perspectives in Education* 109 118 and n 47.

consideration of the experience with incapacity and misconduct in the basic education sector in chapter 6 and the comparative overview in chapter 7.

CHAPTER 5: PROVISIONS SPECIFICALLY APPLICABLE TO EDUCATOR PERFORMANCE

5 1 Introduction

This chapter explores the legislative regulation of individual educator performance in South Africa. In this context, individual educator performance is defined to encompass the conduct and capacity of educators. This is done against the backdrop of the international and constitutional recognition of the right to basic education (discussed in chapter 3) and the broad legislative regulation of the system of basic education and the employment of educators in South Africa (discussed in chapter 4). The discussion in chapter 4 revealed that there are two types of educators employed in the public basic education system – those employed against the provincial post establishment (who are employees of the Provincial Department of Education ("PDE")), and those employed, additional to the provincial post establishment, by the school's School Governing Body ("SGB") (who are employees of the SGB). For both types of employees, the provisions of the Labour Relations Act 66 of 1995 ("LRA") relating to conduct and capacity are important. As becomes clear from the discussion, the rules regulating the conduct and capacity of departmental educators (contained in the EOEA) expressly incorporate the principles of the LRA, while the conduct and capacity of SGB appointed educators are regulated solely by the principles contained in the LRA. For this reason, and even though these principles are well established, paragraph 5 2 of this chapter provides an overview of the LRA principles relating to conduct and capacity. This discussion juxtaposes the LRA with the contractual principles applicable to the employment relationship – it is from these principles that the employer's right to take steps based on conduct and incapacity emanate, but it is also these principles that the LRA seeks to ameliorate.

In paragraph 5 3 of this chapter, the regulation of conduct and capacity by the EOEA in relation to educators employed by the different PDEs is considered. As far as (mis)conduct is concerned, the focus is on sections 17 and 18 of the EOEA read with the provisions of Schedule 2 of the EOEA, which contains the disciplinary code and procedure for these educators. As far as poor work performance (as incapacity) is concerned, the focus is placed on the provisions of Schedule 1 of the EOEA (which contains the procedure for dealing with poor work performance) as well as important developments and provisions relating to the professional registration of educators,

their minimum qualifications and core competences – all issues which ultimately determine the substantive fairness of the employer's decision-making based on alleged incapacity.

In summary then, the goal of this chapter is threefold:

1. to describe the rules applicable to the regulation of the conduct and capacity of educators;
2. to search for provisional insights about the nature of this regulation that may impact on the effective management of educator performance; and
3. to serve as a basis for the overview and critical analysis of the experience with misconduct and poor work performance in the basic education sector in chapter 6.

5 2 General principles of labour law and the LRA

5 2 1 Background

The general labour law rules remain applicable to the employment relationship between the state or public school (represented by its SGB) as employer and the educator as employee in the South African basic education sector.[1] Of course, these labour law rules extend wider than this specific employment relationship and apply in general to the relationship between employers, employees, employers' organisations and trade unions. In line with the focus of this study, this part considers three issues as part of the individual employment relationship,[2] namely discipline and dismissal for misconduct, suspension as an unfair labour practice and poor work performance due to incapacity. Specific consideration is given to the regulation of suspension as an unfair labour practice as it forms part of the disciplinary process, whether implemented as precautionary or punitive suspension. It therefore links to the discussion of misconduct. Admittedly, the LRA also includes unfair discipline short of dismissal in its list of unfair labour practices, which is discussed as part of the general provisions affecting the appropriateness of sanctions for misconduct.

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1 See, eg, item 3 of Schedule 2 of the EOEA that contains the disciplinary code and procedures which expressly includes the Code of Good Practice: Dismissal in Schedule 8 of the LRA as part of Schedule 2 of the EOEA. The Dismissal Code therefore forms part of the disciplinary code and procedures applicable to educators.

2 This refers to the employment relationship between the employer and individual employee.

Before delving into the regulation of these topics, it is necessary to consider the foundation of the employment relationship. The agreement or employment contract between employee and employer remains an important source of rules regulating employment. The common-law employment relationship is based on the *locatio conductio operarum* which entails the rendering of services in exchange for payment.[3] The existence of this agreement (consensus) between one party to provide their services and the other to provide remuneration in return is a requirement for the existence of an employment contract, as is the right of control by the employer.[4] Other contract law rules have to be adhered to for the conclusion of a valid employment contract. Apart from consensus, both parties must have contractual capacity, performance under the contract must be possible, the conclusion, performance and purpose of the contract must be lawful and lastly, any formalities must be adhered to. However, recognition of the principle of freedom to contract creates generally recognised challenges to adequately address the unequal power dynamic between the individual employee and employer.[5] This shortcoming of the common law required legislative intervention. Labour legislation seeks to create and provide comprehensive protection of the employment rights of individual employees.[6]

This does not mean the contract of employment no longer is important, but it is supplemented and impacted on by labour legislation,[7] which introduces the notion of fairness into the employment relationship.[8] Applicants for employment and employees are protected against unfair discrimination by the EEA.[9] Through labour legislation, individual employees are protected against unfair dismissal,[10] are entitled to minimum

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3 The *locatio conductio operarum* under Roman law together as developed in light of influences from English law forms the basis for modern employment contracts. Garbers et al *The New Essential Labour Law Handbook* (2019) 27; See also J Grogan *Workplace Law* 13 ed (2020) 14-15.

4 Of course, modern day contracts for the provision of services come in various forms, for instance freelance workers, consulting or the delivery of services by independent contractors and has required of our courts to develop judicial tests in defining the boundaries of the employment relationship and other contracts involving the provision of services. See Grogan *Workplace Law* 14; A van Niekerk, N Smit, M Christianson, M McGregor, S van Eck *Law@work* (2019) 5-6; Garbers et al *Essential Labour Law* 25.

5 Garbers et al *Essential labour law* 8-9; Grogan *Workplace Law* 3; Van Niekerk et al *Law@work* 4.

6 Labour legislation attempts to address the unfair impact of freedom of contract by regulating employment and importing certain rules. For instance, the BCEA and National Minimum Wage Act 9 of 2018 ("NMWA"). However, criticism has been levelled against the impact of South Africa's labour legislation on economic development and job creation. See Van Niekerk et al *Law@work* 3-4.

7 For a detailed discussion on the development of labour legislation, see Garbers et al *Essential Labour Law* 4-8 and Grogan *Workplace Law* 8-9.

8 Garbers et al *Essential Labour Law* 27.

9 Section 6 of the EEA.

10 Section 188 of the LRA.

conditions of employment[11] and a minimum wage.[12] So-called collective labour law protects employees through its recognition and regulation of the process of collective bargaining. As an integral part of the protection of employees' rights, legislation also provides for specialised dispute resolution forums – bargaining councils, the Commission for Conciliation, Mediation and Arbitration ("CCMA") and the labour courts, with jurisdiction over labour disputes and a mandate to promote fairness in the resolution of labour disputes. In such a way, legislation seeks to bring a greater measure of balance to the initial unequal positions of employers and employees. It is within this framework that the LRA addresses misconduct and incapacity in the form of poor work performance.

5 2 2 Misconduct under the LRA

5 2 2 1 The general approach to discipline of employees for misconduct under the LRA

Any consideration of the way in which the LRA addresses misconduct has to start elsewhere, namely the common-law contract of employment in terms of which the employer and employee both have certain implied rights and obligations.

Employers have two main implied rights: they are entitled to exercise control over their employee(s) and employees must be subordinate to such control.[13] Employers are obligated to remunerate employees and provide them with safe working conditions.[14] It has been argued that employers also have a reciprocal duty to act in good faith towards their employees, thereby treating them with respect and dignity.[15] The employee's implied duties are to be respectful, obey reasonable and lawful instructions by the employer, act in good faith towards the employer, and to report for duty and perform their work with the necessary diligence, competence and skill.[16] As such, the right of an employer to discipline employees (and to take steps based on

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11 The Basic Conditions of Employment Act 75 of 1997.
12 See the NMWA.
13 Garbers et al *Essential Labour Law* 30; See also J Grogan *Dismissal* 3 ed (2017) 213-214.
14 Van Niekerk et al *Law@work* 97.
15 The courts have not decisively stated that there is an implied term of good faith on an employer in terms of the common law employment contract. However, Bosch argues that employees could rely on the reciprocal duty of trust and confidence in the instance where employees are not treated with the necessary respect or dignity by the employer. See Van Niekerk et al *Law@work* 98; C Bosch "The implied term of trust and confidence in South African labour law (2006) *ILJ* 28 51.
16 Garbers et al *Essential Labour Law* 35-39; Van Niekerk et al *Law@work* 90-96. Grogan *Dismissal* 214.

incapacity) already arises from the nature of the agreement between employer and employee. As far as termination is concerned, common-law principles hold that the employer and employee may terminate the employment contract lawfully by giving the required or reasonable notice,[17] or summarily in case of a serious breach. It has always been a matter of concern that the employment contract may be terminated by notice by either party irrespective of the reason for the termination. The LRA now requires that a fair reason and procedure must be followed before the employer can terminate employment fairly.[18] While the common-law position with regard to termination on notice for any reason still stands, employees may now rely on the protection of the LRA in case of a possible unfair dismissal.[19]

Schedule 8 of the LRA, the Code of Good Practice: Dismissal ("Dismissal Code"), must be taken into account when determining whether there was substantive and procedural fairness in the circumstances of each case of misconduct (or incapacity). And while the Dismissal Code, as its name suggests, focuses on dismissal, it has to be recognised that the Code also tells us a lot about how employers should conduct themselves when dealing with misconduct (or incapacity) short of dismissal. Employers typically have disciplinary codes containing the rules about the conduct expected of employees in the workplace. In drafting these disciplinary codes, employers should take into account the Dismissal Code which provides the minimum standard that employers' disciplinary codes for their workplace must comply with.[20] Employers can tailor their disciplinary code to the needs of their specific workplace, provided that it complies with and can be measured against the LRA's Dismissal Code. Disciplinary codes are therefore either adopted by the employer or negotiated between the employer and trade union(s).[21] In the absence of a disciplinary code in the workplace, employers should look to the Dismissal Code for guidance.[22]

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17 The notice period could either be agreed upon by the parties, and in the absence of an agreement reasonable notice had to be given. Grogan *Workplace Law* (2017) 39-40.

18 Grogan *Workplace Law* 39-40; Van Niekerk et al *Law@work* 100; s 188 of the LRA.

19 See Grogan *Workplace Law* 39-40. *SA Maritime Authority v McKenzie* 2010 3 SA 601 (SCA) has confirmed that the LRA did not develop the common law in the sense that fairness is now an implied term and required when terminating an employment contract on notice. The statutory right not to be unfairly dismissed can however be enforced under the LRA.

20 Grogan *Dismissal* 213.

21 214.

22 Garbers et al *Essential Labour Law* 178-179.

First, it is expected that each employer establishes and communicate disciplinary rules applicable to the workplace and their employees.[23] In this regard, it is necessary that employees are clear about the standard of conduct expected of them and that the employer is consistent in implementing the rules and standards expected of employees. Second, employers should implement disciplinary measures in a progressive and corrective manner.[24] This requires of the employer to attempt to correct employees' conduct by implementing disciplinary measures short of dismissal, such as counselling and warnings.[25] This guideline relies heavily on the exercise of the employer's discretion, an approach that may work well in smaller enterprises or businesses where the employer is actively involved in the daily activities of the business and work closely with employees. However, it may already be said that where the employer is not personally present in the workplace and relies upon the proper exercise of a discretion by subordinates with delegated authority, as is the case in the education sector, the practice (or absence thereof) of progressive and corrective discipline may adversely affect the effective functioning of the enterprise or institution. This is especially so in instances where the employer is the government and, as in the case of the basic education sector, the workplace, in the form of schools, is spread across the country. Ensuring the proper exercise of discretion using progressive and corrective discipline by principals on behalf of the Head of Department ("HOD"), requires exceptional management ability by the employer as well as dedicated and capable subordinates. This issue is discussed in more detail in subsequent chapters.

The third and final general guideline in the Dismissal Code is that the employer should use its discretion to invoke either a formal or informal disciplinary procedure in case of misconduct.[26] In this regard, the Dismissal Code advises that minor transgressions should be met with informal advice and correction. More serious misconduct should be met with warnings, while dismissal is reserved for serious or repeated instances of misconduct. Deciding whether to follow a formal or informal disciplinary procedure is determined during the process that follows a disciplinary infraction. The disciplinary process should be initiated as soon as an alleged incident of misconduct takes place. This is typically done through an investigation into the

[23] 178-179; Item 3(1) of Schedule 8 of the LRA.
[24] Item 3(2) of Schedule 8 of the LRA.
[25] Item 3(2).
[26] Item 3(3).

allegation of misconduct, also to gather evidence for purposes of a possible disciplinary enquiry. In case of serious misconduct, the employer may decide to invoke precautionary suspension during this process.[27] In this way, the employee is removed from the workplace which ensures that the employer conduct the investigation without any possible interference by the employee.[28] It is important to mention that precautionary suspension entails that the employee is removed from the workplace on full pay.[29] The employer has to ensure that their decision to invoke precautionary suspension is done fairly. Failure to do so may result in a claim by the employee for an unfair labour practice in the form of unfair suspension. Schedule 2 of the EOEA contains specific guidelines applicable to the suspension of educators which is discussed in more detail later in this chapter.

After the employer has gathered evidence, it should exercise a discretion whether the misconduct requires formal or informal discipline. Formal discipline refers to a formal disciplinary enquiry whereas informal discipline refers to the situation where the employer and employee resolve the issue informally without a formal disciplinary enquiry or resorting to a serious sanction (such as a final written warning or dismissal).[30] This is where corrective and progressive discipline becomes important as less serious forms of misconduct are usually met with a corrective approach instead of resorting to a formal disciplinary enquiry.[31] It does, however, include discussions between the employer, employee and trade union representative, where applicable.[32] This decision by the employer to resort to formal or informal discipline is particularly important in the education sector where the principal as representative of the HOD exercises this discretion. The same reservations expressed above about the potential impact of the separation of employer and decision maker in the application of informal discipline apply here and are considered in more detail further in this thesis.

A formal disciplinary enquiry usually consists of a meeting where the employer presents the evidence obtained through its investigation and the employee is afforded the opportunity to respond to the employer's case (also through presentation of his or her own evidence). The chairperson decides whether the employee is in fact guilty of

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27 Garbers et al *Essential Labour Law* 183.
28 183.
29 183.
30 183; This is also provided for in Item 3 and 4 of Schedule 2 of the EOEA.
31 Garbers et al *Essential Labour Law* 183; This is also provided for in Items 3 and 4 of Schedule 2 of the EOEA.
32 This is also provided for in Item 3 and 4 of Schedule 2 of the EOEA.

the charge(s) of misconduct and, if so, a suitable sanction is imposed. In this regard, it is important that the employer charge the employee correctly in light of available facts, as it may be difficult to amend the charge at a later stage and an incorrect charge may have a detrimental impact on disciplinary proceedings.[33] Again, this is especially true in the education sector, where employers need to have a sound understanding of the grounds of misconduct as listed in the EOEA. As the further discussion shows, the Education Labour Relations Council ("ELRC") arbitrations reveal that educators are in some cases unjustifiably charged with less serious types of misconduct leading to less serious sanctions being imposed.

Although not required by the Dismissal Code, disciplinary codes usually contain an appeal procedure to cater for the situation where either of the parties is unsatisfied with the outcome of the disciplinary enquiry.[34] Irrespective of whether a disciplinary code provides for an appeal procedure, employees may challenge the fairness of discipline imposed by the employer. Where the employee challenges the fairness of a dismissal for misconduct, a dispute may be referred to a bargaining council with jurisdiction (the ELRC in case of departmental educators), or in the absence thereof, the CCMA (in case of SGB appointed educators). The employee has to refer such a dispute within 30 days from the date of dismissal.[35] Where the employee challenges the fairness of the imposition of discipline short of dismissal as an unfair labour practice, the time period for referral is 90 days (but jurisdiction remains the same).[36] Once an employee refers a dispute to the bargaining council or CCMA, the dispute will be based on the substantive and/or procedural fairness of the employer's decision. In this regard, the Constitutional Court has accepted that arbitrators exercise an independent discretion and is required to come to an independent conclusion as to the fairness of the employer's conduct (including sanction) in the circumstances.[37] As is illustrated in chapter 7, this approach is markedly different to that in England, where

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33 184; See *National Union of Mineworkers on behalf of Botsane v Anglo Platinum Mine (Rustenburg Section)* (2014) 35 ILJ 2406 (LAC) paras 2, 23.

34 184. This appeal procedure is applicable where the outcome of the disciplinary enquiry was dismissal. Where it is a sanction short of dismissal, the employee can challenge the outcome as being an unfair labour practice.

35 184.

36 342.

37 231; See also Van Niekerk et al *Law@Work* 259 in reference to *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA* 2006 11 BLLR 1021 (SCA) and *Sidumo v Rustenburg Platinum Mines Ltd* 2007 12 BLLR 1097 (CC).

the Employment Tribunal is called on to assess the reasonableness of the employer's conduct.

At a bargaining council or the CCMA, the first step in the dispute resolution process will be to attempt to resolve the dispute by way of conciliation. Should that fail, the dispute may be referred to arbitration. The arbitrator hears evidence anew (*de novo*). The onus is on the employee to prove that there was a dismissal and the employer bears the onus to prove the fairness of the dismissal.[38] Where the dismissal was procedurally unfair but substantively fair, the employee may be entitled to compensation but is not entitled to reinstatement or re-employment.[39] Where the dismissal is substantively unfair, however, reinstatement or re-employment is usually awarded.[40] In such a case the employee may be reinstated retrospectively meaning that the employee is also entitled to back pay from the date of the dismissal until the date of the arbitration award finding the dismissal substantively unfair.[41] Note that where a sanction short of dismissal is challenged as an unfair labour practice, the onus remains on the employee to prove unfairness.[42]

The functioning of the onus and standard of proof at arbitration may greatly impact any finding as to the substantive fairness of a dismissal for misconduct. As mentioned above, in terms of section 192 of the LRA the employee must prove the existence of a dismissal and the employer must prove the fairness thereof. This differs from the general legal position that the person who alleges a certain version of events must prove that fact. In the case where the employer defaults in its obligation to present evidence (as is often the case in the education sector) the employee is still expected to provide evidence that is sufficient to sustain a finding that the dismissal was unfair.[43] In other words, the arbitrator must be satisfied, based on the evidence presented by the employee, even in the absence of evidence presented by the employer, that the dismissal was unfair. The standard of proof required is the civil standard, namely that

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38 Section 192 of the LRA.
39 Section 193(2)(d).
40 Section 193(1).
41 Garbers et al *Essential Labour Law* 184.
42 The LRA does not state who bears the onus in case of an unfair labour practice dispute. Garbers et al mention that the general principle in regard to the onus then has to be followed which will require that the employee prove that an unfair labour practice occurred, and the employer will then have to show that the practice was not unfair (in other words, that it was fair). See Garbers et al *Essential Labour Law* 342, See also Van Niekerk et al *Law@Work* 232.
43 Grogan *Dismissal* 219.

on a balance of probabilities one version is preferred over the other.[44] For a finding of fairness, it therefore requires that the arbitrator is convinced that the employer's version is more probable than that of the employee.[45] In the further discussion it is seen that where the employer (PDE) defaults by failing to attend arbitration hearings, arbitrators often do not approach the onus in the manner discussed above.

The above discussion provided a summary of the general approach under the LRA to instances of disciplinary transgressions. As part of this discussion, it was mentioned that the employer must exercise its disciplinary prerogative in a substantively and procedurally fair manner. The next step is to discuss the rules regulating substantive and procedural fairness. This overview provides the foundation for the discussion of substantive and procedural fairness of discipline in the education sector later in this chapter and the analysis of whether these rules are adequately implemented in subsequent chapters.

5 2 2 2 The requirements for substantive fairness of discipline for misconduct under the LRA

One of the broad requirements for the fairness of any dismissal laid down by section 188 of the LRA is that a dismissal must be substantively fair, or, in the specific words of the Act, that there has to be a fair reason for the dismissal, inclusive of misconduct. In this regard, item 7 of the Dismissal Code provides for five guidelines that must all be complied with to render a dismissal based on misconduct substantively fair. Subject to the actual issues in dispute between the parties at arbitration, these guidelines have to be considered by the arbitrator or commissioner when determining the fairness of the employer's decision to dismiss for misconduct. It goes without saying that these guidelines have to be pro-actively considered by employers prior to the decision to dismiss. Furthermore, in those instances where the employer imposed a sanction short of dismissal and this is challenged as an unfair labour practice, the same guidelines will apply (with the obvious substitution of the fairness of the sanction short of dismissal instead of dismissal).[46] The Dismissal Code provides as follows:

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[44] 219.
[45] 217.
[46] Item 3 of the LRA's Dismissal Code.

"Any person who is determining whether a *dismissal* for misconduct is unfair should consider –

(a) whether or not the *employee* contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(b) if a rule or standard was contravened, whether or not:

(i) the rule was a valid or reasonable rule or standard;

(ii) the *employee* was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) *dismissal* was an appropriate sanction for the contravention of the rule or standard".[47]

The first of these guidelines concerns "whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace".[48] This guideline requires, first, that a rule must exist. Second, it allows for discipline where a contravention took place away from the workplace, provided the conduct is relevant to the workplace.[49] Third, an actual contravention of the rule is required. This requires the employer to prove that the employee breached a rule and that they are guilty of misconduct.[50] Sometimes, the rule relied on by the employer is one of the implied contractual duties of employees in terms of the common law.[51] It is not always the case that disciplinary rules are expressly contained in, for instance, the contract of employment or a disciplinary code.[52] Contravention of the rule is, in the first instance, a question of fact, but also depends on the legal meaning ascribed to the type of misconduct the employee is charged with.[53] Should it be established that a rule was contravened, further guidelines should be considered.

The second guideline is "whether or not the rule was a valid or reasonable rule or standard".[54] Certain common rules such as those against dishonesty, absence or assault, for instance, are generally recognised as valid and reasonable and also will be enforced by all employers.[55] If there is doubt, it follows that rules must, in the first place, be lawful. In addition, the validity and reasonableness of rules must be assessed taking into account the type of work concerned, the specifics of the

47 Item 7.
48 Item 7(a).
49 Garbers et al *Essential Labour Law* 209; See also Van Niekerk et al *Law@Work* 305.
50 Grogan *Dismissal* 213.
51 214.
52 214.
53 214.
54 Item 7(b)(i) of the LRA's Dismissal Code.
55 Garbers et al *Essential Labour Law* 213-214; Grogan *Dismissal* 223.

workplace and the nature of the employer's operation.[56] The context in which a rule is to be applied therefore plays a significant role in determining the validity and reasonableness of the rule. In most cases, it will not be difficult for employers to meet this requirement, especially concerning the more common types of misconduct, but this may change where the rule is a unique one specifically designed within the context of the specific employer's operation.

The third guideline requires consideration whether "the employee was aware, or could reasonably be expected to have been aware, of the rule or standard".[57] Implicit in this guideline is that employees should be informed of rules in the workplace and should be made aware of the types of conduct that will be considered a transgression of the rules which may lead to discipline.[58] Again, it should be mentioned that it will be difficult for employees to plead ignorance regarding the more well-known types of misconduct, the more so given that the guideline provides for situations where employees may reasonably be expected to be aware of rules.[59] However, where the employer relies on unique employer-specific rules, actual knowledge based on information provided by the employer to employees will in all likelihood be required.[60] This is usually achieved through a dissemination of the employer's disciplinary code.[61]

The fourth guideline requires that "the rule or standard [is] consistently applied by the employer",[62] both as far as the imposition of disciplinary action and the sanction are concerned. This is an important guideline because it creates certainty and clarity in the workplace of the conduct expected of employees as well as the consequences should employees breach the rules.[63] This guideline flows from the principle that it is inherently unfair to treat employees who commit the same misconduct differently.[64] This, however, does not mean that the sanction imposed by the employer for a specific type of transgression has to be identical in all instances. The courts acknowledge that the circumstances surrounding each case may warrant a deviation from previous

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56 Garbers et al *Essential Labour Law* 212-213.
57 Item 7(b)(ii) of the LRA's Dismissal Code.
58 Garbers et al *Essential Labour Law* 213.
59 As such, employees cannot rely on the absence of a disciplinary code to escape accountability for a breach of these common rules. See Garbers et al *Essential Labour Law* 213-214.
60 Grogan *Dismissal* 222; Van Niekerk et al *Law @ Work* 307.
61 Grogan *Dismissal* 222.
62 Item 7(b)(iii) of the LRA's Dismissal Code.
63 Grogan *Dismissal* 223.
64 223.

sanctions for the same misconduct.[65] What ultimately needs to be considered is whether the decision to impose discipline and the outcome of the discipline imposed was fair.[66] It is not expected that the employer or chairperson of a disciplinary hearing come to an identical conclusion in matters of similar misconduct. These decision makers retain their discretion to impose discipline as they see fit, provided that it is fair in each case and there is justification for the different outcomes.[67]

The last – and challenging – question about the substantive fairness of a dismissal for misconduct is whether "dismissal was an appropriate sanction for the contravention of the rule or standard".[68] In this regard, the employer has to motivate its decision to dismiss and this will generally require evidence supporting this decision (which, it has to be emphasised, is separate from the enquiry into the guilt of the employee).[69] The commissioner or arbitrator should therefore be convinced that the employer considered the guidelines discussed above and listed in item 7 of the Dismissal Code prior to exercising its discretion to impose the sanction of dismissal.[70] The same holds true where the employer imposed a sanction short of dismissal and this is challenged by the employee as an unfair labour practice. In respect of dismissal as a sanction, item 3(5) of the Dismissal Code provides as follows:

> "When deciding whether or not to impose the penalty of *dismissal*, the employer should in addition to the gravity of the misconduct consider factors such as the *employee's* circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself."

The gravity of the misconduct is therefore only one of the factors that the employer should take into account when considering dismissal for misconduct.[71] The employer

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65 See Garbers et al *Essential Labour Law* 214-215 in reference to *SA Commercial Catering & Allied Workers Union v Irvin & Johnson Ltd* 1999 20 ILJ 2302 (LAC) para 29.

66 See Garbers et al *Essential Labour Law* 214-215 in reference to *SA Commercial Catering & Allied Workers Union v Irvin & Johnson Ltd* (1999) 20 ILJ 2302 (LAC) para 29.

67 Van Niekerk et al *Law@Work* 307; See also Garbers et al *Essential Labour Law* 214-215 in reference to *SA Commercial Catering & Allied Workers Union v Irvin & Johnson Ltd* (1999) 20 ILJ 2302 (LAC) para 29.

68 Item 7(b)(iv) of the LRA's Dismissal Code.

69 There are instances of serious misconduct where the surrounding circumstances speak to the gravity of the misconduct and in such a case the employer need not present evidence to justify dismissal. See Garbers et al *Essential Labour Law* 218 and Van Niekerk et al *Law@Work* 311 where the authors note that this guideline is often the most difficult to satisfy.

70 Grogan mentions that presiding officers and/or employers have to "exercise their discretion in respect of sanction reasonably, honestly and with due regard to the general principles of fairness" See Grogan *Dismissal* 231.

71 Item 3(5) of the LRA's Dismissal Code.

must also consider the employee's circumstances concerning the length of service, prior record of disciplinary infractions, as well as the (work-related) personal circumstances of the employee.[72] Further factors that the employer must take into account are the nature of the employee's job and the circumstances surrounding the misconduct.[73] It is also necessary that the employer implement discipline in a consistent manner taking into account previous decisions in respect of the same type of misconduct.[74] The decision on sanction requires a balancing of all of these factors before the employer decides to dismiss an employee for misconduct and before a commissioner or arbitrator can find that the sanction imposed (inclusive of dismissal) was fair or otherwise.[75]

Ultimately, taking into account all of these guidelines and factors, the commissioner or arbitrator should decide whether the employer imposed discipline – and possibly dismissed the employee – substantively fairly. For dismissal to be justified, the employer has to show that continued employment would be intolerable (for example, that the risk of continued employment is too great).[76]

5 2 2 3 Procedural fairness of a dismissal for misconduct under the LRA

Procedural fairness refers to the procedure followed by the employer prior to dismissing the employee for misconduct. Besides the requirement that a dismissal has to be substantively fair, the fairness of a dismissal also depends on whether procedural fairness was present.[77] As mentioned above, where the dismissal was substantively fair but procedurally unfair, the employee is not entitled to reinstatement or re-employment as a remedy.[78] Compensation may be awarded depending on how material the procedural unfairness was in the circumstances and the prejudice experienced by the employee as a result.[79] Procedural fairness, as expected of employers by the LRA, broadly requires that employers refrain from arbitrarily dismissing employees.[80] Grogan mentions that this does not require of employers to

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72 Item 3(5).
73 Item 3(5).
74 Item 3(5).
75 Garbers et al *Essential Labour Law* 219.
76 Item 3(4) of the LRA's Dismissal Code.
77 Grogan *Dismissal* 315.
78 315.
79 Garbers et al *Essential Labour Law* 229.
80 Grogan *Dismissal* 317.

apply the law as would the courts, but that "the rules of natural justice require no more than that employers should act according to the common-sense precepts of fairness".[81] The general requirements for procedural fairness are contained in item 4 of the Dismissal Code:

> "(1) Normally, the employer should conduct an investigation to determine whether there are grounds for *dismissal*. This does not need to be a formal enquiry. The employer should notify the *employee* of the allegations using a form and language that the *employee* can reasonably understand. The *employee* should be allowed the opportunity to state a case in response to the allegations. The *employee* should be entitled to a reasonable time to prepare the response and to the assistance of a *trade union representative* or fellow *employee*. After the enquiry, the employer should communicate the decision taken, and preferably furnish the *employee* with written notification of that decision.
> (2) Discipline against a *trade union representative* or an *employee* who is an *office bearer* or *official* of a *trade union* should not be instituted without first informing and consulting the *trade union*.
> (3) If the *employee* is dismissed, the *employee* should be given the reason for *dismissal* and reminded of any rights to refer the matter to a *council* with jurisdiction or to the Commission or to any *dispute* resolution procedures established in terms of a *collective agreement*.
> (4) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures."[82]

The first guideline is that the employer conducts an investigation, which means that employees should not be subjected to disciplinary proceedings in the absence of at least *prima facie* evidence that the employee actually breached a workplace rule.[83] Second, and noteworthy, this does not have to be a formal enquiry, although many employers have adopted the use of disciplinary enquiries in their disciplinary codes. The employer should inform employees of allegations against them in such a way that they understand the allegations of misconduct against them.[84] This, in turn, requires that the employer provide the employee with enough information surrounding the charge to allow the employee to identify the incident and properly prepare a response.[85] This brings us to the third requirement, which is that the employee should

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81 318.
82 Item 4 of the LRA's Dismissal Code.
83 Grogan *Dismissal* 321.
84 Garbers et al *Essential Labour Law* 230.
85 Van Niekerk et al *Law@Work* 314.

have a reasonable time to prepare a response to the allegations.[86] Depending on the provisions of the employer's disciplinary code, this time period is usually a minimum of 48 hours, but the reasonableness of the time period will ultimately depend on the complexity of the case.[87]

The employee must be afforded the opportunity to state his or her case in response to the allegations of misconduct.[88] The Dismissal Code does not prescribe the exact procedure to be followed at disciplinary enquiries.[89] This is in line with the spirit of the LRA which is to import fairness into the employment relationship and not to unduly usurp the employer's prerogative relating to the best way in which to implement discipline in the workplace. Employers should, however, take into account the reason for the enquiry.[90] In the case of misconduct, it will typically take the form of a disciplinary enquiry in serious cases (as is discussed below, in the case of incapacity, consultation and counselling are more appropriate).[91] Determining the fairness of the procedure will require that the disciplinary code of the employer is analysed to ascertain whether the procedure contained in that code was followed and whether the code complies with the LRA.[92] In the absence of a disciplinary code, arbitrators or commissioners should determine whether the employer followed the LRA and Dismissal Code guidelines.[93]

During the disciplinary process, an employee may be assisted by a fellow employee or trade union representative. By assistance in this context is meant active assistance to the employee, inclusive of steps to ensure the procedure followed at the enquiry is fair.[94] The last requirements are that after the enquiry – and in case of dismissal - the employer must inform the employee of its decision and sanction and the reason for this,[95] must inform the employee of the right to refer the dispute to a bargaining council or CCMA,[96] and should inform the employee of an internal appeal procedure in the disciplinary code, if applicable.[97] It is noteworthy that there is no right to an internal

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86 Garbers et al *Essential Labour Law* 230-231.
87 232.
88 232-233; Grogan *Dismissal* 330; Van Niekerk et al *Law@Work* 314.
89 Grogan *Dismissal* 318.
90 330.
91 330.
92 333.
93 333.
94 Garbers et al *Essential Labour Law* 233.
95 233-234.
96 234.
97 235.

appeal to a higher level of management included in the LRA or Dismissal Code, but if the employer's disciplinary code includes such a procedure, it must be conducted fairly.[98] Where an appeal procedure exists, the employee will first utilise the appeal procedure and appeal within the organisation.[99]

While this discussion provides no more than a brief overview of the requirements for procedural fairness of a dismissal for misconduct under the LRA, it bears repeating that it remains important for employers to try to adhere to and follow fair procedures prior to any discipline. While procedural unfairness will not result in reinstatement or re-employment of the employee, it may have considerable financial consequences for an employer.

5 2 2 4 The role of suspension in the disciplinary process

Suspension forms part of the disciplinary process. However, it may be that the employer implements suspension for an unfair reason or fails to follow the proper procedure as provided for by regulation, legislation, collective agreement or the employment contract. In this regard, section 185 of the LRA provides that an employee has the right not to be unfairly dismissed as well as the right not to be subjected to an unfair labour practice. The LRA expressly includes "unfair suspension" in its list of unfair labour practices.[100] The definition of unfair labour practice is contained in section 186(2) of the LRA which determines that:

> "[U]nfair labour practice means any unfair act or omission that arises between an employer and an *employee* involving
> *(a)* unfair conduct by the employer relating to the promotion, demotion, probation (excluding *disputes* about dismissals for a reason relating to probation) or training of an *employee* or relating to the provision of benefits to an *employee*;
> *(b)* the unfair suspension of an *employee* or any other unfair disciplinary action short of dismissal in respect of an *employee*;
> *(c)* a failure or refusal by an employer to reinstate or reemploy a former *employee* in terms of any agreement; and

[98] Grogan *Dismissal* 359.
[99] Garbers et al *Essential Labour Law* 235.
[100] Section 185 of the LRA.

(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act 26 of 2000), on account of the *employee* having made a protected disclosure defined in that Act".[101]

Suspension can take one of two forms, both catered for by the relevant part of the definition of an unfair labour practice in the LRA. It can first be in the form of a precautionary suspension,[102] often used while the employer is investigating disciplinary charges against the employee and before the disciplinary enquiry starts.[103] A precautionary suspension has no punitive purpose, seeing that the alleged misconduct is still being investigated.[104] Suspending the employee in this instance removes the employee from the workplace, which may prevent interference with the investigation, intimidation of possible witnesses and even a recurrence of the misconduct.[105] The second type is a punitive suspension,[106] where suspension is used as the sanction or disciplinary measure imposed on an employee found guilty of misconduct at a disciplinary hearing. This is a disciplinary measure short of dismissal.

Over time, the courts have provided us with guidelines to ensure that suspensions are fair. In the case of precautionary suspension, it will be considered fair if it is done on full pay and the employer had a justifiable reason for suspending the employee.[107] Whether the reason is justifiable will depend on the specific context of the suspension and the employer's explanation as to why the employee should be removed from the workplace.[108] As further explored below, in the basic education sector this reason could be that the employer wants to prevent the employee from possibly jeopardising the investigation into the alleged misconduct. It is also noteworthy that item 6(2) of Schedule 2 of the EOEA makes provision for another option, namely, to transfer the educator to a different position if the employer believes the employee's presence may

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[101] Section 186(2). Only employees are protected against unfair labour practices and the specific acts constituting unfair labour practices in s 186(2) is a closed list, meaning that it is exhaustive. Employees can therefore not rely on acts outside the scope of s 186(2) to argue that it is an unfair labour practice. See Garbers et al *Essential Labour Law* 320-321.

[102] Garbers et al *Essential Labour Law* 333; Van Niekerk *Law@Work* 215-216.

[103] Grogan *Workplace Law* (2017) 72; *MEC for Education North West Provincial Government v Gladwell* 2012 22 ILJ 2033 (LAC) para 35. Courts have confirmed that both precautionary and punitive suspension falls within the ambit of s 186(2)(b) of the LRA. See Garbers et al *Essential Labour Law* 333; See also *Hechter v Department of Education Eastern Cape* PSES716- 14/15 EC with reference to *Koka v Director General: Provincial Administration North West Government* 1997 18 ILJ 1018 (LC) 1028-1029.

[104] Van Niekerk *Law@Work* 216.

[105] Garbers et al *Essential Labour Law* 334; Van Niekerk et al *Law@Work* 216.

[106] Garbers et al *Essential Labour Law* 333.

[107] See, eg, Item 6(1) of Schedule 2 of the EOEA.

[108] 334.

jeopardise the investigation or endanger the well-being or safety of any person at the workplace.[109]

With regard to the procedural fairness of precautionary suspension, it was held in *Long v South African Breweries (Pty) Ltd* ("*Long*")[110] that the employee need not be afforded an opportunity to make representations prior to being suspended.[111] The possible prejudice suffered by the employee for being unable to make pre-suspension representations is mitigated by the fact that they are paid while on precautionary suspension.[112] Precautionary suspension is not a sanction and, as such, the employee will have the opportunity to make representations at the disciplinary hearing prior to the imposition of a sanction. It is possible, however, that pre-suspension procedures are set out in a collective agreement, employment contract or regulations, which will then require that those procedures be followed to ensure the procedural fairness of the suspension.[113] This may include pre-suspension representations.[114] Where precautionary suspension is for an unreasonably long period without a likelihood of a disciplinary hearing actually taking place, or takes place in the absence of a fair reason for suspension, the employee may be justified in requesting that the suspension be lifted.[115] Employees may challenge the fairness of a suspension by referring an unfair labour practice dispute to the relevant bargaining council, such as the ELRC, or to the CCMA, or by exception, launching an urgent application to the Labour Court[116] As is seen below, educators often refer a dispute to the ELRC arguing that their suspension was unfair and that it should be lifted.

Precautionary suspension is usually with full pay, seeing that the purpose of this particular suspension is not punitive.[117] It will differ in the case of punitive suspension,

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[109] Item 6(2) of Schedule 2 of the EOEA.
[110] 2019 40 ILJ 965 (CC).
[111] *Long v South African Breweries (Pty) Ltd* (2019) 40 ILJ 965 (CC) para 24-25.
[112] Para 25.
[113] Garbers et al *Essential Labour Law* 334.
[114] *Long v South African Breweries (Pty) Ltd* 2019 40 ILJ 965 (CC) para 24-25 confirmed the position in regard to a right to pre-suspension representations. Grogan notes that the judgment may have gone too far in regard to pre-suspension representations. The court did not comment on the right to pre-suspension representations where it is included in the employee's contract or in a collective agreement. See Grogan *Workplace Law* 68, footnote 91. See also Van Niekerk et al *Law@work* 218.
[115] Garbers et al *Essential Labour Law* 336.
[116] Grogan *Workplace Law* 68.
[117] See item 6(1) of Schedule 2 of the EOEA.

which is a sanction short of dismissal.[118] However, punitive suspension without pay can only be imposed with consent from the employee or where legislation, the employment contract or disciplinary code allows for it.[119] In this regard, it is noteworthy that punitive suspension is not often used as a disciplinary sanction across many workplaces in South Africa and it is not provided for by the LRA's Dismissal Code, which speaks of counselling and warnings.[120] Rather, the final choice regarding sanction is seen to be between a final warning and dismissal. As is explained further in this thesis, the reason for this approach lies in a combination of sanction being both an endeavour to correct behaviour as well as a risk response in light of the impact of the misconduct on continued employment. If a final warning would not address these concerns, there is no reason to think a final warning and suspension without pay would. The manner in which these principles apply to suspension have been adapted in the education sector is considered below.

5 2 3 Faultless dismissal: Incapacity (poor work performance) under the LRA

5 2 3 1 Substantive fairness of employer conduct based on poor performance as incapacity

Incapacity can either be in the form of poor work performance or as a result of ill health or injury. As the focus of this thesis is on educator performance, it follows that the focus will only be on one type of incapacity, namely poor work performance. Where an employee is dismissed for incapacity due to poor work performance, it is considered an instance of faultless dismissal. This is because the employee's poor performance here arises from a lack of the necessary ability or skill to do the work according to the standard expected by the employer.[121] This must be distinguished from the situation where the employee is able to do the work, but simply fails to do it.[122] The latter is a form of misconduct (sometimes also called poor performance) since the employee's conduct is blameworthy – while the employee does have the ability and skills, the

[118] Punitive suspension on full pay will have no punitive aspect and can therefore not be considered a sanction. Garbers et al *Essential Labour Law* 336; Other examples of disciplinary action short of dismissal include warnings and transfers. See Van Niekerk et al *Law@work* 219.
[119] Garbers et al *Essential Labour Law* 335.
[120] Item 3(2) of the LRA's Dismissal Code. Admittedly, item 3(3) speaks of a "final warning, or other action short of dismissal".
[121] 240; Van Niekerk et al *Law@Work* 318.
[122] Garbers et al *Essential Labour Law* 240; *ZA one (Pty) Ltd t/a Naartjie Clothing v Goldman NO* 2013 34 ILJ 2347 (LC) para 78.

employee either intentionally or negligently fails to fulfil his or her duties at work.[123] Also important is the fact that where prerequisite qualifications for a job exist – such as registration with South African Council for Educators ("SACE") or attainment of other minimum qualifications in the context of basic education – the absence or loss of qualifications, which may lead to termination of the employee, is dealt with as incapacity by our courts.[124]

Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration ("***Gold Fields"***)[125] is an example where the commissioner was tasked with determining the fairness of a dismissal for misconduct (poor work performance), but misconstrued the matter as one of poor work performance due to incapacity.[126] Approaching the matter from an incapacity perspective led to the arbitrator finding that the sanction of dismissal was too harsh and that the employee's conduct should have been met with correction by the employer and that the employee should have been granted the opportunity to improve.[127] The result was that the employee was reinstated without back pay.[128] This finding was finally overturned by the Labour Appeal Court, which confirmed that the employer's decision to dismiss was fair.[129] The employee acted negligently in the exercise of his duties and was charged with and dismissed for misconduct as a result of his blameworthy poor work performance.[130] Jordaan mentions that a failure by the employer (or in the above matter, commissioner) to correctly identify whether poor work performance is due to incapacity or misconduct will be a costly mistake, as it will likely lead to procedural unfairness in case of dismissal.[131] As is evident from the

[123] Van Niekerk et al *Law@Work* 324; Garbers et al *Essential Labour Law* 240; *ZA one (Pty) Ltd t/a Naartjie Clothing v Goldman NO* 2013 34 ILJ 2347 (LC) para 78.
[124] Garbers et al *Essential Labour Law* 270-271, 273. See, eg, *Solidarity v Armaments Corporation of SA (SOC) Ltd* 2019 40 ILJ 535 (LAC) regarding the court's approach to incapacity in the instance where the employee does not have the required qualification.
[125] 2014 35 ILJ 943 (LAC).
[126] *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration* 2014 35 ILJ 943 (LAC) para 22.
[127] *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration* 2014 35 ILJ943 (LAC) para 10.
[128] Para 10.
[129] Paras 29, 34.
[130] Paras 29, 34.
[131] B Jordaan "Poor Work Performance (Incapacity) vs Misconduct" (2009) *Maserumule* <https://www.masconsulting.co.za/wp-content/uploads/2017/08/Poor-work-performance.pdf> (accessed 09-09-2020); *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration* 2014 35 ILJ 943 (LAC) para 23.

further discussion, this same mistake has often been made in the education sector – also by the ELRC.

Should the employer dismiss an employee for incapacity due to poor work performance, the functioning of substantive and procedural fairness is different to what it would be in the case of misconduct.[132] Garbers et al explain it as follows:

> "Dismissal for incapacity is best understood as a process over time through which an employer tries to address the problem and, in the process of doing so, possibly acquires the right (the reason) to dismiss. Put differently, in the case of incapacity, substantive and procedural fairness are interdependent – the process is designed to ensure substantive fairness."[133]

It follows that dismissal for incapacity due to poor work performance requires a different approach and procedure to what the case would be if the employee is disciplined. The employer must identify whether the employee is intentionally or negligently performing poorly or whether it is due to their inability to reach the required standard of performance. One indication of misconduct rather than incapacity would be where an employee has been performing up to standard in the past, but suddenly deviates from that standard.[134]

Dismissal for incapacity due to poor work performance is also regulated by the Dismissal Code and item 9 provides as follows with regard to substantive fairness:

> "Any person determining whether a *dismissal* for poor work performance is unfair should consider
> *(a)* whether or not the *employee* failed to meet a performance standard; and
> *(b)* if the *employee* did not meet a required performance standard whether or not
> (i) the *employee* was aware, or could reasonably be expected to have been aware, of the required performance standard;
> (ii) the *employee* was given a fair opportunity to meet the required performance standard; and
> (iii) *dismissal* was an appropriate sanction for not meeting the required performance standard".[135]

[132] Garbers et al *Essential Labour Law* 241.
[133] 241.
[134] 240; *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration* 2014 35 ILJ943 (LAC).
[135] Item 9 of Schedule 8 of the LRA.

It was mentioned above that in the case of poor work performance, the employee fails to meet the performance standard required by the employer. The employer may set a certain performance standard provided the standard is not irrational or unrealistic. The employer will have to prove that the standard was in fact rational or realistic by comparing the performance of the underperforming employee to the performance of other employees who were able to reach the desired standard of performance.[136] In line with *Eskom v Mokoena*[137] the court will not, however, interfere with the standard of performance determined by the employer unless the expected standard of performance is "grossly unreasonable".[138] That being said, the mere opinion of the employer as to the performance of the employee is not enough, reasonable and objective proof of poor performance is required.[139] It necessarily follows that in order to meet a certain performance standard, the employee must be aware of what is expected of him or her.[140] Similar to the requirements for substantive fairness in the context of misconduct, it is sufficient if the employer can show that the employee could be expected to be aware of the required standard of performance (actual knowledge does not have to be shown). Standards of performance are often agreed to in the employment contract or may be established through policy or practice communicated to employees in the workplace.[141] Whether employees are aware of the expected standard of performance remains a question of fact.[142]

The third requirement in terms of the Dismissal Code is that employees be offered a fair opportunity to rectify their poor performance and meet the expected standard of performance. This is where the substantive and procedural aspects of the dismissal overlap. The procedure followed by the employer before deciding to dismiss the employee will be indicative of the fairness of the dismissal. This requires a consideration of the facts surrounding the poor performance and whether the opportunity to rectify poor performance is realistic in the circumstances. An important

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[136] Garbers et al mention that the employer cannot rely on the performance of one high-performing employee to prove the expected standard of performance but will have to show that other employees in the same position as the underperforming employee, were able to meet the desired standard of performance. Garbers et al *Essential Labour Law* 242-244.
[137] 1997 8 BLLR 965 (LAC).
[138] Garbers et al *Essential Labour Law* 242-243. See *Eskom v Mokoena* 1997 8 BLLR 965 (LAC) 976 and 979; See also *Empangeni Transport (Pty) Ltd v Zulu* 1992 13 ILJ 352 (LAC).
[139] Garbers et al *Essential Labour Law* 243.
[140] 242-243.
[141] 243-244.
[142] 243.

case in this regard is *Palace Engineering (Pty) Ltd v Ngcobo* ("*Palace Engineering*").[143] The Labour Appeal Court found that the employee, in this case, was not given a fair opportunity to rectify his poor performance, as the employer continued to increase the targets expected to be reached by the employee,[144] but failed to provide better support to the employee to enable him to reach his performance targets.[145] The Labour Appeal Court dismissed the employer's appeal, confirmed the court a quo's finding that the dismissal was substantively and procedurally unfair and held that "the employee's failure was attributed to the employer".[146] What transpired in this case shows that circumstances surrounding a dismissal for incapacity are of particular importance and should be considered in determining the substantive and procedural fairness of a dismissal.

The fourth requirement focuses on whether the dismissal was an appropriate sanction. It should be mentioned that use of the word "sanction" in this context is unfortunate and adds to the confusion around poor performance as misconduct and poor performance as incapacity. Even so, this requires of the employer to consider alternatives before deciding to dismiss an employee and that dismissal should be reserved as a last resort.[147] It is possible that with adequate guidance from the employer and an opportunity to rectify his or her performance, an employee will be able to meet the required standard.[148] Dismissal will then no longer be necessary as the employee's incapacity will have been addressed. Where the employer considers alternatives, such as providing the employee with a different role or transferring the employee to a different department, and with the support and guidance of the employer, the employee is still unable to meet the performance standard, dismissal may be appropriate.[149] The facts of each matter will be considered, such as the size of the employer's enterprise or the possibility of transferring the employee to a different role.[150] In this regard, it should also be noted that where, in case of poor performance,

[143] 2014 35 ILJ 1971 (LAC).
[144] *Palace Engineering (Pty) Ltd v Ngcobo* (2014) 35 ILJ 1971 (LAC) paras 17, 21 and 25.
[145] Paras 19 and 21.
[146] Paras 25, 28-29.
[147] Garbers et al *Essential Labour Law* 245.
[148] 245.
[149] 245.
[150] 246.

an employee is in fact or in effect demoted as an alternative to dismissal, the employee may challenge the fairness of such a demotion as an unfair labour practice.[151]

It should also be noted that the Dismissal Code provides for appointment of employees on probation[152] of reasonable duration[153] and also provides that the obligation on employers to assist employees on probation is not as strict as in case of permanent employees.[154] Furthermore, the employer may decide to dismiss for reasons relating to poor performance that are less compelling than in case of permanent employees.[155] Where employers take decisions affecting employees on probation short of dismissal (such as extension of probation), the fairness of these decisions may be challenged as an unfair labour practice.[156] The issue of probation is of particular importance, especially when one juxtaposes the South African approach with the requirements for and experience of the induction of newly appointed educators in England. This is discussed in chapter 7.

5 2 3 2 Procedural fairness of employer conduct based on poor performance as incapacity

With regard to the procedural fairness of a dismissal for poor work performance (incapacity), item 8(2)-(4) of the Dismissal Code provides:

> "(2) After probation, an employee should not be dismissed for unsatisfactory performance, unless the employer has —
> *(a)* given the employee appropriate evaluation, instruction, training, guidance or counselling; and
> *(b)* after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily.
> (3) 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.
> (4) In the process, the employee should have the right to be heard and to be assisted by a trade union representative or a fellow employee".[157]

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[151] See the discussion by Garbers et al regarding demotion as an unfair labour practice. Garbers et al *Essential Labour Law* 326, 328.
[152] Item 8 of the Dismissal Code.
[153] Item 8(1)(d).
[154] Item 8(1)(e) says the employer "should" provide assistance. In respect of permanent employees, item 8(2) says an employee may not be dismissed "unless" the assistance has been provided.
[155] Item 8(1)(j).
[156] In terms of s 186(2)(a) LRA.
[157] Item 8(2)-(4) of the Dismissal Code.

As soon as the employer notes the unsatisfactory performance of an employee, an investigation should be launched.[158] This need not be a formal investigation and may include meetings with the employee during which the employer discusses the employee's performance and areas of concern. This includes informing the employee of the expected standard and explaining how that standard is not being met. These meetings provide the opportunity to identify to what extent the employee's performance is impacted by external factors and to what extent by his or her own incompetence. Ultimately, it is expected that the employer appraises the employee's performance, informs the employee in what respects performance is lacking, the consequences thereof and provides a reasonable opportunity for improvement.[159] The employer should support the employee to improve his or her performance,[160] which usually entails the development and monitoring of a "performance plan". Through this plan, the employer, in consultation with the employee, makes use of the "managerial tools" mentioned in the Dismissal Code – that is, guidance, counselling, instruction, evaluation and training – to address the areas of and reasons for underperformance and to improve the employee's performance.[161] A reasonable time period in which the employee must improve his or her performance will depend on the circumstances at hand.[162] The final step in the procedure may include, although it is not required by the Dismissal Code, that the employer convenes a formal meeting with the employee after the time period for improvement has lapsed to consider continued employment.[163] During this entire process, the employee may be assisted by a fellow employee or trade union representative and may prepare and give a response. Before the employer imposes dismissal, the employee should be given an opportunity to make representations.[164]

The discussion about the procedural fairness of dismissals for poor work performance shows that substantive fairness (the reason for dismissal) is intertwined with the procedure followed prior to dismissal. In practice, there might not be a clear distinction which aspects are the substantive and procedural elements of dismissal,

[158] Garbers et al *Essential Labour Law* 246-247.
[159] 247; Grogan *Dismissal* 458-459.
[160] 247-248; Grogan *Dismissal* (2017) 459. See also *Gostelow v Datakor Holdings (Pty) Ltd t/a Corporate Copilith* (1993) 14 ILJ 171 (IC).
[161] See Item 8(2)-(4) of the Dismissal Code.
[162] Garbers et al *Essential Labour Law* 249; Grogan *Dismissal* 461.
[163] Garbers et al *Essential Labour Law* 250.
[164] Grogan *Dismissal* 462.

but the above guidelines will assist employers to ensure that any dismissal remains fair.

5 3 The adaptation of rules relating to misconduct and poor performance in the basic education sector

5 3 1 Background

The general labour law principles relating to misconduct and incapacity discussed above have been adapted in different ways in the education sector. The primary vehicle for this adaptation is the Employment of Educators Act 76 of 1998 ("EOEA").

As a point of departure, it is important to remind ourselves – as discussed in chapter 4 – that the South African Schools Act 84 of 1996 ("SASA") makes provision for a decentralised model for basic education. On a national level, the Department of Basic Education ("DBE") is headed by the Minister of Education who is responsible for education policy.[165] There are nine provincial departments of education ("PDEs") responsible for implementing national policies as determined by the DBE. In terms of the Policy on the Organisation, Roles and Responsibilities of Education Districts determined in terms of the National Education Policy Act 27 of 1996 ("NEPA"),[166] each province is further divided into districts and circuit offices. Using the Eastern Cape as an example and as explained by Bantwini and Moorosi, there are three education district clusters with a Chief Director responsible for each cluster and each cluster consisting of a number of districts (of which there are 23 in the Eastern Cape).[167] These 23 education districts are managed by the District Director acting with delegated authority from the HOD at the relevant PDE.[168] The districts are further divided into circuits, each with a circuit manager.[169] The circuit manager deals with schools directly and is therefore the closest link between the school and the provincial government.[170] In terms of this policy, districts play a crucial role in ensuring the delivery of quality

[165] See BD Bantwini & P Moorosi "The Circuit Managers as the weakest link in the school district leadership chain! Perspectives from a province in South Africa" (2018) 38 *South African Journal of Education* 1 1-2.
[166] GN 300 in *GG* 36324 of 03-04-2013.
[167] Bantwini & Moorosi (2018) *South African Journal of Education* 1-2.
[168] 1-2.
[169] 2.
[170] 2.

basic education.[171] This is because circuit managers represent the District Director and exercise authority not only over their own circuit office, but over principals and staff at schools.[172]

In this sea of role players, Schedules 1 and 2 of the EOEA, which deal with incapacity and misconduct of departmental educators, merely refer to "the employer" (despite all the role players mentioned above). As a point of departure, it is important to understand who these schedules actually refer to in specific circumstances. Only educators employed by the PDE (departmental educators) are subject to the EOEA.[173] The EOEA provides in section 3(1)(b) that the HOD is the employer of educators in the service of the PDE. The SGB has original power to exercise its duties and fulfil its responsibility to govern the school to the extent provided for in SASA.[174] The HOD, on the other hand, has the power to delegate his or her authority to other officials, including the principal, who must then act in line with this delegated power.[175] The principal is therefore the representative of the HOD at the school in relation to departmental educators. The implication of this delegation is relevant to this research insofar as it relates to dealing with disciplinary matters and incapacity in the workplace.

The principal of a school is responsible for the professional management of the school and this includes addressing disciplinary infractions and incapacity by departmental educators at school level.[176] Where the principal is the person committing the disciplinary infraction, the School Management Team ("SMT") assumes the role of the principal in addressing the misconduct.[177] The role of the SMT is to support and assist the principal in managing the school and to ensure the quality of learning and teaching.[178] The SMT typically comprises of the principal, deputy

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[171] Policy on the organisation, roles and responsibilities of education districts GN 300 in *GG* 36324 of 03-04-2013, 4.

[172] Bantwini & Moorosi (2018) *South African Journal of Education* 2. Unfortunately, circuit managers have been described as the weakest link in education districts – this is discussed in more detail below, when the efficiency of the respective PDE's are analysed.

[173] See chapter 4; See also E Bray & J Beckmann "The employment relationship of the public-school educator: A constitutional and legislative overview" (2001) 19 *Perspectives in Education* 115.

[174] Beckmann & Prinsloo (2009) *South African Journal of Education* 172; I Prinsloo "The Dual Role of the Principal as Employee of the Department of Education and Ex Officio Member of the Governing Body" (2016) 36 *South African Journal of Education* 2.

[175] Prinsloo (2016) *South African Journal of Education* 2.

[176] Section 16A(2)(e) of SASA.

[177] Department of Basic Education "Protocol for the Management and Reporting of Sexual Abuse and Harassment in Schools" (2019) *Department of Basic Education* 15.

[178] Policy on the South African Standard for Principals GN 323 in *GG* 39827 of 18-03-2016; Department of Basic Education "Protocol for the Management and Reporting of Sexual Abuse and Harassment in Schools" (2019) *Department of Basic Education* 15.

principal, heads of department at school level and/or senior educators. In terms of the Policy on the South African Standard for Principals,[179] it is the responsibility of the principal to manage and give guidance on labour-related issues. This includes ensuring that the school and all staff members comply with legislation, policies from the DBE and collective agreements.[180] As such, principals are required to understand and be aware of these measures. This includes the SACE Code of Professional Ethics, collective agreements, legislation and procedures related to the conduct and capacity of educators.[181]

More importantly, item 4 of Schedule 2 of the EOEA specifically mentions that in case of disciplinary action "pertaining to less serious misconduct", the employer (HOD) must delegate the function to "the head of the institution or office where the employer is employed or the immediate superior of the educator where the educator concerned is the head of the institution or office".[182] If the employee is an educator at a public school, the head of the institution, referred to above, is the principal. This means that the principal addresses "less serious" misconduct at school level. However, this requires that it first be determined whether the misconduct is serious or "less serious". The principal is central to the disciplinary process since he or she is the first port of call in case of educator misconduct. Neither the EOEA nor regulations thereto contain or provides guidance as to the type of misconduct considered "less serious". Section 17 perhaps offers some guidance in this regard in that the type of misconduct contained in the provision is considered "serious misconduct" and the principal therefore does not have delegated authority to deal with those types of misconduct. The principal will still have to identify the misconduct as falling under section 17 of the EOEA and refer it to the PDE (circuit manager) for a formal enquiry. Apart from the misconduct in section 17 (which is always considered serious), item 3(3) of Schedule 2 determines that the seriousness of the types misconduct in section 18 must be determined through a consideration of three factors. First, the impact of the misconduct on the school and the work it does.[183] Second, "the nature of the educator's work and responsibilities".[184] Third, the circumstances surrounding the

[179] GN 323 in *GG* 39827 of 18-03-2016.
[180] GN 323 in *GG* 39827 of 18-03-2016.
[181] GN 323 in *GG* 39827 of 18-03-2016.
[182] Schedule 2 item 4(1)(a) of the EOEA.
[183] Schedule 2 Item 3(3)(a).
[184] Schedule 2 Item 3(3)(b).

misconduct.[185] These three factors form the basis for further discussion and suggestions in chapters 6 and 8.

In regard to the status of the misconduct listed in section 18 as serious or "less serious", Rossouw mentions that "the [then] national Department of Education has circulated a document with further guidelines to the Members of the Executive Committee (MECs) of the different provincial departments" containing a list of misconduct that falls under the above delegation.[186] He also states that the abovementioned list was suggested and that the MECs of each province have the power to determine what should be included in the list (of "less serious" misconduct).[187] The current status of the delegation in terms of item 4(2) of Schedule 2 is uncertain and in practice, principals rely on their discretion and the context of the misconduct to determine whether it may be considered "less serious". The effect of this exercise of discretion is that it determines whether the misconduct is dealt with informally at school level (with a final written warning being the most serious sanction) or is referred to the PDE (circuit manager) for a formal disciplinary enquiry (which may lead to any of the sanctions listed in section 18(3)).

In contrast to departmental educators (employees of the PDE), section 3(4) of SASA provides that a public school, represented by its SGB, is the employer of educators appointed by the school in addition to the existing provincial departmental posts.[188] Furthermore, educators appointed by the SGB in addition to existing departmental posts are not subject to the EOEA, but the principles of the LRA as

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[185] Schedule 2 Item 3(3)(c) of the EOEA.

[186] JP Rossouw *Labour Relations in Education: A South African perspective* 2 ed (2010) 171.

[187] 171. The list of misconduct delegated to principals according to Rossouw is repeated here and contain an abbreviated version of the misconduct listed in section 18. The list of misconduct is: s 18(1)(a) (contravenes act); s 18(1)(c) (wrongful possession of property); s18(1)(e) (disregards safety rules); s 18(1)(f) (prejudices the administration); s 18(1)(g) (misuse position in school); s 18(1)(i) (fails to carry out a lawful order); s 18(1)(j) (absence); s 18(1)(l) (poor performance); s 18(1)(o) (sleeps on duty); s 18(1)(q) (improper conduct); s 18(1)(s) (incites unlawful conduct); s 18(1)(t) (disrespectful/abusive behaviour); s 18(1)(u) (intimidation); s 18(1)(w) (operates a money-lending scheme); s 18(1)(y) (refuses to obey security regulations).

[188] See Bray & Beckmann (2001) 19 *Perspectives in Education* 109 112; J Beckmann "Recent legislation regarding the appointment of public-school educators: the end of the decentralisation debate in education?" (2009) 41 *Acta Academica* 128 133; J Beckmann & I Prinsloo "Legislation on school governors' power to appoint educators: friend or foe?" (2009) 29 *South African Journal of Education* 171 178-180; I Oosthuizen & M Smit "Who has the right to appoint teachers" (2006) 24 *Perspectives in Education* 167-170. See also Department of Basic Education "Protocol for the Management and Reporting of Sexual Abuse and Harassment in Schools" (2019) *Department of Basic Education* 2.

discussed above.[189] As such, the further discussion below applies to departmental educators (appointed against the provincial post establishment) only.

5 3 2 Misconduct

As far as the types of misconduct educators may make themselves guilty of are concerned, sections 17 and 18 of the EOEA not only provide a list of these types of misconduct but also distinguish between "serious misconduct" (in section 17) and "misconduct" (in section 18). Section 17 determines that:

> "(1) An educator must be dismissed if he or she is found guilty of—
> *(a)* theft, bribery, fraud or an act of corruption in regard to examinations or promotional reports;
> *(b)* committing an act of sexual assault on a learner, student or other employee;
> *(c)* having a sexual relationship with a learner of the school where he or she is employed;
> *(d)* seriously assaulting, with the intention to cause grievous bodily harm to, a learner, student or other employee;
> *(e)* illegal possession of an intoxicating, illegal or stupefying substance; or
> *(f)* causing a learner or a student to perform any of the acts contemplated in paragraphs (*a*) to (*e*).
> (2) If it is alleged that an educator committed a serious misconduct contemplated in subsection (1), the employer must institute disciplinary proceedings in accordance with the disciplinary code and procedures provided for in Schedule 2."

Section 18, on the other hand, does not contain the peremptory provision that educators must be dismissed if found guilty of the misconduct listed in the provision. The list of types of misconduct in section 18(1) is more comprehensive and reads as follows:

> "(1) Misconduct refers to a breakdown in the employment relationship and an educator commits misconduct if he or she—
> (a) fails to comply with or contravenes this Act or any other statute, regulation or legal obligation relating to education and the employment relationship;
> (b) wilfully or negligently mismanages the finances of the State, a school or an adult learning centre;
> (c) without permission possesses or wrongfully uses the property of the State, a school, an adult learning centre, another employee or a visitor;

[189] See chapter 4. This Labour Court has stated that "[t]he applicant is not employed by the Department, and the Employment of Educators Act (the "Educators Act") is not applicable to her and her employment relationship with the school and the school governing body". See *Solidarity obo Barkhuizen v Laerskool Schweizer-Reneke* 2019 40 ILJ 1320 (LC) para 9.

(d) wilfully, intentionally or negligently damages or causes loss to the property of the State, a school or an adult learning centre;
(e) in the course of duty endangers the lives of himself or herself or others by disregarding set safety rules or regulations;
(f) unjustifiably prejudices the administration, discipline or efficiency of the Department of Basic Education, an office of the State or a school or adult learning centre;
(g) misuses his or her position in the Department of Basic Education or a school or adult learning centre to promote or to prejudice the interests of any person;
(h) accepts any compensation in cash or otherwise from a member of the public or another employee for performing his or her duties without written approval from the employer;
(i) fails to carry out a lawful order or routine instruction without just or reasonable cause;
(j) absents himself or herself from work without a valid reason or permission;[190]
(k) unfairly discriminates against other persons on the basis of race, gender, disability, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth, family responsibility, HIV status, political opinion or other grounds prohibited by the Constitution;
(l) performs poorly or inadequately for reasons other than incapacity;
(m) without the written approval of the employer, performs work for compensation for another person or organisation either during or outside working hours;
(n) without prior permission of the employer accepts or demands in respect of the carrying out of or the failure to carry out the educator's duties, any commission, fee, pecuniary or other reward to which the educator is not entitled by virtue of the educator's office, or fails to report to the employer the offer of any such commission, fee or reward;
(o) without authorisation, sleeps on duty;
(p) while on duty, is under the influence of an intoxicating, illegal, unauthorised or stupefying substance, including alcohol;
(q) while on duty, conducts himself or herself in an improper, disgraceful or unacceptable manner;
(r) assaults, or attempts to or threatens to assault, another employee or another person;

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[190] Apart from the provision regarding absence in s 18(1)(j), s 14 of the EOEA also regulates "deemed discharge" and provides that:

"(1) An educator appointed in a permanent capacity who—
(a) is absent from work for a period exceeding 14 consecutive days without permission of the employer;
(b) while the educator is absent from work without permission of the employer, assumes employment in another position;
(c) while suspended from duty, resigns or without permission of the employer assumes employment in another position; or
(d) while disciplinary steps taken against the educator have not yet been disposed of, resigns or without permission of the employer assumes employment in another position, shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct".

This provision is similar to s 17(3)(a) of the PSA which is applicable to non-educator staff. The issue of "abscondment" or "desertion" by public servants, including educators, is discussed in chapter 6.

(s) incites other personnel to unprocedural and unlawful conduct;
(t) displays disrespect towards others in the work-place or demonstrates abusive or insolent behaviour;
(u) intimidates or victimises fellow employees, learners or students;
(v) prevents other employees from exercising their rights to freely associate with trade unions in terms of any labour legislation;
(w) operates any money-lending scheme for employees for his or her own benefit during working hours or from the premises of the educational institution or office where he or she is employed;
(x) carries or keeps firearms or other dangerous weapons on State premises, without the written authorisation of the employer;
(y) refuses to obey security regulations;
(z) gives false statements or evidence in the execution of his or her duties;
(aa) falsifies records or any other documentation;
(bb) participates in unprocedural, unprotected or unlawful industrial action;
(cc) fails or refuses to—
(i) follow a formal programme of counselling as contemplated in item 2 (4) of Schedule 1;
(ii) subject himself or herself to a medical examination as contemplated in item 3 (3) of Schedule 1 and in accordance with section 7 of the Employment Equity Act, 1998 (Act No. 55 of 1998); or
(iii) attend rehabilitation or follow a formal rehabilitation programme as contemplated in item 3 (8) of Schedule 1;
(dd) commits a common law or statutory offence;
(ee) commits an act of dishonesty; or
(ff) victimises an employee for, amongst others, his or her association with a trade union."

Section 18(3)-(5) contains sanctions that may be imposed should an educator be guilty of the misconduct listed in section 18(1) above. These three subsections read as follows:

"(3) If, after having followed the procedures contemplated in subsection (2), a finding is made that the educator committed misconduct as contemplated in subsection (1), the employer may, in accordance with the disciplinary code and procedures contained in Schedule 2, impose a sanction of—
(a) counselling;
(b) a verbal warning;
(c) a written warning;
(d) a final written warning;
(e) a fine not exceeding one month's salary;
(f) suspension without pay for a period not exceeding three months;
(g) demotion;
(h) a combination of the sanctions referred to in paragraphs (*a*) to (*f*); or
(i) dismissal, if the nature or extent of the misconduct warrants dismissal.

(4) Any sanction contemplated in subsection (3) (*e*), (*f*) or (*g*) may be suspended for a specified period on conditions determined by the employer.
(5) An educator may be dismissed if he or she is found guilty of—
    (a) dishonesty, as contemplated in subsection (1) (*ee*);
    (b) victimising an employee for, amongst others, his or her association with a trade union, as contemplated in subsection (1) (*ff*);
    (c) unfair discrimination, as contemplated in subsection (1) (*k*);
    (d) rape, as contemplated in subsection (1) (*dd*);
    (e) murder, as contemplated in subsection (1) (*dd*);
    (f) contravening section 10 of the South African Schools Act, 1996 (Act No. 84 of 1996), as contemplated in subsection (1) (*dd*)".

The experience with these provisions is discussed and critically analysed in chapter 6. At this stage, it is important to note the types of misconduct educators may be charged with in terms of sections 17 and 18 (according to Schedule 2 of the EOEA these are the only types of misconduct that may warrant discipline and may only be added to in consultation with "the trade unions"[191]). It is necessary to repeat that the LRA's Dismissal Code is included in the EOEA's disciplinary code and procedure in its Schedule 2.[192] In other words, the determination of the substantive and procedural fairness of an educator's dismissal or discipline short of dismissal for misconduct requires consideration of section 17 and/or section 18 of the EOEA, the disciplinary code and procedure in Schedule 2 of the EOEA, as well as the LRA's Dismissal Code. It is also interesting to note that section 18 shows awareness of the distinction between poor performance as incapacity and poor performance as misconduct (in section 18(1)(l)), but also makes it clear that the incapacity process (to be discussed below) may be backed up by discipline (through section 18(1)(cc)(i)).

Fundamental to the disciplinary process, as determined in items 1 and 2 of Schedule 2 of EOEA, are, amongst others, the principles that it should support constructive labour relations in the education sector, promote acceptable conduct, be a corrective and not punitive measure and be applied in a prompt, fair, consistent and just manner.[193] When delegating to the principal the function to deal with acts of misconduct at school level, the employer (HOD) "must determine in writing the specific acts of misconduct to be dealt with under the delegation".[194] This is a rather unfortunate provision, as the remainder of the item does not refer to types of

[191] Item 3(2)(b) Schedule 2 EOEA.
[192] Item 3 Schedule 2.
[193] See Item 1 and 2.
[194] Item 4(2) of Schedule 2.

misconduct (to be delegated), but rather to appropriate sanctions short of dismissal that may be imposed under the delegation. The delegation to the principal in terms of item 4(1) of Schedule 2 authorises the principal to deal with acts of misconduct depending on which sanction is warranted in the circumstances. Items 4(2) to (5) of Schedule 2 determine that:

"(2) In cases where the seriousness of the misconduct warrants *counselling*, the employer of the educator must—

(a) bring the misconduct to the educator's attention;

(b) determine the nature of the misconduct and give the educator an opportunity to respond to the allegations;

(c) after consultation with the educator decide on a method to remedy the conduct; and

(d) take steps to implement the decision as contemplated in subitems (3), (4) or (5).

(3) (a) In cases where the seriousness of the misconduct warrants it, the employer of the educator may give the educator a verbal warning.

(b) The employer must inform the educator that further misconduct may result in more serious disciplinary action.

(c) The employer must record the warning contemplated in paragraph (b).

(4) In cases where the seriousness of the misconduct warrants it, the employer may give the educator a *written warning*. The following provisions apply to written warnings:

(a) The written warning must be in accordance with Form A attached to this Schedule.

(b) The employer must give a copy of the written warning to the educator, who must acknowledge receipt on the copy.

(c) If the educator refuses to sign the copy for acknowledgement of receipt, the employer must hand the warning to the educator in the presence of another educator, who shall sign in confirmation that the written warning was conveyed to the educator.

(d) The written warning must be filed in the educator's personal file.

(e) A written warning remains valid for six months.

(f) If during the six-month period the educator is subject to disciplinary action, the written warning and the written objection or additional information contemplated in paragraph (*g*), may be taken into account in deciding on an appropriate sanction;

(g) (i) If the educator disagrees with the written warning or wishes to add any information, he or she may lodge such additional information or written objection against the sanction.

(ii) The additional information and the objection referred to in paragraph (*a*) must be filed with the written warning.

(5) In cases where the seriousness or extent of the misconduct warrants it, the employer must give the educator a *final written warning*. The following provisions apply to a final written warning:
  (a) A final written warning must be in accordance with Form B attached to this Schedule.
  (b) The employer must give a copy of the final written warning to the educator, who must sign a copy to acknowledge receipt.
  (c) If the educator refuses to sign a copy to acknowledge the receipt of the final written warning, the employer must hand the warning to the educator in the presence of another educator, who must sign in confirmation that the written warning was conveyed to the educator.
  (d) The final written warning must be filed in the educator's personal file.
  (e) A final written warning remains valid for six months.
  (f) If during the six-month period the educator is subject to disciplinary action, the final written warning and the written objection or additional information contemplated in paragraph (*g*), may be taken into account in deciding on an appropriate sanction;
  (g) (i) If the educator disagrees with the final written warning or wishes to add any information, he or she may lodge such additional information or written objection against the sanction.
    (ii) The additional information and the objection referred to in subparagraph (i) must be filed with the final written warning".

Along with these provisions, Schedule 2 also envisions that a formal enquiry will not always be necessary and allows for an informal process which may result in a sanction up to and including a final written warning (excluding a fine, suspension or dismissal as envisaged by section 18(3) of the EOEA). Item 4(6) of Schedule 2 of the EOEA provides as follows:

"(6) (a) If the seriousness or extent of the misconduct does not warrant a formal enquiry the procedures in paragraphs (b), (c) and (d) must be followed.
  (b) The employer must convene a meeting where—
    (i) the educator and, if he or she so chooses, the educator's trade union representative or other employee who is based at the institution, are present;
    (ii) reasons are given to the educator as to why it is necessary to initiate this procedure; and
    (iii) the educator or the educator's representative is heard on the misconduct and reasons therefor.
  (c) After hearing the educator or his or her representative, the employer must—
    (i) counsel the educator;
    (ii) issue a verbal warning;
    (iii) issue a written warning;
    (iv) issue a final written warning;
    (v) impose a combination of any of the above; or

(vi) take no further action".

There is no appeal process available where any of the above sanctions are imposed on the educator.[195] The educator may, however, lodge an objection in writing against the sanction imposed,[196] and may ultimately challenge it as an unfair labour practice (as discussed above).

It is the principal's responsibility to report misconduct to the circuit manager,[197] should the misconduct fall outside the parameters of what the principal may deal with in terms of items 4(2) to (6) of Schedule 2 of the EOEA. In such a case the misconduct is not dealt with at school level but involves a formal disciplinary enquiry as provided for in item 5 of Schedule 2. The disciplinary process starts with an investigation and possible suspension. In this regard, it should be mentioned that the role of precautionary suspensions is of particular importance in the education sector. The reason for this is because misconduct by educators may involve learners (children) and they should be protected during investigations into the disciplinary infraction. As such, precautionary suspension serves an important purpose in the education sector. Item 6(2) of Schedule 2 of the EOEA provides that the employer may suspend the educator on full pay for a maximum of three months.[198] Precautionary suspension is on full pay because suspension without pay will constitute a breach of the employer's duties in terms of the employment contract.[199] Item 6(2) of Schedule 2 of the EOEA goes further and states that the employer may suspend the educator or "transfer the educator to another post if the employer believes that the presence of the educator may jeopardise any investigation into the alleged misconduct, or endanger the well-being or safety of any person at the workplace". Such a possible transfer is only reserved for cases of misconduct listed in section 18(1) and not section 17. After suspending the educator, the employer must do everything possible to conclude the

[195] Item 4(6)(d)(i) of Schedule 2 of the EOEA. In terms of s 25(2) of the EOEA the appeal process discussed later in this chapter is only available where discipline results in a fine (which may not exceed one months' salary), suspension without pay (which may not exceed three months), demotion, dismissal or where the discipline results in a combination of sanctions (including the lesser sanctions against which no appeal ordinarily lies).

[196] Item 4(6)(d)(ii) of Schedule 2 of the EOEA. This objection will also be filed with a record of the sanction in the educator's personal file.

[197] GN 323 in *GG* 39827 of 18-03-2016.

[198] Item 6(2) of Schedule 2 of the EOEA.

[199] *Hechter v Department of Education Eastern Cape* PSES716- 14/15 EC para 31 with reference to *Sappi Forests (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* 2009 30 ILJ 1140 (LC) para 8.

disciplinary hearing within one month of the suspension or transfer.[200] Should the disciplinary hearing be postponed, the presiding officer should ensure that such postponement does not exceed 90 days from the date of suspension.[201] This is in line with the requirement that discipline be applied promptly.[202] Should the proceedings not be concluded within 90 days, the employer must enquire from the presiding officer about the reason for the delay.[203] The employer may at this time, after giving the educator opportunity to make representations, direct that further suspension (that is, after the initial 90 days) be without pay.[204] As the discussion in chapter 6 shows, long suspensions and delays in finalising discipline remain big challenges in the public basic education sector.

After investigation, written notice (of at least five days) of the hearing has to be given to the educator containing detail of the charge, of the hearing and of the rights of the educator, which includes the right to be represented by a fellow educator or trade union representative.[205] Where the educator wishes to have legal representation, such request is subject to approval by the presiding officer of the disciplinary hearing.[206] The hearing has to commence within 10 days of the written notice,[207] and where the educator was suspended, will have to be concluded within three months of the suspension.[208]

Item 7 of Schedule 2 of the EOEA contains the detail of the actual hearing. While many of its provisions are similar to those found in the disciplinary codes of most employers,[209] interesting provisions include the power of the principal to summon witnesses (items 7(10), (12) and (13)), the protection of witnesses under the age of 18 (item7(10A)), and the obligation on the employer to assist the educator to ensure that the educator's preferred witnesses attend the hearing (item 7(11)). In terms of item 7(9)(a) of Schedule 2, the principal (as representative of the employer) must lead evidence on the conduct that led to the disciplinary hearing. In other words, the

[200] Item 6(3)(a) of Schedule 2 of the EOEA.
[201] Item 6(3)(b) of Schedule 2.
[202] See Item 2(b) of Schedule 2.
[203] Item 6(2)(c) of Schedule 2.
[204] Item 6(2)(d) of Schedule 2.
[205] Item 5(1) and (2) of Schedule 2.
[206] Item 5(1)(e) of Schedule 2.
[207] Item 7 of Schedule 2.
[208] In terms of item 6 of Schedule 2.
[209] Such as provision for an interpreter (item 7(4)), recording of proceedings (items 7(7) and 7(7A)), the right of the educator to question witnesses (item7(9)(b)) and the right of the educator to present evidence (item 7(14)(a).

principal acts as the initiator in the proceedings. After hearing the evidence, the presiding officer must decide on the guilt or otherwise of the employee (item 7(16)) and, if guilty and after hearing evidence in mitigation and aggravation of sentence (item 7(17)) impose a sanction as listed in section 18(3) of the EOEA.[210] In determining the sanction, the presiding officer must take into account the nature of the case, the seriousness of the matter, the educator's previous record and any mitigating or aggravating circumstances.[211] Suspension without pay and demotion may only be imposed as an alternative to dismissal and with consent of the educator.[212] The final outcome has to be conveyed to the educator within five days of the conclusion of the hearing (item 7(18)). Section 26 of the EOEA determines that where disciplinary action is taken against educators, SACE must be informed of the outcome of the enquiry, which includes providing the council with the record of the proceedings (this is also required by the SACE Act, also in section 26 of that Act). SACE must therefore be informed of each and every disciplinary enquiry involving an educator except where the disciplinary action involves the caution or reprimanding of the educator.[213]

Should either the educator or the employer be dissatisfied with the finding or sanction imposed by the presiding officer, a limited opportunity to appeal is provided for in section 25 read with item 9 of Schedule 2 of the EOEA.[214] The appeal must be submitted to the Member of the Executive Council ("MEC") or Minister, as the case may be.[215] Should the educator or employer wish to appeal, it must be done within five working days of receiving the outcome of the disciplinary hearing.[216] The MEC or Minister may uphold the appeal, amend the sanction in cases of section 18 misconduct or dismiss the appeal.[217] For instance, in the arbitration between *NAPTOSA obo Booysen v Department of Education Western Cape* ("*Booysen*"),[218] the presiding

[210] Item 8(1) of Schedule 2 of the EOEA.
[211] Item 8(1)(a)-(d).
[212] Item 8(2) of Schedule. In case of demotion, item 8(3) provides that the educator may apply for promotion a year after the sanction was imposed.
[213] Section 26 of the EOEA.
[214] In terms of s 25(2) of the EOEA the appeal process is only available where discipline results in a fine (which may not exceed one months' salary), suspension without pay (which may not exceed three months), demotion, dismissal or where the discipline results in a combination of sanctions (including the lesser sanctions against which no appeal ordinarily lies). See also Item 4(6)(d)(i) of Schedule 2 of the EOEA.
[215] Item 9(1)-(2) of Schedule 2.
[216] Item 9(2) of Schedule 2; See, eg, *NAPTOSA obo Booysen v Department of Education Western Cape* PSES1008-18/19WC paras 5-6.
[217] Item 9(5) of Schedule 2 of the EOEA.
[218] PSES1008-18/19WC.

officer imposed a sanction of a final warning and suspension without pay for three months, suspended for 12 months.[219] This sanction was imposed after finding the educator guilty of dishonesty in terms of section 18(1)(ee) of the EOEA for providing learners with the answers to a test.[220] Dissatisfied with the outcome, the PDE (employer) appealed to the Western Cape Minister of Education who upheld the appeal and amended the sanction to dismissal.[221]

The educator may also refer a dispute to the ELRC for conciliation. The ELRC must appoint a panellist and 30 days are provided to resolve the dispute through conciliation.[222] Conciliation is an informal process (an attempt to reach an agreed settlement). If conciliation is unsuccessful, the dispute may be referred for arbitration. A panellist of the ELRC will be appointed to conduct the arbitration hearing.[223] An arbitration hearing is a hearing *de novo* on the merits.[224] This means that the arbitrator bases his or her finding on the evidence presented at the arbitration.[225] The arbitrator is not bound by the finding of the presiding officer at the disciplinary hearing or the outcome of the appeal, but makes a finding based on the legal merits of the case in light of the evidence presented at arbitration.[226] In case of arbitrations concerning the fairness of discipline of educators, the general principles of the LRA will apply (as discussed above), but will have to be seen and applied in light of the provisions of sections 17 and 18, as well as Schedule 2 of the EOEA (as also discussed above).

In this regard – and as far as substantive fairness of a dismissal for misconduct is concerned - perhaps the biggest influence of the EOEA relates to the apparently closed list of types of misconduct it contains and to sanction, specifically dismissal, for misconduct. As we have seen, section 17 of the EOEA contains a list of types of

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[219] *NAPTOSA obo Booysen v Department of Education Western Cape* PSES1008-18/19WC para 4.
[220] Para 3. This arbitration is discussed in more detail in chapter 6. Had the employer correctly charged the employee in terms of s 17(1)(a), dismissal would have been mandatory meaning it would not have been necessary to appeal the outcome of the disciplinary hearing.
[221] *NAPTOSA obo Booysen v Department of Education Western Cape* PSES1008-18/19WC paras 4-6.
[222] See ELRC "Dispute Management Services" (2021) *ELRC* <https://www.elrc.org.za/dispute-management-services> (accessed 01-06-2020); Clause 14 of Part C of the ELRC Constitution: Dispute Resolution Services.
[223] ELRC "Dispute Management Services" (2021) *ELRC*; Clause 17 of Part C of the ELRC Constitution: Dispute Resolution Services.
[224] *County Fair Foods* (*Pty) Ltd v CCMA* (1999) 20 ILJ 1701 (LAC) para 11; *Sidumo v Rustenburg Platinum Mines Ltd* (2007) JOL 20811 (CC) para 18. Arbitration awards where this was mentioned include, for example, *Vika v Buffalo City TVET College* ELRC74-16/17EC para 55 and *Raophala v Department of Education Limpopo* PSES789-15/16LP para 18.
[225] *County Fair Foods* (*Pty) Ltd v CCMA* (1999) 20 ILJ 1701 (LAC) para 11; *Sidumo v Rustenburg Platinum Mines Ltd* (2007) JOL 20811 (CC) para 18.
[226] *Vika v Buffalo City TVET College* ELRC74-16/17EC para 55.

misconduct where the educator "must" be dismissed, while section 18 tabulates other types of misconduct (which section 18(1) in general, and curiously, describes and categorises as referring "to a breakdown in the trust relationship"). While section 18(3) includes dismissal as a possible sanction for any misconduct contemplated in section 18(1) (provided, of course, the circumstances warrant dismissal), section 18(5) then strangely provides a much more limited list of types of misconduct (taken from the list in section 18(1)) for which an educator may be dismissed. How sections 17, 18(1), 18(3) and (5) of the EOEA interact is discussed in more detail in chapter 6.

What is generally accepted, however, is that any employer – also in the context of public basic education – will be required to present evidence of a breakdown in the employment relationship as a result of the employee's misconduct to justify dismissal (that continued employment is "intolerable").[227] For example, it was held in *SADTU obo Macanda v HOD, Western Cape Department of Education* ("*Macanda*")[228] that:

> "I adopt the approach of the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 ILJ 2405 (CC). I also take into account the CCMA Guidelines on Misconduct Arbitrations, and section 28(2) of the Constitution. While discipline falls within the discretion of the employer, the employer must impose an appropriate and fair sanction. Arbitrators must not merely rubber stamp sanctions imposed by employers. It is the duty of arbitrators to decide for themselves whether penalties imposed by employers are fair, without deference to the employer".[229]

However, in *Shilubane v Department of Education, Limpopo* ("*Shilubane*")[230] the arbitrator referred to *Department of Home Affairs v Ndlovu* ("*Ndlovu*"),[231] where the Labour Appeal Court held that where a breakdown in the employment relationship is clear from the nature of the offence and surrounding circumstances, it will not be necessary for the employer to present evidence to that effect.[232]

This is especially so where the employee holds a position of trust and acts *in loco parentis*, as is the case with educators, and in a profession, as is the case with basic

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[227] *Shilubane v Department of Education, Limpopo* PSES692-16/17LP para 28.
[228] PSES506-16/17WC.
[229] *SADTU obo Macanda v HOD Western Cape Education Department* PSES506-16/17WC para 88.
[230] PSES692-16/17LP.
[231] 2014 ILJ 3340 (LAC).
[232] *Shilubane v Department of Education, Limpopo* PSES692-16/17LP para 28; *Department of Home Affairs v Ndlovu* 2014 ILJ 3340 (LAC) para 16; See also *Edcon Ltd v Pillemer NO* (2008) 29 ILJ 614 (LAC) as cited in *Ndlovu*.

education, where society depends so much on educators for its successful delivery. Trust and risk are closely connected in any workplace and are in some instances heightened in the education context. As mentioned in this regard in *De Beers Consolidated Mines Ltd v CCMA* ("*De Beers*"):[233]

> "Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise".[234]

As far as the requirements of procedural fairness are concerned – and apart from the specific provisions of Schedule 2 of the EOEA discussed earlier – perhaps the most striking feature is that the disciplinary code for educators employed by PDEs (government) is contained in legislation. This is a marked departure from the usual situation where these types of codes are imposed unilaterally by employers (with or without consultation with the workforce, as they may do), or contained in collective agreements. By exception, disciplinary codes are included in contracts of employment. In this regard, it is established law that deviation from a disciplinary code per se is not necessarily unfair (for purposes of challenging the fairness of discipline).[235] The situation may well be different where, as in case of educators, the code is contained in legislation without stating that it contains guidelines that may be deviated from. The implication of this is that, in the basic education context, any disciplinary procedure will have to follow the letter of the law (even though, as discussed earlier, there is provision for the exercise of discretion by the different role players during the disciplinary process). This, in itself, already runs contrary to the approach to the disciplinary process espoused by the labour courts in the context of the Dismissal Code, namely

[233] *De Beers Consolidated Mines Ltd v CCMA* (2000) 21 ILJ 1051 (LAC).
[234] Para 22; *NAPTOSA obo Soga v HOD, Western Cape Department of Education* PSES184-18/19WC para 95.
[235] Garbers et al Essential Labour Law 229-230. The situation will change where the code is contained in a contract and the employee institutes a contractual claim based on breach of contract against the employer. In such a case the employer will be held to the wording of the contract.

that it should be relatively informal.[236] The impact of this apparently legalistic approach to the disciplinary process is considered in chapter 6.

5 3 3 Poor performance (incapacity)

As far as the potential poor work performance of educators due to incapacity is concerned, section 16 of the EOEA provides (under the heading "Incapable educators") that:

> "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".[237]

Immediately it has to be said that the discussion in chapter 6 shows that implementation of the incapacity procedures for poor work performance in Schedule 1 of the EOEA and resultant dismissal for incapacity has not yet come before the ELRC for arbitration. This does not necessarily mean that the code is not utilised in practice, but it does raise a number of questions to be considered in chapter 6. At the same time, it has to be borne in mind that any evaluation of poor performance starts with clarity about the standards – inclusive of requirements around professional registration and minimum qualifications – required of educators. After consideration of the incapacity code below, detailed consideration will be given to the requirement of professional registration, minimum qualifications expected of educators as well as the core competences expected of educators.

As is the case with the disciplinary code applicable to educators (Schedule 2 of the EOEA), the incapacity code (Schedule 1 of the EOEA) incorporates, as a point of departure, the LRA's Dismissal Code (discussed above). In this regard, it should be mentioned that the incapacity code in Schedule 1 of the EOEA is quite brief and, at face value, does not align well with the Dismissal Code (which, for example, expressly

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[236] See, eg, *Avril Elizabeth Home for the Mentally Handicapped v CCMA* (2006) 27 *ILJ* 1644 (LC); *The Trustees for the time being of the National Bioinformatics Network Trust v Jacobsen* (2009) 30 *ILJ* 2513 (LC); *Schwartz v Sasol Polymers* (2017) 38 *ILJ* 915 (LAC) and *National Union of Metalworkers of SA v Transnet National Ports Authority* (2019) 40 *ILJ* 516 (LAC).

[237] Section 16 of the EOEA.

requires guidance, counselling, evaluation, instruction and training as managerial tools to address poor performance).

Item 1(2) of Schedule 1 requires incapacity to be assessed in light of the extent of the impact of the incapacity on the school in question, the extent to which the educator fails to meet standards, the extent to which the educator lacks the skills to perform according to the requirements of the job in question, the nature of the educator's work and the circumstances of the educator.[238] What these "standards" are, is discussed in detail below.

The incapacity process starts – according to item 2(1) of Schedule 1 of the EOEA - when the employer is of the view that an educator "is not performing in accordance with the job that the educator has been employed to do" and who must then give written reasons to the educator why the poor performance procedure will be initiated. This is followed by a meeting with the educator and a trade union representative or fellow employee, if the educator so chooses.[239] At this meeting, the employer must explain the requirements, skills, grade and nature of the job, evaluate the specific educator's performance and indicate what areas of their performance are considered poor performance.[240] The educator (or the representative/fellow employee) must be given the opportunity to be heard and may give reasons for the educator's poor performance.[241] If deemed necessary, this is followed by the initiation of a formal programme of counselling and training in order for the educator to reach the required standard of performance.[242] The parties must determine a realistic time period it would take for the educator to improve and identify appropriate training to assist the educator in reaching the required standard of performance.[243] Should the programme be unsuccessful, the employer may provide the educator with further training and counselling or transfer, demote or terminate the employment of the educator.[244] One marked difference with the LRA's Dismissal Code is that a formal "incapacity enquiry"[245] must be held before any decision about a transfer, demotion or termination of the educator's services for poor performance is taken. Apart from itself providing for

[238] Item 1(2) of Schedule 2 of the EOEA.
[239] Item 2(1)(b) of Schedule 1.
[240] Item 2(3)(a)-(c).
[241] Item 2(3)(d).
[242] Item 4.
[243] Item 4.
[244] Item 5(b).
[245] See Garbers et al *Essential Labour Law* 250 for a discussion regarding the general labour law rules pertaining to an incapacity enquiry.

certain rights relating to evidence, representation and provision of an interpreter during this hearing (item 2(6)(a)), many of the formalistic provisions of Schedule 2 relating to disciplinary enquiries (discussed above) are incorporated into the incapacity enquiry through item 2(6)(b).[246] As such, the same reservations that were expressed about the formalistic nature of disciplinary enquiries in the basic education sector may also be expressed in the context of incapacity.

It should also be mentioned that both section 18(1)(cc) of the EOEA and item 2(5)(a) of Schedule 1 of the EOEA make it clear that an educator who fails or refuses to follow a programme of counselling to address poor performance makes him- or herself guilty of misconduct. These procedures aside, perhaps the greatest challenge around poor performance as incapacity is, in the first instance, to measure performance against the standards expected of educators. As mentioned, this requires sequential consideration of the requirement that educators are and remain registered as professional educators, that they meet the minimum qualifications for the job and that they perform according to the core competencies required for proper performance as educators.

5 3 3 1 Professional registration

It was mentioned in chapter 4 that SACE is the professional body for educators which functions in terms of the SACE Act. As mentioned, there are registration requirements for all educators – not only educators appointed at public schools, but also educators, lecturers and management staff of colleges appointed in terms of the EOEA, SASA, PSA and the Further Education and Training Colleges Act 16 of 2006.[247] Furthermore, educators appointed at independent schools or adult learning centres are also required to be registered with SACE.[248]

Educators registered with SACE are subject to the council's code of professional ethics.[249] The code determines the expected conduct of the educator towards various role players in education, namely learners, parents, colleagues, the employer, the

[246] Item 2(6)(b) incorporates the provisions of items 5 (notice of enquiry), 7 (conducting the hearing), 8 (sanction) and 9 (appeal) of Schedule 2 of the EOEA into the incapacity procedure.
[247] Section 3 of the SACE Act.
[248] Section 3 of the SACE Act; Bray & Beckmann (2001) *Perspectives in Education* 112.
[249] SACE "Code of Professional Ethics" (2016) *SACE* <https://www.sace.org.za/assets/documents/uploads/sace_12998-2020-09-09-SACE%20Booklet%20Yellow.pdf> (accessed 22-10-2021).

community, the council and the profession. Although educators' conduct with regard to each of these role players is important, two aspects deserve particular attention. First, as far as the expected conduct of the educator towards learners is concerned, item 3 of the code of professional ethics requires that:

"**3. An educator:**

3.1 respects the dignity, beliefs and constitutional rights of learners and in particular children, which includes the right to privacy and confidentiality;
3.2 acknowledges the uniqueness, individuality, and specific needs of each learner, guiding and encouraging each to realise his or her potentialities;
3.3 strives to enable learners to develop a set of values consistent with the fundamental rights contained in the Constitution of South Africa;
3.4 exercises authority with compassion;
3.5 avoids any form of humiliation, and refrains from any form of abuse, physical or psychological;
3.6 refrains from improper physical contact with learners;
3.7 promotes gender equality;
3.8 refrains from courting learners from any school;
3.9 refrains from any form of sexual harassment (physical or otherwise) of learners;
3.10 refrains from any form of sexual relationship with learners from any school;
3.11 refrains from exposing and/or displaying pornographic material to learners and or keeping same in his/her possession;
3.12 uses appropriate language and behaviour in his or her interaction with learners, and acts in such a way as to elicit respect from the learners;
3.13 takes reasonable steps to ensure the safety of the learner;
3.14 does not abuse the position he or she holds for financial, political or personal gain;
3.15 is not negligent or indolent in the performance of his or her professional duties; and
3.16 Recognises, where appropriate, learners as partners in education".[250]

As far as the expected conduct of educators with regard to the teaching profession is concerned, item 7 of the code of professional ethics provides that:

"**7. An educator:**

7.1 acknowledges that the exercising of his or her professional duties occurs within a context requiring co-operation with and support of colleagues;
7.2 behaves in a way that enhances the dignity and status of the teaching profession and that does not bring the profession into disrepute;
7.3 keeps abreast of educational trends and developments;
7.4 promotes the ongoing development of teaching as a profession;

[250] Item 3 of the SACE Code of Professional Ethics.

7.5 accepts that he or she has a professional obligation towards the education and induction into the profession of new members of the teaching profession;
7.6 refrains from any contravention of the statutes and regulations of the Republic of South Africa, relevant to the Code;
7.7 refrains from indulging and/or being in possession of intoxicating, illegal, and/or unauthorised substances including alcohol and drugs within the school premises and/or whilst on duty;
7.8 refrains from carrying and/or keeping dangerous weapons in the school premises without any prior written authorisation by the employer; and
7.9 refrains from engaging in illegal activities."

It is clear from these extracts, that many of the provisions of the SACE code may be breached through the misconduct of educators and many through the poor performance (incapacity) of educators. It is important to recognise that irrespective of the reason for the breach (misconduct or incapacity), such a breach potentially impacts on the continued registration of the educator with SACE as a precondition for employment as an educator. As such, and for present purposes, breach of the SACE code is an incapacity issue.

Apart from the required professional ethics contained in the SACE code, SACE recently published the "Professional Teaching Standards" ("PTS"),[251] which is directly relevant to the performance of educators. The PTS rightfully identify that there is a need to strengthen the public's trust in the teaching profession and incorporate a common standard for what is considered a professional educator in South Africa.[252] The policy contains ten Professional Teaching Standards:

1. "Teaching is based on an ethical commitment to the learning and wellbeing of all learners.
2. Teachers collaborate with others to support teaching, learning and their professional development.
3. Teachers support social justice and the redress of inequalities within their educational institutions and society more broadly.
4. Teaching requires that well-managed and safe learning environments are created and maintained within reason.
5. Teaching is fundamentally connected to teachers' understanding of the subject/s they teach.
6. Teachers make thoughtful choices about their teaching that lead to learning goals for all learners.

[251] SACE "Professional Teaching Standards" (2020) *SACE* <https://www.sace.org.za/assets/documents/uploads/sace_31561-2020-10-12-Professional%20Teaching%20Standards%20Brochure.pdf> (accessed 23-10-2021).
[252] SACE "Professional Teaching Standards" (2020) *SACE* 5.

7. Teachers understand that language plays an important role in teaching and learning.
8. Teachers are able to plan coherent sequences of learning experiences.
9. Teachers understand how their teaching methodologies are effectively applied.
10. Teaching involves monitoring and assessing learning".[253]

It should be noted that the implementation of these standards still has to be finalised by SACE through a process of "field-testing".[254] A positive aim of the PTS is to provide a single framework that guides educators from the start of the selection process, through pre-service education and provisional registration until the educator is fully registered and is then supported with evaluation and continuing professional development.[255] The PTS is less clear on how these standards will provide a single framework and how the current fragmentation of policy and legislation in the sector will be addressed. For example, in chapter 7 it is seen that in England regulations pertaining to Teachers' Standards along with a statutory induction period for early career teachers ensure that the best possible candidates are retained in the education system.[256] It will also be seen that these standards are actively enforced through a structured programme guiding trainee teachers to Qualified Teacher Status ("QTS"). After attaining QTS, teachers are continuously appraised to ensure they meet the expected performance standard.[257] Put differently, there is integration in England between the standards expected by the professional body and the standards expected by employers, integration which is also implemented at a practical level. The efficacy of the PTS in South Africa remains to be seen and will rely heavily on its proper implementation.

As mentioned, a breach of the SACE Code of Professional Ethics through misconduct by the educator may also impact on the capacity of the educator to continue teaching (as it may impact on registration as an educator with SACE as a

[253] SACE "Professional Teaching Standards" (2020) *SACE* 8-11.
[254] SACE "Professional Teaching Standards" (2020) *SACE* 6.
[255] SACE "Professional Teaching Standards" (2020) *SACE* 5.
[256] The Teachers' Standards were issued in terms of Regulation 6(8)(a) of the Education (School Teachers' Appraisal) (England) Regulations 2012. See also "Induction for early career teachers (England)" (2021) *Department for Education* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972316/Statutory_Induction_Guidance_2021_final__002_____1___1_.pdf> (accessed 12-08-2021).
[257] This is in terms of the Education (School Teachers' Appraisal) (England) Regulations 2012 as well as the procedure contained in the ACAS Code of Practice on Disciplinary and Grievance Procedures contains a capability procedure in case of poor performance.

precondition for employment). Anyone can lodge a complaint about a breach of this code against an educator and it can be in writing (via email) or may be lodged telephonically.[258] Where SACE receives a complaint, a case file is opened and a case number is allocated. The person against whom the complaint has been lodged is contacted for a written response to the allegations. Such a response must usually reach SACE within ten days, but the time period may be shorter depending on the nature of the allegations. As soon as the response is received, the Ethics Committee determines whether the nature of the issue requires an investigation, mediation, discipline or referral to the PDE, ELRC or SAPS.[259] The complaint procedure explains that a distinction must be drawn between employment-related and ethical matters. Ethical matters are those which violate the Code of Professional Ethics whereas employment matters are related to the conditions of service of educators.[260] It has to be recognised, though, that in most cases there will be an overlap.

The complaint procedure also contains a list of "types of offences".[261] This issue is discussed in more detail in subsequent chapters, but it may already be mentioned that there is an inconsistent and incorrect use of legal terminology. For example, the council for professional ethics' website refers to educator misconduct as "offences", terminology commonly used to refer to crimes.[262]. These "offences" are also placed in two categories not used in any other education policy document and which is not in line with the types of misconduct in the EOEA. The first category is "petty offences" which refer to "verbal abuse, alcohol abuse, unruly behaviour or undermining of colleagues".[263] It clearly is inappropriate to refer to, for example, alcohol abuse by an educator in a school setting as a mere "petty offence". In fact, it is rightfully seen in a serious light by the employer. Both sections 17 and 18 of the EOEA address alcohol-related types of misconduct. In *SADTU obo Mfeka v West Coast FET College*[264] the educator was dismissed for being under the influence of alcohol while on duty.[265] The

[258] SACE "How to lodge a complaint" (2021) *SACE* < https://www.sace.org.za/pages/how-to-lodge-a-complaint>.
[259] SACE "How to lodge a complaint" (2021) *SACE.*
[260] See SACE "How to lodge a complaint" (2021) *SACE.*
[261] SACE "How to lodge a complaint" (2021) *SACE.*
[262] See s 1 of the Criminal Procedure Act 51 of 1977 which states that an "offence means an act or omission punishable by law".
[263] SACE "How to lodge a complaint" (2021) *SACE.*
[264] ELRC 036-13/14 WC.
[265] See *SADTU obo Mfeka v West Coast FET College* ELRC 036-13/14 WC (the arbitration award did not contain paragraph numbers).

second category is “severe offences” which refer to “sexually related acts, intimidation, theft, fraud, corporal punishment, assault and use of violence, insubordination, abscondment, damage of property, unauthorised use of property, employment of unregistered educators”.[266] “Sexually related acts” include “rape, statutory rape, love relationships with learners, sexual relationship with learner, sexual assaults, sexual harassment, sexual coercion of learners”.[267] Aside from the poor use of grammar, this is also the first reference to a type of misconduct called “love relationships with learners”.[268] It is unclear what distinguishes this type of misconduct from a “sexual relationship with [a] learner”, which is a type of misconduct contained in section 17(1)(c) of the EOEA. This inaccuracy in terminology and resultant issues are addressed further in chapter 6.

This brings us to the disciplinary process in case of a breach of professional ethics (by committing one or more of these acts of misconduct).[269] The Disciplinary Panel will issue a summons and serve it on the educator. If the educator fails to attend the disciplinary hearing on the specified date and time, the hearing may be held in the absence of the educator.[270] It is noteworthy that the educator is entitled to legal representation at the disciplinary hearing conducted by SACE.[271] After completion of the disciplinary hearing, the Disciplinary Panel makes a recommendation about whether a breach of professional ethics occurred.[272] In case of a breach, the parties must make representations regarding the appropriate sanction, which may include leading further evidence pertaining to previous breaches of the code.[273] The Disciplinary Panel will make a recommendation to the council, who may decide to impose a caution or reprimand, a fine (which may not exceed a month’s salary) or removal of the educator’s name from the register (for a specific time period or indefinitely).[274] The educator is informed of the panel’s recommendation before the council imposes the sanction and may make written submissions to the council (within

[266] SACE “How to lodge a complaint” (2021) *SACE.*
[267] SACE “How to lodge a complaint” (2021) *SACE.*
[268] SACE “How to lodge a complaint” (2021) *SACE.*
[269] SACE “Disciplinary Procedures” (2021) *SACE* <https://www.sace.org.za/pages/disciplinary-procedures> (accessed 23-10-2021). The discussion that follows is based on this disciplinary procedure.
[270] Para 4.6 of the Disciplinary Procedure.
[271] Para 4.2.4 of the Disciplinary Procedure.
[272] Para 6 of the Disciplinary Procedure.
[273] Para 6.2.
[274] Paras 7 and 8.

14 days) explaining the grounds upon which the educator believes the recommendation by the panel to be incorrect.[275] As mentioned, removal from the register will result in the incapacity of the educator.[276]

5 3 3 2 Educators' qualifications and competences

The broad legislative framework regulating educator qualifications and the expected competences and capacity of educators were discussed in chapter 4. The discussion below focuses in some detail on what those qualifications and competences are. As explained in chapter 4, the first step in standardising educator training in line with the new constitutional values was the renewal of policies regulating education programmes and qualifications. A National Teacher Education Audit was initiated in 1995 under the auspices of the Committee on Teacher Education Policy ("COTEP"). This resulted in the publication of the Norms and Standards for Educators ("NSE") under NEPA in 2000.[277]

The "norms" mentioned in the title of the NSE relate to the applied competences of educators. This is discussed first. In terms of item 3.7 of the NSE, there are seven roles (with associated competences) that define a competent educator. These roles are mentioned briefly, but it should be mentioned that the purpose of identification of these roles was not to serve as a yardstick for poor performance, but rather to enable educational institutions to design their programmes and curricula for educator training. The seven roles of a competent educator in terms of the NSE can be summarised as follows.[278] The first is that an educator has to be a "learning mediator" who understands that learners have diverse needs and attends to this through communication and comprehensive subject content knowledge. Second, a competent educator is an "interpreter and designer of learning programmes and materials" that enables learning in the classroom. Third, the educator is a "leader, administrator and manager" in their classroom and the broader school environment. Fourth, a competent educator is also a "scholar, researcher and lifelong learner" who pursues growth in

[275] Para 8.5 and 9.
[276] The reason for this, as discussed earlier in this chapter under the LRA, is because registration with SACE is a pre-requisite for employment in the public basic education sector in South Africa. In the absence of such registration, the person is incapable of being employed as an educator in the public basic education sector.
[277] The "Norms and Standards for Educators" GN 82 in *GG* 20844 of 04-02-2000 are regulations which were published in terms of s 3(4)(f) and (l) of NEPA.
[278] These seven roles are discussed in Item 3.7 of the Norms and Standards for Educators.

their professional career. The fifth role of a competent educator relates to the "community, citizenship and [a] pastoral role" and requires of an educator to approach teaching respectfully and responsibly. A further role of the educator is one of an "assessor" who incorporates learning and assessment into the teaching and learning process by understanding the purpose and methods of assessment and meeting the requirements of accrediting bodies. Lastly, the educator is a "specialist" in their subject or discipline with the understanding of how best to transfer skills and knowledge to learners. According to item 3 of the NSE, the applied competences ("norms") of an educator, contained in these seven roles, is the cornerstone of the policy.

The "standards" in the title of the NSE refer to qualifications required by educators to be employed in the public basic education sector and exercise the above-applied competences. To be recognised by the then Department of Education, educational institutions based their curricula for educator qualifications upon the NSE and, more specifically, the seven educator roles discussed above. As mentioned in chapter 4, it has since become necessary to develop new policies on education qualifications due to the impact of the NQF Act enacted in 2008 and the revised Higher Education Qualifications Sub-Framework ("HEQSF") in 2013.[279] It should be mentioned here that the policies pertaining to the standard of education qualifications fall under the authority of the Council on Higher Education ("CHE") and the Department of Higher Education and Training ("DHET"), in consultation with the DBE, universities, SACE, the Education Training and Development Practices Sector Education and Training Authority ("ETDP SETA") and trade unions.[280] In response to the HEQSF, the "Revised Policy on the Minimum Requirements for Teacher Education Qualifications" ("MRTEQ") was published in 2015.[281] This policy is aimed at providing guidelines for the design of curricula for Initial Teacher Education ("ITE") and Continuing Professional Development ("CPD") programmes.[282] It is important to note that the MRTEQ replaced the NSE.[283] The HEQSF created a single framework for all

[279] See chapter 4.
[280] Item 1.10 of the Revised Policy on the Minimum Requirements for Teacher Education Qualifications GN 111 in *GG* 38487 of 19-02-2015.
[281] GN 111 in *GG* 38487 of 19-02- 2015, published in terms of s 8(2)(c) of the National Qualifications Framework Act 67 of 2008.
[282] Item 1.13 of the Revised Policy on the Minimum Requirements for Teacher Education Qualifications GN 111 in *GG* 38487 of 19-02-2015.
[283] Item 2.1-2.2.

qualifications,[284] including education qualifications.[285] Item 9.3 of the MRTEQ determines that the list below contains the available qualifications for teacher (educator) education:

> **"Qualifications for Initial Teacher Education:**
> Bachelor of Education degree (NQF Level 7)
> Postgraduate Certificate in Education (NQF Level 7)
> **Qualifications for the Continuing Professional and Academic Development of Teachers:**
> Advanced Certificate (NQF Level 6)
> Advanced Diploma (NQF Level 7)
> Postgraduate Diploma (NQF Level 8)
> Bachelor of Education Honours degree (NQF Level 8)
> Master of Education degree/Master's degree (Professional) (NQF Level 9)
> Doctoral degree/Doctoral degree (Professional) (NQF Level 10)
> **Qualification for Grade R Teaching:**
> Diploma in Grade R Teaching (NQF Level 6)".[286]

The two possible qualifications for ITE are a Bachelor of Education degree or a Postgraduate Certificate in Education. The purpose of ITE is to confirm that the person is a beginner teacher in a specific phase of schooling and/or a specific subject.[287] Educators may specialise in a specific phase (such as the Foundation Phase) or in a subject (such as mathematics) or a combination of the two.[288] In order to specialise, education students are required to engage in practical learning by spending time in schools and implementing their knowledge and skills as part of their studies.[289] Appendix C of the MRTEQ contains the basic competences of a newly qualified ("beginner teacher"):

1. "Newly qualified teachers must have sound subject knowledge.

[284] "Qualifications" are defined by the HEQSF as "the formal recognition, through certification, of learning achievement, and is awarded by an appropriate quality assurance body". See Item 22 of the "Publication of the General and Further Education and Training Qualifications Sub-Framework and Higher Education Qualifications Sub-Framework of the National Qualifications Framework" GN 648 in *GG* 36797 of 30-08-2013.
[285] Item 9.1 of the "Revised Policy on the Minimum Requirements for Teacher Education Qualifications" GN 111 in *GG* 38487 of 19-02-2015.
[286] Item 9.3.
[287] See item 12.1 of the "Revised Policy on the Minimum Requirements for Teacher Education Qualifications" GN 111 in *GG* 38487 of 19-02-2015.
[288] Item 12.1.
[289] Item 12.2-12.3.

2. Newly qualified teachers must know how to teach their subject(s) and how to select, determine the sequence and pace of content in accordance with both subject and learner needs.
3. Newly qualified teachers must know who their learners are and how they learn; they must understand their individual needs and tailor their teaching accordingly.
4. Newly qualified teachers must know how to communicate effectively in general, as well as in relation to their subject(s), in order to mediate learning.
5. Newly qualified teachers must have highly developed literacy, numeracy and Information Technology (IT) skills.
6. Newly qualified teachers must be knowledgeable about the school curriculum and be able to unpack its specialised content, as well as being able to use available resources appropriately, so as to plan and design suitable learning programmes.
7. Newly qualified teachers must understand diversity in the South African context in order to teach in a manner that includes all learners. They must also be able to identify learning or social problems and work in partnership with professional service providers to address these.
8. Newly qualified teachers must be able to manage classrooms effectively across diverse contexts in order to ensure a conducive learning environment.
9. Newly qualified teachers must be able to assess learners in reliable and varied ways, as well as being able to use the results of assessment to improve teaching and learning.
10. Newly qualified teachers must have a positive work ethic, display appropriate values and conduct themselves in a manner that befits, enhances and develops the teaching profession.
11. Newly qualified teachers must be able to reflect critically on their own practice, in theoretically informed ways and in conjunction with their professional community of colleagues in order to constantly improve and adapt to evolving circumstances".[290]

A few remarks may also be made about the most recent education policy, namely the National Education Policy on Recognition and Evaluation of Qualifications for Employment in Education which was published under NEPA in 2017 ("2017 policy").[291] This policy was adopted in response to the requirements of the National Qualifications Framework ("NQF"), the HEQSF and the MRTEQ.[292] The 2017 policy contains the process for evaluating, approving and recognising the qualifications for employment in education.[293] This is done by assigning a Relative Education Qualification Value ("REQV") to each type of qualification. Item 1 of this policy states that it should be read together with the Personnel Administrative Measures ("PAM") issued under the EOEA

[290] Appendix C of the "Revised Policy on the Minimum Requirements for Teacher Education Qualifications" GN 111 in *GG* 38487 of 19-02-2015.
[291] GN 108 in *GG* 40610 of 10-02-2017.
[292] GN 111 in *GG* 38487 of 19-02-2015.
[293] Item 1 of the National Education Policy on Recognition and Evaluation of Qualifications for Employment in Education GN 108 in *GG* 40610 of 10-02-2017.

(discussed below).[294] The REQV provides for the recognition of a qualification whereas the PAM prescribes the minimum requirements to enter a specific educator position (post level). In other words, the 2017 policy gives content (through a specific procedure) to the different pathways to be eligible for employment in education. The list of qualifications provided for by the MRTEQ (discussed earlier) contains the general requirements, whereas the 2017 policy provides for a procedure to evaluate and recognise specific qualifications for employment in education. This may be explained by way of an example. A person with a bachelor's degree in science (Mathematical Sciences) and a Postgraduate Certificate in Education may – according to the MRTEQ – be eligible for employment in education seeing that mathematics is on the list of approved school teaching subjects. The 2017 policy assigns a REQV to the person's initial qualification (B.Sc qualification) to determine whether it is recognised for employment in education.

The PAM, which is expressly referred to in the 2017 policy, contains the duties and responsibilities of educators and provides tangible functions expected of a capable and competent educator. The PAM describes the workload of educators and identifies certain core duties that educators are responsible for during and outside of formal school hours.[295] During school hours (which is not less than seven hours a day), educators are expected to teach during scheduled teaching time, perform relief teaching, fulfil extra and co-curricular activities, carry out pastoral duties (for example, supervise detention), do administration and fulfil supervisory and management functions, see to any professional duties (such as meetings) and, finally, ensure planning, preparation and the evaluation of teaching work.[296] Outside of school hours educators plan, prepare and evaluate teaching work, fulfil extra and co-curricular duties, perform professional duties and pursue professional development.[297] Item A.5 of the PAM contains the core duties and responsibilities of educators. These core duties and responsibilities are divided into five categories, namely teaching, extra- and co-curricular, administrative, interaction with stakeholders and communication.[298]

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[294] Personnel Administrative Measures (PAM), GN 170 in *GG* 39684 of 12-02-2016. PAM was issued in terms of s 4 of the EOEA.
[295] Contained in Item A.5. and Annexure A.2 of PAM.
[296] Item A.4.2.
[297] Para A.4.2.
[298] See Item 3 of Annexure A.2.

Item 3 of Annexure A.2 of the PAM provides that an educator's duties and responsibilities with regard to teaching entails:

"3.1.1 To engage in class teaching which will foster a purposeful progression in learning and which is consistent with the learning areas and programmes of subjects and grades as determined.

3.1.2 To be a class teacher.

3.1.3 To prepare lessons taking into account orientation, regional courses, new approaches, techniques, evaluation, aids, etc. in their field.

3.1.4 To take on a leadership role in respect of the subject, learning area or phase, if required.

3.1.5 To plan, co-ordinate, control, administer, evaluate and report on learners' academic progress.

3.1.6 To recognise that learning is an active process and be prepared to use a variety of strategies to meet the outcomes of the curriculum.

3.1.7 To establish a classroom environment which stimulates positive learning and actively engages learners in the learning process.

3.1.8 To consider and utilise the learners' own experiences as a fundamental and valuable resource".[299]

These core duties and responsibilities of educators are contained in a collective agreement, namely ELRC Resolution 8 of 1998.[300] Each post in the school environment has its own unique corresponding core duties and responsibilities. The above excerpt of the duties of educators concerning teaching serves as an example of what is expected of a competent educator. It should be noted that each one of the other four categories mentioned above (extra- and co-curricular, administrative, interaction with stakeholders and communication) has its own core duties and responsibilities.

A further collective agreement was concluded at the ELRC in 2020 regarding the performance of educators. The "Quality Management System (QMS) for School-based Educators" ("QMS") applies to all educators falling within the ambit of the EOEA (appointed by the PDE or DBE) and was implemented for principals from 1 January

[299] The duties in respect to extra and co-curricular activities, the administrative duties of educators pertaining to their teaching role, participation and interaction with stakeholders and co-operative communication with colleagues, parents and other role players is available in para 4.5(e)(ii)-(v) of PAM.

[300] See ELRC Resolution 8 of 1998, "Duties and responsibilities of educators".

2021 and will apply to educators from 1 January 2022.[301] This agreement repeals ELRC Resolution 2 of 2014[302] and ELRC Resolution 8 of 2003,[303] which only remains applicable to educators until the QMS enters into force.[304] The QMS is aimed at introducing a performance management system for educators to evaluate their performance and competence, improve accountability and ultimately, deliver quality education.[305] This agreement contains a structured programme of educator evaluation and appraisal. It contains guidelines on the implementation of the QMS which may be summarised as follows:[306]

1. A workplan is developed by the principal, deputy principal and departmental heads of the school and is agreed upon by the end of January each year.[307]
2. A staff meeting is called in which the QMS is explained to educators by the principal.
3. Appraisal timelines are communicated to educators and include a mid-year and annual appraisal of educators by their supervisor.
4. The educator conducts a self-appraisal prior to the appraisal by their supervisor.[308]
5. Lesson observations are conducted as part of the mid-year and annual appraisal process (that is, two observations per educator per year).[309]
6. Pre-appraisal and post-appraisal discussions are conducted between the supervisor and educator.[310]

[301] ELRC Resolution 2 of 2020, "Quality Management System (QMS) for School-based Educators" 2-3.
[302] ELRC Resolution 2 of 2014, "Quality Management System (QMS) for School-based Educators".
[303] ELRC Resolution 1 of 2003, "Evaluation Procedures and Performance Standards for Institution Based Educators".
[304] ELRC Resolution 2 of 2020, "Quality Management System (QMS) for School-based Educators" 2.
[305] 8
[306] 11-14.
[307] 11. The workplan contains "performance standards, key activities, targets, [a] time-frame, performance indicators and contextual factors".
[308] 12. The purpose of self-appraisal is for the educator to familiarise themselves with the QMS, reflect on their own performance and make valuable inputs when the appraisal is conducted by their supervisor.
[309] 12-13. The purpose is to evaluate the educator's performance and pedagogical skills and provide input regarding the educator's perception of their performance.
[310] 13. These discussions provide feedback and insight into the expected performance standards and identify important contextual elements that may impact the educator's performance and provide support to control for these contextual elements.

7. The QMS instrument (included as annexures to the agreement) must be completed by the supervisor and signed by the principal.[311]
8. A rating is allocated to each criterion of the QMS instrument. A score is then allocated for each performance standard (which is the sum of the ratings).

There are five performance standards that educators' performance is measured against by the QMS.[312] First, the "creation of a positive learning environment". This requires of the educator to use the classroom to engage learners in learning, as well as manage and supervise the classroom in such a way as to ensure optimal learning, considering the time and resources available.[313] Second, "curriculum knowledge, lesson planning and presentation" are required. This consists of four pillars which are that the educator has knowledge about the subject, effectively plans and presents the lesson, manages the work schedule and ensures proper record keeping to assess effectiveness.[314] Third, there is "learner assessment and achievement". This requires of the educator to provide learners with feedback. It also requires that the educator knows how to use different forms of assessment techniques and actively measures learner achievement.[315] Ultimately, the educator is expected to assess whether learners are progressing and meeting the outcomes of the subject. Fourth, there is "professional development". This assesses whether the educator pursues continuous development and displays professionalism in their career. The last performance standard assesses the educator's "extra-mural and co-curricular participation". The educator is expected to engage with different role players in the school environment and develop extra-mural or co-curricular activities for learners to be a part of.[316]

A positive aspect of the QMS is that it provides clear, tangible performance standards as well as an appraisal rubric that all supervisors use to assess and evaluate the performance of educators throughout the year. This standardises the appraisal of educators in the public basic education system and should also provide a sound basis for early and accurate detection of poor performance by an educator. The QMS agreement was reached at the ELRC, which also means that it was the result of an

[311] 13. Record is kept of the appraisals done by supervisors and the principal must be satisfied that the QMS process was followed and the appraisals were done as required.
[312] 25
[313] 25.
[314] 25.
[315] 25.
[316] 25.

agreement between various stakeholders (including trade unions). This may have a positive impact on its implementation, which will have to be assessed once it enters into force on 1 January 2022. Unfortunately, the QMS is not the first policy of its kind focused on the performance of educators in the public basic education sector. In fact, the QMS repeals both ELRC Resolution 2 of 2014, the "Quality Management System for School-Based Educators" ("2014 QMS"), which was a similar policy, as well as ELRC Resolution 8 of 2003, the "Integrated Quality Management System" (2003 IQMS).[317] Two aspects regarding the performance of educators in the public basic education sector require further research, but are not be considered in detail in this thesis. First, whether the 2003 IQMS and 2014 QMS translated to any tangible improvement in the performance of educators. Second, whether the "rewards, incentives and other salary related benefits"[318] were based on the proper implementation and results of the IQMS and/or QMS appraisals or whether it was merely a rubber stamp and that all (or almost all) educators received the above-mentioned rewards/incentives despite the poor performance of the system.

Before concluding the discussion on the competences of educators, it is necessary to briefly consider the standard of performance applicable to principals. The reason for this is because chapter 6 shows that the capacity of principals is key to the effective functioning of schools in South Africa. The point of departure for the functions and responsibilities of principals at public schools are sections 16 and 16A of SASA. As mentioned in chapter 4 and in terms of section 16(3), the principal is responsible for the professional management of the school.[319] The term "professional management" is, however, not defined in SASA although some guidance is provided in section 16A.[320] Amongst other responsibilities pertaining to his or her position, section 16A(2) provides that:

> "(2) The principal must
> (a) in undertaking the professional management of a public school as contemplated in section 16 (3), carry out duties which include, but are not limited to

[317] Note that the 2003 IQMS is still applicable to educators until the QMS enters into force on 1 January 2022.
[318] Item 2 of ELRC Resolution 2 of 2014, "Quality Management System for School-Based Educators".
[319] Section 16(3) of SASA.
[320] In an attempt to give meaning to the term, Van der Merwe noted that it requires "the management of classroom instruction". See S van der Merwe "The Constitutionality of Section 16A of the South African Schools Act 84 of 1996" (2013) *De Jure* 237 241.

(i) the implementation of all the educational programmes and curriculum activities;
(ii) the management of all educators and support staff;
(iii) the management of the use of learning support material and other equipment;
(iv) the performance of functions delegated to him or her by the Head of Department in terms of this Act;
(v) the safekeeping of all school records; and
(vi) the implementation of policy and legislation;

(b) attend and participate in all meetings of the governing body;
(c) provide the governing body with a report about the professional management relating to the public school;
(d) assist the governing body in handling disciplinary matters pertaining to learners;
(e) assist the Head of Department in handling disciplinary matters pertaining to educators and support staff employed by the Head of Department;
(f) inform the governing body about policy and legislation;
(g) provide accurate data to the Head of Department when requested to do so;
(h) assist the governing body with the management of the school's funds, which assistance must include
(i) the provision of information relating to any conditions imposed or directions issued by the Minister, the Member of the Executive Council or the Head of Department in respect of all financial matters of the school contemplated in Chapter 4; and
(ii) the giving of advice to the governing body on the financial implications of decisions relating to the financial matters of the school;
(i) take all reasonable steps to prevent any financial maladministration or mismanagement by any staff member or by the governing body of the school;
(j) be a member of a finance committee or delegation of the governing body in order to manage any matter that has financial implications for the school; and
(k) report any maladministration or mismanagement of financial matters to the governing body of the school and to the Head of Department".

Although the principal's duties and responsibilities are to a certain extent contained in the PAM and the recent QMS discussed above,[321] the DBE acknowledged that no common and accepted understanding existed regarding the expectations of principals.[322] In 2016 the "Policy on the South African Standard for Principals" ("the Standard") was therefore issued under NEPA. The Standard identifies eight constituent elements of the core purpose of a principal:

1. "Leading teaching and learning in the school - five main kinds of leadership.
2. Shaping the direction and development of the school.

[321] See Annexure A.7 of the PAM and section E of the QMS.
[322] Item 1 of the Policy on the South African Standard for Principals, GN 323 in *GG* 39827 of 18-03-2016.

3. Managing quality of teaching and learning and securing accountability.
4. Developing and empowering self and others.
5. Managing the school as an organisation.
6. Working with and for the community.
7. Managing human resources (staff) in the school.
8. Managing and advocating extramural activities".[323]

Principals are expected to display five kinds of leadership that are each briefly summarised. First, "strategic leadership" requires that the school, as an important part of the community, focuses on each learner and prepares them for the future.[324] Second, "executive leadership" focuses on building relationships and creating a common understanding as to the school's identity and values, evident through the discipline and performance of the school and each role player in it.[325] The principal must display "instructional leadership" which creates a learning community, continuous improvement, promotes the success of all learners and empowers staff to be leaders.[326] Fourth, in line with our constitutional values, the principal must exhibit "cultural leadership" which is focused on embracing, understanding and supporting cultural diversity in the school.[327] Lastly, and considering that the school is dependent on successful management, the principal must display "organisational leadership" which requires the management of the school's resources, including various role players.[328]

5 4 Conclusion

At a first level, the goal of this chapter was to describe the specific rules applicable to educator conduct and performance in some detail. This necessitated an overview of the LRA principles applicable to these phenomena (which apply to both types of educators employed in the public basic education system) as well as the provisions of the EOEA (which specifically apply to educators in the public basic education system appointed against the provincial post establishment).

[323] Item 5.1. of the Policy on the South African Standard for Principals, GN 323 in *GG* 39827 of 18-03-2016.
[324] Item 5.1.1.1.
[325] Item 5.1.1.2.
[326] Item 5.1.1.3.
[327] Item 5.1.1.4.
[328] Item 5.1.1.5.

While the provisions of the LRA are well known and were surveyed for the sake of completeness, the second part of the chapter dealing with the EOEA provided interesting insights for purposes of further discussion. As far as the regulation of misconduct is concerned – bearing in mind the requirements of substantive fairness – the discussion showed that the EOEA already makes a curious distinction between "serious misconduct" (in section 17) for which educators "must" be dismissed and "misconduct" in section 18. A cursory glance at the exhaustive list of types of misconduct provided for in section 18 shows that many of these types of misconduct may rightfully be viewed as serious. And while section 18(3) does provide for the possibility of serious sanctions also in case of section 18 misconduct, section 18(5) then curiously seems to limit this possibility to certain types of misconduct selected from the list in section 18(1). There also seems to be a general trend to judge the seriousness of misconduct in light of the sanction that may be imposed and not its inherent nature – this is revealed by the introduction to section 18 (which describes misconduct in general as referring to a breach of the trust relationship) as well as the way in which Schedule 2 of the EOEA provides for the delegation of authority by the HOD to the school principal, which is done on the basis of the sanction that may be imposed and not the nature of the misconduct. In a way then, the approach of the EOEA shows a peculiar conflation of transgression and sanction as two requirements of substantive fairness and, by so doing, arguably puts the cart before the horse. The EOEA shows little appreciation for the fact that some types of misconduct (and many more than what the EOEA contains in section 17) are just more serious than others, or for the fact that even relatively minor types of misconduct may be very serious depending on the context. It was also pointed out that, as far as basic education is concerned, the unique nature of schools and the paramount importance of the interests of mostly young learners should provide decisive guidance in relation to the appropriateness of any sanction for misconduct.

As far as disciplinary procedures are concerned, the focus fell on Schedule 2 of the EOEA, which contains the disciplinary code and procedure for departmental educators. Two areas of concern are immediately apparent when comparing this code with the Dismissal Code contained in the LRA. While the latter clearly is seen as containing no more than guidelines and have been interpreted to promote a relatively informal approach to discipline (even where it results in dismissal), the EOEA code not only contains a host of detailed requirements but does so in legislation (which may not

allow for any deviation). At face value then, the EOEA creates a formalistic and inflexible approach to discipline. What this discussion also showed is – as is the case with the application of most legal rules – there is discretion built into the system about, for example, whether discipline should be dealt with formally or informally and, if formal, what the educator should be charged with, how the case should be presented at the enquiry and what the finding of the chairperson should be. In the end, these rules will only be as effective as the decision-making around their application. How all of this has played out in practice is investigated in chapter 6.

As far as poor performance as incapacity is concerned, the discussion showed that the EOEA, through section 16 read with Schedule 1, again adopts a very formalistic and legalistic approach to the procedure required prior to decision-making about an educator's poor performance. This is especially true in cases where a more serious sanction, including transfer, demotion or termination, is considered. In such a case, a formal enquiry is required in respect of which many of the requirements applicable to disciplinary enquiries (dealt with in Schedule 2 EOEA) also apply. As far as substantive fairness of the employer's conduct is concerned, the EOEA itself and Schedule 1 of the EOEA says nothing. Various initiatives at ministerial level and at the ELRC were considered. The point of departure in this regard is to have clarity on the standards expected of educators. The discussion considered how registration as an educator with SACE as a prerequisite for employment may impact on the ability of the educator to continue as an educator (and also showed the apparent disconnect between SACE and the actual management of discipline and performance at the level of schools). The chapter also considered initiatives related to the minimum qualifications expected of educators and headway made with the identification of the core competences expected of educators in the public basic education system. In this regard, specific attention was paid to the new (broadly accepted) QMS which should, in future, contribute a lot to the timeous and specific identification of underperformance by educators to serve as a sound basis for addressing such poor performance. Thinking back to the discussion in chapters 2 and 3 – and in line with that discussion – the chapter also showed that what is expected of educators in the delivery of a quality basic education goes far beyond the simple transfer of subject knowledge. Rather, these core competences emphasise the important role educators play in developing individual learners to be productive participants in society and have a sound basis for further education. Again, however, the successful management of educator

performance depends on the proper implementation of the law. As is the case with misconduct, the experience with poor performance in the public basic education system is considered in chapter 6.

CHAPTER 6: A QUANTITATIVE AND QUALITATIVE ANALYSIS OF THE EXPERIENCE WITH DISCIPLINE AND INCAPACITY OF EDUCATORS IN PUBLIC BASIC EDUCATION IN SOUTH AFRICA

> "High quality ITE [initial teacher education] is not a sufficient condition for improving learner achievement. Even if existing and new teachers possess all the necessary knowledge and skills, their professionalism and commitment to fulfilling their teaching responsibilities in the best interests of the learners is of paramount importance. This challenge is aptly summed up in a recent report of the National Treasury: Above all, it is the commitment of teachers that will ensure the success of the education system: to arrive at school on time, every school day; to be prepared for each day's lessons; and to be in their classes, teaching. If the system can ensure this, better basic education and effective expenditure will be within reach".[1]

6 1 Introduction

In chapter 5, the general principles of labour law applicable to discipline and incapacity, as well as the adaptation of those rules in the public basic education sector were discussed. Four of the main takeaways from chapter 5 were the relatively formalistic approach to misconduct and incapacity in the EOEA, the existence of apparently curious provisions in the EOEA (notably sections 17 and 18 of that Act), the fact that the successful application of these principles depends on the discretion of a number of role players (inclusive of the HOD of the PDE, the school principal and the chairperson of an enquiry) and the overarching importance of recognition (certainly as far as a sanction is concerned) that schools are unique workplaces where the protection and promotion of the rights of children as learners remain fundamental guiding principles. As far as the unique nature of schools is concerned, the discussion in chapters 2 and 3 already highlighted the individual, societal and legally recognised importance, not only of basic education, but of a quality basic education (or, to use the terminology of the four A-scheme discussed in chapter 3, an "acceptable" basic education). The right to a basic education is guaranteed by section 29(1)(a) of the Constitution, while section 28(2) of the Constitution of the Republic of South Africa, 1996 ("Constitution") determines that "[a] child's best interests are of paramount importance in every matter concerning the child". Recognition of the fact that children

[1] A Bernstein (ed), J Hofmeyr, K Draper, C Simkins, R Deacon and P Robinson "Teachers in South Africa: Supply and demand 2013 to 2025" (2015) *Centre for Development and Enterprise* 33 (footnotes omitted).

are rights holders demands not only the availability of basic education but also the delivery of quality basic education.

With these remarks in mind, this chapter considers the experience with misconduct and incapacity of educators within the current legislative framework as described in chapters 4 and 5. The approach of the chapter is descriptive and analytical – both quantitative and qualitative. In paragraph 6 2 below, the discussion commences with a description of existing research and views on the prevalence and impact of misconduct and incapacity of educators in and on basic education in South Africa. This is followed (in paragraph 6 3 below) with a statistical overview of the extent of the application of discipline in the basic education sector based on information from the different PDEs themselves and from arbitrations conducted by the Education Labour Relations Council ("ELRC"). As the discussion shows, the presence (or absence) of statistics already tells a story of deficiencies in the system and calls for reform. In addition, one of the aims of the overview in paragraph 6 3 is also to provide a justifiable delimitation of the enquiry in paragraph 6 4 into the specifics of the experience with misconduct and incapacity by selected PDEs in South Africa. In paragraph 6 4 issues concerning substantive fairness (specifically focusing on the most prevalent types of misconduct, sanction, and consistency), procedural fairness, the use of suspension as part of the disciplinary process and poor work performance (as incapacity) in the basic education sector are considered. This enquiry entails a consideration of 138 arbitration awards issued under the auspices of the ELRC (106 relating to misconduct, 16 relating to suspension and another 16 relating to poor performance). The qualitative analysis of these awards is particularly important since each matter tells its own story about the application of legal principles and the exercise of discretion by the different role players responsible for addressing misconduct and incapacity in basic education and will assist in the identification of weaknesses in the system of regulation of educator performance. In paragraph 6 5, the insights from this chapter, along with the earlier insights from chapters 4 and 5, into deficiencies in the current system of regulation of educator performance are tabulated. These insights form the basis for the proposals for legislative amendment made in chapter 8.

6 2 Existing views on the misconduct and incapacity of educators

The media regularly sheds light on misconduct that takes place in schools and, based on this, it is easy to assume that the basic education sector faces huge challenges.[2] The perceived magnitude of the problems of misconduct and incapacity in basic education is confirmed when one considers the sheer amount of academic discourse on the topic, reports from independent bodies, accounts from persons working in basic education and who have insight into the daily issues experienced with misconduct and incapacity, as well as indications from the Department of Basic Education ("DBE") and provincial Ministers of Education that South Africa faces a crisis concerning the quality of educators and education in South Africa.

As far as the capacity of educators is concerned, a measurable contributor to that capacity is the qualifications and competence of educators, which was explored in chapter 5 above. In considering the qualifications of educators, a report published by the Centre for Development and Enterprise ("CDE") found that around 81% of educators in South Africa are adequately qualified.[3] However, the CDE makes an important point by saying that a qualified educator is not necessarily a good or

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2 See, eg, M Savides "At least seven KZN teachers to be suspended today" (12-09-2017) *Times Live* <https://www.timeslive.co.za/news/south-africa/2017-09-12-at-least-seven-kzn-teachers-to-be-suspended-today/> (accessed 28-10-2021); N Jordaan "Cases of physical, sexual assault against teachers have risen: teachers' group" (28-09-2017) *Times Live* <https://www.timeslive.co.za/news/south-africa/2017-09-28-cases-of-physical-and-sexual-assault-against-teachers-have-gone-up-teachers-group/> (accessed 28-01-2021); M Mngadi "KZN education department investigates allegations of sexual abuse at historic Adams College" (13-06-2018) *News24* <https://www.news24.com/news24/SouthAfrica/News/kzn-education-department-investigates-allegations-of-sexual-abuse-at-historic-adams-college-20180613> (accessed 28-01-2021); A Bolowana "Teachers under investigation at Vaal High School for alleged sexual misconduct" (21-10-2020) *SABC News* <https://www.sabcnews.com/sabcnews/teachers-under-investigation-at-vaal-high-school-for-alleged-sexual-misconduct/> (accessed 28-10-2021); M Maqhina "Teachers gone rogue: Increase in corporal punishment and sexual abuse" (28-11-2020) *Saturday Star* <https://www.iol.co.za/saturday-star/news/teachers-gone-rogue-increase-in-corporal-punishment-and-sexual-abuse--1e47895c-3743-43a9-91e2-7f7517b31cd0> (accessed 28-01-2021); P Nombembe "Drama teacher fired for sexually assaulting pupil in a taxi" (05-12-2020) *Times Live* <https://www.timeslive.co.za/news/south-africa/2020-12-05-drama-teacher-fired-for-sexually-assaulting-pupil-in-a-taxi/> (accessed 28-01-2021); A Mitchley "Two Mpumalanga women found guilty of fraud after using fake qualifications to get teaching posts" (03-12-2020) *News24* <https://www.news24.com/news24/southafrica/news/two-mpumalanga-women-found-guilty-of-fraud-after-using-fake-qualifications-to-get-teaching-posts-20201203> (assessed 28-01-2021); J Evans "Bishops Diocesan College sex scandal: Fiona Viotti's case closed as witnesses refuse to testify" (12-12-2020) *News 24* <https://www.news24.com/news24/southafrica/news/bishops-diocesan-college-sex-scandal-fiona-viotti-off-the-hook-as-witnesses-refuse-to-testify-20201212> (accessed 28-01-2021).

3 Bernstein et al (2015) *Centre for Development and Enterprise* 17; JL Beckmann "Competent Educators in Every Class: The Law and the Provision of Educators" (2018) 43 *JJS* 13.

competent one.[4] For the qualification to carry any weight, the educator at least needs to be present in the classroom, utilise instructional time and have the necessary pedagogical content knowledge.[5] Research shows that this is not necessarily the case.

Educators in South Africa have a high annual leave and absenteeism rate and, even when they are present in the classroom, reports reveal that instructional time is wasted. The Human Sciences Research Council ("HSRC") reports that, based on a conservative estimate, South African educators take around 20 to 24 working days' leave per year.[6] The taking of leave itself is not problematic seeing that educators as employees are entitled to annual leave.[7] The problem is that these days do not refer to leave taken during institutional closures[8] ("school holidays") but to working days where leave results in a probable loss of instructional time.[9] The report further reveals that leave rates are highest in disadvantaged schools and where adverse socio-economic factors, such as poverty, are at their highest levels.[10] Jansen comments on the institutional culture of schools and, in particular, the culture among educators in what he calls "black township schools".[11] According to his personal experience in the education sector, an adversarial culture has developed in these schools where

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4 See Bernstein et al (2015) *Centre for Development and Enterprise* 11; JL Beckmann (2018) *JJS* 2, 4; See also S Masondo "Education in South Africa: A system in crisis" (2016) *City Press* <https://www.news24.com/citypress/News/education-in-south-africa-a-system-in-crisis-20160531> (accessed 22-05-2021).

5 The HSRC's study of official leave taken by educators estimates that conservatively each educator takes 20 to 24 working days leave a year. This, together with reports showing wasted learning time by educators who are present in the classroom but fail to teach their learners point to a bigger issue in regard to educator capacity and competence. V Reddy, C Prinsloo, T Netshitangani, R Moletsane, A Juan & D Janse van Rensburg "An investigation into educator leave in the South African ordinary public schooling system" (2010) *HSRC (commissioned by UNICEF*) 84 <http://www.hsrc.ac.za/uploads/pageContent/593/AnInvestigationintoEducatorLeavedec2010.pdf> (accessed 14-05-2021).

6 Reddy et al "An investigation into educator leave in the South African ordinary public schooling system" (2010) *HSRC (commissioned by UNICEF*) 84. It should be noted that PERSAL data calculates the leave rate much lower and at 3-4%, but the under-recording of leave may be due to educators failing to complete leave forms and a failure to capture leave on PERSAL.

7 See s 20 of the BCEA. Educators, as are any other employees, are entitled to annual leave. In terms of item 3.3 of Chapter J of the Personnel Administrative Measures ("PAM"), an educator with less than 10 years' service is entitled to 22 working days leave per annum.

8 In terms of Item 2 of Chapter J of PAM educators are regarded to be on annual leave during institution closures.

9 Chapter B of PAM makes provision for the substitution of educators who are on leave. However, this policy can only be used if educators' leave is predetermined, such as maternity leave. See Reddy et al (2010) *HSRC* 6.

10 Reddy et al (2010) *HSRC* 84.

11 J Jansen "Personal reflections on policy and school quality in South Africa: When the politics of disgust meets the politics of distrust" in Y Sayed, A Kanjee & M Nkomo (eds) *The Search for Quality Education in Post-apartheid South Africa* (2013) 82-84.

absenteeism is commonplace.[12] One reason for the high levels of absenteeism is strong trade union affiliation which results in "stay-aways" that often last for weeks.[13] The strong support for these trade union activities do not necessarily affect the interests of educators directly but are often in support of broader political issues.[14] Jansen further notes that:

> "Teachers are encouraged by their union not to work after hours, and, if they must, to insist on being paid even when this involves professional development activities that benefit the teacher directly. After school, the plant effectively shuts down and whatever life might exist in such a school would be the result of learner-inspired activities or the odd teacher who goes beyond the call of duty".[15]

An analysis by Spaull of self-reported absenteeism reveals that grade 6 mathematics educators are absent for an average of 19 working days per year.[16] This form of absence is distinguished from annual leave, seeing that the research defines it as "unjustified absence".[17] Absenteeism is much higher in South Africa compared to other Sub-Saharan countries and in five of the nine provinces in South Africa, educators were absent for more than a month (more than 20 working days).[18] Spaull notes that self-reporting has a number of shortcomings including under-reporting and what educators may view as acceptable absenteeism.[19] The annual reports of PDEs between 2014 and 2019 of the four provinces that were analysed for this research (see below) show that a total of 235 formal disciplinary hearings addressed absenteeism and 117 addressed abscondment.[20] This only refers to instances where the absenteeism or abscondment by educators was of such a nature that it warranted formal disciplinary action. This number will be much higher if every single instance of unjustified absence in schools across South Africa is recorded. To combat

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12 84-88.
13 83.
14 83.
15 83.
16 N Spaull "Primary school performance in Botswana, Mozambique, Namibia and South Africa" (2011) *SACMEQ Working Paper No 8* 45 <http://www.sacmeq.org/sites/default/files/sacmeq/publications/08_comparison_final_18oct2011.pdf> (accessed 14-05-2021).
17 Spaull (2011) *SACMEQ Working Paper No 8* 46.
18 These provinces were the "Eastern Cape (20.8 days), KwaZulu-Natal (24.6 days), Limpopo (20.3 days), Mpumalanga (20.8 days), and North West (22.1 days)". Spaull (2011) *SACMEQ Working Paper No 8* 45.
19 Spaull (2011) *SACMEQ Working Paper No 8* 45-46.
20 The data is drawn from the PDEs' Annual Reports between 2014 and 2019.

absenteeism requires proper administrative management of educators by principals. This includes that leave forms be properly filed and that the principal ensures that educators are not unjustifiably absent from the workplace.[21] Where the institutional culture is of the nature described by Jansen above, it is doubtful that absence and leave is properly managed in many schools, making the issue difficult to analyse.

Even where educators are present at school, they are not necessarily in the classroom teaching and utilising instructional time.[22] Apart from this, Taylor notes that pedagogical and disciplinary knowledge of education is the foundation for quality teaching and learning.[23] However, he emphasises that this important aspect of the delivery of quality basic education lacks in the majority of educators in South Africa.[24] Standardised testing reveals that the subject content and pedagogical knowledge of educators in South Africa is poor.[25] Two subject fields, Mathematics and English, have been the topics of extensive research. According to Venkat, primary educators' content knowledge of mathematics teaching is lower among educators working in schools with a lower overall socio-economic status compared to those working in schools with an overall higher socio-economic status.[26] Spaull analyses South Africa's educational achievement in cross-national assessments such as the Progress in International Reading Literacy Study, the Trends in International Mathematics and Science Study ("TIMSS") and the SACMEQ.[27] He concludes that educators' mathematical content knowledge in South Africa is poor despite having the appropriate qualifications.[28] Taylor emphasises the far-reaching effects of educators with poor

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21 It should be noted that PERSAL data calculates the leave rate much lower and at 3-4%, but the under recording of leave may be due to educators failing to complete leave forms and a failure to capture leave on PERSAL. See Reddy et al "An investigation into educator leave in the South African ordinary public schooling system" (2010) *HSRC (commissioned by UNICEF*) 84.

22 Jansen "Personal reflections on policy and school quality in South Africa" in Y Sayed, A Kanjee & M Nkomo (eds) *The Search for Quality Education in Post-apartheid South Africa* (2013) 83; Masondo "Education in South Africa: A system in crisis" (2016) *City Press*.

23 N Taylor "Inequalities in teacher knowledge in South Africa" in N Spaul & JD Jansen (eds) *South African Schooling: The Enigma of Inequality: A Study of the Present Situation and Future Possibilities* (2019) 263 263.

24 263.

25 JL Beckmann "Competent educators in every class: The law and the provision of educators" (2018) 43 *JJS* 24; Bernstein et al (2015) *Centre for Development and Enterprise* 3; Spaull "South Africa's Education Crisis: The quality of education in South African 1994-2011" (2013) *Centre for Development and Enterprise*.

26 H Venkat "Teachers' mathematical knowledge, teaching and the problem of inequality" in N Spaull & JD Jansen (eds) South African Schooling: The Enigma of Inequality: A study of the present situation and future possibilities (2019) 189 189.

27 N Spaull "Accountability and capacity in South African education" (2015) 19 *Education as Change* 113-142.

28 113-142.

English reading comprehension.[29] This is because a poor understanding of English by educators pose severe constraints on transferring difficult concepts to learners in any subject.[30] This, together with a lack of accountability for poor work performance results in a cycle of poor service delivery in the education sector.[31] The administrative capacity of principals and the logistical capacity of district officials and the broader PDE inevitably impact on the delivery of quality basic education.[32]

Beckmann, who spent a large part of his career as an educator and later as an academic, addressed numerous issues pertaining to the regulation of education in South Africa. Central to his education law research – much as is the case with this thesis – is an attempt to address regulatory challenges to improve the quality of education.[33] In examining the quality of educators in South Africa, he argues that the quality of the legal framework and its implementation[34] largely determine the quality of the educator.[35] He suggests that the existing legal framework could be improved

[29] Taylor "Teacher knowledge" in *South African Schooling: The Enigma of Inequality* 269.
[30] 269.
[31] Spaull (2015) *Education as Change* 113-142.
[32] See Bantwini & Moorosi (2018) *South African Journal of Education* 1 1-2.
[33] JL Beckmann & N Phathudi "Access to and the provision of pre-school education: The trajectory since 1994" (2012) 27 *SAPL* 472-486; Beckmann & Füssel (2013) *De Jure* 557-582; J Beckmann "Onderwys in Suid-Afrika van 1961 tot 2011: Tussen twee paradigmas en ontwykende ideale" (2011) 51 *Tydskrif vir Geesteswetenskappe* 507-532; J Beckmann "Recent legislation regarding the appointment of public school educators: The end of the decentralisation debate in education?" (2009) 41 *Acta Academica* 128-141; Beckmann "Competent educators in every class: The law and the provision of educators" (2018) *JJS* 1-31; J Beckmann & J Prinsloo "Some aspects of education litigation since 1994: Of hope, concern and despair" (2015) 35 *South African Journal of Education* 1-11; J Beckmann & J Prinsloo "Imagined power and abuse of administrative power in education in South Africa" (2006) *Journal of South African Law* 483-496; J Beckmann & I Prinsloo "Legislation on school governors' power to appoint educators: friend or foe?" (2009) 29 *South African Journal of Education* 171-184; J Beckmann "A dance or a marriage? The relationship between education and the law in South Africa some personal observations from two vantage points" (2015) 18 *PELJ* 2061-2078; J Beckmann "Thuma mina and education: Volunteerism, possibilities and challenges" (2019) 39 *South African Journal of Education* 1-8.
[34] Unfortunately, according to Beckmann, the implementation of the legal framework lacks in many respects. This can also be seen from the analysis of ELRC arbitration awards about misconduct and incapacity analysed in this chapter.
[35] Beckmann (2018) *JJS* 2, 4.

regarding the recruitment and selection,[36] demand,[37] appointment[38] and performance of educators.[39]

Employment law (and the labour rights of educators) is an aspect of the legal framework that potentially impacts on the quality of education received by learners.[40] In this regard, the discussion in the preceding chapters described the rights – both constitutional and legislative – of educators. It has been suggested that the labour rights of educators should be limited considering the impact the full array of labour rights and, more specifically, the right to strike have on the right to education of learners.[41] In this regard, there have been numerous calls to consider an amendment to the Labour Relations Act 66 of 1995 ("LRA") to regard the education sector as an essential service in South Africa.[42] The mere fact that this topic remains on the agenda is indicative of the impact of the exercise of educators' collective labour rights on the delivery of quality basic education. Research by Wills shows that strike action by educators negatively impacts learning in the poorest three quarters of schools.[43] This

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[36] The low requirements (compared to other disciplines) for entry into the profession and the fact that SACE who is responsible for professional standards in the sector plays no role in the selection of educators, contribute to the low quality of educators. See Beckmann (2018) *JJS* 25.

[37] In this regard Beckmann criticises the government for failing to ensure an adequate supply of qualified educators to meet the demand. This inevitably includes ensuring the quality of the staff at higher education institutions. See Beckmann (2018) *JJS* 25; Bernstein et al (2015) *Centre for Development and Enterprise* 15.

[38] In Chapter 4 the provisions of SASA in regard to the SGBs role in recommending educators for appointment to the HOD were discussed. This continues to be a contentious issue resulting in a power play between the PDE and SGBs. Where SGBs are functioning optimally, it follows that they will recommend the best candidates for the position. However, in many instances SGBs have to function in dysfunctional schools. The problem is that the responsibility of ensuring that the SGB fulfills its functions, falls on the HOD in terms of SASA.

[39] Beckmann (2018) *JJS* 20.

[40] See Beckmann & Füssel (2013) *De Jure* 557-582**.**

[41] For instance, it has been argued that education should be considered an essential service thereby limiting the impact of industrial action on the delivery of education in the sector. See K Calitz & R Conradie "Should teachers have the right to strike? The expedience of declaring the education sector an essential service" (2013) 24 *Stell LR* 124-145; See also D Horsten & C le Grange "The limitation of the educator's right to strike by the child's right to basic education" (2012) 27 *SAPL* 509-538.

[42] See, eg, K Calitz & R Conradie "Should teachers have the right to strike? The expedience of declaring the education sector an essential service" (2013) *Stell LR* 124-145; See also Horsten & Le Grange (2012) *SAPL* 509-538. More recently in 2018 did the Democratic Alliance called for the essential services committee to consider strike action in the education sector and whether it should be limited. See S Smit "Teachers right to strike must be protected – Section 27" (2018) *Mail & Guardian* <https://mg.co.za/article/2018-07-09-teachers-right-to-strike-must-be-protected-section27/> (accessed 15-06-2021).

[43] See G Wills "The effects of teacher strike activity on student learning in South African Primary Schools" (2014) *Economic Research Southern Africa (ERSA) funded by the National Treasury of South Africa* 1,11.

is because educators at these schools are involved in strike action more often than those working at the wealthiest 25% of schools.[44]

Experts in the field of education law have long written on challenges around the regulation of education in South Africa, including the misconduct and incapacity of educators.[45] This research reveals that sexual misconduct, including sexual harassment, perpetrated by educators towards learners, is a particular challenge.[46] General violence,[47] assault and corporal punishment[48] are also forms of educator misconduct that have been the topics of extensive research. Coetzee focuses mostly on the sexual misconduct of educators towards learners.[49] In 2012 she investigated the reason the DBE cannot seem to rid schools of educators committing sexual misconduct towards learners and suggested amending the regulation of educator-on-learner-misconduct in the sector.[50] Most of Coetzee's concerns have not been addressed, but a step in the right direction is that the Minister of Education on 9 April 2021 amended the Terms and Conditions of Employment of Educators determined in

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44 11.

45 See, eg, JP Rossouw & E de Waal "Employer tolerance with educator misconduct versus learners' rights" (2004) 24 *South African Journal of Education* 284-288; JP Rossouw "Decentralisation in South African public schools: A labour law perspective on the role of the principal in managing staff misconduct" (2001) 19 *Perspectives in Education* 123-136; JP Rossouw "The potential remedial function of the law in the deteriorating public education system in South Africa" (2013) *De Jure* 285-309.

46 K Calitz & C de Villiers "Sexual abuse of pupils by teachers in South African schools: The vicarious liability of education authorities" (2020) 137 *SALJ* 72-107; E de Waal & RD Mawdsley "Student/learner allegations of teacher sexual misconduct: A teacher's right to privacy and due process" (2011) *De Jure* 74-100; A de Wet & I Oosthuizen "The nature of learner sexual harassment in schools: an education law perspective" (2010) 42 *Acta Academica* 194-229; SA Coetzee "Law and policy regulating educator-on-learner sexual misconduct" (2012) *Stell LR* 76-87; SA Coetzee "Victim rights and minimum standards for the management of learner victims of sexual misconduct in South African schools" (2013) 14 *Child Abuse Research: A South African Journal* 37-48; SA Coetzee "Educator sexual misconduct: Exposing or causing learners to be exposed to child pornography or pornography" (2015) 18 *PELJ* 2108-2139; SA Coetzee "Holding the state directly liable for educator-on-learner sexual abuse" (2018) 19 *Child Abuse Research: A South African Journal* 30-44; SA Coetzee "Promoting fair individual labour dispute resolution for South African educators accused of sexual misconduct (part 1)" (2021) 29 *Journal of South African Law* 29-42.

47 C de Wet "Educators as perpetrators and victims of school violence" (2007) 20 *Acta Criminologica* 10-42.

48 M Reyneke "Educator accountability in South Africa: Rethink section 10 of the South African Schools Act" (2018) 43 *JJS* 117-144.

49 See Coetzee (2012) *Stell LR* 76-87; Coetzee (2013) 14 *Child Abuse Research: A South African Journal* 37-48; SA Coetzee (2015) *PELJ* 2108-2139; SA Coetzee (2018) *Child Abuse Research: A South African Journal* 30-44; Coetzee (2021) *Journal of South African Law* 29-42. On the issue of educator misconduct other than sexual misconduct, see SA Coetzee "South African educators' mutually inclusive mandates to promote human rights and positive discipline" (2013) 31 *Perspectives in Education* 87-95; SA Coetzee "A legal perspective on social media use and employment: Lessons for South African Educators" (2019) 22 *PELJ* 2-36.

50 See Coetzee (2012) *Stell LR* 76-87.

terms of section 4 of the EOEA.[51] This amendment aims to regulate the period of prevention of re-employment of former educators who have been dismissed for misconduct.[52] This step by the Minister to some extent recognises the fact that misconduct by educators is a challenge in the sector and that dismissal has not necessarily solved the issue of repeat offenders being re-appointed (seeing that, until now, these educators could still be re-employed after dismissal).

The research discussed above shows a shared concern about the magnitude of misconduct and incapacity in the basic education sector. This thesis seeks to contribute to this body of research through a more detailed analysis of the experience with substantive fairness, procedural fairness and suspension in relation to misconduct, as well as the experience with the legal response to incapacity in the basic education sector. As mentioned, this is done through analysis of a large number of arbitration awards of the ELRC.

6 3 Statistical overview and delimitation for purposes of the further research

As a point of departure, this study considered the annual reports of PDEs, which include valuable labour relations statistics – including the number of disciplinary hearings per year, the types of misconduct addressed, as well as the outcome of these hearings. These statistics are also valuable for purposes of comparing misconduct and incapacity across provinces to establish certain trends. This alone, however, does not provide enough information to adequately assess specific challenges with the regulation of misconduct and incapacity in the basic education sector. To provide recommendations and identify specific issues with the content and implementation of the legislative framework, the circumstances that gave rise to these statistics need to be explored. It is for this reason that the 138 ELRC arbitration awards issued in respect of four provinces, namely the Western Cape, Eastern Cape, Free State and Limpopo for the period 2014 to 2019 were analysed in detail insofar as the awards related to dismissal, unfair discipline short of dismissal,[53] suspension for misconduct and poor performance (as incapacity). The focus on these four provinces can be motivated as

[51] GN 331 in *GG* 44433 of 09-04-2021.
[52] Item 3 of GN 331 in *GG* 44433 of 09-04-2021.
[53] Insofar unfair dismissal arbitrations were incorrectly categorised by the ELRC and included arbitrations where sanctions short of dismissal were imposed and challenged at arbitration as unfair labour practices. These were not the only matters that dealt with ULPs in the four provinces between 2014 and 2019.

follows. The Western Cape has proved itself to be the most active in addressing misconduct (measured in terms of formal disciplinary hearings for misconduct).[54] The Free State is the province that has consistently delivered the best results in the National Senior Certificate examinations (based on pass rate),[55] which may give some indication of a correlation between academic outcomes in a particular province and its management of discipline and capacity of educators. In contrast, the Eastern Cape and Limpopo were selected because of their consistently low performance in the National Senior Certificate examinations compared to other provinces (over the same period).[56] Apart from that, the Eastern Cape was chosen because it is the province with the most schools, which may add to the challenge with regard to the management of misconduct and incapacity in schools.[57] In addition, consideration of a total of 138 arbitration awards means that a representative number of all arbitration awards issued

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[54] See Graph 2 below.

[55] See the NSC Examinations Reports issued by the DBE from 2016 to 2019 <https://www.education.gov.za/Resources/Reports.aspx> (accessed 6-11-2020) and the data provided by JJ Turner "How each SA province fared in matric exams over the last 5 years" (2019) *News24* <https://www.news24.com/parent/learn/freeexamresources/matric-past-exam-papers/how-each-sa-province-fared-in-matric-exams-over-the-last-5-years-20190109> (accessed 6-11-2020). This was used to calculate the average performance by different provinces in the NSC examinations from 2014 to 2019. According to this calculation the Free State performed the best with an average pass rate of 85.8%. Gauteng came in second with an average of 85.7%, followed by the Western Cape with 83.8%. These were the only provinces that had a average pass rate of above 80% from 2014 to 2019. It should be noted that the DBE in its "National Senior Certificate Examination Report" (2016) *DBE* 7 <https://www.education.gov.za/Portals/0/Documents/Reports/NSC%20EXAMINATION%20REPORT%202016.pdf?ver=2017-01-05-110635-443> (accessed 1-10-2020) made the following comment regarding the difference in performance between 2015 and 2016 "The class of 2016 is the third cohort of candidates to write the NSC examination that is aligned with the internationally benchmarked national Curriculum and Assessment Policy Statement (CAPS). The rise in achievement rates from 70.7% in 2015 to 72.5% in 2016 must be seen in context of a maturing and stabilising system in which teachers and district officials are now more familiar with the required pedagogical content knowledge of CAPS and the need to expose learners to questions of high cognitive demand. It is also underpinned by systemic gains at lower levels of the system as indicated by higher achievement patterns in the recent cycles of TIMSS and SACMEQ".

[56] This also based on calculations in light of the NSC Examinations Reports issued by the DBE from 2016 to 2019 <https://www.education.gov.za/Resources/Reports.aspx> and the data in an article by JJ Turner "How each SA province fared in matric exams over the last 5 years" (2019) *News24* <https://www.news24.com/parent/learn/freeexamresources/matric-past-exam-papers/how-each-sa-province-fared-in-matric-exams-over-the-last-5-years-20190109> (accessed 6-11-2020), was used to calculate the average performance by different provinces in the NSC examinations from 2014 to 2019. According to this calculation Limpopo had an average pass rate of 68.3% and the Eastern Cape had an average pass rate of 65.6%.

[57] The Eastern Cape has the greatest number of schools with 5 468 schools in the province. The provinces with the second most schools are Kwa-Zulu Natal and Gauteng with 2 083 schools each. See Department of Basic Education "Education Statistics in South Africa in 2016" (2018) *Department of Basic Education* 4-5 <https://www.education.gov.za/Portals/0/Documents/Publications/Education%20Statistic%20SA%202016.pdf?ver=2018-11-01-095102-947> (accessed 29-07-2020).

by the ELRC concerning misconduct and poor performance (as incapacity) were considered.

The ELRC is the bargaining council exercising labour dispute resolution jurisdiction over the public education sector in South Africa, which includes jurisdiction to determine unfair dismissal (misconduct and incapacity) and unfair labour practice ("ULP") disputes. A survey of the arbitration awards made by the ELRC is therefore useful as the ELRC is a single forum hearing disputes involving departmental educators and arising from the entire public education sector, should such disputes not be resolved internally or through appeal processes provided for in the EOEA. Analysis of these awards may also lead to further insights into the statistics around misconduct and incapacity – that is, into the manner in which the legislative framework relating to misconduct and incapacity is implemented and into the main trends and challenges facing the basic education sector in the areas of misconduct and incapacity. The analysis is based on arbitration awards that were available for the period 2014 to 2019 as reflected on the ELRC website.[58]

To place the further discussion and analysis in context and explain its focus, it is necessary to consider some preliminary statistics about the basic education sector, the number of disciplinary enquiries in that sector, what these enquiries dealt with, as well as some statistics related to arbitration at the ELRC. In this regard, data from a report published by the DBE in 2018 on Education Statistics in South Africa as of 2016 is used to present statistics about the size of the basic education sector in the graph below.[59]

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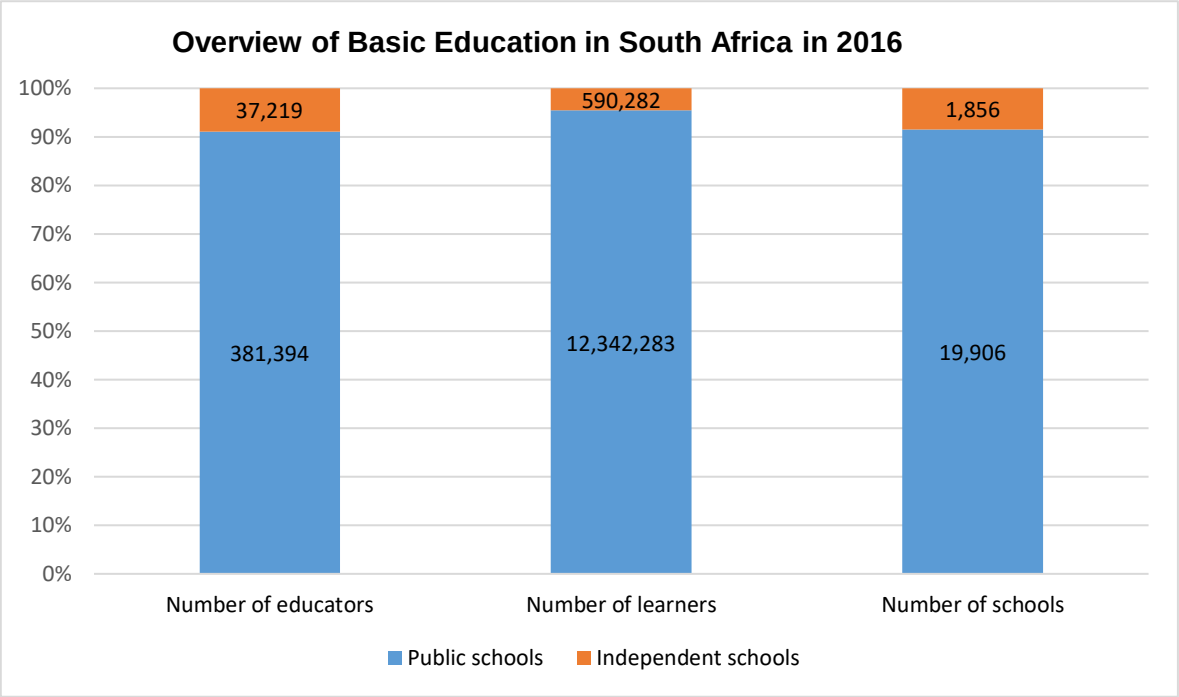
[58] The data is drawn from the arbitration awards provided by the ELRC between 2014 and 2019 as of June 2020. The arbitration awards can be accessed at <https://www.elrc.org.za/awards?field_case_number_value=&field_issue_value=Unfair+Dismissal+-+Misconduct&field_province_value=All&field_award_date_value%5Bvalue%5D%5Byear%5D=&keys=>. The ELRC has since updated its website, categorising the past 20 years' arbitration awards under one link, removing the previous categorisation of arbitration awards according to province, issue and date. I contacted the ELRC who is working on re-categorising the arbitration awards as reflected previously.

[59] Department of Basic Education "Education Statistics in South Africa in 2016" (2018) *Department of Basic Education* 4-5.

Graph 1: Overview of basic education in South Africa in 2016:[60]



Translated to percentages, Graph 1 shows that 91.1% of the total number of educators in South Africa are public school educators, with only 8.89% of educators employed at independent schools. A mere 4,56% of learners attended independent schools in South Africa in 2016. From there the focus of this study on the public basic education sector. The total number of public school educators have increased since 2016 and is reported to currently be around 410 000.[61] This large number of educators, seen in conjunction with the large number of schools, also serves to emphasise the importance of research into misconduct and incapacity in the sector, because of its broad impact. At the same time, it should be noted that the awards that were considered in this research are those of the ELRC, which only has jurisdiction over disputes affecting educators who are on the provincial post establishment of public schools (departmental educators) and not educators employed by school governing bodies ("SGBs") in addition to the provincial post establishment. Even so, by far the

[60] Department of Basic Education "Education Statistics in South Africa in 2016" (2018) *Department of Basic Education* 4-5.

[61] South African Government "Basic Education on increased number of qualified teachers in education system" (2018) *South African Government* <https://www.gov.za/speeches/pubilc-education-system-1-oct-2018-0000#https://theconversation.com/south-africa-must-up-its-game-and-produce-more-teachers-125752> (accessed 28-01-2021).

majority (around 68%)[62] of educators in public schools are departmental employees. In addition, the point was made earlier that the appointment of additional educators by SGBs typically is the preserve of fee-paying schools compared to schools in the poorest communities. As such, one may not only expect the percentage of departmental educators to increase in schools where the delivery of a quality basic education may be most challenging, but a focus on their situation has a definitive and important developmental rationale. Lastly, research into labour disputes affecting educators appointed by SGBs, shows little activity.[63] As mentioned in chapters 4 and 5, these educators (who fall under the LRA and the jurisdiction of the Commission for Conciliation, Mediation and Arbitration ("CCMA")) are typically appointed on contract, which leaves room for the employer to simply not renew the educator's contract in case of unacceptable conduct or incapacity.[64] Even so, later in this chapter, it is argued that SGB appointed educators should, through amendment of the EOEA, be made subject to (at least) the same principles regulating misconduct and incapacity applicable to provincial educators in the public basic education system.

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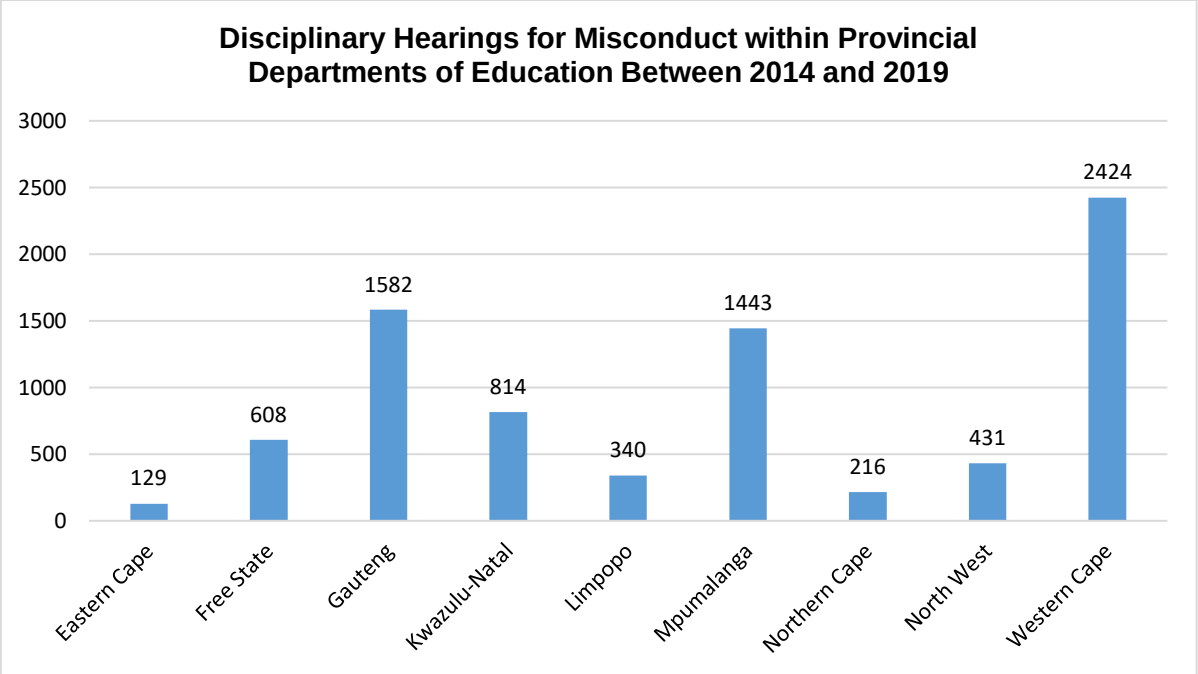
62 In 2014, The Federation of Associations of Governing Bodies of South African Schools ("FEDSAS") published the results of an "Environmental Analysis" which represents information from 561 schools that participated in the study. According to the report, across all nine provinces (in the schools that participated) an average of 30,18% of educators were appointed by SGBs, 67,55% were appointed by PDEs and 2,27% posts were vacant. With regard to non-educator staff, 57,46% were appointed by SGBs, 38,20% were appointed by PDEs and 4,33% of non-educator posts were vacant. See FEDSAS "FEDSAS Environmental Analysis Research Report" (2014) *FEDSAS* 1,4, 9. Note, however, that this study is based on a relatively small sample of schools. Note further that the number of educators represented in Graph 1 earlier in the text (based on information from the DBE) does not make it clear whether that number includes only provincial educators, or SGB appointed educators as well.

63 Few misconduct disputes of SGB appointed educators have reached the CCMA or courts. For example, in *Solidarity obo Barkhuizen v Laerskool Schweizer-Reneke* 2019 40 ILJ 1320 (LC) a SGB appointed educator was suspended by the MEC and the Labour Court found the MEC to have acted *ultra vires*. The suspension was declared unlawful and was uplifted. Apart from misconduct, a few cases where other types of disputes arose in the context of SGB appointed educators may be mentioned. In *Burger v Governing Body of Newcastle Senior Primary School* 2005 2 BALR 175 (CCMA) the educator was dismissed for incapacity after applying for seven weeks unpaid leave for an operation. In *Conn v College Street Primary School* 2017 11 BALR 1181 (CCMA) the dismissal of a fixed term educator for operational requirements was found to be unfair since the employer did not consult with the educator or proved that it selected the educator fairly and the educator had a reasonable expectation of renewal of her contract. In a number of cases the dispute centered around the renewal of fixed term contracts. See *Hlongwane v Bonginkosi Christian Academy* 2017 1 BALR 24 (CCMA), *Ntsoko v St John the Baptist Catholic School* (2019) 9 BALR 1017 (CCMA) and *Roets v Governing Body of Soutpansberg Primary School* 2017 1 BALR 91 (CCMA). In *Grootboom v Member of the Executive Council: Department of Education, Eastern Cape Province* 2019 JOL 40669 (ECG) the educators disputed the difference in remuneration provided for in their fixed term contracts compared to "temporary educators" of the PDE.

64 See paragraph 4 4 3 of chapter 4.

Graph 2 below presents the total number of formal disciplinary hearings conducted within the various PDEs in respect of departmental educators between 2014 and 2019.

Graph 2: Disciplinary hearings for misconduct within Provincial Departments of Education between 2014 and 2019: [65]



* Note that no data was available on disciplinary hearings for the Free State PDE for the years 2014/2015 and 2018/2019 as well as for the Gauteng PDE for the year 2014/2015. This impacts the total number of disciplinary hearings represented in the graph for those two provinces.

Simply looking at these figures does not provide insight into whether educator misconduct is a real issue in the education sector. What it does show, if seen in conjunction with Graph 1, is that educator misconduct seems to be at low levels. For example, compared to the number of public school educators in the sector (381 394 in 2016), it becomes clear that only 0,5% of all educators were involved in formal disciplinary hearings for the year 2016/2017.[66] At the same time, it should be borne in mind that the institution of a disciplinary hearing remains subject to the potentially

[65] The data is drawn from the PDE's Annual Reports between 2014 and 2019. Note that the Graph 2 represents disciplinary hearings held within each PDE between 2014 and 2019 but that the annual reports specify that the year is from 1 April to 31 March of the following year.

[66] This percentage is calculated using the total number of educators in 2016 (381 394) compared to the total number of disciplinary hearings in the year 2016/2017 (1 909) which translates to 0,5%.

incorrect exercise of discretion by responsible persons. In this regard, the analysis of ELRC arbitration awards in this chapter provides a lot of insight into the quality of decision-making relating to misconduct and incapacity required by law in the basic education sector.

Graph 2 also shows that the Western Cape and Gauteng PDEs instituted the highest number of formal disciplinary hearings (2424 and 1582 respectively) between 2014 and 2019. Although data from 2013/2014 was not used to compile Graph 2, it is interesting to note that the Kwazulu-Natal PDE recorded 1691 disciplinary hearings in that year, which in itself is much higher than the total number of enquiries in that province over the five years presented by Graph 2 (only 814). This should be seen as an outlier – the annual report of the Kwazulu-Natal PDE for the 2013/2014 year recorded 1291 of the total number of disciplinary hearings in that year as "social grant misconduct".[67] It is unclear what this form of misconduct entails and the Kwazulu-Natal PDE remains the only department of education in South Africa ever recording such a type of misconduct. This is also not a listed ground of misconduct in sections 17 or 18 of the EOEA.[68] It also raises preliminary questions about the consistency and quality of data recording by the different PDEs.

To return to the Western Cape and Gauteng PDEs, it is noteworthy that in 2016, the Western Cape had 33 254 public school educators and Gauteng 63 092.[69] The Western Cape, however, instituted 59,5% more formal disciplinary hearings in 2016 than Gauteng, which had 89,7% more educators.[70] This already raises an important issue. It seems a matter of logic that the more employees an organisation has the more instances of misconduct will be recorded. However, this is not what the data reflects. In fact, the Western Cape routinely records more formal disciplinary hearings than any other province and is the only PDE that provides data in its annual reports

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67 Kwa-Zulu Natal Department of Education Annual Report 2013/2014, 89.

68 Sections 17 and 18 is quoted in full in chapter 5 above.

69 Department of Basic Education "Education Statistics in South Africa in 2016" (2018) *Department of Basic Education* 4.

70 The first value was calculated using the total disciplinary hearings in the Western Cape in 2016 (539) in relation to the total number of disciplinary hearings in Gauteng in 2016 (338). The second value was calculated using the total number of educators in Gauteng (63 092) in relation to the total number of educators in the Western Cape (33 254). See Western Cape Department of Education Annual Report for 2016/2017, 164 and Gauteng Department of Education Annual Report for 2016/2017, 228. See also Department of Basic Education "Education Statistics in South Africa in 2016" (2018) *Department of Basic Education* 4.

about the total number of reported and finalised cases per year.[71] Using that data, the Western Cape received and finalised 5 291 disciplinary reports between 2014 and 2019.[72] In other words, 2 424 cases during that period were referred for formal disciplinary hearings, whereas the total number of disciplinary reports that the Western Cape PDE received and finalised was 5 291. This leads to further insights based on the fact that a PDE remains responsible for formal disciplinary enquiries (where the principal acts as the initiator – prosecutor), while the principal remains responsible for informal discipline (delegated by the HOD).[73] Each school is responsible to report to the circuit manager the number of cases of misconduct dealt with by the school itself. The higher number of disciplinary reports and formal disciplinary hearings conducted by the Western Cape PDE compared to other PDEs already is indicative of a more efficient and accountable system of discipline than the other PDEs.

As far as the specific types of misconduct in the basic education sector are concerned, Graph 3 represents the types of misconduct most frequently addressed at disciplinary hearings conducted by the PDEs of the four provinces selected[74] for the further detailed analysis, namely the Western Cape, Eastern Cape, Free State and Limpopo.

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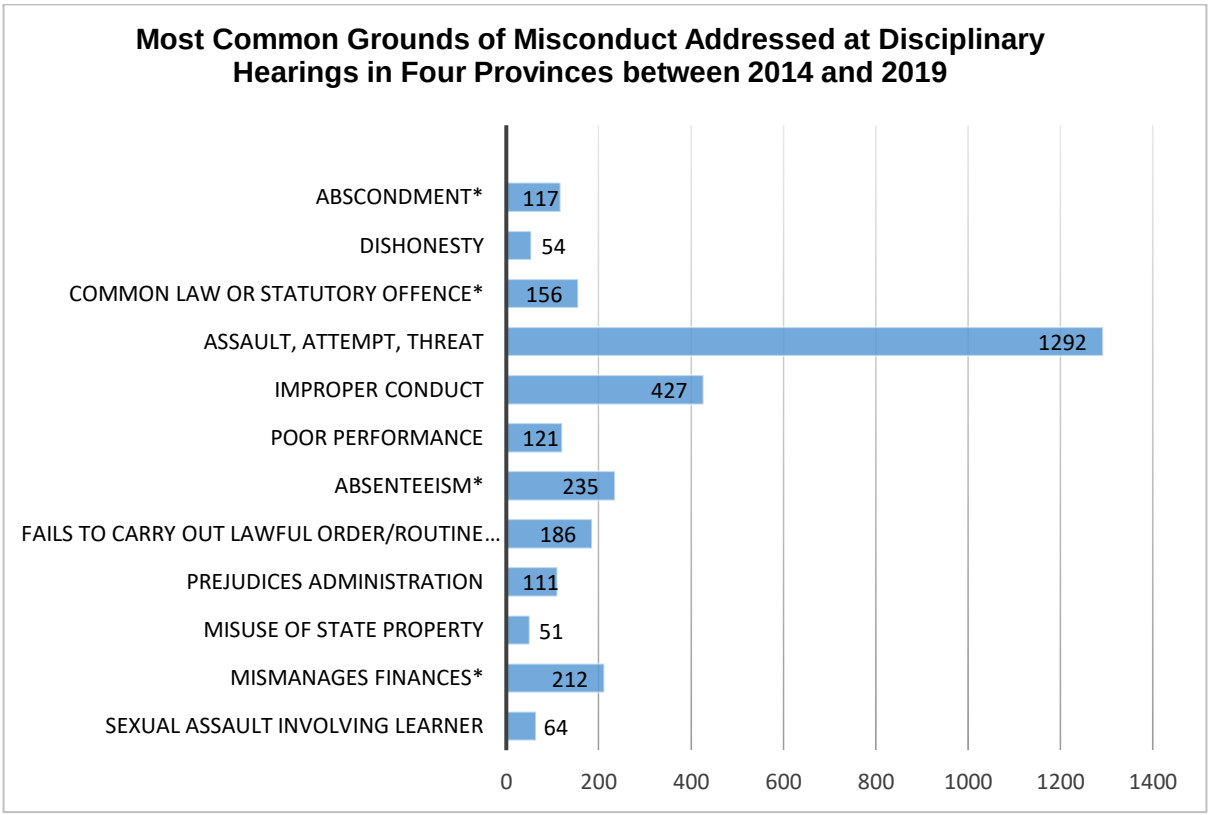
71 See, eg, Western Cape Department of Education Annual Report for 2018/2019, 155. The reports can be accessed at <https://wcedonline.westerncape.gov.za/wced-annual-report>.

72 See Western Cape Department of Education Annual Report for 2014/2015, 157; Western Cape Department of Education Annual Report for 2015/2016, 151; Western Cape Department of Education Annual Report for 2016/2017, 164; Western Cape Department of Education Annual Report for 2017/2018, 156 and Western Cape Department of Education Annual Report for 2018/2019, 155. The reports can be accessed at <https://wcedonline.westerncape.gov.za/wced-annual-report>.

73 See chapters 4 and 5.

74 The reasons for this selection were explained earlier in the text.

Graph 3: Most common grounds of misconduct addressed at disciplinary hearings in four provinces between 2014 and 2019: [75]



* Abscondment.[76]

* Common-law or statutory offence.[77]

* Fails to carry out lawful order/routine instruction.[78]

* Mismanages finances.[79]

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[75] This graph was compiled using the data provided in the annual reports published by the Western Cape Department of Education, Eastern Cape Department of Education, Free State Department of Education and Limpopo Department of Education between 2014 and 2019.

[76] The Western Cape PDE is the only department that included abscondment as a ground of misconduct in its annual reports. Abscondment is not listed as a ground of misconduct in ss 17 and 18 of the EOEA but is provided for in s 14 of the EOEA (which creates a "deemed dismissal" where an educator is absent for a continuous period of more than 14 working days).

[77] Common-law or statutory offence includes misconduct involving theft, fraud, and corruption. The annual reports for the Western Cape include the above grounds of misconduct under "common law or statutory offence" whereas the other PDEs list the grounds separately. This graph combined the data for theft and fraud in the other provinces under this heading. There were no recorded instances of corruption in the Eastern Cape, Free State or Limpopo for the time period.

[78] The annual reports of the Free State list "failure to carry out a lawful order" and "insubordination" separately. The data for these grounds of misconduct were combined under "failure to carry out a lawful order/routine instruction" in this graph, in line with the wording of the EOEA and the classification used in the Western Cape Annual Reports.

[79] The annual reports of the Free State list "mismanagement of funds" and "financial misconduct" separately. The data for these grounds of misconduct were combined under "mismanages finances" in the above graph, in line with the wording of the EOEA and the classification used in the Western Cape Annual Reports.

Graph 3 shows that assault (which includes attempted assault or the threat thereof), improper conduct, absenteeism, mismanagement of finances and insubordination were the five grounds of misconduct most commonly addressed at disciplinary hearings. As mentioned earlier, these statistics provide insight into the types of issues that arise around misconduct in the basic education sector but provide little insight into the specific challenges relating to substance and procedure raised by these types of misconduct. Even so, because of the prevalence of these types of misconduct, they are specifically considered in the further analysis of ELRC arbitration awards below. It should also be noted that abscondment and absenteeism are listed separately in Graph 3. From the data in the various annual reports of the PDEs alone, it cannot be concluded whether the conceptual difference between absenteeism and abscondment was adequately drawn at disciplinary hearings. ELRC arbitration awards where there was a dispute regarding the fairness of the dismissal of educators charged with unauthorised absence are discussed below. This provides insight into whether such a conceptual distinction is adequately drawn and what the circumstances were around the educators' absence. That discussion delves into the difference between absenteeism, abscondment, desertion and deemed discharge.[80] For now, it is mentioned merely to note that the graph records the two types of misconduct separately.

Furthermore, the discussion in chapter 5 showed that the EOEA contains a detailed list of different types of misconduct. Unfortunately, the four PDEs whose annual reports were used to compile Graph 3 do not record all types of misconduct according to the terminology used in sections 17 and 18 of the EOEA. For instance, the annual reports of the Free State list "mismanagement of funds" and "financial misconduct" separately, so too the "failure to carry out a lawful order" and "insubordination".[81] The classification of misconduct is therefore not only confusing, but not in line with the different types of misconduct listed in sections 17 and 18 of the EOEA. In line with the general goal of this thesis, it may be said that the proper approach to discipline starts with a proper understanding of the challenges facing the basic education sector. And

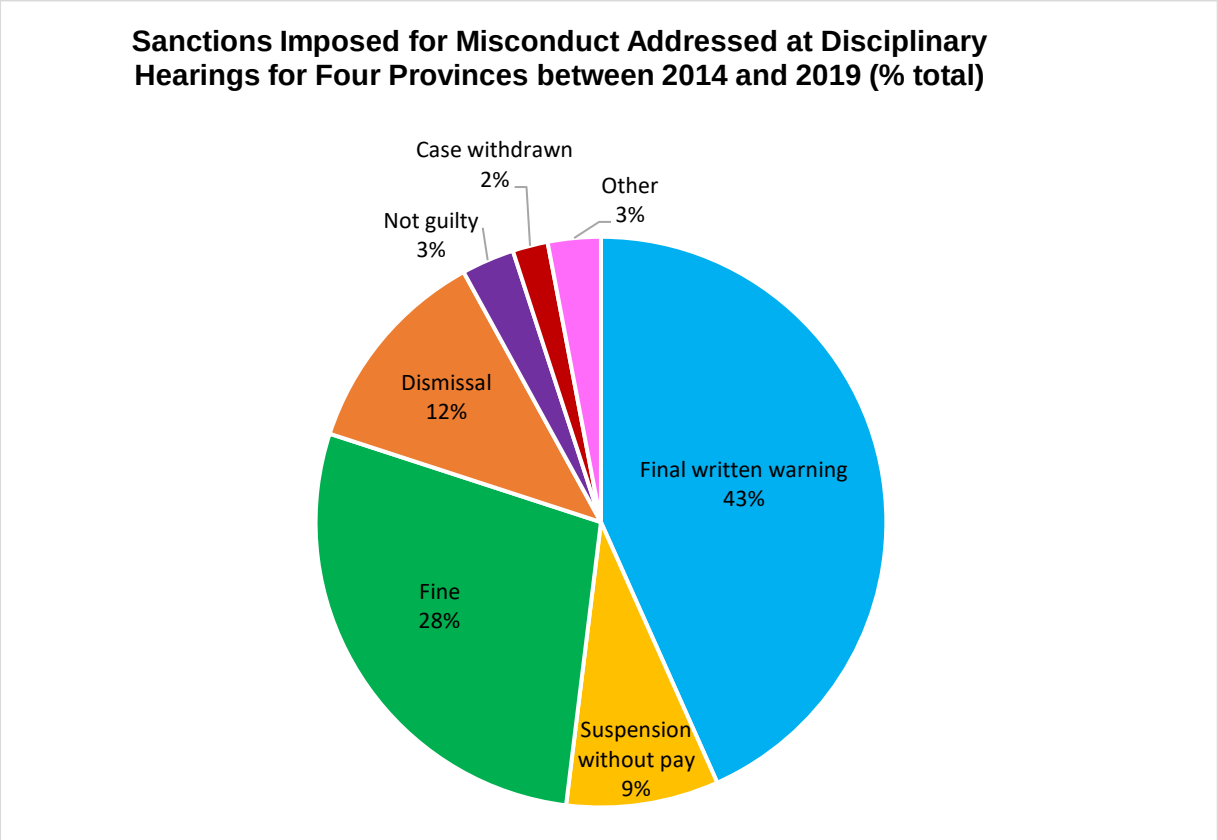
[80] J Grogan *Dismissal* 255.
[81] See, eg, Free State Department of Education Annual Report 2017/2018, 192-193.

that proper understanding starts with an accurate and consistent recording of discipline, not only per province and in line with the EOEA, but also across provinces.

Inaccurate (or confusing) recording of data may also create and be indicative of other challenges. Sections 17(1) and 18(3) of the EOEA give guidance with regard to the sanctions that should or may be imposed should an educator be guilty of one or more of the grounds of misconduct listed in sections 17 and 18. To the extent that there is an incorrect recording of the types of misconduct, it may result in the inappropriate or inconsistent imposition of sanctions. In addition, it may reflect a fundamental misunderstanding of how the EOEA works and what the different types of misconduct entail, a misunderstanding that may exist on the side of the principal (in his or her initial identification and categorisation of the misconduct) as well as the PDE (who may simply be accepting of this inaccuracy or confusion). Lastly, it may also be that in light of the distinction sections 17 and 18 of the EOEA draw between misconduct that must result in dismissal and misconduct that may result in dismissal, that there is a practical manipulation through categorisation of charges to avoid dismissal.

Graph 4 below includes an indication of the outcomes of the disciplinary hearings in these four provinces.

Graph 4: Sanctions imposed for misconduct addressed at disciplinary hearings in four provinces between 2014 and 2019:[82]



Graph 4 represents the sanctions imposed at disciplinary hearings as a percentage of the total number of hearings between 2014 and 2019. The category marked as "other" includes sanctions that were not often imposed (less than 1% of total) or where a combination of sanctions was imposed. Also included in the "other" category is "discharge", a sanction included in the annual reports of the Eastern Cape PDE.[83] This sanction was listed separately from dismissal. It is unclear from the reports if "discharge" refers to deemed discharge in terms of section 14(1)(a) of the EOEA. The annual reports of the Western Cape PDE categorise "dismissal/abscondment"

[82] Graph 4 uses the data from the annual reports of the Western Cape, Eastern Cape, Free State and Limpopo PDEs between 2014 and 2019 and represents sanctions as a percentage of the total number of sanctions imposed.

[83] See Eastern Cape Department of Education Annual Report 2014/2015, 180; Eastern Cape Department of Education Annual Report 2015/2016, 159; Eastern Cape Department of Education Annual Report 2016/2017, 146; Eastern Cape Department of Education Annual Report 2017/2018, 143 and Eastern Cape Department of Education Annual Report 2018/2019, 132.

together, which may also indicate the utilisation of section 14(1)(a) of the EOEA.[84] "Corrective counselling", "verbal warning", "written warning" and "demotion" were the other sanctions included under "other" in Graph 4.[85] The combined sanctions that also fall under "other" are listed in the annual reports of the Eastern Cape PDE as "fine and final written warning", "suspension without pay and final written warning" and "fine, final written warning and counselling".[86] Again, there are discrepancies between provinces in the manner in which labour relations statistics are reported.

Graph 4 shows that a very low percentage (12%) of disciplinary enquiries actually result in dismissal.[87] This, in itself, is strange and seems to show a waste of resources, as disciplinary enquiries are typically reserved for cases of serious misconduct which may well result in dismissal. Part of the explanation for this may be that the disciplinary system in the basic education sector provides for sanctions not usually encountered in the private sector (as envisaged by the Dismissal Code in the LRA), notably the imposition of fines and suspension without pay. Graph 4 shows that in 28% of cases a fine was imposed and in 9% of cases suspension without pay. The system in basic education, as discussed in chapter 5, also provides that a combination of more than one sanction short of dismissal may be imposed on educators (such as a final written warning and a fine or suspension). This may result in educators not being dismissed in circumstances that often lead to dismissal in the private sector. It is also noteworthy that the statistics about sanctions imposed for misconduct are not linked to the different types of misconduct (only totals are provided). As such, the statistics around sanction is a blunt instrument and does little to give insight into the commitment and seriousness with which different types of misconduct are dealt with and viewed. This also adds a further motivation for the analysis of awards later in this chapter.

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[84] See Western Cape Department of Education Annual Report 2014/2015, 156; Western Cape Department of Education Annual Report 2015/2016, 150; Western Cape Department of Education Annual Report 2016/2017, 164; Western Cape Department of Education Annual Report 2017/2018, 155 and Western Cape Department of Education Annual Report 2018/2019, 154.

[85] See the annual reports by the Eastern Cape and Western Cape PDEs mentioned above. See also Limpopo Department of Education Annual Report 2014/2015, 139; Limpopo Department of Education Annual Report 2015/2016, 156-157; Limpopo Department of Education Annual Report 2016/2017, 167; Limpopo Department of Education Annual Report 2017/2018, 141 and Limpopo Department of Education Annual Report 2018/2019, 164. See also Free State Department of Education Annual Report 2015/2016, 157, Free State Department of Education Annual Report 2016/2017, 181 and Free State Department of Education Annual Report 2017/2018, 192. As mentioned above, no data was available for the Free State in 2014/2015 and 2018/2019.

[86] Only the annual reports of the Eastern Cape Department of Education specifically listed a combination of sanctions.

[87] It should be noted that the Western Cape listed this sanction as "dismissal/absconded", which means this percentage includes educators dismissed for abscondment

Graph 5 below represents ELRC arbitration awards on unfair dismissal for misconduct. It already is apparent that there is a great disparity between Graphs 2, 4 and 5. Graph 2 represents the total number of disciplinary hearings held across the four PDEs for misconduct, regardless of the outcome of the disciplinary hearing.[88] Graph 4 shows the percentage of enquiries resulting in dismissal, while Graph 5 represents the total number of ELRC arbitration awards where the employee referred a dispute with regard to the outcome (dismissal) of the disciplinary hearing. In between these processes – and despite the educator having been dismissed – a lot may happen that may result in the matter not being considered at arbitration, such as the educator being re-employed elsewhere, the matter being settled at conciliation (or at another stage of proceedings), or the process simply being abandoned by the educator (who retains the choice to refer the matter to arbitration or not after conciliation).

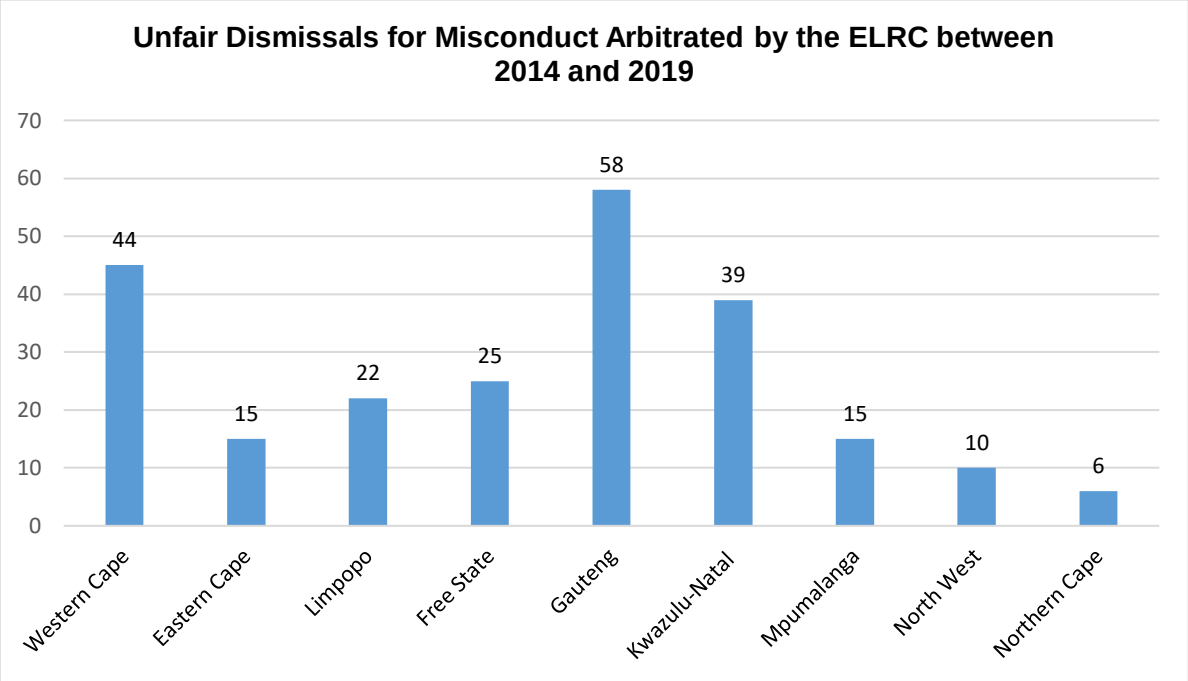
As a result, ELRC arbitration awards on unfair dismissal for misconduct can be seen as a more detailed, albeit small, representation of the challenges relating to misconduct represented in Graph 3 (which dealt with the most prevalent types of misconduct the different PDEs addressed at disciplinary enquiries).[89] Graph 5 below represents the number of arbitration awards on unfair dismissal for educator misconduct issued by the ELRC between 2014 and 2019.[90] The graph represents arbitrations in respect of all nine provinces to also compare the total number of formal disciplinary hearings conducted by the nine PDEs (Graph 2) with the total number of cases resulting in an arbitration award (Graph 5).

[88] This means that the misconduct of employees involved in the disciplinary hearings represented in Graph 2 could have been addressed using the various sanctions provided for in s 18(3) of the EOEA including, but not limited to, dismissal.

[89] It should be noted that not all arbitration awards categorised by the ELRC under "unfair dismissal – misconduct" were actually dismissals. A few of the awards related to unfair labour practices which include sanctions short of dismissal. Graph 5 represents the totals as reflected by the ELRC categorization.

[90] As explained in chapter 5 above, both parties to the disciplinary hearing, the employer or the employee (educator), may appeal the outcome of the disciplinary hearing. Should the appeal of an employee/educator be unsuccessful, he or she may still refer the case to the ELRC.

Graph 5: Unfair dismissals for misconduct arbitrated by the ELRC from 2014 to 2019:[91]



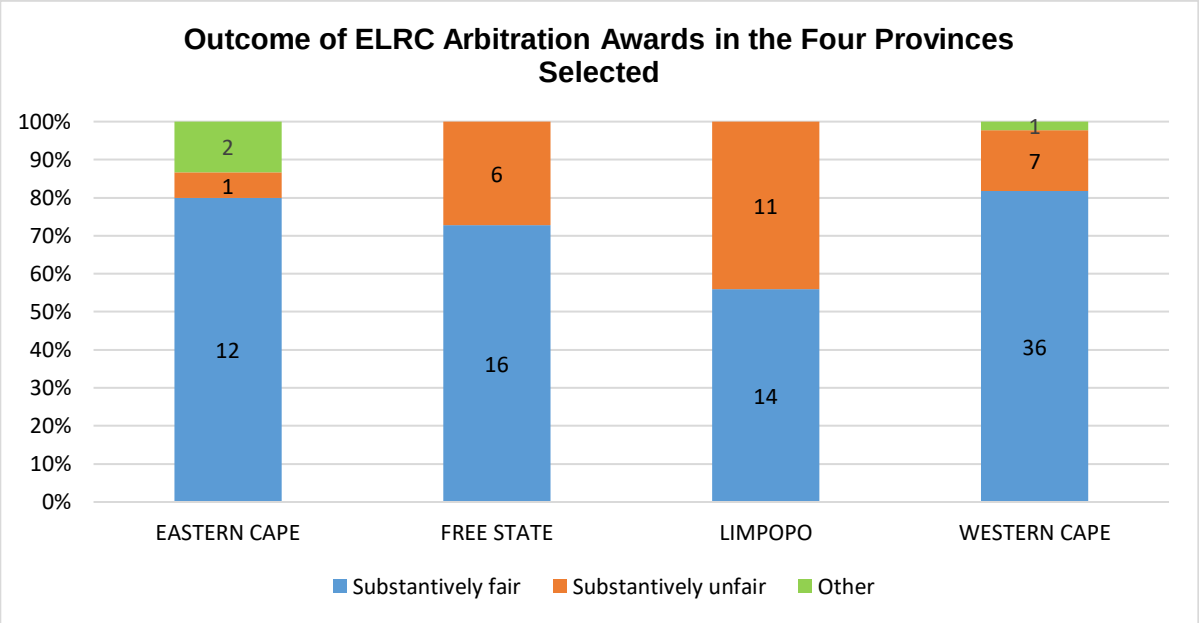
The total number of arbitration awards issued by the ELRC (across all provinces) regarding dismissals for educator misconduct between 2014 and 2019 was 235. The total number of formal disciplinary hearings for educator misconduct across the entire education sector (all PDEs) for the same period was 7 987. This shows that few matters end up in arbitration at the ELRC (bearing in mind that Graph 4 shows, at least in respect of the four provinces selected, only 12% of enquiries result in dismissal). In fact, using the data (totals) in Graphs 2 and 5, only around 2,85% of disciplinary disputes are referred to and result in an arbitration at the ELRC. While this phenomenon in itself may be an interesting avenue to explore in future research (especially concerning sanctions short of dismissal imposed after enquiries into what may be serious misconduct), the relative paucity of arbitration awards does not detract from the valuable contextual background these awards provide to the practical application of the principles of misconduct and incapacity in the basic education sector.

[91] The data is drawn from the arbitration awards of the four provinces analysed (Western Cape, Eastern Cape, Free State and Limpopo) issued by the ELRC between 2014 and 2019.

Below the most common types of misconduct of educators that featured in ELRC arbitrations between 2014 and 2019 are considered in relation to the four provinces selected for further analysis, namely the Western Cape, Eastern Cape, Free State and Limpopo.

The outcomes of the arbitrations in respect of these four provinces are reflected in Graph 6 below. This graph indicates the findings relating to substantive fairness or unfairness of dismissals for misconduct in these four provinces.

Graph 6: Outcome of ELRC arbitration awards in four provinces selected:[92]



* In the arbitrations categorised as "other" there was no finding of fairness or unfairness since the ELRC did not have jurisdiction to hear two of the matters and the other pertained to an application for legal representation.[93]

* Even though all 106 arbitration awards were categorised as "unfair dismissal – misconduct" an analysis of the awards shows that the issues in dispute in a few arbitrations pertained to ULPs, suspension or deemed discharge in terms of section 14(1)(a) of the EOEA.

The findings regarding procedural fairness or otherwise in these same arbitrations are considered in paragraph 6 4 2 below. Graph 6 shows that the two provinces with the lowest percentage of unfair dismissals for misconduct are the Western Cape and

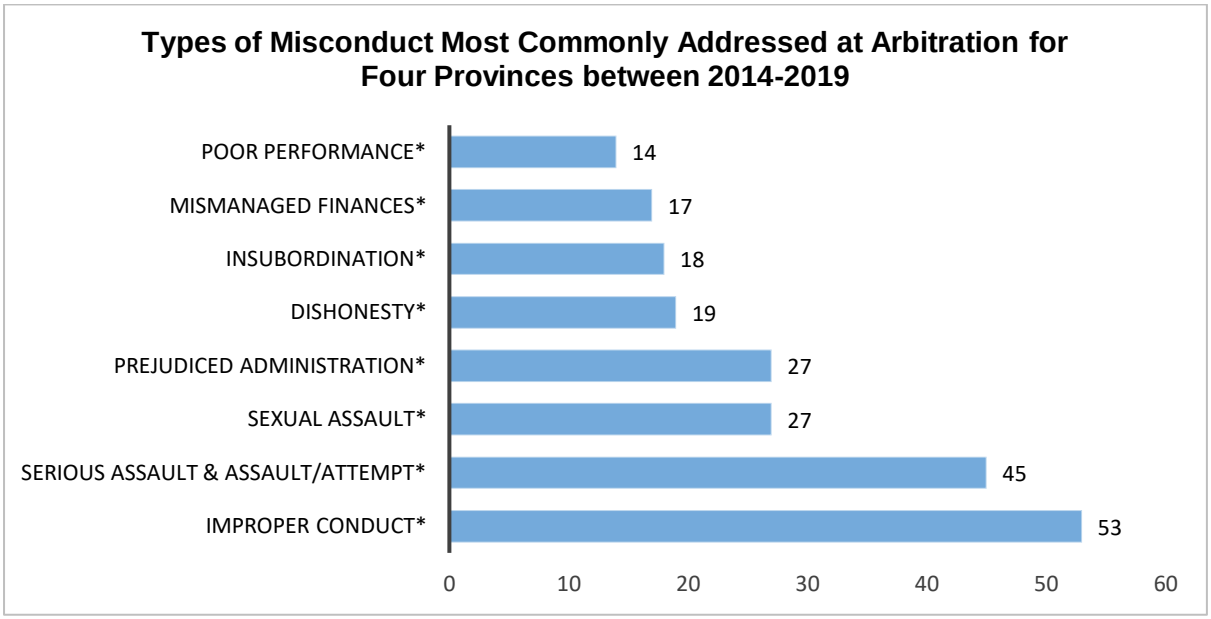
[92] The data is drawn from the arbitration awards of the four provinces analysed (Western Cape, Eastern Cape, Free State and Limpopo) issued by the ELRC between 2014 and 2019.

[93] See *Klaas v Department of Education Western Cape* PSES730-14/15 WC; *Mampondo v Department of Education Eastern Cape* PSES732-17/18 EC; *Ndletyana v Department of Education Eastern Cape* PSES813-16/17EC.

Eastern Cape. In 36 of the 44 unfair dismissal arbitrations involving the Western Cape PDE, the dismissal was found to be fair and in seven unfair (while one pertained to an application for legal representation). Thus, in more than 80% of arbitrations dismissals by the Western Cape PDE were found to be fair. The same can be said for the Eastern Cape, although the number of arbitrations in the Eastern Cape was much lower than that of the Western Cape. In fact, it is strange that in a province with as many schools as the Eastern Cape, only 15 arbitrations dealing with dismissal for misconduct were heard by the ELRC. Limpopo did not fare well, seeing that only 56% of dismissals were found to be substantively fair. This indicates that the legislative framework, specifically the EOEA, is not adequately implemented. It is seen later in this chapter that Limpopo is also the province with the highest number of procedurally unfair dismissals. This also shows that the legislative framework is not adequately implemented in that province.

Graph 3 represents the types of misconduct most commonly addressed at disciplinary hearings in the four provinces under consideration whereas Graph 7 below depicts the types of misconduct most commonly addressed at arbitration. This is according to the categorisation in sections 17 and 18 of the EOEA in the selected four provinces, using the 106 arbitration awards pertaining to unfair dismissal for misconduct that were issued in respect of these four provinces between 2014 and 2019.

Graph 7: Types of misconduct most commonly addressed at arbitration for four provinces between 2014 and 2019:[94]



*Note that the labels are an abridged version based on the types of misconduct listed in sections 17 and 18 of the EOEA and the charges against educators in arbitration awards. See chapter 5 for the complete provisions in the EOEA.

Graph 7 relies on the charges against educators in 106 arbitration awards. As is evident, more than 106 charges of misconduct are accounted for in the graph. This is because multiple charges may be brought against an educator in one disciplinary hearing (also in the alternative), usually based on separate incidents of misconduct or different types of misconduct over a period of time. For instance, in *Sekute v Department of the Free State* ("*Sekute*"),[95] there were six main charges and three alternative charges against the educator.[96] The first charge was in terms of section 17(1)(d) of the EOEA relating to the serious assault of Learner 1 (the educator allegedly slapped the learner in the face, causing a nosebleed),[97] while the second to fifth charges were in terms of section 18(1)(r) for assault of Learners 2, 3, 4 and 5.[98] These separate incidents included attempted slapping of a learner, hitting a learner on

[94] The data is drawn from the arbitration awards in relation to the four provinces analysed (Western Cape, Eastern Cape, Free State and Limpopo) issued by the ELRC between 2014 and 2019.
[95] PSES456-12/13.
[96] *Sekute v Department of the Free State* PSES456-12/13 para 6.
[97] Para 6.
[98] Para 6.

the forehead, slapping a learner in the face and punching a learner in the face.[99] The sixth charge was for improper, disgraceful or unacceptable conduct by the educator in terms of section 18(1)(q) of the EOEA for confiscating test scripts from learners while they were still writing.[100] The alternative charges were brought in terms of section 18(1)(f) for unjustifiably prejudicing the administration, discipline or efficiency of the school through the conduct that formed the basis of the six main charges.[101] The *Sekute* arbitration can be used as an example of how separate charges are levied against educators and that all charges need to be taken into account for purposes of providing an adequate representation of the misconduct taking place in the education sector. At the same time, the facts in *Sekute* already raises questions about the apparently artificial distinction between the types of misconduct in sections 17 (which includes serious assault) and 18 (which includes assault) of the EOEA. One would think any assault of a learner is serious. It should also be mentioned, however, that there are also instances of multiple charges amounting to a splitting of charges, meaning that a single incident of misconduct unjustifiably gave rise to more than one substantive charge of misconduct.[102] Graph 7 did not adjust the total number of charges based on a possible splitting of charges, as the approach used in compiling the graph was to include all charges against educators in the 106 awards analysed.

From Graph 7 it can be seen that there is a difference in the types of misconduct most commonly addressed at disciplinary hearings compared to the types of misconduct considered at arbitration. The five types of misconduct most commonly addressed at disciplinary hearings as presented in Graph 3 were assault (which includes attempted assault or the threat thereof), improper conduct, absenteeism, mismanagement of finances and insubordination.[103] The five types of misconduct most commonly addressed at arbitration were improper conduct, serious assault and assault or the threat thereof, sexual assault, prejudice to the administration of the school and dishonesty.

From these two lists, it is clear that the only types of misconduct that overlap are improper conduct and assault. As such, awards about these two types of misconduct

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[99] Para 6.
[100] Para 6.
[101] Para 6.
[102] See, eg, *SADTU abo Henderson v Department of Education Western Cape* PSES68-15-16 WC para 64. See also *Malatji v Department of Education Limpopo* PSES533/17/18LP para 12 for a possible splitting of charges, although the arbitrator did not specifically mention this issue.
[103] See Graph 3 above.

are analysed and discussed below. In addition, awards relating to other types of misconduct are also considered. Poor work performance and absenteeism have the potential to directly impact the quality of education received by learners.[104] Sexual assault disproportionately affects female learners and impact on their right to education.[105] The mismanagement of finances and conduct that unjustifiably prejudices the administration, discipline or efficiency of a school impact on the quality of education received by learners. Awards relating to dishonesty are included in the discussion simply because it is the type of misconduct that features most often at the ELRC.[106] The discussion that follows in paragraph 6 4 1 to 6 4 4 below attempts to distil insights from a detailed analysis of the awards where these different types of misconduct were considered.

This thesis, of course, is not only about misconduct as a part of educator performance as discussed in the preceding paragraphs. It also deals with the (in)capacity of educators as part of educator performance, generally distinguished (as explained in chapter 5) from misconduct based on the absence of fault on the side of the educator/employee). This issue is considered in paragraph 6 4 4 below. Already it may be mentioned that since its inception, the ELRC has only conducted 16 arbitrations it has characterised as dismissal for poor performance across all provinces. On closer inspection, these arbitrations did not deal with poor performance as incapacity, but rather misconduct. The reasons for and implications hereof are considered below.

6 4 Insights from ELRC arbitration awards

6 4 1 Challenges around the substantive fairness of disciplinary action

6 4 1 1 Section 18(1)(l) of the EOEA: Poor work performance[107]

The earlier discussion showed that poor work performance is one of the most prevalent types of misconduct considered at disciplinary enquiries and by the ELRC in misconduct arbitrations. However, further investigation shows that only five

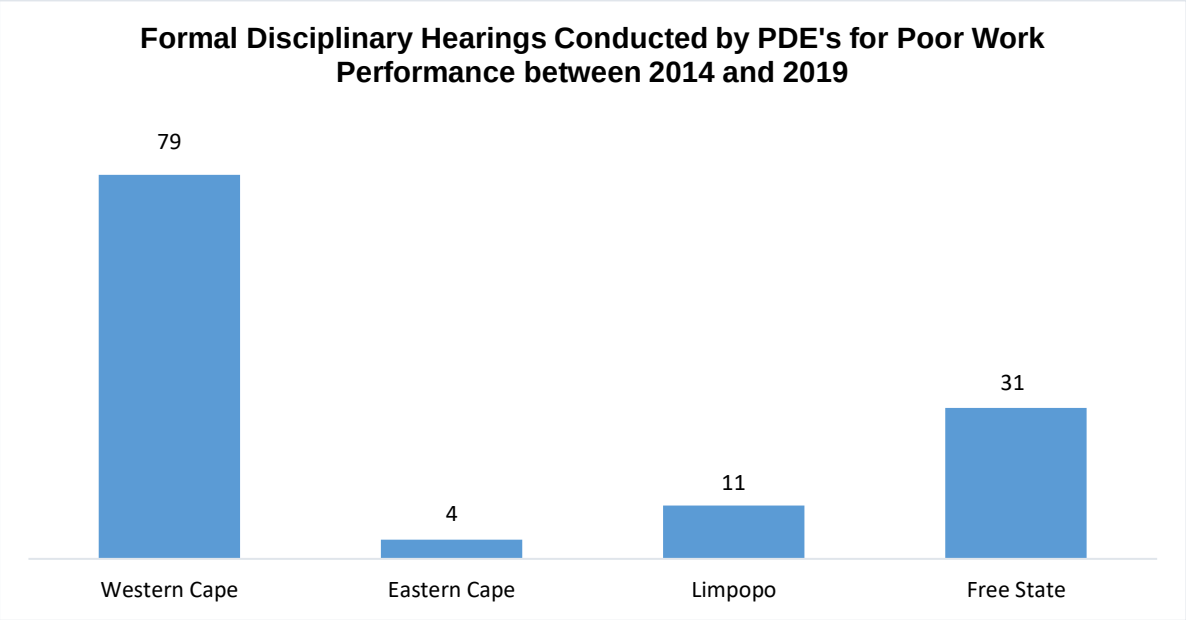
[104] See chapter 6 2 for a discussion of the importance of the educator in the delivery of quality basic education.
[105] See for instance Calitz & De Villiers (2020) *SALJ* 72-107.
[106] See Graph 7.
[107] Section 18(1)(l) of the EOEA reads “performs poorly or inadequately for reasons other than incapacity”.

arbitrations dealt with poor work performance, with one educator facing nine counts of poor performance related to nine different incidents (instances like this already raises fundamental questions about the diligence and promptness with which discipline is applied in schools).[108] As such, this ground of misconduct can be considered prevalent in relation to the number of charges levied against educators, but not in terms of the number of arbitrations dealing with the dismissal of educators for poor work performance.[109] As mentioned earlier, the annual reports by the various PDE's show a significant number of incidents where formal disciplinary hearings addressed the poor work performance of educators. Clearly, not many of these disputes resulted in dismissal.

[108] The five arbitrations charging educators with poor work performance are *SADTU obo Henderson v Department of Education Western Cape* PSES68-15-16 WC; *NAPTOSA obo Rhoda v HOD Western Cape Department of Education* PSES152-16:17WC; *NAPTOSA obo Kukulela v Department of Education Eastern Cape* PSES17-16:17 EC; *Maphutse v Department of Education Free State* PSES88-14:15 FS; *T J Motatinyane v Department of Education Free State* PSES849-15:16FS. In *Motatinyane v Department of Education Free State* PSES849-15:16FS the educator was charged with nine counts of poor work performance.

[109] In four of the five arbitrations regarding poor work performance, the educators were found to have been fairly dismissed.

Graph 8: Formal disciplinary hearings conducted by PDE's for poor work performance between 2014 and 2019:[110]



*Note that no data was available on disciplinary hearings for the Free State PDE for the years 2014 and 2018 which impacts on the total number of disciplinary hearings represented in the graph.

This graph shows that there were a total number of 125 formal disciplinary hearings across the four PDE's about the poor work performance of educators.[111] Although the total number does not in itself indicate whether poor performance is a significant problem in the education sector, the comparison between different provinces (and therefore different PDEs) does show a certain trend. Amongst the four provinces, the Eastern Cape and Limpopo had significantly fewer disciplinary hearings for poor work

[110] The data is drawn from the arbitration awards of the four provinces analysed (Western Cape, Eastern Cape, Free State and Limpopo) issued by the ELRC between 2014 and 2019. See Western Cape Annual Report 2018/2019, 155; Western Cape Annual Report 2017/2018, 156; Western Cape Annual Report 2016/2017, 164; Western Cape Annual Report 2015/2016, 150, Western Cape Annual Report 2014/2015, 156; Limpopo Annual Report 2018/2019, 164; Limpopo Annual Report 2017/2018, 144; Limpopo Annual Report 2016/2017, 168; Limpopo Annual Report 2015/2016 (page 148), Limpopo Annual Report 2014/2015,139; Eastern Cape Annual Report 2018/2019, 132); Eastern Cape Annual Report 2017/2018, 144; Eastern Cape Annual Report 2016/2017, 146; Eastern Cape Annual Report 2015/2016, 159; Eastern Cape Annual Report 2014/2015, 181; Free State Annual Report 2018/2019 (no data), Free State Annual Report 2017/2018, 193; Free State Annual Report 2016/2017, 181; Free State Annual Report 2015/2016 no data, Free State Annual Report 2014/2015, 157.

[111] Note that for the years 2015/2016, 2016/2017 and 2018/2019 the Eastern Cape Annual Reports and for the year 2014/2015 the Limpopo annual reports do not specify any disciplinary hearings related to poor work performance. It can be assumed that there were no disciplinary hearings related to poor work performance as the total number of disciplinary hearings held correspond with the grounds of misconduct the hearings related to (ie, sexual assault, assault etc.).

performance. This is surprising, seeing that these are also the two provinces that consistently performed the worst in the National Senior Certificate between 2014 and 2019 with an average pass rate of 65.6% for the Eastern Cape and 68.3% for Limpopo.[112] The Western Cape and Free State (together with Gauteng) were the provinces that performed the best in the National Senior Certificate for that same period with an average pass rate of 83.8% and 85.8% respectively.[113]

It therefore seems that the provinces that addressed poor work performance more regularly through discipline had consistently better academic outcomes in the National Senior Certificate ("NSC") examinations. The next questions inevitably are whether there is a significant correlation between poor work performance and academic outcomes and whether academic outcomes are impacted or even improve when disciplinary steps are taken against employees in case of poor work performance. These questions can be partly addressed with reference to arbitration awards dealing with poor work performance (as misconduct). These awards are discussed to illustrate the circumstances surrounding poor work performance in the sector, how it was addressed in each case and what the approach of the ELRC was in arbitrating the matter.

In *NAPTOSA obo Rhoda v HOD Western Cape Department of Education* ("*Rhoda*"),[114] the educator was charged with two counts of poor work performance in that he submitted grade 8 and 9 Creative Arts final examinations with duplicate questions and failed to submit the marks for Creative Arts practicals.[115] There were also two other charges in that he failed to carry out a routine instruction to submit examination marks for final moderation and verification[116] and that he unjustifiably prejudiced the administration of the school by failing to adhere to the invigilation rules

[112] These averages were calculated using the pass rates in Examination Reports issued by the Department of Basic Education for the years 2014 to 2019. These Examination Reports are available at <https://www.education.gov.za/Resources/Reports.aspx>. See also JJ Turner "How each SA province fared in matric exams over the last 5 years" (09-01-2019) *Parent24* <https://www.news24.com/parent/learn/freeexamresources/matric-past-exam-papers/how-each-sa-province-fared-in-matric-exams-over-the-last-5-years-20190109> (accessed 5-10-2020).

[113] The average pass rate for Gauteng between 2014 and 2019 was 85.7%. These averages were calculated using the pass rates in Examination Reports issued by the Department of Basic Education for the years 2014 to 2019. These Examination Reports are available at <https://www.education.gov.za/Resources/Reports.aspx>. See also Turner "How each SA province fared in matric exams over the last 5 years" (09-01-2019) *Parent24*.

[114] PSES152-16:17WC.

[115] *NAPTOSA obo Rhoda v HOD Western Cape Department of Education* PSES152-16:17WC para 5.

[116] Para 5.

and allowed learners to be disruptive during an examination.[117] He was dismissed. The arbitrator noted that, even though discipline falls within the discretion of the employer, the sanction imposed must be appropriate and fair.[118] The employer bears the onus to prove the substantive and procedural fairness of the dismissal and item 7 of the Dismissal Code provides guidance to determine such fairness.[119] The arbitrator found that the poor performance of the employee was due to his own negligence in failing to apply "sufficient care and diligence" in his work rather than him being incapable of performing the work to the required standard.[120] In this regard, the arbitrator emphasised that:

> "The Bill of Rights enjoins all those who make decisions affecting children, to consider the best interests of the child. Everything that educators do, must be informed by this basic human right. In respect of each of the charges of which applicant [educator] was convicted, the applicant undermined the best interests of the learners. He also contravened the SACE Code of Professional Ethics for educators which states that educators may not be negligent in the performance of their professional duties".[121]

Having determined that the employee was guilty of the misconduct charges against him and considering the impact of the misconduct on the best interest of learners, the only question left for the arbitrator to determine was the appropriateness of dismissal as a sanction. In this regard, the arbitrator followed the Constitutional Court's approach in *Sidumo v Rustenburg Platinum Mines Ltd* ("*Sidumo*"),[122] and took into account the CCMA Guidelines on Misconduct Arbitrations[123] and Schedule 2 of the EOEA.[124] In line with item 3 of the LRA Dismissal Code, the arbitrator accepted that dismissal should be reserved for serious misconduct or repeat offences and where the

[117] Para 5.
[118] Para 51.
[119] Para 24; Item 7 of the Dismissal Code determines that: Any person who is determining whether a dismissal for misconduct is unfair should consider (a) whether or not the applicant contravened a rule regulating conduct in or of relevance to the workplace; (b) if a rule was indeed contravened, whether or not: (i) the rule was a valid or reasonable rule; (ii) the applicant was aware or could reasonably be expected to be aware of the rule; (iii) the rule had been consistently applied by the respondent; (iv) dismissal was an appropriate sanction for the contravention of the rule.
[120] *NAPTOSA obo Rhoda v HOD Western Cape Department of Education* PSES152-16/17WC para 31.
[121] Para 56.
[122] (2007) 28 ILJ 2405 (CC).
[123] GN R224 in GG 38573 of 17-03-2015.
[124] *NAPTOSA obo Rhoda v HOD Western Cape Department of Education* PSES152-16/17WC para 51.

misconduct makes the continued employment relationship intolerable.[125] In this case, the educator was not a first offender. On a previous occasion, he had received a fine of R2 000 and a final written warning for allowing learners to misbehave while writing a test.[126] This final written warning (which remains valid for 6 months) expired just before the employee received another final warning and a suspended fine of one month's salary for allowing learners to use their books while writing a test.[127] The arbitrator pointed out that "where an employee is guilty of several acts of misconduct which individually do not justify dismissal, the cumulative effect of all acts of misconduct may justify dismissal".[128] Given the employee's lack of remorse and history of misconduct, the arbitrator found that the continued employment relationship would be intolerable and, as such, found the dismissal to be fair.[129]

In *Motatinyane v Department of Education Free State* ("*Motatinyane*")[130] the principal of a school was charged with nine counts of poor work performance. The principal failed to adequately administer the National School Nutrition Programme ("NSNP") in that he did not keep proper record of the learners and food handlers participating in the programme and failed to ensure that learners were fed.[131] This failure negatively impacted the programme for over a year.[132] The principal also failed to keep proper records of the school's finances, made expenses without attaching the required supporting documentation, failed to keep a petty cash register and incorrectly made out cheques.[133] The principal was also charged with dishonesty for informing the PDE that the school did not receive funding for the NSNP whereas the funds had in fact been transferred to the school bank account.[134] The effect of the principal's poor performance was that he failed to operate the feeding scheme despite the PDE paying funds to the school to feed 1 500 learners. This resulted in learners being deprived of nutrition for seven months.[135] The arbitrator expressed his dismay regarding the

[125] See Item 3 of the LRA Dismissal Code; *NAPTOSA obo Rhoda v HOD Western Cape Department of Education* PSES152-16:17WC para 54.
[126] *NAPTOSA obo Rhoda v HOD Western Cape Department of Education* PSES152-16/17WC para 57.
[127] Para 57.
[128] Para 57.
[129] Para 63.
[130] PSES849-15/16FS.
[131] *Motatinyane v Department of Education Free State* PSES849-15/16FS para 6.
[132] Para 6.
[133] Para 6.
[134] Para 6.
[135] Para 69.

manner in which public funds were managed at the school and that financially needy learners were disadvantaged because of the negligence of the principal.[136] The arbitrator found the dismissal to be substantively fair.[137]

In *Maphutse v Department of Education Free State* ("*Maphutse*")[138] the educator faced ten charges for failing to carry out a lawful order or routine instruction, poor work performance and unjustifiably prejudicing the administration, discipline and efficiency of the school.[139] These charges were based on the fact that the educator did not compile and submit tests for the various modules he was responsible for.[140] He also failed to mark and submit the marks for tests and examinations for one of the modules.[141] The facts also show that the educator was a loyal member of his trade union (SADTU) and tried to justify his actions by reliance on his loyalties to the trade union.[142] In this regard, the arbitrator noted that the educator was well within his rights to support the trade union of which he was a member, but that these rights need to be exercised in line with the LRA[143] The arbitrator found that the educator's wilful and serious refusal to obey instructions (designed to ensure that he performs his work up to the required standard) constituted insubordination for which dismissal was fair.[144]

In *NAPTOSA obo Kukulela v Department of Education Eastern Cape* ("*Kukulela*")[145] a principal faced various charges including fraud and corruption for allocating examination marks to students who did not write the examination, dishonesty, inciting learners to strike and cause violence, failure to perform his duties and forging the chairperson of the SGB's signature.[146] These charges covered a wide range of different types of misconduct, including poor work performance. What is important to note is that the misconduct was found to have destroyed the trust relationship between the employer and employee.[147] Similar to the *Rhoda* award discussed above, the

[136] Para 90.
[137] Para 93-95. The dismissal was, however, found to be procedurally unfair resulting in compensation for the applicant in the amount of R50 455. This was due to the PDE failing to provide the applicant with documents needed to prepare for his case. See *Motatinyane v Department of Education Free State* PSES849-15/16FS para 67.
[138] PSES88-14:15 FS.
[139] *Maphutse v Department of Education Free State* PSES88-14/15 FS para 4.
[140] Para 4.
[141] Para 4.
[142] Para 6.6.
[143] Paras 6.3-6.4.
[144] Para 6.8-6.9.
[145] PSES17-16:17 EC.
[146] See *NAPTOSA obo Kukulela v Department of Education Eastern Cape* PSES17-16/17 EC paras 47-52.
[147] Para 58.

arbitrator emphasised that learners' interests are paramount in terms of the Constitution and that any conduct that undermines and interferes with the best interest of the child cannot be tolerated.[148] This already shows that arbitrators attach significant weight to the impact of educators' misconduct on the interests of learners in determining the fairness of the sanction of dismissal for misconduct. This is in line with both the recognition of the rights to basic education and children's rights in the Constitution, but also with the approach of the Constitutional Court in *Sidumo* to sanction in the employment context, which includes, amongst others, that the commissioner takes into account "the totality of circumstances" and "the harm caused by the employee's conduct".[149] Where the employee guilty of misconduct is an educator, the totality of circumstances inevitably include the impact of the misconduct on the interests of learners and the harm caused by the misconduct to the quality of education received by learners.

These arbitration awards show that the alleged poor work performance of educators often involve more serious misconduct, such as insubordination, serious negligence and dishonesty. As such, "poor work performance" as a type of misconduct contained in section 18 of the EOEA is probably best seen as a "catch-all" or "fall-back" type of misconduct. Perhaps the best solution would be to describe poor performance in the EOEA for what it really is – either the wilful dereliction of duty or the negligent failure to carry out the duties of an educator. Such a description would also prevent the relatively mild-looking charge of "poor work performance" being used to sanitise more serious types of misconduct (something that may already happen at the level of the disciplinary enquiry to prevent dismissal). From these awards, however, it is clear that the arbitrators were alive to the seriousness of the actual (primary) misconduct in question and recognised the detrimental impact of the educator's misconduct on the quality of education received by learners – whether it is due to a failure to mark

[148] *NAPTOSA obo Kukulela v Department of Education Eastern Cape* PSES17-16/17 EC para 67.

[149] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 2 SA 24 (CC) para 78. The other factors to be considered are as follows:

> "In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list".

assessments, set papers, provide nutrition in order for hungry learners to be able to learn or the failure to enforce discipline to ensure the reliability of assessment. It is also significant that in four of the five arbitrations the employee charged with poor work performance was the principal of the school.[150] The South African Schools Act 84 of 1996 ("SASA") entrusts to the principal the professional management of the school. In the absence of a competent and dedicated principal, the entire staff and, inevitably, learners are negatively affected.

SADTU abo K.M Henderson v Department of Education Western Cape ("*Henderson*")[151] also involved a principal and was the only one of the five arbitrations related to poor work performance where it was found that the dismissal was substantively unfair. The employee was awarded compensation equal to four months' salary, but was not reinstated to her position as principal.[152] The arbitrator found the educator incapable of performing her duties as principal as the particular school had "difficult circumstances" and she did not have the skills to manage the staff and overcome these obstacles.[153] On closer inspection, the facts of this case are disconcerting and the reasoning of the arbitrator muddled. The arbitrator's assessment of the facts was that the misconduct was a consequence of the heavy workload and a lack of support by senior educators at the school.[154] The facts were that the principal had been an educator since 1998 and had been deputy principal for a year prior to becoming a principal in 2009.[155] A number of charges were levelled at the principal. These included serious charges – insubordination,[156] dishonesty,[157] endangering the lives of learners[158] and a failure to adhere to financial policies[159] – to which she pleaded guilty. In addition, the principal was charged with poor work performance (for

[150] The arbitrations where the employee charged with poor performance was the principal are *SADTU abo Henderson v Department of Education Western Cape* PSES68-15-16 WC; *NAPTOSA obo Kukulela v Department of Education Eastern Cape* PSES17-16:17 EC; *Maphutse v Department of Education Free State* PSES88-14:15 FS; *Motatinyane v Department of Education Free State* PSES849-15:16FS. In *Motatinyane v Department of Education Free State* PSES849-15:16FS. The remaining arbitration is *NAPTOSA obo Rhoda v HOD Western Cape Department of Education* PSES152-16:17WC.
[151] PSES68-15-16 WC.
[152] *SADTU abo Henderson v Department of Education Western Cape* PSES68-15-16 WC para 66-67.
[153] Para 62-64.
[154] Para 64.
[155] Para 3.
[156] Para 7. The principal refused to carry out an instruction from the HOD pertaining to the re-admittance of two learners who were wrongfully expelled from the school.
[157] Para 7. The principal reported a receipt book of the school stolen, which was not the case.
[158] Para 7. The principal allowed her husband and others entry to the school and allowed him/them to assault and/or threaten the learners in her presence.
[159] Para 7. The principal did not keep the receipt book of the school in the school safe.

failing to monitor and manage the School Management Team, implement assessment control guidelines at the school, submit reports requested by the supervisor and follow procedure in suspending and expelling learners), dishonesty (for submitting a false attendance register and leave report to the supervisor regarding educators at the school) and unjustifiable prejudice to the administration, discipline and/or efficiency of the school (for failing to perform her tasks as principal).[160]

The arbitrator found the principal guilty of poor work performance and unjustifiably prejudicing the administration, discipline and efficiency of the school,[161] despite the arbitrator stating that the principal "did not have the necessary skills to be a leader after a period of being in the position for more than 6 years"[162] and concluding that "[i]t was my inference of the evidence as a whole that the applicant did not have the necessary management skills to effectively manage her personnel and enforce discipline".[163] In other words, in the arbitrator's own words, this was to a large extent a case of poor performance as incapacity (in the employee's role as principal) and not misconduct. This confusion on the side of the arbitrator is exacerbated by the fact that the educator had been a principal for five years before the allegations (including poor performance) were dealt with by the PDE and that the arbitrator found the dismissal to have been unfair, this despite the educator's clear guilt on serious charges of misconduct she had earlier admitted. In this regard, the arbitrator was clearly swayed by what was in effect the view that the matter concerned incapacity and not misconduct – the arbitrator felt that the principal's incapability to be a principal did not mean she was incapable of being an educator.[164] In this regard, the question arises whether the arbitrator should have considered re-employment (as an educator) as a remedy. The arbitrator merely accepted that no vacancies were available and that compensation was therefore the appropriate remedy.[165] In line with section 193(1) and 193(2) of the LRA the arbitrator must require the employer to either reinstate or re-employ the employee unless the following applies:

"*(a)* the *employee* does not wish to be reinstated or reemployed;

[160] Para 8.
[161] *SADTU abo Henderson v Department of Education Western Cape* PSES68-15-16 WC para 62.
[162] Para 56.
[163] Para 62.
[164] Para 66.
[165] Para 66.

(b) the circumstances surrounding the *dismissal* are such that a continued employment relationship would be intolerable;
(c) it is not reasonably practicable for the employer to reinstate or re-employ the *employee*; or
(d) the *dismissal* is unfair only because the employer did not follow a fair procedure".

The arbitrator did, however, mention that the principal could re-apply to be employed by the PDE should vacancies arise in future.[166]

Apart from the many insights to be gathered from the *Henderson* and other arbitrations discussed earlier, what also emerges is that the poor work performance of educators, especially principals, affects the education received by learners. Christie, in the context of the need for school leadership and quality of education in South Africa, referred to a comment by the then Deputy Minister of Education:

> "Despite significant advances, the primary measure of quality in education, i.e. learner achievement, has continued to lag behind. There are a number of reasons for the continued underperformance of the South African schooling system. These include poor management of schools by principals, inadequate teaching, lack of content knowledge among teachers, a lack of support to schools by district and provincial offices, a heavy administrative burden on teachers, limited time on task and weak acquisition of foundational skills by learners".[167]

Research suggests that effective school management can result in high performing schools despite constraints such as socio-economic circumstances and that there is a link between the quality of leadership in a school and positive academic outcomes.[168] Bush writes about the success of decentralised models in education where there is a high level of self-management in schools, which is the model followed in the South African education system.[169] Bush notes, as is also clear from some of the arbitrations

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[166] Para 66.
[167] P Christie, P Sullivan, N Duku & M Gallie "Researching the need: School leadership and quality of education in South Africa" (2010) *Report prepared for Bridge (South Africa) and Ark (United Kingdom)* <https://www.bridge.org.za/wp-content/uploads/2014/12/School-leadership-Report-on-Quality-School-Leadership-Aug-2010.pdf> (accessed 9-11-2020).
[168] I Naicker, C Grant & S Pillay "Schools performing against the odds: Enablements and constraints to school leadership practice" (2016) 36 *South African Journal of Education* 1-10; In this regard the authors refer to research by T Bush "Leadership development" in T Bush, L Bell & D Middlewood eds *The principles of educational leadership and management* 2 ed (2010). See also T Bush "Editorial: The significance of leadership theory" (2010) 38 *Educational Management Administration & Leadership* 266. See also G Wills *An economic perspective on school leadership and teachers' unions in South Africa* PhD Stellenbosch University (2016).
[169] T Bush "Editorial: The significance of leadership theory" (2010) 38 *Educational Management Administration & Leadership* 266.

considered above, that the leadership required of a principal necessitates a different set of skills to what would be needed from an educator.[170] A lack of leadership commitment and skill impacts on the efficiency of the school and the quality of education received by learners.[171]

6 4 1 2 Absence in terms of section 18(1)(j) of the EOEA,[172] absenteeism, abscondment and deemed discharge

One of the forms of misconduct most disruptive of the education of learners is the unauthorised absence of educators.[173] As mentioned earlier, an educator needs at least be present in the classroom in order for learners to receive an education. In *PSA obo Ndayi v Department of Education Western Cape* ("*Ndayi*"),[174] the arbitrator remarked that "[l]earners do not get quality education, because of [a] shortage [of] teachers or due to the absenteeism of educators".[175]

Any consideration of absenteeism in the basic education sector has to start with considering the frequency absenteeism has been dealt with at disciplinary enquiries as well as the sometimes confusing terminology used to describe different types of absences – such as "absence", "absenteeism", "abscondment", "desertion" and "deemed discharge". The distinction between these terms assists in identifying when the absence of an educator is considered misconduct and also the seriousness of the misconduct. In addition, the discussion of circumstances surrounding the absence of educators as experienced in arbitration awards provides valuable insights into the

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[170] 266.

[171] Bush notes that the governments of Canada, England, France, Scotland, Singapore and certain of the states in the United States of America require that school principals have some form of a leadership qualification. In other words, being a qualified teacher (educator) is not enough, principals must have leadership training. The reason is because of research shows that there is a link between school leadership and student outcomes. See Bush (2010) *Educational Management Administration & Leadership* 266-267.

[172] Section 18(1)(j) of the EOEA reads "absents himself or herself from work without a valid reason or permission".

[173] As mentioned in *Phenithi v Minister of Education and Others* 2008 (1) SA 420 SCA para 24:
"[T]he consequences of an educator's absence without leave are, to mention a few, that: the learners are left without a teacher; the department cannot appoint a substitute or a temporary educator immediately; major disruptions are caused as a reshuffling of both educators and learners is required; the department has to remunerate such educator while he/she is not fulfilling his/her obligations and the principal of the school concerned has a grave dilemma regarding what to do during the educator's absence".

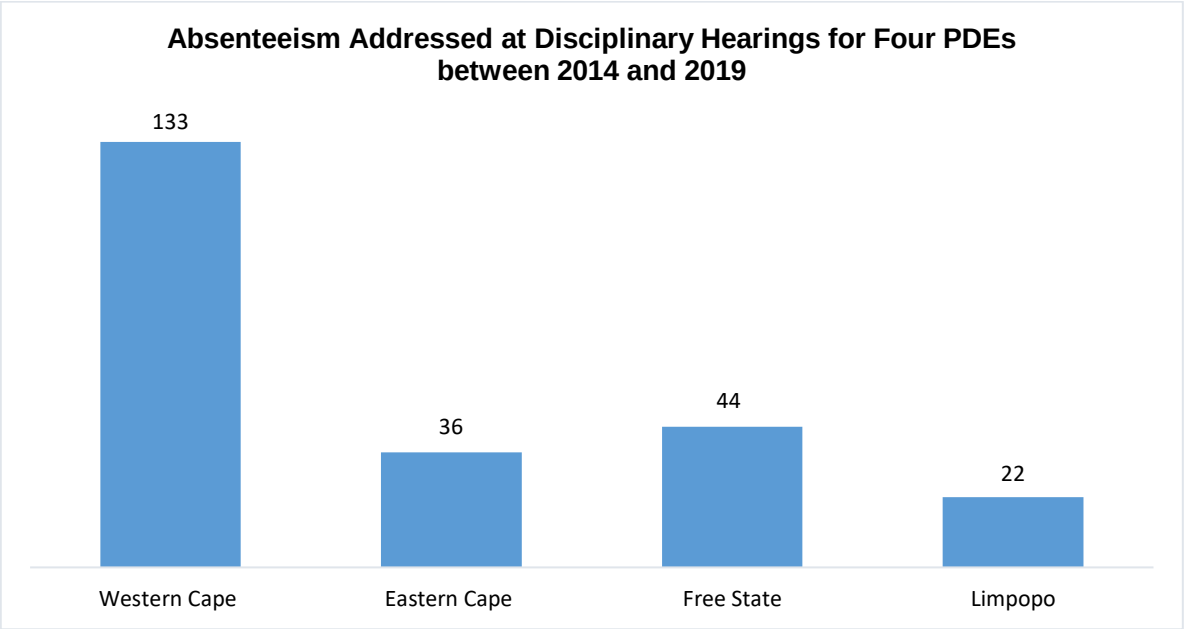
[174] PSES923-17/18WC.

[175] *PSA obo Ndayi v Department of Education Western Cape* PSES923-17/18WC para 29.

impact of absent educators on the delivery of quality basic education in South Africa and how absenteeism is dealt with in practice.

Graph 9 below shows the number of disciplinary enquiries where educators were charged with absenteeism (as mentioned in section 18(1) of the EOEA) in the four selected provinces between 2014 and 2019.

Graph 9: Absenteeism addressed at disciplinary hearings for four PDEs between 2014 and 2019:[176]



The annual reports of the Western Cape PDE list a further form of misconduct that is not listed in either section 17 or 18 of the EOEA. This further ground of misconduct is listed as "abscondment", which was addressed at 117 disciplinary hearings. The PDEs of the Free State, Eastern Cape and Limpopo did not include this type of misconduct in their annual reports.[177] As Graph 9 shows, absenteeism was addressed at a total of 235 disciplinary hearings across the four provinces.[178] As such, absenteeism is the third most common type of misconduct addressed at disciplinary hearings. At the same

[176] The graph was compiled using the data provided in the annual reports published by the Western Cape Department of Education, Eastern Cape Department of Education, Free State Department of Education and Limpopo Department of Education between 2014 and 2019. These reports can be accessed on the websites of the respective PDEs.

[177] See Graph 3 above. The graph was compiled using the data provided in the annual reports published by the Western Cape Department of Education, Eastern Cape Department of Education, Free State Department of Education and Limpopo Department of Education between 2014 and 2019. These reports can be accessed on the websites of the respective PDEs.

[178] See Graph 3 above.

time, only a few arbitrations addressed the issue.[179] In fact, there were only six arbitrations where the fairness of the dismissal of educators for absence was considered.[180] One explanation for this may simply be (in line with Graph 4 above) that very few educators are actually dismissed for absenteeism for the simple reason that it is generally regarded as one of the less serious types of misconduct and will only attract a serious sanction in case of repeated and/or lengthy unexplained absences. Of course, where a sanction short of dismissal is imposed, this may also be challenged as a ULP, but the incentive for the employee/educator to do so is relatively small. At the same time, the discussion in paragraph 6 2 above showed that absenteeism is regarded as a real problem in the basic education sector and has attracted the attention of many researchers for its potential adverse impact on the delivery of quality basic education.

As discussed in chapter 5, the employee's common-law duties to the employer include the rendering of his or her services.[181] The employee is expected to be present at the workplace unless there is an understanding between the parties[182] or good reason for the employee to be absent.[183] In the absence of such an understanding or reason for the employee to be absent, his or her absence is a breach of the employment contract.[184] Not surprisingly, this is viewed as misconduct by employers and is also included in section 18(1)(j) of the EOEA as those instances where the educator "absents himself or herself from work without a valid reason or permission". As far as terminology is concerned, Grogan notes that absenteeism refers to "late-coming, absences from an employee's workstation, and absences from the workplace itself for short periods".[185] Garbers et al describe abscondment as when an employee leaves his or her employment without explanation or without providing a reason (the employee "disappears" and cannot be contacted).[186] The distinction between

[179] See Graph 3 above.
[180] These are *SADTU obo Mokgawa, A.P v Department of Education Limpopo* PSES751-14/15; *Mphahlele v Sekhukhune FET College* ELRC53-14/15LP; *SADTU obo Mfeka v West Coast FET College* ELRC 036-13:14 WC; *SADTU obo Sievers v Department of Education Western Cape* PSES568-14-15; *SADTU obo Kgoele v Department of Education Limpopo* PSES737-14/15 and *NAPTOSA obo Mohlala v Department of Education Limpopo* PSES539-14/15 LP.
[181] Grogan *Dismissal* 255; see also NL Parsee "Absenteeism in the Workplace" (2008) 20 *SA Merc LJ* 522 523.
[182] For instance, where the employee works from home and does not have to be physically present at the workplace.
[183] Grogan *Dismissal* 255.
[184] 255.
[185] 255.
[186] Garbers et al *The New Essential Labour Law Handbook* 186-188.

abscondment and absenteeism is therefore not an easy one to draw (and may be artificial). Grogan notes that this distinction is sometimes drawn in disciplinary codes with reference to the time the employee is absent from work, with abscondment only existing once a certain amount of time has passed (for example, five days). Desertion may be described as the situation where the employee "intimated expressly or by implication that he or she does not intend to return to work".[187] From the annual reports and arbitration awards analysed, there is no indication of instances of "desertion", but, as mentioned, the Western Cape PDE did record instances of abscondment. However, it should be noted that section 14(1)(a) of the EOEA provides for a deemed discharge where an educator appointed in a permanent capacity "is absent from work for a period exceeding fourteen consecutive days without permission of the employer".[188] Deemed discharge may be seen as the EOEA's version of abscondment, seeing that there is a time period connected to this form of absence.

There were six arbitrations classified under "unfair dismissal – misconduct" by the ELRC regarding the absence of employees.[189] Upon closer inspection it is apparent that not all the employees involved were educators involved in basic education and not all employees were actually dismissed, but that some of these arbitrations also involved sanctions such as fines (amounts deducted from the employee's salary for the days of absence) or a suspension without pay.[190] Three of the arbitrations actually concerned dismissal for absence (but not all educators) – *SADTU obo Mokgawa, A.P v Department of Education Limpopo* ("*Mokgawa*"),[191] *SADTU obo Mfeka v West Coast FET College* ("*Mfeka*")[192] and *SADTU obo Sievers v Department of Education Western Cape* ("*Sievers*").[193] In *Mokgawa* the applicant was appointed as curriculum advisor and was charged with an unauthorised absence of 84 days and for prejudicing the

[187] Grogan *Dismissal* 255, 258.
[188] Section 14(1)(a) of the EOEA.
[189] These are *SADTU obo Kgoele v Department of Education Limpopo* PSES737-14/15; *SADTU obo Mfeka v West Coast FET College ELRC* 036-13/14 W; *SADTU obo Mokgawa v Department of Education Limpopo* PSES751-14/15; *SADTU obo Sievers v Department of Education Western Cape* PSES568-14-15; *NAPTOSA obo Mohlala v Department of Education Limpopo* PSES539-14/15 LP *and Mphahlele v Sekhukhune FET College* ELRC53-14/15LP.
[190] See *SADTU obo Kgoele v Department of Education Limpopo* PSES737-14/15; *NAPTOSA obo Mohlala v Department of Education Limpopo* PSES539-14/15 *LP and Mphahlele v Sekhukhune FET College* ELRC53-14/15LP.
[191] PSES751-14/15.
[192] ELRC 036-13:14 WC.
[193] PSES568-14-15.

administration and efficiency of the PDE.[194] In this instance, the employee had unsuccessfully applied for a transfer from the Vlakfontein Circuit office to the Pietersburg Circuit office.[195] Despite being aware that his application was unsuccessful, that he was to report to the Vlakfontein Circuit office and was informed by his superior on numerous occasions to report for duty at the Vlakfontein Circuit office, he failed to do so.[196] Commenting on the employee's absence of 84 days, the arbitrator emphasised that "[t]he public education sector has many employees in different occupational levels. How would the employer manage a situation wherein staff would report where it suits them and without conforming to acceptable reporting norms?"[197] The employee's dismissal was found to be substantively fair.[198] Even though the employee in this matter was not an educator, as curriculum advisor it was his duty to ensure the quality of education in the subjects at the schools he was responsible for. In this way his absence directly impacted on the quality of the education learners received.

In *Mfeka* the employee was employed as a senior lecturer at a Further Education and Training ("FET") College.[199] He was found guilty of being under the influence of alcohol, attempting to bring, or causing the name of the college to be brought into disrepute, absence from work without permission and conducting himself in an improper, disgraceful and unacceptable manner.[200] His absence and alcohol abuse had been addressed on previous occasions.[201] The employer provided assistance (rehabilitation) to the employee, which the employee indicated that he did not require.[202] The arbitrator was satisfied that the employer implemented progressive discipline and that the employee's absences by disappearing from work or reporting

[194] *Mokgawa* para 8-9. From the facts of this arbitration, it looks like a splitting of charges as both the charges, for absence and for prejudicing the administration, relate to the same offence of absence.
[195] *SADTU obo Mokgawa v Department of Education Limpopo* PSES751-14/15 para 30
[196] Paras 30, 32 and 34.
[197] Para 32.
[198] Para 38.
[199] *Mfeka v West Coast FET College* ELRC 036-13:14 WC. The arbitration contains no paragraph numbers.
[200] *Mfeka v West Coast FET College* ELRC 036-13:14 WC.
[201] *Mfeka v West Coast FET College* ELRC 036-13:14 WC.
[202] *Mfeka v West Coast FET College* ELRC 036-13:14 WC. On the issue of alcoholism as a form of incapacity or misconduct, the arbitrator referred to *Transnet Freight Rail v Transnet Bargaining Council* [2011] 6 BLLR 594 (LC): "[W]hen an employee, who is not an alcoholic and does not claim to be one, reports for duty under the influence of alcohol, she will be guilty of misconduct". There was no proof in the current arbitration that the employee was an alcoholic and such claims were only made by the employee after he had been dismissed.

to work late and reporting for duty under the influence of alcohol persisted.[203] The dismissal was found to be fair, both substantively and procedurally.[204]

In *Sievers,* the first charge against the applicant was that he was late for work on three occasions and the second charge was that he was dishonest about the time he left the school as he indicated on the attendance register.[205] He was found guilty at the disciplinary hearing on both charges and dismissed.[206] Prior to the misconduct for which he was dismissed, the educator had been issued a final written warning and a deferred fine of R2 500 (deducted from his salary over 5 months) for earlier instances of absenteeism (not considered at the arbitration).[207] This warning and fine were, however, issued after the further incidents of absenteeism that formed the subject of the arbitration.[208] On the absenteeism charge the arbitrator first found that the employer should have addressed the misconduct (the further instances of absenteeism) when it occurred.[209] The arbitrator also found that the applicant was temporarily incapacitated due to depression and anxiety and that the respondent did not do enough to accommodate him.[210] In relation to the dishonesty charge the arbitrator found that the applicant did not intentionally deceive the employer when he signed the time on the attendance register and, in any event, the applicant had a medical certificate for that day.[211] The applicant was not awarded reinstatement as the arbitrator considered him to still be temporarily incapacitated and awarded 12 months' remuneration as compensation.[212]

NAPTOSA obo Mohlala v Department of Education Limpopo ("*Mohlala*")[213] is an example of an educator challenging a sanction short of dismissal for absence. The first charge against the educator was absence (28 counts) and the second prejudicing the administration (10 counts).[214] The employer emphasised at the arbitration that "[t]he main business of the Department of Education is to provide quality education to

[203] *Mfeka v West Coast FET College* ELRC 036-13:14 WC.
[204] *Mfeka v West Coast FET College* ELRC 036-13:14 WC.
[205] *SADTU obo Sievers v Department of Education Western Cape* PSES568-14-15 para 8.
[206] Para 8.
[207] Para 9. These incidents of absence took place between January and May 2013.
[208] Para 8. The incidents of absence that formed the subject of the arbitration took place on 3, 8 and 9 October 2013.
[209] Para 64.
[210] Paras 61-62.
[211] Para 60.
[212] Paras 65 and 67.
[213] PSES539-14/15 LP.
[214] *NAPTOSA obo Mohlala v Department of Education Limpopo* PSES539-14/15 LP para 1.8-1.9.

the learners. There was no provision of services on the days that the Applicant was absent from work".[215] The days the educator was absent from work were deducted from his salary and at the disciplinary hearing he was found guilty of both charges above and a sanction of three months suspension without pay was imposed.[216] On appeal to the Member of the Executive Council ("MEC") by the applicant, the sanction was reduced to two months' suspension without pay.[217] At arbitration, the educator argued that he was subject to double jeopardy since the deduction was made from his salary, but he was also suspended without pay.[218] The arbitrator dismissed his claim, explaining that the deduction from his salary was for the days he was absent and that he breached his common-law duty (and his employment contract) when he was absent without reason or permission.[219] The arbitrator found that the educator was not entitled to remuneration for the days he was absent since this duty includes that he be present and render his services in order to be remunerated.[220] This should be distinguished from the sanction of suspension without pay which was the sanction imposed for the two charges of misconduct.[221] The employer proved the charges of misconduct and the sanction imposed was suspension without pay.[222] There was therefore no double jeopardy.

As mentioned earlier, the EOEA, in line with the general approach in the public service,[223] makes provision for a deemed discharge in section 14(1)(a). This section provides that a permanent educator who is absent from work for a period exceeding fourteen consecutive days without permission of the employer is deemed to be discharged on account of misconduct. The effect of such a discharge is that unfair dismissal cannot be claimed by the educator against the employer.[224] In other words, as soon as the employer can show that the employee was absent for fourteen consecutive days, the employer does not have to follow the disciplinary procedure provided for misconduct in Schedule 2 of the EOEA and can discharge the educator

[215] Para 1.23.
[216] Paras 1.10-1.11.
[217] Para 1.12.
[218] Para 1.13.
[219] Paras 1.64-1.70.
[220] Paras 1.64-1.70.
[221] Paras 1.64-1.70.
[222] Paras 1.64-1.70.
[223] See, eg, s 17(3)(a) of the Public Service Act 103 of 1994.
[224] F Erasmus & G Kinghorn "Understanding deemed dismissals in state departments" (2015) *De Rebus* <http://www.derebus.org.za/understanding-deemed-dismissal-in-state-departments/> (accessed 10-06-2020).

immediately by way of a letter informing the educator of his or her deemed dismissal.[225] Should there be a factual dispute, for instance, whether the days of absence were correctly calculated or whether the educator had permission to be absent, such a dispute is justiciable by a court of law.[226] Section 14(1)(a) therefore provides the employer with a way to dismiss absconding educators without having to go through the disciplinary procedure. As such, these cases can be dealt with efficiently and the principal can start the process of replacing the educator to reduce the disruption experienced by learners. Unfortunately, no general statistics about the use of section 14(1)(a) are available across the different PDEs (except for the Western Cape).

Case law on section 14(1)(a) provides the employer with further guidelines as to the correct implementation of the provision. Two important points are clear from the *Phenithi*[227] case. First, the deeming provision of section 14 is not dependent upon a decision but comes into effect by operation of law.[228] This means that the *audi alteram partem* rule is not applicable in such circumstances and cannot be infringed upon in the absence of a decision (by the employer).[229] In the absence of a decision by the employer there can be no administrative action that is subject to review,[230] nor a dismissal that can be challenged as unfair. Second, section 14(1)(a) of the EOEA is not unconstitutional because of its apparent deprivation of the right of educators to administrative action that is procedurally fair.[231] In *Phenithi* the court emphasised that there is not a complete absence of the opportunity to be heard in section 14 of the EOEA since the deemed dismissal may be reversed in terms of section 14(2). This subsection provides the educator with the opportunity to present to the employer good cause as to why he or she was absent and should be reinstated.[232] It was also held that to the extent that section 14(1)(a) limits an educator's right to procedurally fair

[225] Erasmus & Kinghorn (2015) *De Rebus* <http://www.derebus.org.za/understanding-deemed-dismissal-in-state-departments/>.
[226] *Minister van Onderwys en Kultuur v Louw* 1995 2 All SA 1 (SCA) ("*Louw*") para 9 as referred to in *Phenithi v Minister of Education* 2008 1 SA 420 (SCA) para 9.
[227] *Phenithi v Minister of Education and Others* 2008 1 SA 420 SCA.
[228] *Minister van Onderwys en Kultuur v Louw* 1995 2 All SA 1 (SCA) para 9, as referred to in *Phenithi v Minister of Education* 2008 1 SA 420 SCA para 9.
[229] *Minister van Onderwys en Kultuur v Louw* 1995 2 All SA 1 (SCA) para 9, as referred to in *Phenithi v Minister of Education* 2008 1 SA 420 SCA para 9.
[230] *Minister van Onderwys en Kultuur v Louw (*1995) 2 All SA 1 (SCA) para 9, confirmed in *Phenithi v Minister of Education* 2008 1 SA 420 SCA para 10.
[231] *Phenithi v Minister of Education* 2008 (1) SA 420 SCA para 20.
[232] Para 23.

labour practices, it is reasonable and justifiable in terms of section 36(1) of the Constitution.[233] It should be kept in mind that a reason behind the deeming provision of section 14 of the EOEA is to protect learners from the disadvantage of not having an educator present at school to teach them, while still providing educators with fourteen consecutive days of absence before the provision takes effect.[234] Grogan criticises the *Phenithi* judgment, arguing that section 14(1)(a) mentions that the discharge is effected "unless the employer directs otherwise".[235] He reasons that this implies the use of discretion on the side of the employer,[236] making it administrative action that may be subject to review[237] (and, by implication, a dismissal for purposes of section 186(1)(a) of the LRA). He concludes by saying that even in the case of a failure to act (by the employer), it would also be open to review.[238] In the context of a public sector employee and in terms of the corresponding provision in section 17(3)(a) of the PSA, the Labour Court in *Grootboom v National Prosecuting Authority* ("*Grootboom*")[239] held that the deemed dismissal provision does not amount to a decision by the employer and is therefore not subject to review under PAJA.[240] However, relying on *De Villiers v Head of Department: Education, Western Cape Province* ("*De Villiers*"),[241] the court found that where the employer refuses to reinstate the (deemed dismissed) employee in terms of section 17(3)(b) of the PSA, that decision is subject to review under section 158(1)(h) of the LRA (on the principle of legality).[242]

The implementation of section 14(1)(a) of the EOEA has not been without issue. Three Eastern Cape ELRC arbitrations illustrate the kind of problems experienced with the implementation of this provision. In *Bester v Department of Education Eastern*

[233] Para 25.
[234] Para 25.
[235] Grogan *Dismissal* 95.
[236] 95.
[237] 95.
[238] 95.
[239] (2010) 31 ILJ 1875 (LC).
[240] *Grootboom v National Prosecuting Authority* (2010) 31 ILJ 1875 (LC) para 24.
[241] (2010) 31 ILJ 1377 (LC) para 20.
[242] *Grootboom v National Prosecuting Authority* (2010) 31 ILJ 1875 (LC) paras 37-38. Section 158(1)(h) of the LRA determines that "[t]he labour court may review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law". It should be noted that this matter ended in the Constitutional Court which found that the employer had not met the requirements of the deeming provision in that the employee must be absent from duty "without the employer's permission". In this case the employee had been on suspension which implies permission to be absent. As such, leave to appeal the decision of the Labour and Labour Appeal Court was granted. See *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) para 45.

Cape ("*Bester*"),[243] the arbitrator issued a jurisdictional ruling to the effect that the ELRC had jurisdiction to hear the educator's referral on the substantive fairness of his dismissal because the educator had not been absent for fourteen consecutive days (meaning that section 14(1)(a) did not apply).[244] The PDE disagreed with the ruling and applied for review to the Labour Court. The Labour Court confirmed the interpretation of the arbitrator.[245] In terms of the arbitrator's interpretation, the period of fourteen consecutive days provided for in section 14(1)(a) of the EOEA excludes days on which the educator is not required to be at work (Saturdays and Sundays).[246] The provision will therefore only come into effect after fourteen consecutive work days of absence.

In the *Bester* arbitration, the principal miscalculated the educator's days of absence meaning that section 14(1)(a) of the EOEA did not apply.[247] However, the arbitrator proceeded to consider the PDEs evidence about the habitual absence of the educator. In fact, the educator had received numerous letters informing him of the adverse effect his absence without leave has on the school and learners' education.[248] The educator had been absent for 27 work days (mostly Mondays and Fridays) between July and October 2014.[249] The arbitrator mentioned that it was clear from the evidence that, despite the attempts made by the principal and SGB to address the educator's conduct, he continued with his habitual absence.[250] The arbitrator emphasised that the expected duty of the educator in the specific circumstances of the case was more onerous as he was working at a school for children with special needs.[251] As such the employer's decision to dismiss the educator was substantively fair.[252] However, because the employer incorrectly relied on section 14(1)(a) of the EOEA, no hearing was held, which meant that the dismissal was procedurally unfair.[253] The arbitrator awarded the educator two months' remuneration as compensation.[254] This arbitration is important because it not only contains an egregious example of habitual

[243] PSES447-15/16 EC.
[244] *Bester v Department of Education Eastern Cape* PSES447-15/16 EC para 3.
[245] Para 5.
[246] Para 5.
[247] Para 16.
[248] Para 25.
[249] Para 25.
[250] Para 26.
[251] Para 27.
[252] Para 27.
[253] Paras 28-32.
[254] Para 32. The compensation amounted to R45 700.

absenteeism but also clarifies the position with regard to section 14(1)(a) of the EOEA. It also illustrates that educators may yet be disciplined and fairly dismissed for absence (even where the section does not apply or is implemented incorrectly). It also shows the important role the rights of learners play in considering the fairness of the sanction imposed on an educator.

In *Mampondo v Department of Education Eastern Cape* ("*Mampondo*")[255] the arbitrator found that the reason for dismissal was the failure of the three educators in question to report for duty as instructed.[256] Seeing that their absence exceeded fourteen consecutive days as required by section 14(1)(a) the arbitrator found the educators to be dismissed by operation of law.[257] At the same time, the facts of the case speak to the bigger issue surrounding absenteeism in the education sector. The three educators were instructed to report for duty on 1 November 2017.[258] On 26 November 2017, the employer notified the educators that they had been dismissed by virtue of section 14(1)(a) for abscondment, after they had absented themselves from work for around a month.[259] The only reason the educators eventually returned to the workplace on 24 January 2018 was to enquire about the reason for them not receiving their salaries.[260] These facts show a complete disregard for their duty as educators and their indifference to the impact their absence had on the learners they teach.

Unfortunately, the issue of absenteeism is not always adequately addressed by principals, SGBs and officials representing PDEs. *Ndletyana v Department of Education Eastern Cape* ("*Ndletyana*")[261] is an instance where the different role players failed dismally in their responsibility to properly implement the legislative framework and address misconduct.[262] In this case, the Acting District Director informed the educator on 29 January 2015 that he would be placed at a different school pending an investigation of serious misconduct against him. The educator then failed to report for duty at that school.[263] However, due to a delay of 18 months in instituting disciplinary proceedings and conducting a disciplinary hearing, the presiding

[255] PSES732-17/18 EC.
[256] *Mampondo v Department of Education Eastern Cape* PSES732-17/18 EC para 11.
[257] Paras 11-12.
[258] Para 8.
[259] Para 12.
[260] Para 8.
[261] PSES813-16/17EC.
[262] *Ndletyana v Department of Education Eastern Cape* PSES813-16/17EC paras 6-8.
[263] Paras 7, 16.

officer on 2 August 2016 found that the charges had to be withdrawn.[264] On 7 September 2016, the educator was informed by the PDE to report for duty on 12 September 2016.[265] Again the educator failed to report for duty.[266] After a back-and-forth between the PDE and educator, the PDE on 23 February 2017 informed the educator that his services were terminated in terms of section 14(1)(a).[267] During all of this, the educator benefited from two years' salary without rendering any services.[268] The arbitrator rightly criticised the PDE for taking 18 months to institute disciplinary proceedings and emphasised that there was no reasonable explanation for such a delay.[269] Furthermore, the arbitrator remarked that the educator should have been dismissed in terms of section 14(1)(a) two years earlier when he had failed to report for duty at the school he was assigned to pending the investigation into his serious misconduct.[270]

6 4 1 3 Section 18(1)(b) of the EOEA: Mismanaged finances[271]

The mismanagement of finances is the fourth most common type of misconduct addressed at disciplinary hearings in the four provinces analysed. Between 2014 and 2019 there were 212 instances of financial mismanagement that led to formal disciplinary hearings[272] and seven instances were considered by the ELRC at arbitration.[273] The facts of these cases show (as was the case with poor work performance) that what is often at stake are more serious instances of misconduct, such as corruption, fraud, theft and dishonesty, which constitute a wilful and serious disregard of the law, policy and professional ethics required by public servants who

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[264] Para 8.
[265] Para 22.
[266] Para 22. The PDE official made a note at the bottom of the letter, saying that the educator refused to accept the letter and said that "he is better qualified than all the principals in PE. He will never comply with this request".
[267] *Ndletyana v Department of Education Eastern Cape* PSES813-16/17EC para 12.
[268] Para 35.5.
[269] Para 35.3.
[270] Para 35.2.
[271] Section 18(1)(b) of the EOEA reads "wilfully or negligently mismanages the finances of the State, a school or an adult learning centre".
[272] See Graph 3 above.
[273] *NATOPSA obo Lole v Department of Education Eastern Cape* PSES358 - 12/13 EC; *SADTU obo Williams v Department of Education Western Cape* PSES487-16/17WC; *SADTU abo Henderson v Department of Education Western Cape* PSES68-15-16 WC; *Mokhampane v Department of Education Free State* PSES482-15/16; *SAOU obo Rambele v Department of Education Free State* PSES489-12/13 FS; *Estate Late Tlhoeloeng Martha Serei, Molusi Ishmael Serei v Department of Education Free State* PSES380-10/11 FS; *SADTU obo Davhana v Department of Education Limpopo* PSES89 -14/15LP.

deal with and are responsible for state resources. This already is concerning: not only does the number of formal disciplinary hearings conducted by the four PDEs show that the mismanagement of finances is a much bigger problem than that evidenced by the number of actual arbitrations, but it may also indicate that, despite serious misconduct, employees are not dismissed.

These arbitrations do, however, indicate the kind of financial mismanagement that occurs in schools. The facts of these seven arbitrations may be summarised as follows. In *SADTU obo Davhana v Department of Education Limpopo* ("*Davhana*"),[274] the principal of a no-fee school, knowing very well that school fees were not to be charged, asked parents of learners to "donate" R50 to the school, upon which he used (stole) the money.[275] In *Estate Late Tlhoeloeng Martha Serei, Molusi Ishmael Serei v Department of Education Free State* ("*Serei*"),[276] a newly elected SGB laid a complaint with the PDE against the principal about the manner in which the school's finances were managed.[277] A forensic investigation revealed financial irregularities for three years, between 2006 and 2009.[278] In contravention of SASA, which determines that the SGB administer the school's bank account, the principal used the debit card linked to that bank account, even after being informed by bank officials that it was unlawful to do so. During the investigation, she also could not provide documentation supporting the expenditure of more than R200 000 of the school's money.[279] The *Henderson* arbitration was discussed under the poor work performance paragraph above, but it is necessary to mention here that the principal in that matter was also charged with financial mismanagement.[280] She failed to follow financial policy to keep the school's receipt book in the safe and upon enquiry as to where the receipt book

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[274] PSES89 -14/15LP.

[275] *SADTU obo Davhana v Department of Education Limpopo* PSES89 -14/15LP. The arbitration award did not contain paragraph numbers.

[276] PSES380-10/11 FS.

[277] *Estate Late Tlhoeloeng Martha Serei, Molusi Ishmael Serei v Department of Education Free State* PSES380-10/11 FS para 6.2.

[278] Para 6.3-6.8.

[279] Para 6.7, 6.10, 11 and 16. The correct manner of managing the funds in the school bank account was, amongst others, through the use of a cheque book. See *Estate Late Tlhoeloeng Martha Serei, Molusi Ishmael Serei v Department of Education Free State* PSES380-10/11 FS para 9.4 which referred to the Free State Provincial Government Gazette no. 68 published on 21 September 2001 regulating how finances in a public school are held:

> "Any money which is required to be paid by the school, and which is not paid from the petty cash, shall be paid from the school bank account by means of a cheque issued from the cheque book of the public school or through the system of electronic funds transfer".

[280] See paragraph 6 4 1 1.

was, fabricated a story that it was stolen in a house break in, which was not the case.[281] The principal in *Mokhampane v Department of Education Free State* ("*Mokhampane*") was charged with 21 charges relating to dishonesty and a failure to comply with financial management procedures. In particular, the charges included that the principal was dishonest in failing to deposit amounts of money which resulted in the amounts being unaccounted for, failing to report an incident of fraud, claiming cheques for certain amounts and submitting proof of payment for lesser amounts (or failing to submit proofs of payment), compensating SGB members for their service to the school and processing unauthorised payments.[282] Unfortunately, the PDE did not show up for the arbitration hearing. In the absence of the employer (PDE) – which bore the onus of proving the fairness of the dismissal – the arbitrator found in favour of the principal, resulting in his reinstatement (with back pay).[283] This matter is an example of Grogan's argument (discussed in chapter 5) with regard to the discharge of the onus in unfair dismissal disputes. In this case, the employer did not show up for the arbitration hearing. Even so, according to Grogan's interpretation, the employee is still expected to provide some evidence that the dismissal was unfair.[284] In other words, the arbitrator must be satisfied, based on the evidence presented by the employee and even in the absence of evidence presented by the employer, that the dismissal was unfair. In this matter the educator disputed his guilt and led evidence to that effect, resulting in the arbitrator finding in his favour.[285]

The principal in *SAOU obo Rambele v Department of Education Free State* ("*Rambele*")[286] faced eight charges relating to financial mismanagement and his dismissal was found to be fair at arbitration.[287] In this matter, the principal embezzled school funds on numerous occasions by instructing the financial clerk to co-sign cheques even though there was no supporting documentation for the requisition forms.[288] In *SADTU obo Williams v Department of Education Western Cape* ("*Williams*"),[289] the principal faced nine charges of misconduct, seven of which related

[281] *SADTU abo Henderson v Department of Education Western Cape* PSES68-15-16 WC paras 7 and 53.
[282] Para 9.
[283] *Mokhampane v Department of Education Free State* PSES482-15/16 paras 19-26.
[284] Grogan *Dismissal* 219.
[285] *Mokhampane v Department of Education Free State* PSES482-15/16 paras 18-24.
[286] PSES489-12/13 FS.
[287] *SAOU obo Rambele v Department of Education Free State* PSES489-12/13 FS paras 33-37.
[288] Paras 46 and 65.
[289] PSES487-16/17WC.

to financial mismanagement.[290] The principal on numerous occasions allowed payments of large sums of money (totalling more than R500 000) without complying with financial policy.[291] She failed to provide supporting documentation and/or cheque requisition forms for payments made.[292] She also effected payment of two educators' salaries without submitting an application for approval, which resulted in double payment of their salaries.[293]

The arbitration between *NAPTOSA obo Lole v Department of Education Eastern Cape* ("*Lole*")[294] illustrates the state of certain schools in South Africa due to poor management, corruption and fraud. In this case, the PDE was informed of corruption at the school by a parent. The PDE launched an investigation, but only a few months later.[295] The principal of the school initially faced six charges of misconduct, was found guilty of five of these at the disciplinary hearing and dismissed.[296] At arbitration two of the charges against the principal were proved and his dismissal was found to be substantively and procedurally fair.[297] It is necessary to mention the different charges against the principal to illustrate the types of incidents that may arise in public schools. The first charge against the principal was that he committed fraud or corruption by inflating learner numbers at the school, submitting in the annual survey that 501 learners were enrolled at the school.[298] A head count by the PDE showed that there were only 169 learners enrolled at the school.[299] The allocation of resources to schools is based on learner numbers, meaning that the PDEs finances were impacted in relation to the school nutrition programme, post establishment and scholar transport.[300] The second charge was for financial mismanagement in that the principal failed to provide full financial records and supporting documentation for expenses to the PDE when requested to do so.[301] The facts showed that the principal made all decisions pertaining to the finances of the school even though the school had finance

[290] *SADTU obo Williams v Department of Education Western Cape* PSES487-16/17WC para 9.
[291] Para 9.
[292] Para 9.
[293] Para 9.
[294] PSES358-12/13 EC.
[295] *NATOPSA obo Lole v Department of Education Eastern Cape* PSES358-12/13 EC. The letter was dated 2 August 2009 and the principal was charged with misconduct on 11 May 2010.
[296] Para 4.4-4.5.
[297] Para 36-41.
[298] Para 4.4.
[299] Para 7.
[300] Para 4.4.
[301] Para 4.4.

and procurement committees.[302] The principal admitted to authorising payments and paying for services without filling out the necessary requisition forms and did so after the fact when the auditors required such documentation.[303] Furthermore, the principal instructed persons to fill out the required forms in the name of the finance officer, even though they were clearly not that person.[304]

Third, the principal informed the PDE that 400 learners were to benefit from the school nutrition programme, whereas there were only 169 learners enrolled at the school.[305] The arbitrator found that the principal was negligent in failing to inform the PDE that learner numbers at the school had declined and continuing to receive funding from the PDE to feed 400 learners.[306] The PDE's investigation into the school and principal took place in November 2009, meaning that the principal was aware of the decline in learner numbers for many months, but failed to inform the PDE.[307] The fourth charge was based on dishonesty in that the principal misled the PDE (through inflated learner numbers) that the school was entitled to the posts of Deputy Principal and HOD, where it was not in fact eligible for those posts.[308] Lastly, the principal was charged with a failure to carry out a lawful order in that he failed to assist the PDE with its investigation by being present at the school and handing over financial documents.[309]

The arbitrator found that the principal was not only negligent in the manner he managed the finances of the school but that he did so in a fraudulent and grossly dishonest manner.[310] This misconduct caused the PDE to suffer a great financial loss based on the budgetary allocation to the school, especially with regard to the school nutrition programme.[311]

One important issue raised by the *Lole* arbitration, which speaks to a culture of financial mismanagement, corruption, theft, dishonesty and fraud, is that the Eastern Cape PDE apparently investigated 279 schools for inflating learner numbers.[312] The

[302] Para 36.
[303] Para 36.
[304] Para 36.
[305] Para 37.
[306] Para 37.
[307] Para 37.
[308] Paras 4.4 and 27.
[309] Para 4.4.
[310] Para 36.
[311] Paras 37 and 41.
[312] Para 21.

investigation revealed that 75 schools inflated learner numbers and 46 of those inflated their learner numbers "by huge margins".[313] It is unclear whether any steps were taken in relation to the responsible persons (the principals) in these other schools. Apart from *Lole*, no other cases pertaining to the inflation of learner numbers reached the ELRC. Furthermore, the proper management of finances also requires that responsibility be taken by the PDE to ensure proper management of schools in the province. The mere fact that it was necessary to investigate 279 schools raises questions about oversight and leadership in a province. In *Lole*, the letter sent by a parent to alert the PDE was received on 2 August 2009, whereas the first visit by PDE officials to the school to investigate the complaint took place on 5 November 2009 (three months later).[314] Furthermore, the principal did mention in an earlier letter to the PDE that there was a decline in learner numbers at the school as a result of learner transport being available at neighbouring schools (but not at this school).[315] This does not mitigate the fact that the principal had a responsibility to inform the PDE to allocate fewer resources to the school due to a decline in learner numbers. However, the principal received no response and no assistance with regard to the provision of learner transport to address enrolment numbers from the PDE.[316]

In each one of the seven arbitrations discussed above, the employee charged with financial mismanagement was the school principal. Each one of the principals was found guilty of misconduct, sometimes of wilful and serious misconduct. In *Davhana*, *Serei*, *Rambele* and *Lole* the facts show that the principals disregarded financial policy to embezzle funds or use the school's money for unauthorised purposes. Not all of the principals had the intention to mismanage the finances of the school. The facts in the *Williams* arbitration reveal a blatant disregard of financial policy, but do not indicate that the principal disregarded policy to steal money from the school. In the *Henderson* arbitration, for example, the arbitrator mentioned that the principal did not have the necessary skills to be an effective principal.[317]

As such, these arbitrations also show that not all principals are equipped to manage the finances of schools and that there may be a lack of financial training of these

[313] Para 21.
[314] Para 4.3, 8 and 9.
[315] *NATOPSA obo Lole v Department of Education Eastern Cape* PSES358 - 12/13 EC para 21.
[316] Para 21.
[317] See *SADTU abo Henderson v Department of Education Western Cape* PSES68-15-16 WC paras 12, 21 and 55.

officials.[318] It also speaks to the capacity of certain educators who are promoted to the position of principal, but who do not have the necessary skills to fulfil managerial obligations. What these arbitrations also show is that financial mismanagement in our education sector is not limited to mismanagement by school principals, but that there are inevitable questions about the extent and quality of oversight by the PDE. A failure in oversight leads to wasted resources. This is exacerbated by the failure to identify and address financial mismanagement when it occurs. This runs the danger of leading to a culture of poor training, financial incompetence and weak accountability in the sector. And it certainly does not help, as was the case in *Makhampane,* if the PDE does not show up for the arbitration with the effect that the principal is reinstated.

In this regard, it may already be mentioned that it is strange that while section 17(1) of the EOEA (which mandates dismissal) regards "theft, bribery, fraud or an act of corruption" as serious misconduct, it only does so in relation to "examinations or promotional reports".[319] Given the serious impact of financial mismanagement – especially if based on more serious instances of misconduct – on the delivery of basic education, this may well need to change. This is discussed in more detail in the next section.

6 4 1 4 Section 18(1)(ee) of the EOEA: Dishonesty[320]

As mentioned earlier, dishonesty is not one of the types of misconduct most commonly addressed at disciplinary hearings. However, it is the type of misconduct that presented itself most often at arbitration. Dishonesty featured in 19 of the arbitration awards considered for this part of the research. In one sense, this is not surprising as the far-reaching effect of his type of misconduct on the employment relationship is largely self-evident and may well result in dismissal.[321] Furthermore, in the context of the basic education sector where the educator works with learners, the employee as educator, is in a particular position of trust and acts *in loco parentis*.[322] Honesty in the

[318] The above effect is exacerbated where schools do not have functioning and effective SGBs managing the school's finances.
[319] Section 17(1)(a) of the EOEA.
[320] Section 18(1)(ee) reads "commits an act of dishonesty".
[321] See Grogan *Dismissal* 272-273.
[322] See the arbitration of *SAOU obo May v Department of Education, Western Cape* PSES749-18/19WC para j. Howden (the panellist) emphasised that "educators play an *in loco parentis* role (looking after the physical and mental wellbeing of learners)". See also Calitz & De Villiers (2020) *SALJ* 82; J Potgieter "Delictual negligence of teachers in schools: The confusing influence of the in loco parentis doctrine" (2004) 22 *Perspectives in Education* 153-156.

employment relationship by an educator is therefore important for two reasons. First, as in every other employment relationship, dishonesty damages the trust relationship on which the agreement (contract) between employer and employee is based.[323] Second, educators act *in loco parentis* and this employment relationship is distinctive seeing that educators hold a position of trust in schools and, in fact, in society.[324]

Grogan mentions that in criminal law a person cannot be convicted of an offence of dishonesty alone since there has to be a wrongful act accompanying the dishonesty (such as in case of theft or fraud).[325] This is different in the case of the employment relationship where dishonesty is considered a type of misconduct for which the employee can be sanctioned and even dismissed.[326] Dishonesty can be in the form of deceit, withholding information from the employer, misrepresentation or the making of false statements or corruption.[327] Dishonesty as a type of misconduct is mentioned in section 18(1)(ee) of the EOEA. The exact type of conduct considered dishonesty is not defined, but in *Nedcor Bank Ltd v Frank*[328] the court described dishonesty as "a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently".[329] What is clear from this description of dishonesty is that it requires an intention on the part of the employee to deceive.[330] In other words, an employee cannot be dishonest when acting negligently but can be dishonest by omission when that omission is deceitful.[331] It was mentioned earlier that dishonesty is particularly problematic in the education sector because employees are educators who hold a position of trust in their dealings with learners, colleagues and society.[332]

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[323] Grogan *Dismissal* 272.

[324] In *SADTU obo Davhana v Department of Education Limpopo* PSES89 -14/15LP, the arbitrator mentioned that "[a]s principal of a school the Applicant was placed in a position of trust". Similarly, in *Sigudu v Department of Education Limpopo* PSES575-15/16LP para 19 the arbitrator emphasised that "[t]he Applicant was placed in a position of trust where he must always conduct himself in line with the trust assigned to a Principal".

[325] Grogan *Dismissal* 272.

[326] 272.

[327] 272.

[328] (2002) 23 ILJ 1243 (LAC).

[329] *Nedcor Bank Ltd v Frank* (2002) 23 ILJ 1243 (LAC) para 15. The Labour Appeal Court considered the following cases and sources in developing the definition of dishonesty: *Toyota SA Motors SA (Pty) Ltd v Radebe* (2000) 21 ILJ 340 (LAC) para 345FH; *R v Brown* 1908 TS 21; *R v White* 1968 (3) SA 556 (RAD) *Ex parte Bennett* 1978 2 SA 380 (W) para 383H-384C; *S v Manqina*; *S v Madinda* 1996 (1) SACR 258 (E) para 260eh and the Oxford Dictionary.

[330] Grogan *Dismissal* 272-273.

[331] 272-273.

[332] See, eg, the professional ethics required by educators in the SACE Code of Professional Ethics which states, amongst others, that educators "acknowledge that the attitude, dedication, self-discipline, ideals, training and conduct of the teaching profession determine the quality of education in this country". Further that an educator "recognises that an educational institution serves the

Furthermore, educators and principals are entrusted with and are the custodians of state resources, which requires honesty in ensuring resources are utilised to realise the right to a basic education.[333]

Table 2 below provides a summarised overview of instances of dishonesty considered at arbitration by the ELRC between 2014 and 2019.

Table 2: Dishonesty addressed at arbitration between 2014 and 2019 in the four provinces analysed:[334]

	Arbitration	Province	Charge	Summary of misconduct	Broader issue	Outcome
1	*Kukulela*[335]	EC	Section 17(1)(a): Fraud/Corruption (examinations or promotional reports). Section 18(1)(aa): Falsified records or documentation. Section 17(1)(f): Caused a learner to perform acts in s 17(1)(a)-(e). Section 18(1)(a): Contravened act. Section 18(1)(l):	Falsified the marks of examinations which were never written; Falsified records by forging signatures of SGB for appointment of meal servers; Incited learners to strike.	Wilful mis-management and abuse of power	Dismissal

community, and therefore acknowledges that there will be differing customs, codes and beliefs in the community; and conducts him/herself in a manner that does not show disrespect to the values, customs and norms of the community" and "behaves in a way that enhances the dignity and status of the teaching profession and that does not bring the profession into disrepute". See SACE "SACE Code of Professional Ethics" (2020) *SACE*.

[333] See, eg, *NATOPSA obo Lole v Department of Education Eastern Cape* PSES358 - 12/13 EC which shows the far-reaching effect when state employees do not perform their tasks diligently. In this matter the negligence and poor management of the school by the principal resulted in the cessation of the nutrition scheme at the school, even though the PDE provided the necessary funds. This resulted in learners being deprived of nutrition for months on end.

[334] The data in the table is from the arbitration awards listed.

[335] *NAPTOSA obo Kukulela v Department of Education Eastern Cape* PSES17-16:17 EC.

			Poor performance.			
			Section 18(1)(ee): Dishonesty.			
			Section 18(1)(g): Misused his position in the Department of Education, office or school.			
			Section 18(1)(j): Prejudiced administration.			
2	*Lole*[336]	EC	Section 17(1)(a): Fraud/Corruption (examinations or promotional reports).	Inflated learner numbers.	Fraud	Dismissal
			Section 18(1)(b): Mismanaged finances.	Failed to keep proper financial records and supporting documents.		
			Section 18(1)(aa): Falsified records.	Inflated learner numbers.		
			Section 18(1)(ee): Dishonesty.	Misled the PDE that the school was entitled to posts for which it is not eligible.		
			Section 17(1)(a): Fraud/Corruption (examinations or promotional reports).	Falsified signatures of retired Education Development officer.		

[336] *NATOPSA obo Lole v Department of Education Eastern Cape* PSES358-12/13 EC.

			Section 18(1)(a): Contravened Act.	Failed to make himself available for a meeting with PDE officials and hand over financial documents.		
3	*Letsoara*[337]	FS	Section 18(1)(ee): Dishonesty.	Unlawfully wrote herself a motivation letter in support of an application for HOD at a school.	Dishonesty	Dismissal
4	*Makheti*[338]	FS	Section 18(1)(a): Contravened act.	Failed to participate in short listing and interview process (walked out).	Wilful mis-management and abuse of power	Dismissal
			Section 18(1)(i): Insubordination.	Failed to effect the appointment of a new HOD.		
			Section 18(1)(a): Contravened act.	Failed to allocate duties to the new HOD.		
			Section 18(1)(dd): Statutory offence.	Threatened to shoot the new HOD.		
			Section 18(1)(ee): Dishonesty.	Wrote a letter to the PDE that he was unaware of the new HOD's appointment, resulted in the HOD's salary being frozen.		
5	*Mokamphane*[339]	FS	Section 18(1)(b): Mismanaged finances.	Failed to deposit various amounts belonging to the	Financial mis-management	Unfair dismissal

[337] *Letsoara v Department of Education Free State* PSES567-14/15.
[338] *Makhethi v Department of Education Free State* PSES48-15/16FS.
[339] *Mokhampane v Department of Education Free State* PSES482-15/16.

			Section 18(1)(ee): Dishonesty.	school, claimed cheques and submitted proof for lesser amounts, processed unauthorised payments.		
6	*Motatinyane*[340]	FS	Section 18(1)(ee): Dishonesty.	Principal informed DOE that no funds were received for the nutritional scheme when the funds were in fact transferred.	Financial mis-management	Dismissal
			Section 18(1)(l): Poor performance.	Failed for seven months to ensure learners were fed through the nutrition programme.		
			Section 18(1)(l): Poor performance.	Failed to maintain registers of learners participating in nutrition programme.		
			Section 18(1)(l): Poor performance.	Failed to ensure financial statements were accurate.		
			Section 18(1)(l): Poor performance.	Failed to ensure proper financial records resulting in an understatement of expenditure.		
			Section 18(1)(l): Poor performance.	Discrepancies regarding the validity of invoices submitted by the principal.		

[340] *Motatinyane v Department of Education Free State* PSES849-15/16FS.

			Section 18(1)(l): Poor performance.	Failed to ensure that the school maintained a petty cash register.		
			Section 18(1)(l): Poor performance.	Cheques made out did not reflect the supporting documentation.		
			Section 18(1)(l): Poor performance.	No supporting documentation attached to expenses.		
7	*Davhana*[341]	LP	Section 18(1)(b): Mismanaged finances. Section 18(1)(ee): Dishonesty. Section 18(1)(d): Damage/loss of state property. Section 18(1)(f): Prejudiced administration.	Principal was dishonest about the whereabouts of an amount of money belonging to the school and did not deposit the money indicating that he had the intention of stealing it.	Financial mis-management	Fair labour practice: Final written warning and fine
8	*Mundzhedzi*[342]	LP	Section 17(1)(a): Fraud/Corruption (examinations or promotional reports). Section 18(1)(ee): Dishonesty. Section 18(1)(g) Misused his position in the Department of Education, office or school.	Provided a learner with the memorandum of the Mathematical Literacy examination to rewrite the paper at the principal's house.	Fraud	Dismissal

[341] *SADTU obo Davhana v Department of Education Limpopo* PSES89-14/15LP.
[342] *Mundzhedzi v Department of Education Limpopo* PSES563-15/16LP.

9	*Shilubane*[343]	LP	Section 18(1)(ee): Dishonesty.	Failed to disclose that she was previously employed by the public service and dismissed.	Dishonesty	Dismissal
10	*Sigudu*[344]	LP	Section 18(1)(g) Misused his position in the Department of Education, office or school. Section 18(1)(ee): Dishonesty. Section 18(1)(f): Prejudice administration.	Principal changed the district's examination table and grade 12 learners wrote Mathematical Literacy at 06h30 instead of 08h30 impacting learners who stayed far from school.	Misused position	Unfair labour practice
11	*Muller*[345]	WC	Section 17(1)(a): Fraud/Corruption (examinations or promotional reports). Section 18(1)(ee): Dishonesty (alternative).	Awarded marks to unmarked scripts.	Fraud	Dismissal
12	*Fisher*[346]	WC	Section 17(1)(a): Fraud/Corruption (examinations or promotional reports). Section 18(1)(ee): Dishonesty (alternative).	Awarded marks without conducting the assessments.	Fraud	Dismissal

[343] *Shilubane v Department of Education, Limpopo* PSES692-16/17LP.
[344] *Sigudu v Department of Education Limpopo* PSES575-15/16LP.
[345] *SADTU obo Muller v Department of Education Western Cape* PSES815-17/18.
[346] *SADTU obo Fisher v Department of Education Western Cape* PSES574-15/16 WC

13	*Henderson*[347]	WC	Section 18(1)(i): Insubordination.	Failed to adhere to HOD's instruction to readmit expelled learners.	Poor performance	Unfair dismissal
			Section 18(1)(ee): Dishonesty.	Reported receipt book stolen during a housebreaking, which was untrue.		
			Section 18(1)(e): Endangered the lives of learners by disregarding safety rules.	Allowed others to enter school premises and resulted in the assault and threatening of learners.		
			Section 18(1)(b) Mismanaged finances.	Failed to follow financial policy.		
			Section 18(1)(l): Poor performance.	Failed to manage the SMT, implement assessment guidelines, submit reports to supervisor and follow proper procedure to expel learners.		
			Section 18(1)(ee): Dishonesty.	Submitted false attendance register and leave reports to supervisor.		
			Section 18(1)(f): Prejudiced the administration.	Failed to perform her tasks as principal.		
14	*Visagie*[348]	WC	Section 18(1)(dd): Statutory offence: Fraud.	Principal changed the bank details of the school to his own, resulting in	Maladministration	Unfair dismissal

[347] *SADTU abo Henderson v Department of Education Western Cape* PSES68-15-16 WC.
[348] *Visagie v Department of Education Western Cape* PSES180-15/16WC.

			Section 18(1)(ee): Dishonesty (alternative).	incorrect payments into his personal account.		
15	*Abrahams*[349]	WC	Section 18(1)(dd): Statutory offence: Fraud. Section 18(1)(ee): Dishonesty (alternative).	Misrepresentation to a donor regarding an amount that was needed for a field trip.	Fraud	Dismissal
16	*Bains*[350]	WC	Section 18(1)(ee): Dishonesty.	Educator "too ill to work" but went to assist in a by-election.	Dishonesty	Dismissal
17	*Booysen*[351]	WC	Section 18(1)(ee): Dishonesty.	Provided learners with the answers to a test.	Dishonesty	Dismissal
18	*Davani*[352]	WC	Section 18(1)(c): Without permission possesses state property. Section 18(1)(ee): Dishonesty (alternative).	Stole a computer from the school.	Theft	Dismissal
19	*Sievers*[353]	WC	Section 18(1)(j): Absence. Section 18(1)(ee): Dishonesty.	Often came late to work. Signed the attendance register, but only came to school in the afternoon.	Absenteeism	Unfair dismissal

[349] *Abrahams v HOD, Western Cape Department of Education* PSES590-18/19WC.
[350] *SADTU obo Bains v Department of Education Western Cape* PSES64-18/19WC.
[351] *NAPTOSA obo Booysen v Department of Education Western Cape* PSES1008-18/19WC.
[352] *SADTU obo Davani v Department of Education Western Cape* PSES242-18/19 WC.
[353] *SADTU obo Sievers v Department of Education Western Cape* PSES568-14-15.

The first thing that this table reveals is that dishonesty as envisaged by section 18(1)(ee) of the EOEA usually is the secondary or alternative charge of misconduct. From a reading of the facts of each arbitration, the broader issue informing the various charges for misconduct was identified and is indicated in Table 2 above. This "broader issue" can be explained by way of example. In *Sievers*, the main issue was the absence of the educator, but apart from being absent, he was also charged with being dishonest about it.[354]

In only four of the 19 cases was "dishonesty" the main charge.[355] These awards are discussed briefly to provide an overview of the conduct that apparently warrants the main charge of dishonesty for misconduct. In *Letsoara v Department of Education Free State* ("*Letsoara*")[356] the educator unlawfully wrote himself a motivation letter in support of his application for the position of HOD and falsely claimed that the letter was written by the acting principal.[357] The dismissal was (rightfully) based on the gravity of the misconduct and the impact it had on the trust relationship between the principal and the educator.[358] In *Shilubane v Department of Education Limpopo* ("*Shilubane*")[359] the educator failed to disclose when she applied for a position that she had previously been employed by the public service and was dismissed in terms of section 14(1)(a) of the EOEA (deemed discharge).[360] It should be mentioned here that the charge was for dishonesty for failing to disclose her previous employment with the public service, but the facts reveal that she specifically wrote on the employment form that she "was never employed and dismissed by the state before".[361] In other words, it was not dishonesty by omission but blatant dishonesty by filling out the employment form in a fraudulent manner. In *SADTU obo Bains v Department of Education Western Cape* ("*Bains*")[362] the educator informed the principal that she was too ill to report to work but proceeded to assist in a by-election during work hours.[363]

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[354] See *SADTU obo Sievers v Department of Education Western Cape* PSES568-14-15.
[355] It can also be seen from the table that charges of fraud are usually accompanied by a charge for dishonesty seeing that fraud is inherently a dishonest act. These cases were not considered to have "dishonesty" as the broader issue, seeing as the main charge was still fraud.
[356] PSES567-14/15.
[357] *Letsoara v Department of Education Free State* PSES567-14/15 para 4.
[358] Para 14-16.
[359] PSES692-16/17LP para 9.
[360] *Shilubane v Department of Education Limpopo* PSES692-16/17LP para 9.
[361] Para 24.
[362] PSES64-18/19WC.
[363] *SADTU obo Bains v Department of Education Western Cape* PSES64-18/19WC para 3.

The facts of the arbitration revealed that the educator continued to be dishonest to try and escape accountability. Her testimony was not credible and was inconsistent with the testimony of other witnesses who the arbitrator found to be "forthright and honest".[364] The arbitrator considered whether the dismissal was too harsh a sanction in the circumstances, considering the educator's length of service. However, the educator showed no remorse for her actions with the result that the arbitrator found that the trust relationship had been broken and that dismissal was substantively fair.[365] In *NAPTOSA obo Booysen v Department of Education Western Cape* ("*Booysen*")[366] the educator was charged with dishonesty for providing learners with the answers to a Natural Science and Technology test.[367]

As mentioned above, these arbitrations pertained to cases where dishonesty was the main or only charge. There were other arbitrations (discussed below), that also pertained to dishonesty by providing learners with the answers to assessments. In *Mundzhedzi v Department of Education Limpopo ("Mundzhedzi")*,[368] *SADTU obo Muller v Department of Education Western Cape* ("Muller"),[369] and *SADTU obo Fisher v Department of Education Western Cape ("Fisher")*[370] the educators provided learners with the answers to assessments. In each one of these cases, dishonesty was the secondary or alternative charge, with a contravention of section 17(1)(a) being the main charge. In *Mundhedzi* the learner failed the mathematics examination after which the educator invited the learner to his house, gave her the memorandum and allowed her to rewrite the examination.[371] In *Muller* the educator, with 31 years teaching experience, awarded marks to unmarked "assignment scripts" in respect of a subject he was teaching.[372] In the award, it is explained that the marks for these assignments were later "recorded onto the WCED Official Record Sheet as a final mark and finally recorded onto the Assessment Reports that are issued to learners at the end of the school term".[373] The significance of this statement becomes clear below.

[364] Paras 25, 28-29.
[365] Paras 35-36.
[366] PSES1008-18/19WC.
[367] *NAPTOSA obo Booysen v Department of Education Western Cape* PSES1008-18/19WC para 5.
[368] PSES563-15/16LP.
[369] PSES815-17/18.
[370] PSES574-15/16 WC.
[371] *Mundzhedzi v Department of Education Limpopo* PSES563-15/16LP para 4, 15-19.
[372] *SADTU obo Muller v Department of Education Western Cape* PSES815-17/18 paras 7-9.
[373] *SADTU obo Fisher v Department of Education Western Cape* PSES574-15/16 WC para 10.

In the last matter, that of *Fisher,* dishonesty was the alternative charge.[374] The educator, with eight years teaching experience, allocated marks to learners in respect of reading and oral assessments that were never conducted.[375] The specific acts of misconduct for which these educators were charged are significant because they reveal a shortcoming in the EOEA as well as inconsistency in charging educators. The wording of section 17(1)(a) may be repeated here: "an educator must be dismissed if he or she is found guilty of theft, bribery, fraud or an act of corruption *in regard to examinations or promotional reports*" (own italics).[376] At first, it seems that the main charge in *Booysen* was "dishonesty" because it pertained to a "test" and therefore does not fall within the ambit of section 17(1)(a) (for which dismissal is mandatory). However, in *Muller*, the dishonesty pertained to "assignment scripts" but the fact that those marks were later recorded in learners' "reports" may justify that the misconduct falls within the ambit of section 17(1)(a). However, the *Fisher* case reveals that the educator was in fact charged in terms of section 17(1)(a) relating to "reading or oral assessments". In other words, educators are not charged consistently in terms of section 17(1)(a) which requires dishonesty in relation to examinations or promotional reports. In *Mundzhedzi*, *Muller* and *Fisher* the dismissals were found at arbitration to be substantively fair. The question arises why *Booysen* was not also charged in terms of section 17(1)(a) if the misconduct pertained to providing learners with answers (fraud) to a test. In *Booysen* the educator was in fact dismissed for dishonesty and the arbitrator confirmed the substantive fairness thereof. However, the dishonesty charge was in terms of section 18(1)(ee) which means that the employer could have imposed any of the sanctions short of dismissal listed in section 18(3) of the EOEA. The wording of section 17(1)(a) clearly results in conceptual difficulties and inconsistency in dealing with instances of misconduct that constitute dishonesty. Furthermore, the differentiated treatment of dishonesty in both section 17 and section 18 of the EOEA simply misses the point that dishonesty always is serious.

The reasons why four dismissals and one ULP relating to dishonesty were found to be unfair at arbitration need to be considered. The *Visagie* matter is the only case where the dismissal was found to be unfair on the merits in that the banking details of

[374] Para 8.
[375] Para 8.
[376] S17(1)(a) of the EOEA.

the school was not changed by the principal dishonestly, but that it was a case of maladministration.[377]

In *Sievers* the broader issue surrounding the educator's absenteeism was found to be temporary incapacity due to the educator's depression and mental state.[378] In *Henderson* the principal was found to be incapable to perform according to the required standard.[379] This reveals that the unfairness of dismissal was due to the presence of broader issues. In both these instances, reinstatement was not ordered but the arbitrators found compensation to be "appropriate under the circumstances".[380]

In both *Mokhampane* and *Sigudu* the reason discipline was found to be unfair was not because the misconduct did not take place or because the sanction was not appropriate in the circumstances. It is clear from the Table 2 above that the misconduct was in fact serious. In *Mokhampane* the PDE did not attend the hearing and the arbitrator called the respondent to ascertain whether a representative would attend, but no one answered.[381] In *Sigudu* the PDE did not attend the hearing and, once again, the arbitrator called the employer who claimed to have been unaware of the hearing.[382] While on the phone with the arbitrator (on loudspeaker), the union representative (of the principal) agreed to the PDEs request to submit written closing arguments instead of leading evidence.[383] However, in the absence of evidence led by the employer that the principal committed the misconduct and that it justified the sanction of demotion, the arbitrator found in favour of the principal (ULP) and ordered reinstatement.[384]

These examples indicate the impact dishonesty has on the delivery of a basic education apart from its fundamental impact on the trust relationship between employer and employee. At one level, dishonesty relating to school and state resources impact on the efficiency and quality of the system of delivery of a quality basic education. Where educators are dishonest in conducting assessments or any other aspect pertaining to learning, the dishonesty directly impacts on the integrity and quality of basic education.

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[377] *Visagie v Department of Education Western Cape* PSES180-15/16WC.
[378] *SADTU obo Sievers v Department of Education Western Cape* PSES568-14-1 para 62.
[379] *SADTU abo Henderson v Department of Education Western Cape* PSES68-15-16 WC para 66.
[380] *SADTU obo Sievers v Department of Education Western Cape* PSES568-14-15 paras 65, 67; *SADTU abo Henderson v Department of Education Western Cape* PSES68-15-16 WC paras 66, 67.
[381] *Mokhampane v Department of Education* Free State PSES482-15/1 para 2.
[382] *Sigudu v Department of Education Limpopo* PSES575-15/16LP paras 2, 25.
[383] Paras 9, 24.
[384] Paras 34-39, 42.

6 4 1 5 Section 18(1)(q) of the EOEA: Improper conduct[385]

Section 18(1)(q) of the EOEA declares it to be misconduct where an educator "while on duty, conducts himself or herself in an improper, disgraceful or unacceptable manner" (hereafter "improper conduct"). One can expect that, due to the broad wording of this provision and in the absence of a definition, this type of misconduct will not only be used to include a variety of (often unforeseen) behaviours but (as was seen with regard to poor work performance) to play a residual role (as an alternative charge) in case of the directly identifiable presence of other types of serious misconduct. In light of this, it is not surprising that at disciplinary hearings improper conduct was the second most common type of misconduct educators were charged with between 2014 and 2019 (it featured in 427 disciplinary hearings).[386] So too at arbitration, where it was the most common type of misconduct considered across the four PDEs analysed (in 31 cases).[387]

As mentioned above, specific reliance on the broad wording of the provision allows for various types of misconduct to be classified as "improper conduct". From an analysis of the relevant arbitration awards, it becomes clear that this section was used to address two categories of behaviour. These two categories are, first, unprofessional behaviour by the educator amounting to misconduct and, second, gross abuse of the educator's position resulting in the verbal, physical or emotional abuse of learners. The arbitration awards are grouped in these two categories in the tables below and the type of misconduct that occurred in each matter is briefly mentioned. This is done as further explanation of the provision in the EOEA. Note that other sources applicable to the employment of educators were considered in the compilation of Table 3 below. In this regard, the term unprofessional behaviour was used along the lines of the requirements of the South African Council for Educators ("SACE") Code of Professional ethics (discussed in chapter 5). In most instances listed below the unprofessional behaviour by the educator was towards a colleague, but the instances that involved learners are indicated in the table. The SACE Code of Professional Ethics requires that towards colleagues, the educator –

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[385] Section 18(1)(q) of the EOEA reads "while on duty, conducts himself or herself in an improper, disgraceful or unacceptable manner".
[386] See Graph 3 above.
[387] See Graph 5 above.

> "refrains from undermining the status and authority of his or her colleagues; respects the various responsibilities assigned to colleagues and the authority that arises there from, to ensure the smooth running of the educational institution; uses proper procedures to address issues of professional incompetence or misbehaviour; promotes gender equality and refrains from sexual harassment (physical or otherwise) of his or her colleagues; uses appropriate language and behaviour in his or her interactions with colleagues; avoids any form of humiliation, and refrains from any form of abuse (physical or otherwise) towards colleagues".[388]

Of the 53 charges brought against educators for improper conduct that featured in 31 arbitrations, 18 charges related to the unprofessional behaviour of educators whereas 35 charges related to the abuse of the educator's position.

Table 3: Unprofessional behaviour by an educator as a type of improper conduct in terms of section 18(1)(q) of the EOEA:[389]

Unprofessional behaviour by an educator as a type of improper conduct in terms of section 18(1)(q) of the EOEA		Number of charges
1	Stormed into another teacher's classroom[390]	1
2	Acted without instruction/approval of supervisor[391]	1
3	Disrespectful behaviour: Shouting at colleagues[392]	2
4	Displayed racially offensive images[393]	1
5	Displayed old South African flag[394]	1
6	Communicated contradicting information to a learner about disciplinary case[395]	1
7	Disgraceful and unacceptable language towards colleagues[396]	5

[388] SACE "SACE Code of Professional Ethics" (2020) *SACE* <https://www.sace.org.za/pages/the-code-of-professional-ethics> (accessed 25-11-2020).
[389] The information in Table 3 is drawn from ELRC arbitration awards between 2014 and 2019. The awards are separately referenced in the table according to the misconduct.
[390] See *Kleinbooi v Department of Education Eastern Cape* PSES250-13/14EC.
[391] See *NAPTOSA obo Mehlo v HOD of the Eastern Cape Department of Education* PSES658-16/17EC.
[392] See *SADTU obo Pakade v Department of Education Eastern Cape* PSES187-14/15EC; See also *SADTU obo Goedeman v Department of Education Western Cape* PSES585-13/14WC.
[393] See *SADTU obo Mackay v Department of Education Free State* PSES615-14/15 FS.
[394] See *SADTU obo Mackay v Department of Education Free State* PSES615-14/15 FS.
[395] See *SADTU obo Mackay v Department of Education Free State* PSES615-14/15 FS.
[396] See *Witbooi v Department of Education Eastern Cape* PSES227-14/15 EC; *NAPTOSA obo Kruger v HOD Western Cape Education Department* PSES781-16/17WC; *SADTU obo Goedeman v Department of Education Western Cape* PSES585-13/14WC.

8	Confiscated test papers while learners were writing[397]	1
9	Insulted principal[398]	1
10	Refused to meet with new tourism educator[399]	1
11	Locked principal in classroom[400]	1
12	Slammed the door in the principal's face[401]	1
13	Improper conduct (unspecified)[402]	1
	Total	**18**

The misconduct listed in Table 4 below concerns conduct predominantly directed at learners (which, of course, has the potential to impact the learner far beyond the immediate act of misconduct). Although unprofessional behaviour (towards colleagues) by educators remains important, the focus of this research is on misconduct that impacts the quality of education received by learners. The misconduct listed in Table 4 concerns conduct directed towards learners in that the educator, by virtue of his or her position, inflicted verbal, physical or emotional abuse. In this regard, while the EOEA does not include abuse as a type of misconduct, the definition of abuse in the Children's Act 38 of 2005 provides guidance as to the type of behaviour considered abuse against children (which the majority of learners are):

> **"[A]buse**, in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, and includes-
> *(a)* assaulting a child or inflicting any other form of deliberate injury to a child;
> *(b)* sexually abusing a child or allowing a child to be sexually abused;
> *(c)* bullying by another child;
> *(d)* a labour practice that exploits a child; or
> *(e)* exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally".[403]

The examples of misconduct in Table 4 range from physical abuse such as assault, verbal abuse in the form of abusive or inappropriate language when speaking to

[397] See *Sekute v Department of Education Free State* PSES456-12/13**.**
[398] See *Smango v Department of Education Free State* PSES219-13/14**.**
[399] See *Maphoto v Department of Education Limpopo* PSES549-15/16 LP.
[400] See *SADTU obo Macanda v HOD Western Cape Education Department* PSES506-16/17WC.
[401] See *Heynes v Department of Education Western Cape* PSES326-14 WC.
[402] See *SADTU obo Mfeka v West Coast FET College* ELRC 036-13/14 WC.
[403] Section 1 of the Children's Act 38 of 2005.

learners and emotional abuse in promising a learner money in exchange for sexual favours.

Table 4: Abuse of the educator's position as a type of improper conduct in terms of section 18(1)(q) of the EOEA resulting in the verbal, physical or emotional abuse of learners:[404]

	Abuse of the educator's position as a type of improper conduct resulting in the verbal, physical or emotional abuse of children	Number of charges
1	Sexual harassment[405]	8
2	Sexual assault[406]	2
3	Assaulted/attempted to assault learner (and parent)[407]	1
4	Sexual relationship with learner[408]	1
5	Kissed a learner, touched a learner inappropriately[409]	6
6	Hugged, touched a learner's buttocks[410]	1
7	Promised money in return for sex[411]	1
8	Called a learner a prostitute[412]	1
9	Asked for a learner's cell phone number, requesting to meet[413]	2
10	Showed an 18 age-rated movie to grade 8 learners[414]	1
11	Abusive language towards a learner (and parent in one instance)[415]	4
12	Peeped under girls' skirts[416]	1
13	Made utterances of a sexual nature towards a learner[417]	1

[404] The information in Table 4 is drawn from ELRC arbitration awards between 2014 and 2019.
[405] See *Aba v Department of Education Eastern Cape* PSES643-17/18EC; *Mara v Department of Education Limpopo* PSES71-13/14LP; *SALIPSWU obo Zaula v Department of Education Western Cape* PSES224-16/17 WC; *Adams v Department of Education Western Cape* PSES501-19/20WC; *Moyo v Western Cape Education Department* PSES811-18/19WC.
[406] *Moyo v Western Cape Education Department* PSES811-18/19WC; *SAOU obo Joseph v Department of Education Western Cape* PSES716-18/19WC.
[407] *Kleinbooi v Department of Education Eastern Cape* PSES250-13/14EC.
[408] *Chirwa v Department of Education Western Cape* PSES643-15/16FS.
[409] *SAOU obo Joseph v Department of Education Western Cape* PSES716-18/19WC; *NAPTOSA obo Larney v Department of Education Western Cape* PSES-800-16/17WC; *Arendse v Department of Education Western Cape* PSES860-16/17WC; *Van Wyk v Department of Education Western Cape* PSES508-16/17WC, *Bless v Department of Education Free State* PSES356-13/14.
[410] *Gwe v HOD Department of Education Western Cape* PSES708-16/17WC.
[411] *Gwe v HOD Department of Education Western Cape* PSES708-16/17WC.
[412] *NAPTOSA obo Kruger v HOD Western Cape Education Department* PSES781-16/17WC.
[413] *Satani v HOD Department of Education Western Cape* PSES232-13/14WC; *Moyo v Western Cape Education Department* PSES811-18/19WC.
[414] *Western Cape Department of Education v Le Grange* PSES231-15/16.
[415] *Western Cape Department of Education v Le Grange* PSES231-15/16; *Steenkamp v Western Cape Department of Education* PSES730-15/16 WC; *Kleinbooi v Department of Education Eastern Cape* PSES250-13/14EC.
[416] *Western Cape Department of Education v Le Grange* PSES231-15/16.
[417] *SAOU obo Aronse v Western Cape Education Department* PSES740-18/19 WC.

14	Performed pre-circumcision procedures on male learners[418]	1
15	Touched a female learner's chest/breasts[419]	4
	Total	**35**

Two types of recurring and inherently serious types of misconduct in Table 4 are sexual harassment and sexual assault. These types of misconduct were present in seven of the arbitrations where charges in terms of section 18(1)(q) were considered. The facts surrounding these charges are elaborated on below. As a point of departure, however, it is necessary to first consider why these types of misconduct were addressed in terms of section 18(1)(q). As mentioned, the EOEA addresses misconduct in both section 17 (serious misconduct, dismissal peremptory) and 18 (dismissal discretionary). Sexual assault and assault are types of misconduct listed in section 17(1)(b) (sexual assault), section 17(1)(d) (serious assault) and 18(1)(r) (assault or attempted assault). The question is, in the event of for instance sexual assault, why is the educator charged in terms of section 18(1)(q) and not in terms of section 17(1)(b)?

Educators are often charged in the alternative based on the same incident of misconduct, meaning that the main charge will be in terms of section 17(1)(b) and the alternative charge in terms of section 18(1)(q) of the EOEA. This may be illustrated by considering *SALIPSWU obo Zaula v Department of Education Western Cape* ("*Zaula*").[420] The applicant in this matter was charged in terms of section 17(1)(b) for sexual assault of a learner in that he "forcefully hugged the learner in his office and/or touched her buttocks and/or kissed her on her cheeks".[421] In the alternative to this charge, the applicant was charged with sexual harassment in terms of section 18(1)(q) of the EOEA.[422] The applicant faced two further main charges. He was charged with improper conduct for making an inappropriate utterance of a sexual nature towards the same learner asking her why she is not responding to his requests.[423] The last charge was also for improper conduct in that the applicant on another occasion made a comment of a sexual nature towards the learner and sent her pornographic

[418] *NAPTOSA obo Thompson Mlumbi v Department of Education Western Cape* PSES675-18/19WC.
[419] *Moyo v Western Cape Education Department* PSES811-18/19WC.
[420] PSES224-16/17 WC.
[421] *SALIPSWU obo Zaula v Department of Education Western Cape* PSES224-16/17 WC para 8.
[422] Para 8.
[423] Para 8.

images.[424] Two aspects regarding the charges in the *Zaula* arbitration are of note. It confirms that section 18(1)(q) is used as a catch-all provision in case of sexual misconduct when the misconduct is not "serious" enough to warrant a charge in terms of section 17(1)(b) (or, arguably, does not meet its precise description). All three incidents above were misconduct of a sexual nature, but only the incident where there was physical contact was regarded as warranting a charge in terms of section 17(1)(b). As discussed in chapter 5, section 17(1) is a peremptory provision and determines that educators must be dismissed if found guilty of the misconduct listed in the provision. The *Zaula* arbitration further shows that decision makers tasked with charging educators classify certain acts as sexual harassment and then charge the educator in terms of section 18(1)(q) for improper conduct. It should be noted that sexual harassment is not specifically mentioned in sections 17 or 18 of the EOEA as a type of misconduct. Clearly, depending on its nature, sexual harassment could constitute sexual assault for purposes of section 17(1)(b) of the EOEA. Conversely, confining sexual harassment to section 18 of the EOEA, or regarding it as "improper conduct" (also in terms of section 18 of the EOEA) sends out an immediate message that it is of lesser importance.

Role players tasked with charging educators with misconduct include charges in terms of section 18(1)(q) due to the broad wording of the section. It therefore conveniently serves as a catch-all for specific types of misconduct listed elsewhere in sections 17 and 18 of the EOEA. The *Zaula* arbitration discussed above is an example of this. Section 18(1)(q) is often the alternative charge, especially where there are serious main misconduct charges in terms of section 17 of the EOEA. In 21 of the 31 arbitrations where charges of improper conduct played a role, charges based on section 18(1)(q) were either the alternative charges or were main charges, but in addition to more serious charges in terms of section 17.[425] Arbitrations that stand out in this regard are *Aba v Department of Education Eastern Cape* ("*Aba*")[426] and *Gwe v HOD Department of Education Western Cape* ("*Gwe*"). The value of these awards is that they confirm the seriousness of misconduct sometimes classified under section

[424] Para 8.

[425] See, eg, *Bless v Department of Education Free State* PSES356-13/14 where the charge for improper conduct was alternative to a sexual assault charge in terms of s 17(1)(b). See also *NAPTOSA obo Kruger v HOD Western Cape Education Department* PSES781-16/17WC where s 18(1)(q) was one of the main charges (for swearing at learners) amongst more serious other main charges such as assault in terms of s 18(1)(r).

[426] PSES643-17/18EC.

18(1)(q), such as sexual harassment and sexual assault.[427] These two arbitrations are reviewed in paragraph 6 4 1 7 below (where sexual misconduct is considered).

What these two arbitrations show is that due to the broad wording of section 18(1)(q) and in the absence of sexual harassment as a listed type of misconduct in section 17 or 18, educators are charged in sexual harassment cases in terms of section 18. This immediately creates the possibility that they are not necessarily dismissed for the misconduct. Given the wide recognition of sexual harassment as a workplace phenomenon, serious consideration should be given to its specific inclusion in the EOEA. The more so in a context where the victims of the misconduct/harassment are usually children. One way to address the apparent shortcoming is to include "sexual misconduct" as a type of misconduct in either section 17 or 18 and then to define it so as to include sexual harassment. In this way, any misconduct of a sexual nature – also short of sexual assault – and irrespective of whether it is verbal or non-verbal, will be provided for and role players tasked with charging educators will have clarity as to the appropriate charge (rather than the use of the rather amorphous "improper conduct"). Put differently, if sexual misconduct is the problem, it is in schools, it should be called by its name.

6 4 1 6 Section 18(1)(f) of the EOEA: Prejudiced administration, discipline or efficiency of the school[428]

Similar to section 18(1)(q) discussed above, section 18(1)(f) of the EOEA contains a common type of misconduct educators are charged with. An educator may be charged in terms of section 18(1)(f) if he or she "unjustifiably prejudices the administration, discipline or efficiency of the Department of Basic Education, an office of the State or a school or adult learning centre". This ground of misconduct featured in 16 arbitrations (which dealt with a total of 27 of these charges). The circumstances surrounding a charge of prejudicing the administration, discipline or efficiency of the school usually pertains to the educator/principal failing to fulfil his or her duties.[429] Allegations

[427] PSES708-16/17WC.

[428] Section 18(1)(f) of the EOEA reads "unjustifiably prejudices the administration, discipline or efficiency of the Department of Basic Education, an office of the State or a school or adult learning centre".

[429] See generally *SADTU abo Henderson v Department of Education Western Cape* PSES68-15-16 WC and *SADTU obo Sekgotha v Department of Education Limpopo* PSES378-13/14LP. In *NAPTOSA obo Kukulela v Department of Education Eastern Cape* PSES17-16/17 EC and *Maphoto v Department of Education Limpopo* PSES549-15/16 LP the applicants were charged with

included favouring grade 12 learners by giving them the memorandum to complete the Mathematical Literacy paper where they had not finished writing;[430] the failure to mark formal assessments and produce classwork;[431] a failure (on numerous occasions) to compile and submit assessments for the various subjects the educator was responsible for;[432] a curriculum advisor being absent for 84 days;[433] a principal of a school, in contravention of the district's examination timetable, requiring grade 12 learners to write their examination two hours earlier, thereby prejudicing learners who lived far from the school;[434] the failure by principals to manage the assessments of learners, to submit the required assessment schedules and to submit the annual survey.[435]

Apart from these instances where educators and principals were charged in terms of section 18(1)(f) for failing in or neglecting their duties, this section of the EOEA has also been used in relation to educators assaulting or sexually assaulting learners and, in one instance, theft. In *Baloyi*,[436] *Sekute*,[437] *Malatji*[438] and *Mangena*[439] there was also a charge in terms of section 17 (based on assault), which is in line with the framework of the EOEA.[440] In *Baloyi* the charges were for assaulting and sexually assaulting a colleague.[441] However, both charges were in terms of section 17(1)(d) which is the provision for "serious" assault.[442] As section 17 stands, sexual assault should be charged in terms of section 17(1)(b) of the EOEA. The charge for prejudicing the administration was based on the same facts.[443] Similarly, in *Davhana* one of the main charges was in terms of section 18(1)(f) and related to theft, but there were also other

prejudicing the administration, discipline or efficiency of the school but at arbitration the PDE was unable to prove these charges.

[430] *Mulaudzi v Department of Education Free State* PSES818-15/16FS para 8.
[431] *SADTU obo WILLIAMS v Department of Education Western Cape* PSES487-16/17WC para 9.
[432] *Maphutse v Department of Education Free State* PSES88-14/15 FS para 4.
[433] *SADTU obo Mokgawa v Department of Education Limpopo* PSES751-14/15 paras 8-9.
[434] *Sigudu v Department of Education Limpopo* PSES575-15/16LP para 20.
[435] *SADTU obo Mandla v Department of Education Eastern Cape* PSES714-13/14 EC para 4.4.
[436] *Baloyi v Department of Education Limpopo* PSES12-18/19.
[437] *Sekute v Department of Education Free State* PSES456-12/13.
[438] *Malatji v Department of Education Limpopo* PSES533/17/18LP.
[439] *Mangena v Department of Education Limpopo* PSES364-14/15 LP.
[440] See *Baloyi v Department of Education Limpopo* PSES12-18/19 para 12; *Sekute v Department of Education Free State* PSES456-12/13 para 6; *Malatji v Department of Education Limpopo* PSES533/17/18LP para 5; *Mangena v Department of Education Limpopo* PSES364-14/15 LP para 12.
[441] *Baloyi v Department of Education Limpopo* PSES12-18/19 para 12.
[442] Para 12.
[443] Para 12.

main charges in terms of section 18 in respect of which the educator was found guilty.[444]

Put differently, these arbitrations show that charges in terms of section 18(1)(f) typically is secondary (and some in the alternative) to other charges more in line with the misconduct at hand. What the earlier discussion shows is that section 18(1)(f) is best suited to cases where educators or principals failed in or neglected their duties. It stands to reason that this section is inextricably linked to the "poor performance" of educators and principals, a type of misconduct considered earlier. As mentioned in that context, it is preferable to describe "poor performance" (as misconduct) for what it is – either an intentional dereliction of duty or a negligent failure to perform those duties, or perform them to the required standard. It is submitted that such a provision in effect also encompasses conduct that prejudices the administration, discipline or efficiency of schools as envisaged by section 18(1)(f) of the EOEA. In fact, section 18(1)(f) is more about the effect of misconduct, rather than the misconduct itself.

6 4 1 7 Sexual misconduct including sexual assault, sexual relationships and sexual harassment[445]

All of the types of misconduct considered in paragraphs 6 4 1 1 to 6 4 1 6 above are listed in section 18 of the EOEA, which provides for, but does not require dismissal. However, should the employee be found guilty of any of the types of misconduct listed in section 17, the sanction, according to the EOEA, "must" be dismissal.[446] Two of the serious types of misconduct listed in section 17 are assault and sexual assault. The reasons these two types of misconduct are considered serious are because of their prevalence and because of their serious impact, especially where it involves learners. It was mentioned above that section 18(1)(q), which declares improper conduct to be misconduct, is broadly worded and often is used to address what amounts to sexual misconduct. With this reality in mind, it becomes apparent from Graph 7 above (the

[444] *SADTU obo Davhana v Department of Education Limpopo* PSES89 -14/15LP (no paragraph numbers in the arbitration). It should be noted that none of the charges in this case was in the alternative.

[445] Section 17(1)(b) of the EOEA reads "committing an act of sexual assault on a learner, student or other employee". Note that sexual harassment is not included in ss 17 or 18 as a ground of misconduct.

[446] Section 17(1)(b) and (c) of the EOEA as well as s 18(1)(q) of the EOEA.

most prevalent types of misconduct considered at arbitration) that sexual misconduct in basic education is more common than one thinks.

The view of this research is that any misconduct of a sexual nature should be seen as "sexual misconduct", which includes various specific types of misconduct such as rape, sexual assault/violation/abuse, sexual grooming of children, sexual harassment, compelling or exposing learners to sexual offences or acts, and sexual relationships with learners at schools.[447] It is seen in Table 5 below that sexual assault, sexual harassment and sexual relationships are the only terms used in arbitration awards to describe misconduct of a sexual nature. Table 5 summarises sexual misconduct considered at arbitration between 2014 and 2019 in respect of the Western Cape, Eastern Cape, Free State and Limpopo. Again, it should be emphasised that these are not the only instances of sexual misconduct in these provinces. These are the only matters that ended up at arbitration (in 27 cases). The purpose of Table 5 is to show the types of conduct educators were charged with and to convey the seriousness of the sexual misconduct that takes place in South African schools. The charges against the educator as well as the outcome of the arbitration are included. The number of charges against the educator, which includes but is not limited to charges for sexual misconduct, are included.

Table 5: Sexual misconduct addressed at arbitration between 2014 and 2019 in the four provinces analysed:[448]

	Arbitra-tion	**Provi nce**	**Num-ber of charg-es**	**Charge**	**Summary of misconduct**	**Outcome**
1	*Kleinbooi RB*[449]	EC	6	Section 17(1)(b): Sexual assault Section 18(1)(r): Assault/attempt	Hitting a learner's head into a desk, kicking her. Smacking, kicking, hitting a learner on his body.	Dismissal

[447] The Children's Act and SOA already contain definitions for many of these types of conduct and provide valuable guidance as to their seriousness. See s 1, 3-11, 15-22 of the SOA and s 1 of the Children's Act.

[448] The information in Table 5 is from the arbitration awards listed.

[449] *Kleinbooi v Department of Education Eastern Cape* PSES250-13/14EC. Note that the educator in this matter was incorrectly charged in terms of s 17(1)(b) of the EOEA which is sexual assault instead of s 17(1)(d) of the EOEA which is serious assault.

				Section 18(1)(q): Improper conduct	Smacking a parent. Verbal abuse. Stormed into another educator's class to confront a learner.	
2	*Aba*[450]	EC	2	Section 18(1)(q): Improper conduct Section 18(1)(t): Disrespectful behaviour	Sexual harassment of a colleague including unwanted contact, indecent exposure of genitals and sexual advances. Suggested he replace her husband, asked personal questions.	Unfair labour practice
3	*Witbooi*[451]	EC	3	Section 17(1)(b): Sexual assault Section 18(1)(q): Improper conduct Section 18(1)(dd): Corporal punishment	Rape of a grade 7 learner. Disgraceful language. Corporal punishment.	Dismissal
4	*Kleinbooi*[452]	EC	1	Section 17(1)(b): Sexual assault	Rape of a grade 5 learner.	Dismissal
5	*Vika*[453]	EC	3	TVET College. Sexual harassment Contravention of section 3.8 of the SACE Code of Professional Ethics Bringing the name of the College into disrepute	Forcefully kissed a learner's neck and cheeks, rubbing erect penis against learner's stomach and legs.	Dismissal
6	*Kodisang*[454]	FS	1	Section 17(1)(b): Sexual assault	Rape of a learner.	Dismissal
7	*Kodisang II*[455]	FS	1	Section 17(1)(b): Sexual assault	Rape of a learner.	Unfair dismissal
8		FS	2	Section 17(1)(b): Sexual assault	Sexual assault of a learner by kissing and attempting to	Dismissal

[450] *Aba v Department of Education Eastern* Cape PSES643-17/18EC.
[451] *Witbooi v Department of Education Eastern Cape* PSES227-14/15 EC.
[452] *Kleinbooi v Department of Education Eastern Cape* PSES300-16/17 EC.
[453] *Vika v Buffalo City TVET College* ELRC74-16/17EC.
[454] *SADTU obo Kodisang v Department of Education Free State* PSES173-17/18FS
[455] *Kodisang II v Department of Education Free State* PSES173-17/18FS.

	Bless[456]			Section 18(1)(q): Improper conduct Section 17(1)(c): Sexual relationship Section 18(1)(q): Improper conduct	touch the private parts of the learner. Sexual relationship with a different learner. Kissed and attempted to touch the private parts of the learner.	
9	*Chirwa*[457]	FS	2	Section 17(1)(c): Sexual relationship Section 18(1)(q): Improper conduct	Had a sexual relationship with a grade 11 learner.	Dismissal
10	*Mara*[458]	LP	2	Section 18(1)(q): Improper conduct Section 17(1)(c): Sexual relationship	Sexual harassment for asking a learner's number asked her to go home with the educator, sent her messages.	Dismissal
11	*Baloyi*[459]	LP	2	Section 17(1)(d): Assault Section 18(1)(f): Prejudiced administration	Fiddled with the breasts of a colleague and assaulted her.	Unfair dismissal
12	*Nevthavho*[460]	LP	3	Section 17(1)(b): Sexual assault Contravened Item 3.5 of the Code of Professional Ethics (abuse) Contravened Item 3.6 of the Code of Professional Ethics (improper physical contact)	Rape of an 8-year-old learner.	Dismissal
13	*Xolani*[461]	LP	2	Section 17(1)(b): Sexual assault	Educator sexually assaulted (raped) a learner in her	Dismissal

[456] *Bless v Department of Education Free State* PSES356-13/14.
[457] *Chirwa v Department of Education Western Cape* PSES643-15/16FS.
[458] *Mara v Department of Education Limpopo* PSES71-13/14LP.
[459] *Baloyi v Department of Education Limpopo* PSES12-18/19. Note that the educator in this matter was incorrectly charged in terms of s 17(1)(d) of the EOEA which provides for serious assault, instead of s 17(1)(b) of the EOEA which provides for sexual assault.
[460] *SADTU obo Nevthavhok v Department of Education Limpopo* PSES11-15/16LP.
[461] *Xolani v Department of Higher Education* PSES160-19/20LP.

				Section 17(1)(c): Sexual relationship	hostel room, smashed her cell phone.	
14	*Kenosi*[462]	LP	3	Section 17(1)(a), (c) and (f) Sexual relationship	Educator had sexual relationships with learners at the school. Lured a learner to his hostel residence to give her money and then kissed the learner and gave her R50.	Unfair dismissal
15	*Van Wyk*[463]	WC	3	Section 17(1)(b): Sexual assault Section 18(1)(dd): Statutory sexual assault Section 18(1)(q): Improper conduct		Dismissal
16	*Klaasen*[464]	WC	1	Section 17(1)(b): Sexual assault	Male educator body searched only girls and touched their breasts and thighs.	Dismissal
17	*Le Grange*[465]	WC	8	Section 17(1)(b): Sexual assault Section 18(1)(q): Improper conduct	Rubbed the thighs of two learners. Kissed a different learner and touched her breasts. Showed an inappropriate movie to learners. Unacceptable language. Peeped under the skirts of learners.	Dismissal
18	*Zaula*[466]	WC	3	Section 17(1)(b): Sexual assault Section 18(1)(q): Improper conduct	Forcefully hugged, touched learner's buttocks and kissed her cheeks. Asked learner "why are you not responding to my love". Asked learner to go to educator's residence because he is "horny", sent learner pornographic photos.	Dismissal
19	*Abels*[467]	WC	1	Section 17(1)(b): Sexual assault		Dismissal

[462] *SADTU obo Kenosi v Department of Education Limpopo* PSES416 – 13/14LP.
[463] *Van Wyk v Department of Education Western Cape* PSES508-16/17WC.
[464] *SADTU obo Klaasen v Department of Education Western Cape* PSES861-17/18 WC.
[465] *Western Cape Department of Education v Le Grange* PSES231-15/16.
[466] *SALIPSWU obo Zaula v Department of Education Western Cape* PSES224-16/17 WC.
[467] *Department of Education Western Cape v Abels* PSES947-18/19 WC.

				Section 18(1)(q): Improper conduct	Educator rubbed his penis against learner while hugging her.	
20	*Adams*[468]	WC	3	Section 17(1)(b): Sexual assault Section 18(1)(dd): Statutory sexual assault Section 18(1)(q): Improper conduct	Touched a learner's breasts. Sexual harassment: Kissed learner on the cheek, called her darling, rubbed and massaged her shoulders.	Dismissal
21	*Arendse*[469]	WC	1	Section 17(1)(b): Sexual assault Section 18(1)(q): Improper conduct	Kissing a learner on the neck.	Dismissal
22	*Aronse*[470]	WC	2	Section 17(1)(b): Sexual assault Section 18(1)(q): Improper conduct	Kissing a learner and putting his tongue in her mouth. Made inappropriate utterances towards the learner.	Dismissal
23	*Joseph*[471]	WC	2	Section 17(1)(b): Sexual assault Section 18(1)(q): Improper conduct	Touched a learner's breasts, leg and attempted to kiss her.	Dismissal
24	*Moyo*[472]	WC	9	Section 17(1)(b): Sexual assault Section 18(1)(q): Improper conduct	Sexual assault involving seven learners. Touched learners' breasts, requested a learner to meet up after school, asking for her cellphone number, calling her “Mrs Moyo”, my beautiful. Calling different learners his girlfriend and Mrs Moyo.	Dismissal

[468] *Adams v Department of Education Western Cape* PSES501-19/20WC.
[469] *Arendse v Department of Education Western Cape* PSES860-16/17WC.
[470] *SAOU obo Aronse v Department of Education Western Cape* PSES740-18/19 WC.
[471] *SAOU obo Joseph v Department of Education Western Cape* PSES716-18/19WC.
[472] *Moyo v Western Cape Education Department* PSES811-18/19WC.

25	*Gwe*[473]	WC	2	Section 18(1)(q): Improper conduct	Hugged/touched/massaged/ rubbed a learner's body; requested the learner to kiss and have sex, the educator told the learner he loved him, promised to give him R50 if he remained silent.	Dismissal
26	*Satani*[474]	WC	1	Section 18(1)(q): Improper conduct	Asked for a learner's cell phone number, requesting to meet, asked if she had a boyfriend.	Fair labour practice - Final written warning and R6 000 fine
27	*Larney*[475]	WC	2	Section 17(1)(c): Sexual relationship Section 18(1)(q): Improper conduct	Kissing a learner in the educator's class after school and/or was often in class with learner after school behind closed doors and covered windows.	Unfair dismissal

At first glance Table 5 shows that at least some educators are in fact dismissed for sexual misconduct and also shows reliance on section 17(1)(b) of the EOEA to achieve this result.

The facts of two of the arbitrations mentioned in Table 5, however, tell a somewhat different story. In *Zaula* and *Arendse* the sanctions imposed by the presiding officers of the disciplinary hearings against the educators for sexual misconduct were not dismissal.[476] In *Zaula* the educator was found guilty of sexually harassing a learner over a period of three years.[477] The sanction imposed by the presiding officer was a final written warning.[478] The PDE appealed against the sanction to the Minister, who

[473] *Gwe v HOD Department of Education Western Cape* PSES708-16/17WC.
[474] *Satani v HOD Department of Education Western Cape* PSES232-13/14WC.
[475] *NAPTOSA obo Larney v Department of Education Western Cape* PSES-800-16/17WC.
[476] *SALIPSWU obo Zaula v Department of Education Western Cape* PSES224-16/17 WC para 8
[477] Para 8
[478] Para 8

imposed summary dismissal.[479] In *Arendse* the educator was charged with sexual assault and improper conduct for kissing a learner in the neck.[480] The presiding officer found him guilty of improper conduct and imposed a final written warning and ordered an assessment of the educator by a social worker.[481] Once again, the PDE appealed to the Minister who overturned the presiding officer's decision and imposed summary dismissal.[482] Had the specific PDE accepted the outcome of the disciplinary hearing and not appealed the sanction imposed against the educator, the sanction would not have been a dismissal. This shows that discipline in the sector relies heavily on the various role players to adequately implement and utilise the legislative framework regarding disciplinary action.

Included in the 27 awards relating to sexual misconduct, are eight awards where charges were brought in terms of section 18(1)(q) (for improper conduct) based on sexual harassment of a learner or, in *Aba*'s case, a colleague.[483] For instance, in *Moyo* the alternative charge to sexual assault for touching a learner's breasts was improper conduct on the same facts as the main charge.[484] In this regard, it is noteworthy that sexual harassment (which does not necessarily constitute sexual assault) is a well-established concept in employment law and relates to sexual misconduct involving either two employees, an employee and third party or employer and employee. Sexual harassment in employment is defined and regulated by the Amended Code of Good Practice: Sexual Harassment ("Sexual Harassment Code") [485] issued in terms of Employment Equity Act 55 of 1998 ("EEA"). Serious consideration should be given to include sexual harassment in the EOEA as misconduct and to define it along the lines of this Code while making it clear that consent (or whether the conduct was "welcome"

[479] Para 8
[480] *Arendse v Department of Education Western Cape* PSES860-16/17WC paras 12 and 37.
[481] Para 14.
[482] Para 6.
[483] See *Aba v Department of Education Eastern Cape* PSES643-17/18EC; *Vika v Buffalo City TVET College ELRC74-16/17EC*; *Mara v Department of Education Limpopo* PSES71-13/14LP; *SALIPSWU obo Zaula v Department of Education Western Cape* PSES224-16/17 WC; *Adams v Department of Education Western Cape* PSES501-19/20WC; *Moyo v Western Cape Education Department* PSES811-18/19WC; *Gwe v HOD Department of Education Western Cape* PSES708-16/17WC and *Satani v HOD Department of Education Western Cape* PSES232-13/14WC. Note that in *Satani v HOD Department of Education Western Cape* the charge did not expressly state that the educator conducted himself in an improper manner by sexually harassing the learner. However, it is clear from the context that the "improper conduct" in this matter amounts to sexual misconduct.
[484] *Moyo v Western Cape Education Department* PSES811-18/19WC para 8.
[485] Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace GN 1357 in *GG* 27865 of 04-08-2005. The basis of the definition of sexual harassment in the Code (in item 4) is "unwelcome conduct of a sexual nature that violates the rights" of someone else.

as mentioned in the Code) may never be a defence in the context of an educator and learner. The Labour Appeal Court's zero tolerance of sexual harassment confirms the seriousness of this type of misconduct and it should urgently be seen as such in the education sector where victims are usually children.[486]

Currently, neither section 17 nor section 18 of the EOEA specifically provides for sexual harassment as a type of misconduct. In *Aba*, for example, which involved conduct towards a colleague, the educator was charged in terms of section 18(1)(a) for failing to comply with or contravening the EOEA or any other statute, regulation or legal obligation relating to education and the employment relationship.[487] In the alternative, he was charged in terms of section 18(1)(q) with improper, disgraceful or unacceptable conduct.[488] The second charge was in terms of section 18(1)(t) for displaying disrespect to a colleague.[489] In *Vika*,[490] *Mara*,[491] *Moyo*,[492] *Zaula*[493] and *Adams*[494] the sexual misconduct involved learners (children), but the educators were charged with improper conduct despite the facts showing and the charges referencing sexual harassment.[495] As mentioned earlier, if sexual misconduct – specifically sexual harassment - is such a fundamental challenge in the basic education sector, the least the EOEA can do is to call it by its name. As also mentioned in paragraph 6 3 of this chapter, accurate statistics is the first step to successfully addressing systemic failures. If the EOEA includes sexual harassment as a type of misconduct and record keeping about its prevalence is required, it may go a long way to addressing it properly.

In *Gwe*[496] and *Satani*[497] the educators were charged with improper conduct in terms of section 18(1)(q) of the EOEA, but the charges did not expressly state that the improper conduct was for sexually harassing learners. In *Gwe* the educator was charged for requesting a grade 7 learner to kiss him, telling the learner that he loved him, requesting him to have sex and promising to give him R50 if he does not tell

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[486] See *Campbell Scientific Africa (Pty) Ltd v Simmers & Others* (2016) 37 ILJ 116 (LAC), para 19-20, 27 and 33.
[487] See s 18(1)(a) of the EOEA.
[488] See s 18(1)(q).
[489] See s 18(1)(t).
[490] *Vika v Buffalo City TVET College* ELRC74-16/17EC para 10.
[491] *Mara v Department of Education Limpopo* PSES71-13/14LP para 11.
[492] *Moyo v Western Cape Education Department* PSES811-18/19WC para 8.
[493] *SALIPSWU obo Zaula v Department of Education Western Cape* PSES224-16/17 WC para 8.
[494] *Adams v Department of Education Western Cape* PSES501-19/20WC para 7.
[495] See the "summary of misconduct" column in Table 5 above.
[496] *Gwe v HOD Department of Education Western Cape* PSES708-16/17W para 9.
[497] *Satani v HOD Department of Education Western Cape* PSES232-13/14WC para 12.

anyone.[498] The arbitrator defined the misconduct as sexual harassment, stating that it is misconduct of a serious nature that justifies dismissal.[499] Similarly, in *Satani* the arbitrator emphasised the seriousness of the "improper conduct" in this matter by stating that:

> "If any criticism can be levelled at the sanction that was imposed, then it would be that it might have been too light. What applicant has done in essence amounts to grooming, which is generally one of the first steps taken by an adult when he or she wants to sexually abuse a particular child".[500]

The sanction in this matter was a final written warning and a fine of R6 000 for asking a learner for her cell phone number, requesting to meet and talk to her, suggesting to meet in a forest or bush and/or asking if she has a boyfriend.[501] The learner in question was in grade 6 when the above incidents occurred, meaning that she was around 12 years of age.[502] This matter graphically illustrates how serious misconduct (which should warrant dismissal) may be sanitised by using the amorphous terminology – like "improper conduct" – in section 18 of the EOEA.

What is clear from all of this, is that the employer's approach to sexual misconduct in the basic education sector is that reliance on section 17(1)(b) of the EOEA is reserved for those cases where a physical type of sexual misconduct occurs. When the sexual misconduct is of a verbal, non-verbal or emotional nature, the educators are charged in terms of section 18(1)(q) with improper conduct. This, however, creates the risk that the gravity of the misconduct is not appreciated. As *Satani* makes clear, non-physical conduct may be very serious and, for example, may amount to the sexual grooming of young children. Sexual grooming is an offence in terms of section 18 of the SOA.[503] In short, it seems clear that the application of discipline relating to sexual misconduct is hampered by the artificial distinction in sanction between sections 17 and 18 of the EOEA, the specific wording of section 17(1)(b), as well as reliance on the amorphous wording of some of the types of misconduct (especially "improper conduct") in section 18. This point may be made in another way. Sexual harassment

[498] *Gwe v HOD Department of Education Western Cape* PSES708-16/17W para 9.
[499] Paras 121 and 126.
[500] *Satani v HOD Department of Education Western Cape* PSES232-13/14WC para 104.
[501] Para 12.
[502] Para 34.
[503] Section 18 of the SOA.

is generally accepted to constitute sex discrimination.[504] At the same time, section 18(1)(k) declares unfair discrimination to be misconduct. In addition, despite dismissal not being peremptory for a transgression of section 18(1)(k), section 18(5)(c) of the EOEA, which seems to contradict section 18(3) of the EOEA (which provides for dismissal in case of any transgression of section 18(1)), specifically allows for dismissal for a transgression of some of the provisions of section 18(1), including section 18(1)(k). In a different way, this already illustrates all the questions that arise from a very convoluted approach to especially sexual misconduct in sections 17 and 18 of the EOEA. It should not be this difficult to get to the actual challenge – that of addressing sexual harassment. Considering that educators work with children, a clear and effective basis for dealing with sexual misconduct is imperative. This starts with clarity about terminology. Most types of sexual misconduct – be it assault, abuse, violence, harassment, grooming or other forms – have been identified and have names. They should be included as such in the EOEA.

Considering the seriousness of the sexual misconduct as summarised in Table 5, it is interesting to investigate whether the employer placed the educator on precautionary suspension while investigating the allegations of sexual misconduct against the educators. The survey shows that in at least seven (but only seven) of the 27 cases the educator was placed on precautionary suspension.[505] Of course, it may be that more educators were suspended and that this fact was merely omitted in the writing of the arbitration award. It does, however, raise the importance of suspension in these cases to avoid the situation where a learner (child) is forced into continued potential contact with the perpetrator.[506]

In this regard, two further awards may be considered. In *Witbooi*, the educator was charged with and found guilty of sexually assaulting a grade 7 learner (approximately

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[504] See s 6(3) of the EEA.

[505] *SADTU obo Kodisang v Department of Education Free State* PSES173-17/18FS para 33; *Kodisang II v Department of Education Free State* PSES173-17/18FS para 3; *SAOU obo Joseph v Department of Education Western Cape* PSES716-18/19WC para 22; *Moyo v Western Cape Education Department* PSES811-18/19WC para 6; Department of Education Western Cape v Abels PSES947-18/19 WC para 9; *Mara v Department of Education Limpopo* PSES71-13/14LP para 42; *Vika v Buffalo City TVET College* ELRC74-16/17EC, para 9 and *Kleinbooi v Department of Education Eastern Cape* PSES300-16/17 EC para 33.

[506] See Coetzee (2013) *Child Abuse Research: A South African Journal* 37 where she stated in regard to *Mxolisi Bobo v Department of Education Eastern Cape* ELRC 2010:46-47 "The educator concerned was not suspended and remained at the school for more than a year after the sexual misconduct was reported because there was no labour relations officer at the district office to deal with the matter at that time" (ELRC 2010:46-47).

13 years of age) in that he raped her in his classroom during school hours.[507] It should be noted that the educator allegedly sexually assaulted several learners between January and July 2012 but that only one learner was prepared to testify at arbitration as the matter "dragged on for various years".[508] Nowhere in the arbitration award does it state that the educator was ever suspended. Similarly, in *Nevthavhok*[509] the educator was charged with sexually assaulting the learner. Aside from the fact that the educator was not placed on precautionary suspension after allegations of rape surfaced, this arbitration also shows the PDEs ignorance of the EOEA and the law on sexual offences. The wording of the charge against the educator was as follows:

> "Charge 1: You contravened the provisions of section 17(1)(b) of the Act in that during or around November 2013 or at any period incidental thereto, at or near Tshilwavhusiku Primary School, you had a [sic] *sexual intercourse* with Learner KM, *a Grade 2 learner without her consent*, and therefore, you committed an act of sexual assault on a learner" (own italics).[510]

Typically, a grade 2 learner is around 8 years of age. The PDE, who is entrusted with the education of children, should know that section 15(1) of the SOA clearly criminalises sexual intercourse between an adult and a child, regardless of consent (statutory rape of children between 12 and 16 years of age).[511] Section 3 of the SOA defines rape[512] and distinguishes it from sexual assault[513] (defined in section 5 of the SOA), with the distinguishing factor being the presence or absence of penetration. As such, the issue of consent is irrelevant seeing that children below the age of 16 years can never consent to sexual intercourse.[514] Mentioning consent in this context creates

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[507] *Witbooi v Department of Education Eastern Cape* PSES227-14/15 EC paras 16-17.
[508] Para 8.
[509] *SADTU obo Nevthavhok v Department of Education Limpopo* PSES11-15/16LP.
[510] Para 7.
[511] Section 15(1) of the SOA determines that: "A person ('A') who commits an act of sexual penetration with a child ('B') is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child". See also the definition of "child" in s 1 of the SOA.
[512] Section 3 of the SOA determines that: "Any person ('A') who unlawfully and intentionally commits an act of sexual *penetration* with a complainant ('B'), without the consent of B, is guilty of the offence of rape" (own italics).
[513] Section 5 of the SOA determines that: "A person ('A') who unlawfully and intentionally sexually violates a complainant ('B'), without the consent of B, is guilty of the offence of sexual assault" or "A person ('A') who unlawfully and intentionally inspires the belief in a complainant ('B') that B will be sexually violated, is guilty of the offence of sexual assault".
[514] See s 15(1) of the SOA.

the impression that the outcome of the matter may be determined by the presence or absence of consent of a child.[515] Furthermore, section 17(1)(b) of the EOEA does not require rape, it requires assault. In this regard, section 17(1)(c) of the EOEA, which mandates dismissal in case of a sexual relationship between an educator and learner at the same school, clearly negates consent as a defence (at least to the extent that a relationship implies consent).[516] Sexual relationships (albeit only with learners at the same school)[517] will always be considered misconduct attracting mandatory dismissal in terms of the EOEA, regardless of the age of the learner.[518] Furthermore, sexual intercourse between an adult and a child between the age of 12 and 16 is a criminal offence in the form of statutory rape, even with the consent of the learner.[519] It should be added that even where the learner is older than 16, the educator still is in a position of power in relation to that learner – both as educator and as adult. As such, there is no reason not to exclude use of consent in case of any sexual misconduct involving a learner.

Table 5 reveals that of the 27 arbitrations concerning sexual misconduct, the dismissal (and one sanction short of dismissal) was found to be unfair in five arbitrations. Of these five arbitrations, the discussion below shows that in four cases the unfairness of the sanction was not because the misconduct was not serious or did not take place, but because of administrative failures on the part of the PDE. In *Baloyi*, the principal was (incorrectly) charged in terms of section 17(1)(d) (serious assault) for touching the breasts of an educator and in terms of section 18(1)(f) (prejudicing the administration) for assaulting the same educator.[520] The charges were for two incidents that apparently occurred on the same day. The PDE requested a

[515] The "Protocol for the Management and Reporting of Sexual Abuse and Harassment in Schools" ("Protocol") emphasises that "[a] learner may never consent when it is in reference to the prohibited conduct of an educator". See Department of Basic Education "Protocol for the Management and Reporting of Sexual Abuse and Harassment in Schools" (2019) *Department of Basic Education* 2 <https://www.education.gov.za/Portals/0/DoE%20Showcase/Launch%20of%20protocol/Sexual%20Abuse%20and%20Harassment%20in%20Schools%20march%202019%20.pdf?ver=2019-03-13-093825-600> (accessed 19-05-2020).

[516] The Protocol and Item 3 of the SACE Code of Professional Ethics include sexual relationships between educators and learners at *any* school, widening the scope of the type of misconduct. See Department of Basic Education "Protocol for the Management and Reporting of Sexual Abuse and Harassment in Schools" (2019) *Department of Basic Education* 2.

[517] See the previous footnote. In this chapter it is suggested that all relationships between educators and learners (also learners at different schools) be prohibited.

[518] See s 17(1)(c) of the EOEA.

[519] Section 15(1) of the SOA.

[520] *Baloyi v Department of Education Limpopo* PSES12-18/19 para 12.

postponement as it was unable to secure its witnesses for the arbitration hearing.[521] The request was denied by the arbitrator due to the prejudice it would cause the applicant (principal) who had secured witnesses and were present to testify.[522] The PDE did not present its version of events and left the principal's version unchallenged, resulting in the arbitrator finding that the dismissal was substantively unfair.[523] In *Kenosi*[524] the educator was charged in terms of section 17(1)(a), (c), (f) and 18(1) for "having sexual relations with learners at the school".[525] The award describes the misconduct as stated above and does not list the charges or the specific acts of misconduct. The PDE requested a postponement because it failed to secure its witness. The matter had previously been set down, but a postponement had been granted and the PDEs witness had been found in contempt for failing to comply with a subpoena.[526] The PDE thereafter instructed its attorney not to pursue the contempt proceedings against the witness in the Labour Court. For this reason, the arbitrator denied a further request for postponement as the PDE could not provide a reason for not pursuing Labour Court proceedings or why the witness would comply if subpoenaed a second time.[527] The PDE closed its case, with the effect that there was no evidence presented to prove that the educator breached a rule or was guilty of misconduct. The educator was reinstated with back pay.[528]

In *Kodisang I*, the acting principal was charged with sexual assault in terms of section 17(1)(b) in that he allegedly raped a learner.[529] The principal dropped five learners off at home after writing an examination. The victim was the last to be dropped off and the principal asked that she show him a farm. According to the learner, they stopped along the way for her to urinate and the principal then raped her in the vehicle.[530] The arbitrator did not find that the principal raped the learner, but based on the totality of the facts, made the "inference" that the principal had a sexual relationship with the learner and had made certain promises to the learner. The arbitrator found that the complaint arose as a result of the principal failing to follow through on his

[521] Para 6.
[522] Para 7.
[523] Paras 19-21.
[524] *SADTU obo Kenosi v Department of Education Limpopo PSES416 – 13/14LP*.
[525] Para 2.
[526] Para 3.
[527] Para 3.
[528] Para 5, 7.
[529] *SADTU obo Kodisang v Department of Education Free State* PSES173-17/18FS para 7.
[530] Para 20.

promises (for example, he promised to buy her a tracksuit).[531] Based on the arbitrator's finding of a sexual relationship between the principal and learner, the dismissal was found to be substantively fair.[532] The principal successfully took the matter on review in terms of section 145 of the LRA.[533] In *Kodisang II* the arbitrator heard the dispute *de novo* and found that the dismissal had been substantively and procedurally unfair. This was due to inconsistencies in the learner's testimony and that the PDE did not discharge the onus of showing, on a balance of probabilities, that the dismissal was substantively fair.[534] The principal was reinstated with back pay amounting to more than R1 million.[535]

In *Aba*,[536] the principal was charged in terms of section 18(1)(a), (q) and (t) for sexually harassing a colleague.[537] The principal allegedly made unwanted physical contact with his colleague, asked personal questions, made sexual advances, proposed sexual intercourse, exposed his genitals and stated that he wished her husband would die.[538] Unfortunately, there was a nine-month delay on the side of the PDE to schedule the disciplinary hearing and a further nine-month delay in informing the principal of the outcome and sanction of the disciplinary hearing.[539] None of the witnesses were available to testify at arbitration and the PDE submitted that transcribing the disciplinary hearing record would cost more than the relief sought by the principal. The PDE therefore only called one witness, the chairperson of the disciplinary hearing.[540] The arbitrator found that the PDE failed to prove that the disciplinary action was fair with the result that a ULP had been committed and the sanction of a final written warning and fine of R5 000 was set aside.[541] Particularly disconcerting about this case is that the principal had not been dismissed in the first place for what was apparently serious misconduct.

The only case where the unfairness of the dismissal was due to the arbitrator finding that the sanction imposed was too harsh was *Larney.*[542] In this case, the educator (27

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[531] Para 53.
[532] Para**s** 56, 60.
[533] *Kodisang II v Department of Education Free State* PSES173-17/18FS para 8.
[534] Para 77, 91-95.
[535] Para 93.
[536] Para 4.
[537] Para 4.
[538] Para 4.
[539] The timeline pertaining to the disciplinary procedure is discussed in paragraph 6 4 2 below.
[540] Para 10.
[541] Paras 31-32.
[542] *NAPTOSA obo Larney v Department of Education Western Cape* PSES-800-16/17WC.

years old) was charged with having a sexual relationship with a learner (15 years old), was seen kissing the learner and was often alone with the learner in her classroom after school.[543] The three learner witnesses who saw the educator and learner kissing testified at the disciplinary hearing but did not want to testify at the arbitration hearing.[544] The educator argued that she comforted the learner (about personal problems he was struggling with) by hugging him and that he kissed her, but that she pulled away.[545] The arbitrator stated that:

> "It is perhaps not the best idea for a female educator to hug a male learner of that age when they are alone together and [vice] versa for obvious reasons. However a hug to comfort a distressed leaner cannot be evidence of a sexual relationship. This is a de novo hearing and I have no evidence before me to dispute the applicant's testimony that she was kissed by the learner A and that she did not kiss him and her version of the details of the applicant's and learner A's relationship".[546]

The principal testified that the educator was hardworking, went the extra mile for learners, organised soccer at the school and effectively enforced discipline.[547] According to him the trust relationship was not tarnished by the misconduct.[548] The educator was found guilty of improper conduct for hugging the learner and being alone with the learner in her classroom.[549] The arbitrator found that the sanction of dismissal was too harsh in the circumstances and that she be reinstated with back pay and a final written warning valid for 12 months.[550]

The last aspect that deserves to be mentioned regarding sexual misconduct arises from ELRC Collective Agreement 3 of 2018,[551] which mandates that sexual misconduct by educators towards learners must be dealt with in terms of section 188A of the LRA – that is, an inquiry by an arbitrator replacing the internal disciplinary hearing and which carries the same status as an arbitration by the ELRC. The purpose

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[543] Para 4.
[544] Paras 28-30.
[545] Para 8.
[546] Para 39.
[547] Paras 24-26.
[548] Para 26.
[549] Paras 45-46.
[550] Para 47.
[551] ELRC Collective Agreement 3 of 2018 Providing for Compulsory Inquiries by Arbitrators in Cases of Disciplinary Action Against Educators Charged with Sexual Misconduct in Respect of Learners <https://www.elrc.org.za/sites/default/files/documents/Collective%20Agreement%203%20of%202018%20Inquiry%20by%20Arbitrators.pdf> (accessed 20-05-2020).

of the collective agreement is to protect learners from unnecessary trauma by expecting them to give the same evidence about the sexual misconduct of educators at several hearings.[552] The issue of securing evidence in sensitive cases (as is the case with sexual misconduct) involving learners is a particular challenge. Mention has been made of the provision in Schedule 2 of the EOEA for evidence to be presented through an intermediary.[553] This collective agreement seeks to ensure that learners do not have to testify twice - at a disciplinary hearing and, sometimes years later, at arbitration.

As the collective agreement mandates an inquiry by an arbitrator in case of sexual misconduct, all instances of sexual misconduct should therefore be available in the form of an arbitration award issued by the ELRC. This means that this data should be readily available and would be valuable information in assessing the gravity of sexual misconduct in the sector, as well as the steps taken against educators guilty of sexual misconduct. Unfortunately, it seems that the collective agreement did not have quite the impact in practice as one would have expected. Table 5 contains the province in which the misconduct took place and which PDE was responsible for the matter. Taking into account only the awards that were made after 25 September 2018, it shows that the Western Cape PDE is the only department that has set matters down for an inquiry by an arbitrator. Since 2018 (until June 2020) there have only been two inquiries by an arbitrator in line with the collective agreement.[554]

What is unique about these two inquiries, is that in both cases the arbitrator found the educator unsuitable to work with children in terms of section 120 of the Children's Act.[555] More specifically, the arbitrator required that the General Secretary of the ELRC notify the Director-General of Social Development in writing of this finding.[556] The effect of such a finding is that the Director-General must enter the educator's name in part B of the register contemplated in section 120 of the Children's Act.[557] The

[552] ELRC Collective Agreement 3 of 2018 Providing for Compulsory Inquiries by Arbitrators in Cases of Disciplinary Action Against Educators Charged with Sexual Misconduct in Respect of Learners.
[553] Item 7(10A) Schedule 2 of the EOEA. This is allowed where the chairperson is of the opinion the evidence will expose a witness under 18 years of age to undue mental stress or suffering. Noteworthy – also for the discussion of assault – is that this provision is not limited to instances of sexual misconduct.
[554] See *SAOU obo Joseph v Department of Education Western Cape* PSES716-18/19WC and *Department of Education Western Cape v Abels* PSES947-18/19 WC.
[555] See *SAOU obo Joseph v Department of Education Western Cape* PSES716-18/19WC para 34 and *Department of Education Western Cape v Abels* PSES947-18/19 WC para 27.
[556] Para 27
[557] Para 27

purpose of the register is to have a record of persons found unsuitable to work with children.[558] This information is then used to protect children against abuse from these persons.[559] The above register is only of value if employers such as the PDE themselves ensure that the names of educators applying for employment are not included in the register or the National Register for Sex Offenders[560] The recent amendment to the terms and conditions of employment of educators simply requires a prospective educator to provide a certificate to this effect.[561] These inquiries are small steps to ensure that sexual predators such as *Joseph* and *Abels* are never again employed as educators. However, collective agreements, such as this one under consideration are meaningless if PDEs do not implement them. Its effectiveness depends heavily on role players treating sexual misconduct as the serious misconduct it is and ensuring that offending educators are held to account.

6 4 1 8 Section 17(1)(d) of the EOEA: Serious assault and section 18(1)(r) of the EOEA: Assault or attempted assault[562]

Assault is the last type of misconduct that is discussed. This section follows a similar approach as the preceding section on sexual misconduct. Table 6 presents the arbitrations in which assault was considered. The charges against the educators, a summary of the assault that took place and the outcome of the arbitration are included. Table 6 reveals the severity of the assault in the education sector by educators against learners. The information also calls for discussion of three further issues. First, Table 6 shows that of the 20 arbitrations regarding assault, only two resulted in findings of unfair dismissal. The reasons for this is discussed below. Second, it became apparent from these awards that in at least eight cases the educators were repeat offenders.

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[558] Section 118 of the Children's Act 38 of 2005.
[559] Section 118.
[560] Section 42 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[561] The purpose of the Regulations regarding Terms and Conditions of Employment of Educators in terms of Section 4 of the Act GN 331 in *GG* 44433 of 9 April 2021 is to regulate the period of prevention of re-employment of former educators dismissed or deemed dismissed for misconduct or deemed resigned and to provide a procedure for the re-employment of such educators. Item 6 determines that in case of dismissal for sexual assault or sexual harassment the educator is indefinitely banned from re-employment by the PDE or DBE. It should be mentioned, however, that applicants are required to provide a certificate evidencing that their name is not included in the above registers and not that the PDE should verify the above information with the Director-General of the Department of Social Development and the Registrar of the Department of Justice.
[562] Section 17(1)(d) of the EOEA reads "seriously assaulting, with the intention to cause grievous bodily harm to, a learner, student or other employee" and s 18(1)(r) of the EOEA reads "assaults, or attempts to or threatens to assault, another employee or another person".

Third, the assault of a learner goes against the very essence of a school as a safe learning environment. It is further considered how many of the educators charged with assaulting a learner or learners, were placed on precautionary suspension or what other measures were put in place to ensure learners' safety.

Table 6: Assault addressed at arbitration between 2014 and 2019 in the four provinces:[563]

	Arbitration	Province	Number of charges	Charge	Summary of misconduct	Outcome
1	*Kleinbooi RB*[564]	EC	6	Section 17(1)(b): Sexual assault Section 18(1)(r): Assault/attempt Section 18(1)(q): Improper conduct	Hitting a learner's head into a desk, kicking her. Smacking, kicking, hitting a learner on his body. Smacking a parent. Verbal abuse. Stormed into another educator's class to confront a learner.	Dismissal
2	*Sisilana*[565]	EC	1	Section 17(1)(d): Serious assault	Banged learner against the wall, her head against the desk and beat her with a stick.	Dismissal
3	*Malale*[566]	LP	1	Section 17(1)(d): Serious assault	Threatened to "blow the principal's head" during an altercation.	Dismissal
4	*Malatji*[567]	LP	4	Section 17(1)(b): Sexual assault Section 18(1)(f): Prejudiced administration Section 18(1)(a): Contravenes Act Section 18(1)(x) Carries firearm	Threw a learner at other learners and kicked her.	Dismissal

[563] The information in Table 6 is from the arbitration awards listed.
[564] *Kleinbooi RB v Department of Education Eastern Cape* PSES250-13/14EC.
[565] *SADTU obo Sisilana v Department of Education Eastern Cape* PSES465-14/15EC.
[566] *Malale v Department of Education Limpopo* PSES683-11-12LP.
[567] *Malatji v Department of Education Limpopo* PSES533/17/18LP.

				without authorisation		
5	*Mangena*[568]	LP	5	Section 17(1)(d): Serious assault Section 18(1)(d): Damage/loss of state property Section 18(1)(r): Assault/attempt Section 18(1)(a): Contravenes act Section 18(1)(f): Prejudiced administration	Hit a pregnant learner.	Dismissal
6	*Sekute*[569]	FS	6	Section 17(1)(d): Serious assault Section 18(1)(r): Assault/attempt Section 18(1)(f): Prejudiced administration Section 18(1)(q): Improper conduct	Slapped learner A in the face causing his nose to bleed. Slapped learner B in the face. Hit learner C on the forehead. Punched learner D causing his gums to bleed. Attempted to slap learner E.	Dismissal
7	*Smango*[570]	FS	2	Section 17(1)(d): Serious assault Section 18(1)(q): Improper conduct	Learner had linear bruising and internal bleeding.	Dismissal

[568] *Mangena v Department of Education Limpopo* PSES364-14/15 LP.
[569] *Sekute v Department of Education Free State* PSES456-12/13.
[570] *Smango v Department of Education Free State* PSES219-13/14.

8	*Van der Merwe*[571]	WC	1	Section 18(1)(r): Assault/attempt	Slapped a learner behind the head, causing him to bump his head against the desk.	Unfair dismissal
9	*Sauer*[572]	WC	2	Section 17(1)(d): Serious assault Section 18(1)(r): Assault/attempt	Assaulted three learners. Slapped the learner in his face, pushed him to the ground and kicked him, the other learner was assaulted with a pick-handle.	Unfair dismissal
10	*Baatjies*[573]	WC	3	Section 17(1)(d): Serious assault Section 18(1)(r): Assault/attempt	Hit learner A with a pipe on the arms. Grabbed learner B by the neck, threw him on the ground, kicked him and threatened to kill him. Grabbed a parent by the throat, lifted her and threw her out of the room, sat on her with his knee, kicked her, hit her with the fists.	Dismissal
11	*Kruger*[574]	WC	5	Section 18(1)(r): Assault/attempt Section 18(1)(q): Improper conduct	Threw learner A with a stone and hit her with a stick. Kicked learner B. Threw learner C with a book in the face, pulled him from his desk.	Dismissal
12	*Plaatjies*[575]	WC	1	Section 18(1)(r): Assault/attempt	Hit a learner with a chain over the arm.	Dismissal

[571] *Van der Merwe v HOD, Western Cape Department of Education* PSES112-17/18WC.
[572] *NAPTOSA obo Sauer v Department of Education Western Cape* PSES292-16/17WC.
[573] *NAPTOSA obo Baatjies v Department of Education Western Cape* PSES391-17/18 WC.
[574] *NAPTOSA obo Kruger v HOD Western Cape Education Department* PSES781-16/17WC.
[575] *Plaatjies v Department of Education Western Cape* PSES122 -17/18WC.

13	*Scholtz*[576]	WC	2	Section 17(1)(d): Serious assault Section 18(1)(r): Assault/attempt	Choked learner A and banged his head against a desk. Threw a stick against 'earner B's head.	Dismissal
14	*Steenkamp*[577]	WC	5	Section 17(1)(d): Serious assault Section 18(1)(q): Improper conduct	Grabbed learner A by the neck, pushed her against the wall and kicked her in the face. Hit learner B in the face and head and pushed her out of class. Hit learner C with a broom on the back.	Dismissal
15	*Zita*[578]	WC	2	Section 17(1)(d): Serious assault Section 18(1)(r): Assault/attempt	Hit a learner on the hand and eye. Hit a learner on the arm with a pipe.	Dismissal
16	*Dempers*[579]	WC	2	Section 17(1)(d): Serious assault Section 18(1)(r): Assault/attempt	Became involved in a fistfight with a learner, punching him in the face and mouth, breaking his teeth. Pushed a learner down the stairs.	Dismissal
17	*Gertenbach*[580]	WC	1	Section 18(1)(r): Assault/attempt	Hit a learner on the shoulder twice and pulled the learner into the classroom.	Dismissal
18	*May*[581]	WC	1	Section 18(1)(r): Assault/attempt	Hit a learner's head against a school desk and/or hit him in his	Dismissal

[576] *SADTU obo Scholtz v Department of Education Western Cape* PSES779-15/16WC.
[577] *Steenkamp v Western Cape Department of Education* PSES730-15/16 WC.
[578] *Zita v Department of Education Western Cape* PSES286-16/17.
[579] *SADTU obo Dempers v Department of Education Western Cape* PSES608-18/19WC.
[580] *SAOU obo Gertenbach v Department of Education Western Cape* PSES967-18/19WC.
[581] *SAOU obo May v Department of Education Western Cape* PSES749-18/19WC.

					face and/or kicked him against his leg.	
19	*Mlumbi*[582]	WC	1	Section 17(1)(d): Serious assault	Educator performed a pre-circumcision procedure on male learners at school by pricking their penises and putting a thread through.	Dismissal
20	*Presens*[583]	WC	2	Section 17(1)(d): Serious assault	Assaulted two learners. Hit a learner in the stomach with a fist; and/or with a beer bottle; and/or kicking the learner in his face; and/or hitting the learner with a 500ml bottle on his head; and/or hitting the learner with a ceiling baton over his head, arms and legs; and/or hitting the learner with an aluminium level over his back; and/or pushing a wheelbarrow with cement into the learner.	Dismissal

In *Van der Merwe* and *Sauer* the dismissals were found to be unfair. In *Van der Merwe* the educator was charged in terms of section 18(1)(q) of the EOEA with assault for slapping a learner behind his head, as a result of which he bumped his head against the desk.[584] The learner (8 years old) who was assaulted, as well as the learners who were called to testify to corroborate the events that occurred in the classroom on the

[582] *NAPTOSA obo Mlumbi v Department of Education Western Cape* PSES675-18/19WC.
[583] *NAPTOSA obo Presens v Department of Education Western Cape* PSES-588-14/15WC.
[584] *Van der Merwe v HOD, Western Cape Department of Education* PSES112-17/18WC para 12.

day of the alleged assault, no longer wanted to testify.[585] The PDE called no other witnesses to testify and closed its case.[586] The arbitrator noted that, based on the evidence, he could not determine whether the educator was guilty or not.[587] As a result, he followed the principle that should the respondent (employer) fail to discharge its onus that, on a balance of probabilities, the employee was guilty of the misconduct, the dismissal should be found unfair.[588] As such, the dismissal of the educator for assault was found to be substantively unfair.[589]

Despite contradictory evidence by the employer's witnesses in *Sauer*, the arbitrator found the educator guilty of the assault of three learners.[590] The arbitrator opined that the assault was not serious enough to be classified under section 17(1)(d), but that it could fall within section 18(1)(r) of the EOEA.[591] The arbitrator found that taking into account the totality of the circumstances, including the educator's length of service, mitigating factors and "the potential effect of a serious warning on his future conduct, dismissal is not a suitable sanction in this regard".[592] The award provided that the PDE should reinstate the educator and that he be reprimanded with three months' suspension (unpaid) in accordance with section 18(3)(f) of the EOEA.[593] It is noteworthy that in this case the misconduct consisted of slapping a learner in his face, pushed him to the ground and kicking him, while another learner was assaulted with a pick-handle.

In eight instances of assault, the educators were repeat offenders. In *May* the educator had on two previous occasions received final written warnings and fines of R6 000 and R2 000 respectively for assaulting learners.[594] Allegations of assault were also levelled against the educator on two further occasions, but the parents did not wish to pursue the matter.[595] The arbitrator emphasised that this disciplinary record "clearly shows that the Applicant has no respect for rules and regulations, no respect for the Constitution of South Africa, the code of conduct of the SACE and the

[585] Para 6.
[586] Para 6.
[587] Para 71.
[588] Para 71.
[589] Para 71.
[590] *NAPTOSA obo Sauer v Department of Education Western Cape* PSES292-16/17WC paras 31-33.
[591] Paras 31-33.
[592] Para 42.
[593] Para 47-50. The amount for the unpaid suspension was to be deducted from the amount of back-pay to be paid to the employee as per his reinstatement.
[594] *SAOU obo May v Department of Education Western Cape* PSES749-18/19WC para 16.
[595] Para 16.

Employment of Educators Act".[596] The educator in *Mangena* had previously been suspended for one month for assaulting a learner.[597] The principal who testified in the *Malale* matter stated that the educator had previously been in prison and had also previously been fined for assaulting him (the principal).[598] The educator in the *Van der Merwe* matter (discussed above) also had a record of assault.[599] On a previous occasion, she had assaulted a learner and the sanction imposed was suspension.[600] Shortly after returning to work from her suspension she was once again charged with assault.[601] The educator in *Plaatjies* had previously received two final written warnings with fines of R4 000 and R2 000 respectively for assaulting a learner and disgraceful conduct towards a learner.[602] In *Scholtz* the educator had earlier entered into a plea bargaining agreement in terms of which he had admitted guilt to assault and had received a final written warning and fine of R2 500.[603] In *Steenkamp,* it was testified that the educator had a poor disciplinary record and a history of assault and improper conduct.[604] The educator in *Dempers* also had a history of assault and had received final written warnings and fines on two previous occasions.[605] Apart from this, he had also received a "cautionary letter" from the Western Cape PDE informing him of allegations of assault against him, but that the parents no longer wanted to pursue the matter.[606] The PDE instructed him to take the letter with the necessary caution and refrain from misconduct. Less than two months later the educator was once again charged with assault (for punching a learner in the face, breaking his teeth).[607] It should also be mentioned here that after his dismissal for serious assault, the educator was employed by a different school in a SGB position.[608] Lastly, in *Gertenbach* the

[596] Para 16.
[597] *Mangena v Department of Education Limpopo* PSES364-14/15 LP para 34.
[598] *Malale v Department of Education Limpopo* PSES683-11-12LP para 13.
[599] *Van der Merwe v HOD, Western Cape Department of Education* PSES112-17/18WC para 12.
[600] Para 12.
[601] Para 12.
[602] *Plaatjies v Department of Education Western Cape* PSES122 -17/18WC para 8.
[603] *SADTU obo Scholtz v Department of Education Western Cape* PSES779-15/16WC paras 6 and 7.
[604] *Steenkamp v Western Cape Department of Education* PSES730-15/16 WC para 40.
[605] *SADTU obo Dempers v Department of Education Western Cape* PSES608-18/19WC para 30.
[606] Para 22.
[607] Para 4.
[608] Para 32. SGB appointed educators do not fall within the ambit of the EOEA, meaning the period of prevention from re-employment to a departmental position is not applicable to them. In terms of the Regulations regarding Terms and Conditions of Employment of Educators in terms of Section 4 of the Act GN 331 in *GG* 44433 of 09-04-2021, educators who are dismissed for serious assault (such as Dempers) are indefinitely prevented from being re-employed by any PDE/DBE. However, this shortcoming of the EOEA results in such educators remaining in the public school system through SGB appointments.

educator had earlier been charged with assaulting learners on two occasions and had been suspended for six weeks, had been issued with a final written warning and had been instructed to attend anger management counselling.[609]

It is concerning that educators who assault learners receive lenient sanctions such as final written warnings and that dismissal is only considered after further instances of assault. It begs the question as to how many educators who make a habit of assaulting learners continue to be employed at schools in South Africa.

A further issue that deserves attention is precautionary suspension in assault matters. As mentioned in the context of sexual misconduct as a serious type of misconduct where learners are involved, it may be argued that educators should be routinely suspended pending an investigation into the serious misconduct. So too in case of assault. However, this is not how precautionary suspension is approached in practice. It seems that the focus is much more on whether the educator will hinder the investigation than it is on the well-being and safety of the learner that is the victim of the misconduct. In the 20 matters under consideration, only three educators were placed on precautionary suspension while allegations of assault were investigated.[610]

The facts in *Van der Merwe* and *Zita* illustrate that the implementation of precautionary suspension does not follow a child-centred approach. Not only are educators not suspended for committing serious misconduct such as assaulting learners, but learners are disadvantaged by the procedure followed. In *Zita* the educator was dismissed for assaulting a learner but was not suspended pending the outcome of the disciplinary hearing.[611] The learner who was assaulted by the educator was moved to a different class as "is standard procedure and was instructed by the social worker, the district office and the department of education".[612] Not only is the learner disadvantaged by being assaulted at school, but is again disadvantaged by the disciplinary process.

The learner is forced to move classes, being removed from his or her friends and the space known to him or her. The question is why the learner's experience at school must be disrupted if the EOEA makes provision for two possibilities to ensure the well-

[609] *SAOU obo Gertenbach v Department of Education Western Cape* PSES967-18/19WC para 8.
[610] See *NAPTOSA obo Presens v Department of Education Western Cape* PSES-588-14/15WC para 4*; SAOU obo Gertenbach v Department of Education Western Cape* PSES967-18/19WC para 8 *and NAPTOSA obo Baatjies v Department of Education Western Cape* PSES391-17/18 WC para 13.
[611] *Zita v Department of Education Western Cape* PSES286-16/17 para 6.
[612] Para 6.

being and safety of learners in these circumstances. First, the educator may be placed on precautionary suspension and is in this way removed from the school.[613] Second, the EOEA makes provision for the transfer of educators to a different post if the employer believes the presence of the educator may endanger the well-being or safety of any person at the workplace.[614] In none of the arbitration awards analysed for this research was an educator ever transferred to a different post due to the impact of the educator's presence on the learner. In *Ndletyana* the educator was transferred to a different school pending the investigation into allegations of serious misconduct, but the reason for the transfer was not the educator's impact on learners.[615] In *Van der Merwe* the educator was also not suspended and continued to teach the learner she assaulted. According to the arbitration award "[l]earner A did not ask not to be taught further by applicant and was prepared to proceed to attend her classes. The parents of learner A did not ask for him to be transferred to another teacher after the incident".[616] As mentioned, the EOEA provides two options to ensure the well-being and safety of learners by removing the educator from the workplace. It should not be up to an 8-year-old (or his or her parents) to assert themselves against the employer and request that the learner not share a space with the person who assaulted him or her. The rights and well-being of the child should be at the centre of any consideration in the basic education sector of whether an educator should be suspended pending an enquiry into serious misconduct.

6 4 1 9 Consistency in discipline

In chapter 5 the general principles of labour law were discussed. It was mentioned that the LRA's Dismissal Code constitutes part of the EOEA's disciplinary code and procedures applicable to educators. In determining the substantive fairness of a dismissal, Item 7 of the Dismissal Code provides certain guidelines to be taken into account and applied to the facts of the matter. One of those guidelines is that "the rule or standard has been consistently applied by the employer".[617] Item 3(6) of the Dismissal Code determines that "[t]he employer should apply the penalty of dismissal

[613] Item 6(1)-(2) of Schedule 2 of the EOEA.
[614] Item 6(2).
[615] See *Ndletyana v Department of Education Eastern Cape* PSES813-16/17EC.
[616] *Van der Merwe v HOD, Western Cape Department of Education* PSES112-17/18WC para 15.
[617] See Item 7(b)(iii) of the Dismissal Code.

consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration".[618] In the *Serei* arbitration, mention was made of the courts' distinction between historical inconsistency and contemporaneous inconsistency.[619] Historical inconsistency refers to the situation where the employer either had not in the past taken disciplinary action for a contravention of a specific rule in the workplace and wants to when it occurs again, or where the employer did take such steps but imposed different sanctions.[620] Contemporaneous inconsistency exists where two or more employees commit the same type of misconduct at the same time, but are treated differently – either in the decision to discipline or in terms of the sanction imposed.[621]

In *SA Commercial Catering & Allied Workers Union v Irvin & Johnson* ("*Irvin*"),[622] Conradie JA made an important point with regard to consistency in discipline. He said, first of all, that consistency is only one principle or guideline to take into account in determining the substantive fairness of a dismissal.[623] He explained that consistency is not a rule unto itself, but one aspect of the substantive fairness of a dismissal.[624] Second, and going to the root of why consistency is important, he mentioned that "[i]t is really the perception of bias inherent in selective discipline which makes it unfair".[625] Therefore, what is needed is that disciplinary action is reasonably consistent to remove the possibility of selective discipline.[626] In *Gcwensha v Commission for Conciliation, Mediation & Arbitration* ("*Gcwensha*"),[627] the Labour Appeal Court further interpreted the meaning of consistency in the implementation of discipline. According to Nicholson JA:

> "Disciplinary consistency is the hallmark of progressive labour relations and the 'parity principle' merely requires that every employee must be measured by the same standards. Discipline must also not be capricious nor should there be any perception of bias. When

[618] Item 3(6) of the Dismissal Code.
[619] *Estate Late Tlhoeloeng Martha Serei, Molusi Ishmael Serei v Department of Education Free State* PSES380-10/11 FS para 26.
[620] Para 26.
[621] Para 26.
[622] 2002 (3) SA 250 (LAC).
[623] *SA Commercial Catering & Allied Workers Union v Irvin & Johnson* (1999) 20 ILJ 2302 (LAC) para 29.
[624] Para 29.
[625] Para 29.
[626] Para 29.
[627] (2006) 27 ILJ 927 (LAC).

> comparing employees care should be taken to ensure that the gravity of the misconduct is evaluated and the disciplin[ary] record of the two employees compared. No extraneous matters should be regarded and a comparison has to be made between all the relevant features that are normally considered when one employee is disciplined".[628]

With this as background, there were six ELRC arbitration awards where educators challenged the substantive fairness of the dismissal on the basis of inconsistency.[629] It is interesting to note that in all six of the awards the arbitrator found that the employer (PDE) acted consistently.

What may be said of inconsistency challenges is that the arbitrator can only make a finding if the employee presents at least some evidence indicating inconsistency. The employer will then have to show that the relevant rule was in fact applied consistently. In the absence of the employee challenging the substantive fairness of a dismissal on the basis of inconsistency, it will be accepted that the employer had in fact applied the rule consistently.[630] Furthermore, an unsubstantiated challenge based on the inconsistent application of a rule will not lead to the arbitrator finding the dismissal substantively unfair.[631] To succeed with a claim of substantive unfairness, the employee has to identify the exact basis for unfairness (that is, inconsistent application of a rule) and lead evidence to that fact. It is difficult to demonstrate the inconsistent application of rules, as one distinction in circumstances may prove two cases to be distinguishable. In *Fisher*,[632] the applicant challenged the consistent application of the sanction of dismissal.[633] He was dismissed for allocating marks to learners for reading and oral without actually conducting the assessments.[634] The rule or standard (that it was expected that educators conduct assessments before

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[628] *Gcwensha v Commission for Conciliation, Mediation & Arbitration* (2006) 27 ILJ 927 (LAC) para 36. In its interpretation of consistent discipline, the court also built on the interpretation of *SA Commercial Catering & Allied Workers Union v Irvin & Johnson* (1999) 20 ILJ 2302 (LAC) para 29.

[629] These are: *Letsoara v Department of Education Free State* PSES567-14/15, *Zita v Department of Education Western Cape* PSES286-16/17, *Kolatseou v Department of Education Free State* PSES394 -14/15 FS, *SADTU obo Fisher v Department of Education Western Cape* PSES574-15/16 WC, *Estate Late Tlhoeloeng Martha Serei, Molusi Ishmael Serei v Department of Education Free State* PSES380-10/11 FS and *NATOPSA obo Lole v Department of Education Eastern Cape* PSES358 - 12/13 EC.

[630] *Kolatseou v Department of Education Free State* PSES394 -14/15 FS para 12.

[631] See *Letsoara v Department of Education Free State* PSES567-14/15 para 12 and *Zita v Department of Education Western Cape* PSES286-16/17 para 20. See also *Mulaudzi v Department of Education Free State* PSES818-15/16FS para 84.

[632] *SADTU obo Fisher v Department of Education Western Cape* PSES574-15/16 WC.

[633] Para 9.

[634] Para 8.

allocating marks) was not disputed.[635] He argued, however, that another educator was allowed by the principal to use the assessment marks from the previous term where she did mark and assess later scripts but they were misplaced.[636] The educator argued that these circumstances were similar to his own and that the principal in the other case was not dismissed, resulting in an inconsistent application of the relevant rule.[637] The arbitrator noted that there are limits to the extent the parity principle will assist employees who are guilty of serious misconduct.[638] It is expected of the employer to show that a distinction in the treatment of different employees is justifiable.[639] He found that there was in fact a distinction between the two instances and that the circumstances were different, justifying a different outcome.[640] Although the principal's decision in the other matter was open to criticism, it was found that it did not involve dishonesty and was not fraudulent as in the case of the educator.[641] The arbitrator found that the educator's dismissal was substantively fair.[642]

The circumstances of a particular matter may thus distinguish it from another making the application of a rule consistent even though the outcome (such as dismissal) was different. The *Lole* arbitration can be used to illustrate this point. In *Lole*, a whistle blower letter alerted the PDE to possible corruption and financial mismanagement at an Eastern Cape school.[643] In an investigation of 279 schools, the PDE discovered that 75 schools in the province had inflated their learner numbers resulting in the PDE allocating more resources to the schools than required.[644] Not all of the principals were dismissed. In *Lole*, however, the charge relating to the inflation of learner numbers was not proven.[645] At arbitration, the applicant challenged the substantive fairness of his dismissal based on the inconsistent application of a rule in relation to employees who committed similar misconduct.[646] In other words, the applicant argued that since not all the principals who inflated learner numbers were

[635] Para 10.
[636] Para 14.
[637] Para 21.
[638] Para 21.
[639] Para 21.
[640] Para 21.
[641] Para 21. The principal conceded that it would have been better to have the learners redo their assessments instead of using the previous term's assessment marks. However, the learners in question were in grade 1 and the assessments were therefore not examinations.
[642] *SADTU obo Fisher v Department of Education Western Cape* PSES574-15/16 WC para 25.
[643] *NATOPSA obo Lole v Department of Education Eastern Cape* PSES358-12/13 EC para 4.3.
[644] Para 21.
[645] Para 27.
[646] Para 27.

dismissed, it made his own dismissal substantively unfair. The arbitrator found that since the charge of inflating learner numbers by the principal was not proven, his case is distinguishable to that of the other principals who were found guilty of inflating learner numbers.[647] The applicant's dismissal was based on different charges and as such there was no inconsistent application of rules.[648]

It is clear that succeeding with a claim based on the inconsistent application of a rule is not an easy feat and that arbitrators will consider the principles laid down by our courts to determine whether the employer had acted unfairly in applying a rule inconsistently in the workplace. Various aspects, such as the facts of each case and the circumstances surrounding the misconduct have to be considered. It is, however, encouraging that the arbitration awards analysed show that the PDEs consistently implement rules ensuring that this guideline of substantive fairness is largely adhered to.

6 4 2 Challenges around the procedural issues of disciplinary action for misconduct

In paragraph 6 4 1 above, the ELRC arbitration awards were analysed with a focus on the substantive fairness of discipline for misconduct. While in most of these arbitrations the substantive fairness of discipline (mostly dismissal) was in dispute, procedural fairness was challenged in 53 of these awards. Of those 53 challenges, 17 were successful.[649] Importantly, the different provinces did not have a similar number of matters that were found to be procedurally unfair. The table below shows the total number of arbitrations per province compared to the number of arbitrations where procedural fairness of the dismissal was challenged, as well as the number of matters ultimately found to be procedurally unfair. This is informative as it indicates which provinces routinely ensure the procedural fairness of disciplinary proceedings as well as the provinces that typically do not follow the requirements of the LRA and EOEA pertaining to procedural fairness.

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[647] Para 27.
[648] Paras 27, 42.
[649] In *PSA obo Leputhing v Department of Higher Education and Training* PSES807-17/18FS the dispute was not regarding the unfair dismissal of the applicant, but rather an unfair labour practice. This matter was incorrectly categorised by the ELRC under "unfair dismissal – misconduct".

Table 7: Procedural fairness of dismissals for misconduct for four provinces between 2014 and 2019:[650]

Province	Total arbitrations pertaining to unfair discipline for misconduct:	Number of arbitrations where procedural fairness challenged:	Procedural fairness challenges translated to percentage (%)	Number of matters found to procedurally unfair:	Procedurally unfair matters translated to percentage (%)
WC	44	15	34	1	7
EC	15	11	73	4	36
FS	22	14	64	4	29
LP	25	13	52	7	54

As mentioned before, while arbitration awards provide no more than a micro-representation of what transpires in dispute resolution in the basic education sector, the detail contained in these awards provides insight into issues that arise and the efficiency of the administration of discipline of these four PDEs. Table 7 shows that the Western Cape PDE fared the best concerning procedural fairness, with only one dismissal found to have been procedurally unfair (out of a total of 44 arbitrations).[651] This outcome shows that the Western Cape is committed to ensuring that the EOEA's and Dismissal Code's guidelines are followed concerning procedural fairness and that educators are afforded fair disciplinary hearings. Conversely, procedural fairness in respect of Limpopo is a different story. In Limpopo procedural fairness was challenged in 52% of arbitrations and, in 54% of these matters, procedural unfairness was found to exist. The arbitrators' reasons for finding procedural unfairness in Limpopo and the resultant impact on the PDE are discussed below.

In seven of the 13 Limpopo arbitrations where procedural fairness was challenged, the challenge was successful. One of these arbitrations, *Kgoele*, was incorrectly categorised as a dismissal and was in fact a ULP, where the arbitrator found that the PDE unfairly deducted an amount from the applicant's salary for leave without pay and

[650] This table was compiled using data from arbitration awards issued by the ELRC for the Western Cape, Eastern Cape, Free State and Limpopo between 2014 and 2019.

[651] The procedural unfairness was due to the chairperson of the disciplinary hearing disallowing one of the applicant's (educator) witnesses because the respondent (PDE) objected to it. This evidence was unchallenged, and the arbitrator concluded that the educator was prejudiced and should receive compensation (as solatium) of R18 000. *See SADTU obo Fisher v Department of Education Western Cape* PSES574-15/16 WC paras 24-26.

was ordered to repay the amount.[652] In three of the arbitrations, dismissal was found to be substantively and procedurally unfair, with the PDE ordered to reinstate the educator with retrospective effect to the date of dismissal.[653] The effect of this is that the educators were entitled to be paid their salaries by the PDE from the date of dismissal to the date of the arbitration award (in one lump sum). These three arbitrations are each discussed briefly. In *SADTU obo Kenosi v Department of Education Limpopo* ("*Kenosi*"),[654] this was for a period of 19 months (meaning that the PDE had to pay the applicant an amount of R243 829.62).[655] As mentioned above in paragraph 6 4 1 7, the PDE, in this case, could not secure its witness and closed its case without presenting evidence. The educator did not present evidence either but merely requested to "be reinstated retrospectively without any loss of benefits".[656] The arbitrator found that the PDE did not discharge the onus in respect of the substantive or procedural fairness of the dismissal and found in favour of the educator.[657] He was reinstated retrospectively and awarded the above-mentioned amount. Similarly, in *Raophala v Department of Education Limpopo* ("*Raophala*"),[658] the PDE was ordered to reinstate the applicant with back pay for 12 months amounting to R315 396.[659] Again, the PDE could not secure its witness and closed its case.[660] Neither party presented evidence. The arbitrator followed the exact same approach as in *Kenosi* by finding that the respondent did not discharge the onus of proving procedural fairness.[661] As mentioned in chapter 5 and according to Grogan's view with regard to the discharge of the onus at arbitration, at the very least the educator should still present sufficient evidence to justify a finding that the dismissal was unfair. Furthermore, even in the absence of a material witness central to proving substantive fairness, the PDE can present its case to prove the procedural fairness of the dismissal. In *Kenosi* and *Raophala* this would have required no more than an explanation by the PDE, relying on the evidence of the chairperson of the enquiry, as

[652] See *SADTU obo Kgoele v Department of Education Limpopo* PSES737-14/15.
[653] See *SADTU obo Kenosi v Department of Education Limpopo* PSES416 – 13/14LP; *Raophala v Department of Education Limpopo* PSES789-15/16LP and *NEHAWU obo Mokanzi v Department of Education Limpopo* PSES108-17/18LP.
[654] PSES416 – 13/14LP.
[655] See *SADTU obo Kenosi v Department of Education Limpopo* PSES416 – 13/14LP para 7.
[656] Para 4.
[657] Para 5-6.
[658] PSES789-15/16LP.
[659] *Raophala v Department of Education Limpopo* PSES789-15/16LP.
[660] Para 10.
[661] Para 25.

to the fairness of the procedure seeing that the educator presented no facts, explanation or basis for procedural unfairness.

In *NEHAWU obo Mokanzi v Department of Education Limpopo* ("*Mokanzi*"),[662] a failure in the administration of the PDE resulted in the reinstatement of an educator who was in fact not eligible for permanent employment with the PDE (and back pay for five months in the amount of R72 137.50).[663] In this matter, the applicant was appointed to a permanent position as educator and, after his appointment, was given certain forms to complete.[664] Upon capturing the details on the Personal and Salary System ("PERSAL") system, it came to light that the applicant had previously been employed by the PDE and was allegedly dismissed for misconduct.[665] Circular 121 of 2014 determines that the re-appointment of staff who have left the employ of the department is restricted.[666] Realising that the appointment was in contravention of the Circular, the PDE summarily terminated the applicant's appointment.[667] The arbitrator found that there was no evidence proving that the educator failed to disclose his prior employment or that there was misrepresentation on his side.[668] The PDE could give no justification for failing to follow the prescribed pre-dismissal procedure.[669]

In the remaining three arbitrations where the dismissal was found to be substantively fair but procedurally unfair, compensation was awarded. In *SADTU obo Kgaphola v Department of Education Limpopo* ("*Kgaphola*"),[670] the applicant was awarded compensation equal to two weeks remuneration amounting to R12 559.[671] Neither the employer nor the educator led evidence concerning the procedural fairness of the dismissal.[672] In the absence of evidence, the arbitrator noted that she has to draw a negative inference and that the employer failed to discharge its onus in this regard.[673] The arbitrator noted that Schedule 2 of the EOEA does not give guidance as to the procedure to follow where the record of the disciplinary proceedings is no

[662] PSES108-17/18LP.
[663] *NEHAWU obo Mokanzi v Department of Education Limpopo* PSES108-17/18LP paras 26-29.
[664] Para 10.
[665] Para 3.
[666] Para 7.
[667] Para 24.
[668] Para 22.
[669] Para 24.
[670] PSES448-13/14LP.
[671] *SADTU obo Kgaphola v Department of Education Limpopo* PSES448-13/14LP para 60.
[672] Para 48.
[673] Para 48.

longer available.[674] Her finding was that the principles of fairness dictate that the educator be afforded the opportunity to take part in the reconstruction of the record.[675] Since he was not offered this opportunity, procedural unfairness existed and compensation was awarded as *solatium*.[676] The arbitrator went further and explained that the PDE (employer) pays compensation as a penalty for their failure to afford the applicant (employee) their right to pre-dismissal procedures.[677] The arbitrator was alive to section 193(2)(d) of the LRA, which determines that reinstatement be ordered unless the dismissal is unfair for reason only that the employer failed to follow a fair procedure.[678] The arbitrator noted that the severity of the procedural unfairness should be considered and, should compensation be awarded, it must be just and equitable in the circumstances.[679] In the present matter, the procedural unfairness and its impact on the educator was not severe and as such two weeks remuneration as compensation was ordered.[680]

In *NEHAWU obo Ntshali v Department of Education Limpopo* ("*Ntshali*"),[681] the educator was awarded one month's remuneration as compensation for procedural unfairness (amounting to R21 000).[682] The basis of the challenge was that he was not afforded the opportunity to present mitigating circumstances before the chairperson made her finding.[683] The arbitrator agreed that this amounted to a procedural irregularity, but found that the impact thereof was minimal.[684] In *Shilubane v Department of Education Limpopo* ("*Shilubane*"),[685] the applicant was awarded three months remuneration as compensation for procedural unfairness (amounting to R64 509).[686] In his case, there simply was no pre-dismissal procedure.[687] The applicant was summarily dismissed when the PDE discovered that she had been employed and discharged from the department before.[688] The PDE argued that she

[674] Para 49.
[675] Para 49.
[676] Para 57.
[677] Para 57.
[678] Para 56.
[679] Para 56.
[680] *SADTU obo Kgaphola v Department of Education Limpopo* PSES448-13/14LP para 58.
[681] ELRC 31-17/18 LP.
[682] *NEHAWU obo Ntshali v Department of Education Limpopo* ELRC 31-17/18 LP para 1.238.
[683] Paras 1.212-1.216.
[684] Para 1.217.
[685] PSES692-16/17LP.
[686] *Shilubane v Department of Education Limpopo* PSES692-16/17LP para 34.
[687] Para 24.
[688] Para 24.

had been dishonest in failing to disclose her prior employment with the department. The arbitrator agreed that the trust relationship had been tarnished as a result.[689]

In the Eastern Cape, four of the eleven challenges to procedural fairness succeeded.[690] In three of the four cases, there was also a finding of substantive fairness and in one – *Aba* – there was a finding of substantive unfairness (pertaining to a ULP and not dismissal). The reasons for the procedural unfairness in each of these arbitrations are mentioned briefly. It was already mentioned in paragraph 6 4 1 7 above that in the matter of *Aba* there was an unreasonable delay in dispensing with the disciplinary procedure. The facts of this matter shed light on the leisurely approach of the PDE in certain cases of misconduct.[691] The misconduct of the principal occurred in May and June 2015 and the educator involved submitted a grievance to the PDE on 26 November 2015. The principal was only served with the charge sheet some nine months later on 15 August 2016 and the disciplinary hearing was held on 1, 12 and 26 September 2016. The outcome of the hearing in which the principal was found guilty was communicated to the parties on 14 October 2016. The parties were given the opportunity to submit mitigating or aggravating circumstances. On 15 November 2016 the chairperson submitted her finding of a written warning and fine of R5 000 to the PDE. Once again, due to a delay on the part of the PDE, the principal only received the approved finding and sanction on 29 June 2017. The principal lodged an appeal on 6 July 2017 which was dismissed on 12 September 2017 and the sanction was implemented on 20 November 2017. The principal referred a dispute to the ELRC and the arbitration was set down for 17 April 2019. It is unclear from the facts what transpired between 2017 and 2019. The arbitrator found no justification for the unreasonable delay by the PDE.[692] It is also not clear why it took the PDE two months after the appeal had been dismissed to implement the sanction against the principal.

In *Mehlo*, procedural fairness was challenged based on the chairperson of the disciplinary hearing proceeding with the hearing in the absence of the educator.[693] The educator sent her daughter to the hearing with a medical certificate stating that she

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[689] Paras 25-26.

[690] *Ndletyana* was also an arbitration emanating from the Eastern Cape and is discussed below. However, due to the implementation of s 14(1)(a) of the EOEA the matter was not considered to be procedurally unfair and as such, does not form part of the "four" arbitrations mentioned here.

[691] See *Aba v Department of Education Eastern Cape PSES643-17/18EC* paras 1, 2, 5, 6 10-12.

[692] *Aba v Department of Education Eastern Cape* PSES643-17/18EC para 20.

[693] *NAPTOSA obo Mehlo v HOD of the Eastern Cape Department of Education* PSES658-16/17EC paras 47-48.

was incapacitated due to a broken ankle.[694] The chairperson did not grant a postponement. At arbitration, the authenticity of the medical certificate was not challenged by the PDE and the arbitrator accepted that she had been unable (unfit) to attend the hearing.[695] The arbitrator stated that the chairperson "should have erred on the side of caution and adjourned the hearing".[696] It was found that the employer committed a ULP, with the sanction of a final written warning and a fine of one month's salary being set aside.[697] For the procedural unfairness, compensation of R10 000 was awarded.[698] In *Kleinbooi*, the arbitrator found that the chairperson of the disciplinary hearing did not guide the parties as to the proper procedure of a hearing and did not explain to the educator the risk of not testifying at the hearing, leading to the educator not stating his case.[699]

In *Bester,* the educator was described as "a habitual absentee offender" who was discharged in terms of section 14(1)(a) of the EOEA (by operation of law). The principal miscalculated the number of consecutive days by including days that the educator was not required to be at work.[700] As such, section 14(1)(a) did not apply and the educator argued that the dismissal was procedurally unfair seeing that he was not afforded a disciplinary hearing prior to dismissal.[701] The educator was awarded compensation in the amount of R45 700, but the substantive fairness of his dismissal was confirmed at arbitration despite the principal's error in implementing section 14(1)(a) of the EOEA.[702] One further arbitration award emanating from the Eastern Cape, *Ndletyana*, deserves attention. The arbitrator, with reference to *De Villiers v Head of Department: Education, Western Cape Province* ("*De Villiers*"),[703] found that the applicant's employment was terminated by operation of law in terms of section 14(1)(a) of the EOEA, which in law takes effect independent of any decision by the employer.[704] As such, the question of procedural fairness does not arise, as no dismissal took place.[705]

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[694] Para 47.
[695] Para 48.
[696] Para 52.
[697] Para 69.
[698] Para 71.
[699] *Kleinbooi v Department of Education Eastern Cape* PSES300-16/17 EC para 60.
[700] *Bester v Department of Education Eastern Cape* PSES447-15/16 EC para 28.
[701] Paras 28-30.
[702] Para 27.
[703] (2010) 31 ILJ 1377 (LC).
[704] *Ndletyana v Department of Education Eastern Cape* PSES813-16/17EC para 36.
[705] Para**s** 34, 36.

This is in line with the *dictum* in *Phenithi* as discussed in the context of absenteeism above.[706]

A few insights may be gleaned from the facts of these Eastern Cape arbitrations. First, *Aba* reveals that procedural unfairness is sometimes due to a failure by the PDE to take misconduct seriously and implement the EOEA expeditiously. *Mehlo* and *Kleinbooi*, on the other hand, show that decisions by the chairpersons of disciplinary hearings may also be the reason for procedural unfairness, which may be due to a lack of experience or knowledge pertaining to the legislative framework or failure to adequately implement it.[707]

In the Free State four of the fourteen challenges to procedural fairness (three dismissals and one ULP) were successful, namely in *Kodisang II, PSA obo Leputhing v Department of Higher Education and Training* ("Leputhing"),[708] *SADTU obo Sempe v Motheo TVET College* ("Sempe"),[709] and *Motatinyane v Department of Education Free State* ("*Motatinyane*").[710] In two if these cases, *Kodisang II* and *Sempe*, discipline was found to be procedurally and substantively unfair, while in *Motatinyane* it was found to be procedurally unfair but substantively fair. Lastly, the PDE was found to have committed a ULP in *Leputhing*. The facts surrounding procedural unfairness in these cases are mentioned briefly.

The facts of *Kodisang I* and *Kodisang II* were discussed in paragraph 6 4 1 7 above and will not be repeated here. The procedural challenge pertained to whether the principal was notified of the "last sitting" of the hearing and whether he had the opportunity to state his case.[711] The chairperson of the disciplinary hearing proceeded in the absence of the principal.[712] On review, procedural unfairness was confirmed based on the finding that the principal did not have a fair hearing and was not afforded the opportunity to present mitigating circumstances.[713] In *Sempe,* procedural unfairness pertained to an unreasonable delay (without explanation from the PDE) to convene the disciplinary hearing (the educator was placed on precautionary

[706] See paragraph 6 4 1 2 above.
[707] See, eg, *Kleinbooi v Department of Education Eastern Cape* PSES300-16/17 EC para 60.
[708] PSES807-17/18FS.
[709] ELRC 91-14/15 FS.
[710] PSES849-15/16FS.
[711] *SADTU obo Kodisang v Department of Education Free State* PSES173-17/18FS para 6.
[712] *Kodisang II v Department of Education Free State* PSES173-17/18FS para 26.
[713] Paras 84-85.

suspension for seven months).[714] Since the dismissal was substantively unfair, reinstatement with back pay was ordered but compensation was not ordered.[715]

In *Leputhing* procedural fairness centred around whether the chairperson was properly appointed, notice and postponement of the disciplinary hearing.[716] The arbitrator confirmed that the employer committed a ULP by suspending the educators without pay for one week due to an alleged unprotected strike.[717] The educators bore the onus to prove that they did not in fact participate in an unprotected strike and that the employer committed a ULP.[718] However, the PDE did not refute the educators' evidence that they did not participate in an unprotected strike, resulting in the arbitrator finding that no misconduct took place (and that the employer committed a ULP).[719] Although procedural unfairness did exist, no compensation was awarded and the PDE had to repay the educators the week's salary that was deducted.[720]

Lastly, in *Motatinyane* procedural unfairness resulted in compensation of R50 455 being awarded. The procedural unfairness was due to the employer refusing to provide the educator with the documents he required to prepare his defence.[721]

What this discussion reveals, is that procedural fairness in disciplinary proceedings goes hand in hand with the administrative capability and efficiency of a PDE. The Limpopo PDE, which had a high rate of successful procedural challenges, also had administrative failures (as are evident from the *Kgaphola* and *Shilubane* matters). Table 7 revealed a completely different reality in relation to the Western Cape PDE. It was the PDE with the most disciplinary hearings and the most referrals to the ELRC. The outcome of these arbitration awards indicates that procedural fairness is consistently adhered to. This, together with the sheer amount of formal disciplinary hearings annually dispensed with by the Western Cape PDE,[722] shows the capacity to implement the legislative framework and to ensure fairness in dealing with misconduct.

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[714] *SADTU obo Sempe v Motheo TVET College* ELRC 91-14/15 FS para 21.
[715] Para 24-27.
[716] *PSA obo Leputhing v Department of Higher Education and Training* PSES807-17/18FS para 3.
[717] Paras 148-151.
[718] Para 140.
[719] Para 147.
[720] Paras 148-151.
[721] *Motatinyane v Department of Education Free State* PSES849-15/16FS para 67.
[722] See Graph 2 above. The Western Cape routinely records more formal disciplinary hearings and is the only PDE that provides data in its annual reports about the total number of reported and finalised cases per year. Using that data, the Western Cape received and finalised 5291 disciplinary reports during the period of 2014 to 2019. In other words, 2833 cases were referred for formal disciplinary hearings whereas the total number of disciplinary reports that the PDE received and finalized were 5 291.

One further theme from the preceding discussion about procedural fairness is the undue delays in the finalisation of disciplinary proceedings that sometimes arise. In this regard, a closer analysis of a number of awards reveals a further recurring theme in discipline in the education sector, namely how the procedure (contained in Schedule 2 of the EOEA and which was described as legalistic and formalistic in chapter 5) may be manipulated by trade union representatives. This topic also shows a close relationship with the suspension of educators considered later in this chapter.

In *SADTU obo Scholtz v Department of Education Western Cape ("Scholtz")*,[723] the educator and his trade union representatives requested a postponement of the disciplinary hearing on numerous occasions.[724] It is clear from the arbitration award that these postponements were merely a delay tactic. At arbitration, the presiding officer of the disciplinary hearing testified (procedural fairness was in dispute) that after the educator received notice of the disciplinary hearing, it was postponed three times.[725] On the first occasion, the educator's union representative requested the postponement.[726] However, on the date the hearing was postponed to, the educator requested a further postponement since the union representative was absent.[727] On the third date, the educator arrived with a different union representative who requested a further postponement.[728] The presiding officer agreed to all three postponements. On the fourth – agreed by the parties – date set for hearing, neither the educator nor his union representative was present.[729] This was more than two months after the educator had been served with the notice of the hearing.[730] A day before this hearing, the union representative e-mailed the presiding officer indicating that he was not available for the hearing the next day and that the educator was ill.[731] The presiding officer was not convinced that the medical certificate provided by the educator was a valid one and informed the educator that should he wish for the hearing be postponed, he should attend the hearing and request a postponement. This was because the

[723] PSES779-15/16WC.
[724] *SADTU obo Scholtz v Department of Education Western Cape* PSES779-15/16WC paras 18-21.
[725] Paras 18-19.
[726] Para 18. On 23 July 2015 the educator received notice of a disciplinary hearing to be held on 5 August 2015. On 5 August 2015 the hearing was postponed at the request of the union representative by agreement to 28 August 2015.
[727] Para 18. On 28 August 2015 the hearing was postponed to 9 September 2015.
[728] Para 18. On 9 September 2015 the hearing was postponed to 29 September 2015.
[729] Para 19.
[730] Para 18-19. Notice of the hearing was received on 23 July 2015 and the fourth date set for the hearing was 29 September 2015.
[731] Para 19-20.

medical certificate was dated before the educator attended the third hearing and the third postponement was granted.[732] No mention was made at that stage that the educator was ill.[733] Furthermore, the presiding officer weighed up the educator's right to be heard with the rights of learner witnesses who had to make themselves available to testify on four different occasions.[734] The educator agreed to attend the hearing the next day, but failed to do so.[735] The hearing proceeded in the absence of the educator and his union representative.[736] All of this was in the context of serious charges – the first charge against the educator was for seriously assaulting a learner with the intent to do grievous bodily harm, by choking the learner and banging the learner's head against a desk[737] while the second charge was for a separate incident of assault where the educator allegedly threw a stick against the learner's head.[738] The educator appealed the outcome of the disciplinary hearing and referred the matter to arbitration after the appeal was dismissed.[739] At arbitration, the educator challenged the procedural fairness of his dismissal. The arbitrator agreed with the reasoning of the presiding officer and found that the educator had been awarded his rights in terms of the LRA's Dismissal Code, but that he chose not to make use of his opportunity to be heard.[740]

In *SADTU obo Coko v Buffalo City FET College* ("*Coko*")[741] (albeit in the context of a FET) the applicant was charged with and dismissed for misbehaviour and insubordination.[742] The facts reveal that the applicant, who was a site chairperson of SADTU, had a grievance regarding the job descriptions of employees and sent an e-mail to the principal copying various senior staff members stating "[m]ay you please take this serious as a manager before we make the college ungovernable".[743] The

[732] *SADTU obo Scholtz v Department of Education Western Cape* PSES779-15/16WC para 20. See also *SADTU obo Scholtz v Department of Education Western Cape* PSES779-15/16WC para 41 where the arbitrator agreed with the reasoning of the presiding officer in regard to the validity of the medical certificate. Since the validity of the medical certificate was not shown by the educator by submitting a medical report or testimony from the medical doctor and the educator did not show up for the hearing, the fact that the hearing proceeded in his absence did not make the dismissal procedurally unfair.
[733] Para 20.
[734] Paras 20-21.
[735] Para 20.
[736] Para 21.
[737] Para 3.
[738] Para 3.
[739] Para 3.
[740] Paras 41-42.
[741] ELRC29-14/15EC.
[742] *SADTU obo Coko v Buffalo City FET College* ELRC29-14/15EC para 33.
[743] Para 92.

applicant was served with a notice of disciplinary hearing but refused to sign the acknowledgement form.[744] On the day of the disciplinary hearing, members of SADTU "stormed in and disrupted the process" and instructed the chairperson of the disciplinary hearing to wait outside.[745] The chairperson contacted the principal who addressed the group after which the venue was vacated.[746] The chairperson enquired as to whether the applicant had a valid reason to be absent from the hearing and in the absence of any reason or representative for the applicant, proceeded with the hearing.[747] This led to the applicant challenging the procedural fairness of the dismissal. The arbitrator, with reference to *Avril Elizabeth Home for the Mentally Handicapped v CCMA* ("*Avril*"),[748] found that the requirements of the *audi alteram partem* principle were not violated in the circumstances.[749] The applicant received notice of the disciplinary hearing and was allowed the opportunity to state her case. The disciplinary notice also stated that disciplinary hearings will be held in the absence of employees who do not attend disciplinary hearings and cannot provide reasonable grounds for their absence.[750] The facts of this case reveal that the applicant used her union involvement to intimidate the principal and undermine his authority.[751] This is also shown by the events that transpired at the disciplinary hearing and the fact that the applicant showed up at the hearing with a group of union members.[752] As discussed earlier, principals of schools occupy a central decision-making position in the management of discipline and may find themselves the targets of intimidation. In this regard, it should also be mentioned that room for intimidation of principals exist already in the decision whether to treat misconduct as serious (requiring a formal enquiry by the PDE) or less serious (dealt with at school level), which may have a decisive bearing on the outcome of that discipline.

In *SADTU obo Kodisang v Department of Education Free State* ("*Kodisang I*"),[753] an acting principal was charged with sexual assault in terms of section 17(1)(b) of the

[744] Para 18.
[745] Para 114.
[746] Para 24.
[747] Paras 115-117.
[748] (2006) 27 ILJ 1644 (LC).
[749] *SADTU obo Coko v Buffalo City FET College* ELRC29-14/15EC para 119.
[750] Para 117.
[751] Para 44.
[752] Para 114.
[753] PSES173-17/18FS.

EOEA in that he allegedly raped a learner.[754] He was subsequently dismissed and the dismissal was confirmed on appeal.[755] The presiding officer of the disciplinary hearing testified at arbitration that the union representative requested numerous postponements.[756] In fact, the arbitrator's analysis of the facts was that "it was not disputed that the union had a tendency of applying for postponements a day before the sitting of the set hearing date".[757] After the matter had already been postponed twice at the request of the union representative and a day before the agreed and set date, the union representative informed the presiding officer that he was unavailable for the hearing the following day as he had to attend to a different case.[758] The presiding officer proceeded with the hearing in the absence of the applicant and his union representative. The arbitrator emphasised the sensitivity of the case and the impact of postponements on a child witness and found that the presiding officer had been reasonable in his decision to proceed with the hearing.[759] The dismissal was found to be both substantively and procedurally fair.[760] However, the Labour Court granted a review of the arbitration, ordering that the dispute had to be heard de novo by a different commissioner.[761] In *SADTU obo Kodisang v Department of Education Free State* ("*Kodisang II*"),[762] the arbitrator came to a different conclusion regarding procedural fairness. He found that the applicant's dismissal had been substantively and procedurally unfair.[763] The applicant was reinstated with retrospective effect and awarded 33 months remuneration in back pay.[764]

As far as procedure is concerned, the facts of the *Kodisang* matter show that the applicant was suspended on 15 May 2015 and the disciplinary hearing was only finalised on 15 August 2016.[765] At face value, this time period seems long (and it was successfully argued as such on behalf of the educator), but what the arbitrator did not take into account was the union's role in the protracted disciplinary hearing. The first

[754] See *Kodisang II v Department of Education Free State* PSES173-17/18FS para 4.
[755] *SADTU obo Kodisang I v Department of Education Free State* PSES173-17/18FS para 9.
[756] Paras 12-16.
[757] Para 45.
[758] Paras 13-14.
[759] Para 45.
[760] Para 60.
[761] *Kodisang II v Department of Education Free State* PSES173-17/18FS para 8.
[762] PSES173-17/18FS (same case number, but the award in Kodisang I was issued on 20 September 2017 whereas the award in Kodisang II was issued on 28 April 2019).
[763] *Kodisang II v Department of Education Free State* PSES173-17/18FS para 91.
[764] Paras 91-95.
[765] Para 21.

date set for the applicant's disciplinary hearing was 26 June 2015 on which date the hearing was postponed to 15 September 2015.[766] The reason for this particular postponement is unclear from the arbitration award.[767] On 15 September 2015, the union representative requested a postponement, which was granted and 21 September 2015 was the agreed date on which the hearing would proceed.[768] The hearing could not proceed on 21 September 2015 due to the state the learner victim was in.[769] The first chairperson was replaced at this stage and on 12 October 2015, due to the unavailability of the venue, the hearing was again postponed.[770] The next agreed date for the disciplinary hearing was 28 May 2016 and evidence was led on that day.[771] The hearing was set to proceed on 6 June 2016 upon which the union representative requested a postponement. The union representative wanted to proceed on 25 July 2016, but it was eventually agreed that the hearing would proceed on 21 July 2016.[772] On 20 July 2016, the union contacted the presiding officer informing him that their witness will only be ready on 25 July 2016.[773] The hearing was postponed to 8 August 2016, but on 7 August 2016, the union representative informed the presiding officer that he had to attend a different disciplinary hearing on 8 August 2016.[774] The presiding officer contacted the initiator of the other case, who said that the union representative made no mention of another case he had to attend on 8 August 2016 when their hearing was arranged.[775] The presiding officer proceeded with the hearing the following day in the absence of the union representative and educator.[776] From all this, it is clear that the role of the union in protracting this hearing was significant.

The arbitrator also found that the presiding officer acted unfairly as he "refused the applicant his right to present his case", referring to the hearings on 28 May 2016 and 8 August 2016.[777] This simply ignored the fact that evidence had been led on 28 May

[766] Para 22.
[767] Para 22.
[768] Para 22.
[769] The charge against the applicant was in terms of s 17(1)(b) of the EOEA for sexual assault in the form of rape. *Kodisang II v Department of Education Free State* PSES173-17/18FS para 22.
[770] Para 25.
[771] Para 22.
[772] Para 22.
[773] Para 22.
[774] Paras 22-23.
[775] *SADTU obo Kodisang I v Department of Education Free State* PSES173-17/18FS para 14.
[776] Para 14-15.
[777] See *Kodisang II v Department of Education Free State* PSES173-17/18FS para 84.

2016 and was supposed to continue on 6 June 2016.[778] As mentioned above, the union requested a postponement on that day.[779] Again, due to postponements requested by the union, the hearing was postponed to 8 August 2016.[780] In light of these facts and the facts discussed above, the presiding officer regarded the representative's reason for his unavailability as insufficient. The presiding officer also took into account the impact of the numerous postponements on the learner victim. Despite this, the arbitrator found the hearing to have been procedurally unfair.

Although *SADTU obo Sekgotha v Department of Education Limpopo* ("*Sekgotha*")[781] did not deal with postponements, the matter is still of importance to illustrate the role of trade unions, in this case SADTU, in hampering the efficiency of the DOE. In this matter, the Limpopo PDE arranged a workshop for educators. A person who identified himself as the chairperson of a SADTU branch disrupted the workshop by ordering all educators to abandon the workshop and return to their workplaces.[782] The reason for disrupting the workshop was unclear, but at arbitration, it was testified that on a different occasion the chairman of the same SADTU branch also caused a workshop to be cancelled.[783] In that instance, the issue was that the catering for the workshop was inadequate and the material was not sufficient to cover all attendees.[784] It is unclear why it is necessary to cancel a workshop aimed at enhancing the skills of educators instead of attempting to address shortcomings such as the above.

From these awards, it can be seen that presiding officers – perhaps unduly - try to accommodate parties who request a postponement. It is also clear, however, that union representatives, knowing the importance of the *audi alteram partem* principle in disciplinary proceedings, use this to unduly benefit their members. The benefits, of course, include either continued employment (with remuneration) if there is no suspension, or, in the case of suspension, at least remuneration (the EOEA determines that the educator should receive full pay for the period in which they are suspended).[785] In case of undue delays, this has a serious financial impact on the PDE

[778] See *SADTU obo Kodisang I v Department of Education Free State* PSES173-17/18FS para 12.
[779] Para 12.
[780] *Kodisang II v Department of Education Free State* PSES173-17/18FS para 22.
[781] PSES378-13/14LP.
[782] *SADTU obo Sekgotha v Department of Education Limpopo* PSES378-13 para 4.1.
[783] Paras 4.6-4.7.
[784] Paras 4.6-4.7.
[785] See Item 6 of Schedule 2 of the EOEA.

and the education of learners since the suspended educator will have to be replaced pending the outcome of the disciplinary hearing. Lastly, it seems that where presiding officers or commissioners decide to proceed with the hearing in the absence of the union official and educator, and even if they have good reason to do so, the scale of procedural fairness tips in favour of the educator. This can be seen from the *Kodisang II* arbitration award. It is perhaps worthwhile to mention that one of the express goals of the LRA is to ensure speedy and efficient dispute resolution.[786] This approach is reiterated in Schedule 2 of the EOEA which calls for prompt discipline[787] and that enquiries must be concluded in the shortest possible time frame.[788] A postponement should only be granted if there really are good reasons why, in the interests of fairness and weighing up all the circumstances, it is necessary and should be seen by arbitrators as such.

6 4 3 Substantive and procedural issues around suspension in case of misconduct

Chapter 5 contained a discussion of suspension as part of the broad disciplinary process – either as a precautionary or punitive measure in case of misconduct. Where the employer implements suspension for an unfair reason or fails to follow the applicable procedure, the employee may refer a ULP dispute to the ELRC. Section 185(b) of the LRA provides every employee with the right not to be subjected to ULPs. The definition of a ULP includes “the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee”.[789] Where the employer imposes suspension, whether precautionary or punitive, the educator is removed from the workplace, which inevitably disrupts teaching. The suspended educator will either have to be replaced with a temporary educator or other educators at the school will have to step in to ensure that instructional time is not lost. In certain instances, which are discussed in more detail below, it is necessary to remove the educator from the workplace, whether it be to investigate charges against the educator or as a sanction after the educator is found guilty of the charges at a disciplinary hearing. The focus of the discussion below is on the utilisation of suspension as part of the disciplinary process and its impact on the efficiency of discipline.

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[786] See s 138(1) of the LRA.
[787] Item 2(b) Schedule 2 of the EOEA.
[788] Item 2(g).
[789] Section 186(2)(b) of the LRA.

The Western Cape PDE provides data in its annual reports regarding the number of punitive and precautionary suspensions, the average number of days per precautionary suspension and the financial cost to the department.[790] This is valuable information, as the number of unfair suspension disputes ultimately heard by the ELRC is low (there were only 16 arbitrations concerning suspension in the period 2014 to 2019 across the four provinces).[791] The table below provides some insight into the utilisation of precautionary and punitive suspension in practice as well as its impact on the department, measured by the number of days educators are on precautionary suspension and its financial cost to the department.

Table 8: Western Cape PDE suspensions between 2014 and 2019:[792]

Year	Punitive suspensions (without pay)	Precautionary suspensions (with full pay)	Average number of days of precautionary suspension	Cost of precautionary suspension (in Rand)
2018/2019	50	22	211.97	1 721 193,90
2017/2018	56	15	130.93	1 887 099,00
2016/2017	63	23	113.96	2 754 372,40
2015/2016	73	14	112.21	1 350 000,00
2014/2015	46	17	98.24	1 293 000,00

This table shows that the number of punitive and precautionary suspensions is much higher in practice than what may be inferred from arbitration awards, but – and this is especially true of precautionary suspension – very low in comparison to the number of formal disciplinary hearings conducted in the Western Cape for the corresponding period. During this period there were 2424 disciplinary hearings, but only 91 precautionary suspensions. Precautionary suspension is even lower in the other

[790] The other three PDEs also provide some information in their annual reports regarding precautionary suspension, but not in the same detail as the Western Cape PDE.

[791] There were 24 arbitrations classified by the ELRC under "Unfair labour practice – suspension" but eight of the arbitrations pertained to unfair disciplinary action short of dismissal and not unfair suspension.

[792] This table was compiled using data from the annual reports of the Western Cape PDE between 2014 and 2019. See Western Cape PDE Annual Report 2018/2019, 154-155; Western Cape PDE Annual Report 2017/2018, 155; Western Cape PDE Annual Report 2016/2017, 164-165; Western Cape PDE Annual Report 2015/2016, 150-151 and Western Cape PDE Annual Report 2014/2015, 156-157.

provinces surveyed with the Eastern Cape recording 59, the Free State 25 and Limpopo 12 precautionary suspensions between 2014 and 2019.[793] What is also concerning is that the average number of days educators are on precautionary suspension exceeded the 90-day threshold in item 6(3) of Schedule 2 of the EOEA for all five years considered. The number was even higher in the Eastern Cape, with educators on precautionary suspension for an average of 236 days over the same period (for 2016/2017 it was as high as 492 average days in respect of four educators placed on precautionary suspension).[794] Furthermore, the extensive use of punitive suspensions as a sanction relates to an issue raised earlier in the context of substantive fairness. Ordinarily (as also envisaged by the LRA's Dismissal Code), the two most serious sanctions typically imposed on employees are a final warning or dismissal. In the basic education sector, however, provision is made (in section 18(3) of the EOEA) for a host of sanctions between a final warning and dismissal (such as a demotion, suspension without pay or a fine), and also for a combination of these sanctions (for example, a final written warning and a fine or suspension without pay). This may well mean – as was in fact illustrated in the earlier discussion in the context of assault – that educators who commit very serious misconduct are actually not dismissed, only to again be subjected to discipline (and dismissed) for the same misconduct as repeat offenders. All at the expense of learners.

Table 9 below represents ELRC arbitrations in respect of the Western Cape, Eastern Cape, Free State and Limpopo where a dispute was referred regarding the unfair suspension of an educator. The arbitration awards were analysed to understand the use of suspensions in the education sector.

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[793] See Eastern Cape Department of Education Annual Report 2014/2015, 182; Eastern Cape Department of Education Annual Report 2015/2016, 160; Eastern Cape Department of Education Annual Report 2016/2017, 147; Eastern Cape Department of Education Annual Report 2017/2018, 145 and Eastern Cape Department of Education Annual Report 2018/2019, 133. Limpopo Department of Education Annual Report 2014/2015, 140; Limpopo Department of Education Annual Report 2015/2016, 158; Limpopo Department of Education Annual Report 2016/2017, 168; Limpopo Department of Education Annual Report 2017/2018, 142; Limpopo Department of Education Annual Report 2018/2019, 165. Free State Department of Education Annual Report 2015/2016, 158; Free State Department of Education Annual Report 2016/2017, 183 and Free State Department of Education Annual Report 2017/2018, 194.

[794] A lack of data in the annual reports for the Free State and Limpopo did not allow for a similar comparison. The average is based on the data in the following annual reports for the Eastern Cape. Eastern Cape Department of Education 2014/2015, 182; Eastern Cape Department of Education 2015/2016, 160; Eastern Cape Department of Education 2016/2017, 147; Eastern Cape Department of Education 2017/2018, 145 and Eastern Cape Department of Education 2018/2019, 133.

Table 9: Unfair suspension disputes in the four provinces analysed:[795]

	Arbitration	Issue	Time period of suspension	On full pay	Type of suspen-sion	Outcome	Compensation awarded
1	*Abrahams*[796]	Unfair suspension	3 months	No	Punitive	Fair	No
2	*Daniels*[797]	Unfair suspension disguised as special leave	4 months	Yes	Precautio nary	Unfair	No
3	*Hechter*[798]	Unreasonable delay in concluding disciplinary hearing	23 months	Yes	Precautio nary	Unfair	Two months' remuneration (R62 507.07)
4	*Kalipa*[799]	Unfair suspension disguised as special leave	8 months	Yes	Precautio nary	Unfair	One months' remuneration (R50 176.50)
5	*Kotoyi-Mosala*[800]	Unreasonable delay in conducting disciplinary hearing and froze educator's salary for two months	10 months	Yes*	Precautio nary	Fair	No
6	*Mahlungulu*[801]	Failed to implement outcome of	5 months	No	Precautio nary	Unfair	Four months' remuneration (R188 803)

[795] The table was drawn up using data from ELRC arbitration awards four provinces, namely Western Cape, Eastern Cape, Free State and Limpopo. All arbitrations relating to unfair suspension in these four provinces were analysed. There were, however, eight arbitrations classified by the ELRC under "unfair labour practice – suspension" which were not unfair suspension disputes but rather pertained to the second part of s 186(2)(b) of the LRA which is "any other unfair disciplinary action short of dismissal in respect of an employee". These arbitrations are not included in Table 9 and are not discussed in detail. The arbitrations are: *Thusi v Provincial Department of Education Free State* PSES144-17/18FS; *SADTU obo Lebajoa v Department of Education Free State* PSES475-14/15; *Andreas v Department of Education Eastern Cape* PSES5024 ET AL EC; *Mamabolo v Department of Education Limpopo* PSES46-14/15LP; *James v Department of Education Western Cape* PSES535-10/11WC; *NUPSAW obo Lategan v Department of Education Western Cape* PSES373-11/12WC; *Public Service Association obo Mpahlana v Department of Education Western Cape* PSES184-10/11WC; *Sijula v Department of Education Western Cape* PSES208-16/17WC.

[796] *Abrahams S v Department of Education Western Cape* PSES282-18/19WC. Note that there is a misconduct arbitration where the applicant was also Abrahams. The abridged reference to this arbitration is "Abrahams S".

[797] *SADTU obo Daniels v Department of Education Western Cape* PSES485-09/10 WC.

[798] *Hechter v Department of Education Eastern Cape* PSES716- 14/15 EC.

[799] *Kalipa v Department of Education Eastern Cape* PSES475-16/17 EC.

[800] *PSA obo Kotoyi-Mosala v Department of Education Free State* PSES198-10/11FS & PSES628-09/10FS.

[801] *Mahlungulu v Department of Education Eastern Cape* PSES79 – 18/19 EC.

		disciplinary hearing to uplift suspension					
7	*Makethi*[802]	Unfair suspension	4 months	Yes	Precautionary	Fair	No
8	*Malale*[803]	Unfair suspension	3 months	No	Punitive	Unfair	One months' remuneration (R31 000)
9	*Matshexana*[804]	Procedure not in line with disciplinary code	3 months	Yes	Precautionary	Unfair	No
10	*Mofokeng*[805]	Interpretation of disciplinary code	5 weeks	Yes	Precautionary	Fair	No
11	*Msimanga*[806]	Unfair suspension	2 months	No	Punitive	Fair	No
12	*Ntlokwana*[807]	No opportunity for pre-suspension representations	4 months	Yes	Precautionary	Fair	No
13	*Ntlola*[808]	Unfair suspension and transfer	19 months	Yes	Precautionary	Unfair	No
14	*Ntsetshe*[809]	Unfair suspension	3 months	No	Punitive	Fair	No
15	*Ntuli*[810]	Unreasonable delay in concluding disciplinary hearing	10 months	Yes	Precautionary	Unfair	Two months' remuneration
16	*Ramaila*[811]	Unfair suspension	3 months	No	Punitive	Fair	No

* Note that in the Koyoti-Mosala arbitration the educator was suspended on full pay but her salary was subsequently frozen in an attempt to get into contact with her, as her contact details and address were incorrect on the PDEs system, making it impossible to serve the

[802] *Makhethi TJ v Department of Education Free State* PSES584-14/15 FS.
[803] *Malale v Department of Education Limpopo* PSES683-11-12LP.
[804] *NEHAWU obo Matshexana, Loyiso v Department of Higher Education & Training* PSES186-19/20EC.
[805] *SALIPSWU obo Mofokeng v Department of Higher Education and Training* ELRC 23-16/17FS.
[806] *Msimanga v Department of Education Free State* PSES242-15/16FS.
[807] *Ntlokwana v Department of Education Eastern Cape* PSES120-19/20EC.
[808] *Ntlola v Department of Education Free State* PSES748-18/19FS.
[809] *Ntsetshe v Department of Education Free State* PSES702-14/15.
[810] *Ntuli v Department of Education Free State* PSES183-14/15 FS.
[811] *Ramaila & 3 Others v Lephalale TVET College and Department of Higher Education & Training* ELRC85-15/16LP.

notice of disciplinary hearing. She was reimbursed for the two months her salary was frozen.

A few issues raised by the information in Table 9 require consideration. As a point of departure, both punitive suspension and precautionary suspension have been considered at arbitration. Of the 16 arbitrations regarding unfair suspension, five were about punitive suspensions and the remaining 11 were about precautionary suspensions. The preceding table (in respect of the Western Cape) showed that there is a widespread use of punitive suspensions as sanctions at disciplinary enquiries, also compared to the use of precautionary suspensions in the run-up to enquiries. The widespread use of punitive suspensions was also confirmed by Graph 4 earlier in this chapter. Of course, where employees are suspended (rather than dismissed) as the outcome of an enquiry, there may be less incentive to challenge the outcome, especially where the misconduct was serious and suspension relatively lenient.

In this regard, in four out of the five arbitrations where punitive suspensions were challenged, the arbitrator found it to be fair. *Malale v Department of Education Limpopo ("Malale")*[812] was the only matter where the arbitrator found the sanction of three months' suspension without pay and a final written warning to be unfair.[813] The reason for this was because, based on the evidence presented at arbitration, the applicant was not guilty of the misconduct as found at the disciplinary hearing.[814] The guilty finding was reversed at arbitration and the sanction uplifted.[815] In each one of the other matters, namely *Msimanga v Department of Education Free State* ("Msimanga"),[816] *Ntsetshe v Department of Education Free State* ("Ntsetshe"),[817] *Ramaila v Lephalale TVET College and Department of Higher Education & Training* ("*Ramaila*")[818] and *Abrahams S v Department of Education Western Cape ("Abrahams S")*,[819] the sanction of punitive suspension imposed on the educators at their respective disciplinary hearings was found to be fair.

[812] PSES683-11-12LP.
[813] *Malale v Department of Education Limpopo* PSES683-11-12LP paras 74-78.
[814] Paras 72-73.
[815] Para 77.
[816] PSES242-15/16FS.
[817] PSES702-14/15.
[818] ELRC85-15/16LP.
[819] PSES282-18/19WC.

What is concerning about the imposition of precautionary suspension is that of the 11 arbitrations heard by the ELRC, only four were found to be fair.[820] In this regard, it is necessary to revisit the requirements of Schedule 2 of the EOEA in respect of precautionary suspensions. Item 6(1) determines that in case of serious misconduct as listed in section 17 of the EOEA, the employer (PDE) may suspend an educator on full pay for a maximum period of three months.[821] Where the conduct falls within the ambit of section 18, the employer may also do so.[822] Item 6(2) makes provision for another option, which is to transfer the educator to another post if the employer believes the presence of the educator may jeopardise any investigation or endanger the well-being or safety of anyone at the workplace.[823] Furthermore, the employer must do everything possible to conclude a disciplinary hearing within one month of the suspension or transfer.[824] The presiding officer may decide on postponement of disciplinary proceedings, which must not exceed 90 days from the date of suspension.[825] The employer must enquire from the presiding officer what the reasons are for proceedings not being concluded within 90 days.[826] The employer may, after hearing the reason(s) for the delay and allowing the educator an opportunity to make representations, direct that further suspension will be without pay.[827]

In the seven arbitrations where precautionary suspension was found to be unfair, the time period of suspension ranged from three to 23 months. All the suspensions that were found to be unfair were suspensions on full pay.[828] It seems that, although there are flaws with the PDEs reasons for imposing a precautionary suspension or the procedure followed, the suspensions are generally on full pay which is in line with item 6(1) of Schedule 2 of the EOEA. Compensation was awarded to the applicants in four instances where the precautionary suspension was found to be unfair (which ranged from one to four months' remuneration).[829] Unfortunately, compensatory orders

[820] See *PSA obo Kotoyi-Mosala v Department of Education Free State* PSES198-10/11FS & PSES628-09/10FS, *Makhethi TJ v Department of Education Free State* PSES584-14/15 FS, *SALIPSWU obo Mofokeng & 2 Others v Department of Higher Education and Training* ELRC 23-16/17FS and *Ntlokwana v Department of Education Eastern Cape* PSES120-19/20EC.
[821] Item 6(1) of Schedule 2 of the EOEA.
[822] Item 6(2).
[823] Item 6(2).
[824] Item 6(3)(a).
[825] Item 6(3)(b).
[826] Item 6(3)(c).
[827] Item 6(3)(d).
[828] See the "On full pay" column in Table 9 above.
[829] See the "Compensation awarded" column in Table 9 above.

against the PDE result in a waste of resources that could otherwise be used to promote education in the relevant province. In *Hechter v Department of Education Eastern Cape* ("*Hechter*"),[830] the applicant was suspended on full pay for a period of 23 months.[831] The disciplinary hearing was convened within a month of suspension, but apparently due to postponements by the presiding officer, the disciplinary hearing was still not finalised after 23 months[832] It is unclear why the employer did not intervene and request reasons for the delay from the presiding officer, in line with the procedure provided for in item 6(3)(d) of Schedule 2 of the EOEA. The employer also failed to show that it had a prima facie case against the educator as a reason for keeping the educator from the workplace.[833] The suspension was found to be substantively and procedurally unfair.[834] The PDE was ordered to pay the applicant compensation equal to two months' remuneration amounting to R125 014.14. The reason for the compensatory award against the PDE was for the psychological, social and emotional prejudice the applicant had apparently endured.[835]

The fact that the applicant had been suspended for a period of 23 months begs the question of what impact his suspension had on the delivery of quality education to the learners in his classes. The absence of a *prima facie* case against the applicant and a protracted disciplinary hearing (for which the PDE offered no explanation apart from stating that the presiding officer postponed the matter) led to a compensatory award. This shows that, where the PDE does not efficiently dispose of disciplinary matters, it leads to unnecessary expenses which further impacts the administration of the PDE.

Similarly, in *Mahlungulu v Department of Education Eastern Cape* ("*Mahlungulu*"),[836] the applicant argued that the PDE had failed to implement the withdrawal of the precautionary suspension as ordered by the presiding officer at the disciplinary hearing.[837] The employee was instead instructed to report to the district office.[838] The PDE argued that the district office is an extension of the school and that it therefore complied with the upliftment of the suspension.[839] This argument was

[830] PSES716- 14/15 EC.
[831] *Hechter v Department of Education Eastern Cape* PSES716- 14/15 EC paras 5 and 16.
[832] Para 15.
[833] Para 36.
[834] Paras 41-48.
[835] Paras 41-48.
[836] PSES79 – 18/19 EC.
[837] *Mahlungulu v Department of Education Eastern Cape* PSES79 – 18/19 EC para 18.
[838] Para 21.
[839] Paras 91, 99 and 123.

rejected by the arbitrator and, in the absence of reasons justifying the PDE to not adhere to the order of upliftment, the PDE was found to have acted unfairly.[840] The applicant was awarded four months' remuneration as compensation since she had to incur additional expenses to travel to the district office, which would not have been the case had the suspension been uplifted.[841]

Three further issues raised by ELRC arbitrations concern perhaps more complex legal questions about the substantive and/or procedural fairness of suspension. These are pre-suspension representations, the status of the EOEA's suspension procedure and, lastly, the position where educators placed on precautionary suspension appeal the outcome of the disciplinary hearing.

As far as pre-suspension representations are concerned, it was held in *Hechter* that the employee should be given an opportunity to make representations before the employer imposes a suspension.[842] This requires that the employee has enough information at his or her disposal as to the reason for the proposed suspension because, in the absence of such information, the employee's opportunity to make representations will be meaningless.[843] The educator in *Ntlokwana v Department of Education Eastern Cape* ("*Ntlokwana*")[844] also relied on his right to pre-suspension representations, arguing that suspension is unfair if this is denied. The argument was based on section 20(2) of the EOEA which provided that "before suspending an educator from duty, the employer shall … call upon the educator to show cause within the period specified in the notice, which period shall not be less than 14 days from date of notice, why the educator should not be suspended".[845]

Section 20 of the EOEA was, however, deleted from the EOEA by section 11 of the Education Laws Amendment Act 53 of 2000.[846] The Constitutional Court in *Long v South African Breweries (Pty) Ltd* recently confirmed the position pertaining to an employee's right to pre-suspension representations.[847] As a point of departure, Theron J confirmed the Labour Court's finding that precautionary suspension is a precautionary measure and not a disciplinary one.[848] The *audi alteram partem*

[840] Paras 121-123.
[841] *Mahlungulu v Department of Education Eastern Cape* PSES79 – 18/19 EC paras 132-133.
[842] *Hechter v Department of Education Eastern Cape* PSES716- 14/15 EC para 30.
[843] Para 31.
[844] PSES120-19/20EC.
[845] *Ntlokwana v Department of Education Eastern Cape* PSES120-19/20EC para 8.
[846] Para 9.
[847] *Long v South African Breweries (Pty) Ltd* (2019) 40 ILJ 965 (CC).
[848] Para 24.

principle requires that an employee be afforded the opportunity to state his or her case, which is available to the employee at the disciplinary hearing before the employer can impose a sanction. This does not, however, extend to precautionary suspension. The court therefore confirmed that the law does not require employees be granted the opportunity to make pre-suspension representations.[849] This now provides clarity, also for the education sector, where there has been some confusion in the past.[850]

The second issue is the EOEA's suspension procedure and the effect on the fairness of suspension if the procedure is not adhered to. In many arbitrations, the reason for the educator referring an unfair suspension dispute to the ELRC is because the PDE did not adhere to the suspension time periods and procedure as contained in item 6 of Schedule 2 of the EOEA.[851] It is true that in some arbitrations suspensions are found to be unfair where the PDE cannot produce a justifiable reason for failing to comply with the time periods in the EOEA. What is important to note, however, is what the Labour Appeal Court stated in *Highveld District Council v CCMA* ("*Highveld*"):[852]

> "The mere fact that a procedure is an agreed one does not, however, make it fair. By the same token, the fact that an agreed procedure was not followed does not in itself mean that the procedure actually followed was unfair''.[853]

Arguably, this also extends to the education sector, despite the procedure contained in legislation. The circumstances of each matter are to be taken into account and fairness should be determined on that basis.[854] However, even though it did not involve the suspension of an educator, the Labour Court has confirmed that a suspension for an unreasonably long period is a ULP.[855] These points are illustrated by the *Kotoyi-Mosala*[856] arbitration. The PDE suspended the educator (Foundation Phase HOD) to

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[849] *Long v South African Breweries (Pty) Ltd* (2019) 40 ILJ 965 (CC) para 24.
[850] See *Hechter v Department of Education Eastern Cape* PSES716- 14/15 EC and *Ntlokwana v Department of Education Eastern Cape* PSES120-19/20EC.
[851] See *Hechter v Department of Education Eastern Cape* PSES716- 14/15 EC; *PSA obo Kotoyi-Mosala v Department of Education Free State* PSES198-10/11FS & PSES628-09/10FS; *NEHAWU obo Matshexana, Loyiso v Department of Higher Education & Training* PSES186-19/20EC; *SALIPSWU obo Mofokeng v Department of Higher Education and Training* ELRC 23-16/17FS and *Ntuli v Department of Education Free State* PSES183-14/15 FS.
[852] (2003) 24 ILJ 517 LAC.
[853] *Highveld District Council v CCMA* (2003) 24 ILJ 517 LAC para 15.
[854] Para 15.
[855] See *Minister of Labour v General Public Service Sectoral Bargaining Council* 2007 5 BLLR 467 (LC); Van Niekerk et al *Law @ Work* (2019) 217.
[856] *PSA obo Kotoyi-Mosala v Department of Education Free State* PSES198-10/11FS.

investigate alleged dysfunctionality at the school.[857] There was a 10-month delay in serving her with a notice of disciplinary hearing and the reason for this was that the PDE could not locate the educator.[858] Her address had been incorrect on the PDEs system and the school also did not have her correct details.[859] The PDE requested the Director to authorise the finance department to freeze her salary in the hope that she would then contact the PDE and confirm her correct address for service of the notice of disciplinary hearing.[860] The educator contacted the PDE through her union, which allowed the PDE to serve the notice via her union and her salary was subsequently reinstated and she was reimbursed.[861] The educator referred an unfair suspension dispute to the ELRC requesting that her suspension be uplifted and that compensation be awarded for the delay on the respondent's side to timeously convene a disciplinary hearing.[862] The arbitrator disagreed that the PDEs failure to adhere to the EOEAs time periods was unfair in the circumstances.[863] According to the arbitrator, a departure from the prescribed procedure is not per se unfair but must be measured against general standards of fairness contained in the LRA.[864]

An important aspect that emerged from two arbitrations is that the PDE sometimes place employees on special leave instead of placing them on precautionary suspension. This provides the PDE with more flexibility because, for instance, special leave does not have the same time restrictions attached to it as suspension. It also might constitute an effort to circumvent the ULP provisions of the LRA as "special leave" is not listed as a ULP in the LRA, but suspension is. In *Heyneke v Umhlatuze Municipality*[865] a public service employee (municipal manager) was placed on special leave. The court held that where there is an ulterior motive in placing the employee on special leave, such as to remove the employee from the workplace pending an investigation into misconduct, it will be seen as a suspension.[866]

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[857] Para 13(c)-(e).
[858] Para 13(f)-(j).
[859] Para 13(f)-(j) and (p). It was mentioned at arbitration that it is an employee's responsibility to ensure that their personal details are correct on the PDEs system.
[860] *PSA obo Kotoyi-Mosala v Department of Education Free State* PSES198-10/11FS para 13(k) and (l).
[861] Para 13(o).
[862] Para 16.
[863] Paras 43-44, 54 and 56.
[864] Para 40.
[865] (2010) 3 ILJ 2608 (LC).
[866] *Heyneke v Umhlatuze Municipality* (2010) 3 ILJ 2608 (LAC) paras 33-34, 65 and 130; See also J Grogan *Workplace Law* (2020) 67.

The *Kotoyi-Mosala* matter shows that the general standards of fairness will be used to determine whether a departure from the prescribed procedure was unfair or not. This does not, however, allow the employer to bend the legislative framework to its will. The *Kalipa v Department of Education Eastern Cape* ("*Kalipa*")[867] and *SADTU obo Daniels v Department of Education Western Cape* ("*Daniels*")[868] arbitrations illustrate this point. In *Kalipa* the principal of the school was placed on special leave by the PDE from 20 April 2016 until 9 January 2017.[869] The principal referred a ULP dispute to the ELRC alleging that he had in fact been unfairly suspended.[870] The PDE disputed this, stating that chapter J paragraph 20 of the Personnel Administrative Measures ("PAM") provides that "[i]f in the opinion of the employer, circumstances justify it, it may grant or place an educator on special leave in extraordinary circumstances for any reasonable purpose and for any reasonable period, and such leave shall be without pay unless the employer determines otherwise".[871] The principal was remunerated in this case.[872] The PDEs reason for placing the principal on special leave was to investigate accusations of financial mismanagement.[873] The arbitrator found that the circumstances surrounding the principal's special leave "points to effectively a suspension in the hope of subverting the residual ULP provisions of the Labour Relations Act 66 of 1995 (LRA) and all the time and other constraints that accompany suspensions".[874] The principal therefore discharged the onus of proving that the PDE committed a ULP and was awarded one month's remuneration as compensation.[875]

Similarly, the principal in *Daniels* was also placed on special leave pending an investigation by the PDE into allegations of theft and fraud against the principal.[876] The PDE admitted that it was unlikely the disciplinary hearing would be conducted within a month's time since the applicant obtained legal representation and "consideration had to be given to the diaries of the attorneys".[877] The arbitrator noted that the PDE

[867] PSES475-16/17 EC.
[868] PSES485-09/10 WC.
[869] *Kalipa v Department of Education Eastern Cape* PSES475-16/17 EC paras 6-7.
[870] Para 9-12.
[871] Paras 9-10.
[872] Paras 28, 35.
[873] Para 24.
[874] Para 27.
[875] Paras 33 and 36.
[876] *SADTU obo Daniels v Department of Education Western Cape* PSES485-09/10 WC para 19.
[877] Paras 21-23.

elected to place the principal on special leave even though the surrounding circumstances indicated that he should have been suspended.[878] The arbitrator found that the PDE circumvented the procedure in item 6(2) of Schedule 2 of the EOEA by placing the principal on special leave, but that the reality was that he had been suspended.[879] The arbitrator ordered the PDE to withdraw the unfair suspension.[880]

The last issue concerning precautionary suspension is the position where educators on precautionary suspension appeal against the outcome of a disciplinary hearing. In *Ntuli v Department of Education Free State* ("*Ntuli*")[881] the applicants were suspended pending an investigation into alleged misconduct.[882] The arbitration award does not mention the type of misconduct investigated. The outcome of the disciplinary hearing was that the applicants were dismissed. They then appealed against the outcome of the disciplinary hearing.[883] Despite the appeal not being finalised, the issue at arbitration was whether the employer must withdraw the precautionary suspension pending the outcome of the appeal.[884] It should be noted that the applicants at all times were suspended with pay.[885] The arbitrator was of the view that the investigation and disciplinary hearing were concluded and in the absence of a justifiable reason by the employer, the suspension no longer served a purpose other than to punish the applicants.[886] He found the ongoing suspension to be unfair, amounting to a ULP and awarded three months' remuneration as compensation.[887]

This view is clearly incorrect. It is far-reaching and may have a serious impact – also on learners – in circumstances where serious misconduct has already been committed, the educator already found guilty, and the educator already dismissed. Even if this view is correct, item 6(2) of Schedule 2 of the EOEA offers an alternative to a precautionary suspension that may be used in such a case, which is that the educator may be transferred to another post if the employer believes that the presence of the educator may endanger the well-being or safety of any person at the workplace. The best solution, however, probably lies in an amendment to item 6(2) of Schedule 2

[878] Para 31.
[879] Paras 40-41.
[880] Paras 41-42.
[881] PSES183-14/15 FS.
[882] *Ntuli v Department of Education Free State* PSES183-14/15 FS para 12.
[883] Para 13.
[884] Para 13.
[885] Para 13.
[886] Para 16.
[887] Paras 18-22.

of the EOEA. Seeing that it continues to be a precautionary suspension, the suspension will be extended on full pay, ameliorating the prejudice to the employee.

6 4 4 Poor work performance due to incapacity

Since the establishment of the ELRC in 1994, there have only been 16 arbitration awards issued that were classified as "unfair dismissal – poor work performance" across all ELRC provincial chambers.[888] The ELRC classified these 16 arbitrations separately from poor work performance as a type of misconduct.[889] As discussed earlier, it is possible to be charged with poor work performance as misconduct in terms of section 18(1)(l) of the EOEA, which describes this type of misconduct as where an educator "performs poorly or inadequately for reasons other than incapacity".[890] The arbitrations classified by the ELRC as "unfair dismissal – misconduct" between 2014 and 2019 in four provinces (Eastern Cape, Western Cape, Free State and Limpopo) included five (of 106) arbitrations where at least one of the alleged types of misconduct was poor work performance as described in section 18(1)(l) of the EOEA.[891] These awards were discussed earlier where it was pointed out that in almost all of these cases there was actually more serious misconduct involved (and "poor performance" typically served as an alternative charge). The point was also made that the "poor performance" in section 18(1)(l) of the EOEA is best amended to reflect what it actually is – either the intentional dereliction of duty, or the negligent failure to perform duties or to negligently perform them below reasonable expectations.

As discussed in chapter 5, poor work performance due to incapacity relates to an inability or lack of skills, which prevents the educator to perform the work to the

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[888] See ELRC "Unfair dismissal – poor work performance" (2020) *ELRC* <https://www.elrc.org.za/awards?field_case_number_value=&field_issue_value=Unfair+Dismissal+-+Poor+Work+Performance&field_province_value=All&field_award_date_value%5Bvalue%5D%5Byear%5D=&keys=> (accessed 09-09-2020).

[889] See ELRC "Unfair dismissal – misconduct" (2020) *ELRC* <https://www.elrc.org.za/awards?field_case_number_value=&field_issue_value=Unfair+Dismissal+-+Misconduct&field_province_value=All&field_award_date_value%5Bvalue%5D%5Byear%5D=&keys=> (accessed 14-09-2020).

[890] Section 18(l) of the EOEA.

[891] In the following arbitrations there were fourteen charges of poor work performance related to fourteen separate incidents. See *SADTU obo Henderson v Department of Education Western Cape* PSES68-15-16 WC; *NAPTOSA obo Rhoda v HOD Western Cape Department of Education* PSES152-16:17WC; *NAPTOSA obo Kukulela v Department of Education Eastern Cape* PSES17-16:17 EC; *Maphutse v Department of Education Free State* PSES88-14:15 FS; *Motatinyane v Department of Education Free State* PSES849-15:16FS.

standard of performance that is expected.[892] The poor work performance is not due to fault on the part of the employee.[893] Conversely, poor work performance as misconduct implies that the employee does in fact have the necessary ability or skill to perform the work, but negligently or intentionally fails to do so.[894] It should be clear that this is fertile ground for confusion, which may be exploited by an educator to avoid sanction for misconduct by arguing that more accommodating incapacity procedures should be followed. In the *Rhoda* arbitration discussed earlier, for example, the trade union representative representing the employee argued that the employer should not have dismissed the employee for misconduct, but should have approached it from the perspective of incapacity.[895] This means the employer (and the arbitrator) must analyse the facts and determine whether steps should be (or were supposed to be) taken based on misconduct or incapacity. As mentioned by the arbitrator in *Rhoda* in respect of the argument raised in that case: "it is clear that [the] applicant could do what was required, but simply failed to do so due to indifference. That is not incapacity; it is misconduct".[896]

This is an important distinction to draw since it influences the procedure followed by the employer to address the poor performance in question. Where it is an instance of negligent or intentional poor work performance, the employer will take disciplinary steps against the employee based on misconduct. In such a case, the employer must adhere to the misconduct provisions of the Dismissal Code and EOEA to ensure substantive and procedural fairness. Where it is an instance of poor work performance due to incapacity, a different process (also prescribed by the Dismissal Code and EOEA) must be followed by the employer to ensure fairness. As the discussion in chapter 5 showed, the required procedure in case of incapacity is one of support.[897] In *Gold Fields*, JP Waglay emphasised that:

> "In order to find that an employee is guilty of poor performance and consider dismissal as an appropriate sanction for such conduct, the employer is required to prove that the employee did not meet existing and known performance standards; that the failure to meet

[892] Garbers et al *Essential Labour Law* 240; *ZA one (Pty) Ltd t/a Naartjie Clothing v Goldman NO* 2013 34 ILJ 2347 (LC) para 78.
[893] Garbers et al *Essential Labour Law* 240.
[894] 240; *ZA one (Pty) Ltd t/a Naartjie Clothing v Goldman NO* 2013 34 ILJ 2347 (LC) para 78.
[895] *NAPTOSA obo Rhoda v HOD Western Cape Department of Education* PSES152-16:17WC para 47.
[896] Para 47-48.
[897] See chapter 5 above; Garbers et al *Essential Labour Law* 240.

> the expected standard of performance is serious; and that the employee was given sufficient training, guidance, support, time or counselling to improve his or her performance but could not perform in terms of the expected standards. Furthermore the employer should be able to demonstrate that the failure to meet the standard of performance required is due to the employee's inability to do so and not due to factors that are outside the employee's control".[898]

The 16 arbitrations heard by the ELRC and classified as "unfair dismissal – poor work performance" are summarised in Table 10 below with reference to the charge(s) in each matter, the issue to be determined at arbitration, the result and whether the applicant was charged in terms of the EOEA.

[898] *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration* (2014) 35 ILJ 943 (LAC) para 25.

Table 10: ELRC arbitrations classified as "unfair dismissal – poor work performance":[899]

	Case	Charge	Issue	Arbitration result	EOEA Charge
1	*Arries*[900]	Dishonesty, poor performance	Unfair dismissal	Fair dismissal	No
2	*Kgosana*[901]	Poor performance, insubordination	Unfair dismissal	Fair dismissal	No
3	*Letebele*[902]	Section 18(1)(l): Poor performance	Unfair dismissal	Fair dismissal	Yes
4	*Mabusela*[903]	No charges – PDE unilaterally stopped paying the employee and alleged he was dismissed	Unfair dismissal	Unfair dismissal	No
5	*Malatji PF*[904]	Section 18(1)(i): Insubordination Section 18(1)(q): Improper conduct	Unfair labour practice	No jurisdiction in re assault, other claims dismissed	Yes
6	*Mapendo*[905]	Poor performance	Unfair dismissal	Fair dismissal	No
7	*Maphalle*[906]	Gross insubordination, dereliction of duties	Unfair dismissal	Fair dismissal	No
8	*Mahala*[907]	Contravention of invigilation guidelines prejudiced the administration discipline and efficiency of the department and colluded with other lecturers to leak the examination paper	Inquiry by arbitrator – Section 188A	Three months suspension without pay was a fair sanction	No

[899] This table was compiled using ELRC arbitration awards classified as "unfair dismissal – poor work performance".
[900] *Arries v Department of Education Western Cape* PSES72-13/14WC.
[901] *NUPSAW obo Kgosana v Department of Education Western Cape* ELRC90-14/15.
[902] *Letebele v Department of Education North West* PSES14 – 14/15NW.
[903] *Mabusela v Department of Education Eastern Cape* PSES1097 EC.
[904] *Malatji v Department of Education Mpumalanga* PSES137-14/15 MP.
[905] *SADTU obo Mutambala, Mapendo v Department of Education Free State* PSES527-15/16FS.
[906] *Maphalle v Department of Higher Education and Training Limpopo* PSES703 - 17/18LP.
[907] *Kagiso Augustine Mashala v Department of Education Limpopo* ELRC 60-15/16 LP.

9	*Mofokeng*[908]	Section 17(1)(a): Fraud (promotional reports) Section 18(1)(i): Insubordination Section 18(1)(l): Poor performance	Unfair dismissal	Unfair dismissal	Yes
10	*Motswatswa*[909]	Section 18(1)(i): Insubordination	Unfair dismissal	Fair dismissal	Yes
11	*Ngozo*[910]	Operational requirements	Unfair labour practice	No unfair labour practice	No
12	*Phalane*[911]	Section 17(1) and section 18(1)(f): Fraudulently progressing five learners to the next grade	Unfair dismissal	Fair dismissal	Yes
13	*Roelofze*[912]	Section 18(1)(l): Poor performance Section 18(1)(f): Prejudiced the administration	Unfair dismissal	Unfair dismissal	Yes
14	*Sibiya*[913]	Disrespectful behaviour, Insubordination, Prejudiced administration	Unfair dismissal	Fair dismissal	No
15	*Tshabalala*[914]	Section 18(1)(l): Poor work performance	Fairness of the sanction of a fine of one month's salary	Fair sanction	Yes
16	*Vumendlini*[915]	Section 18(1)(a): Contravenes Act Section 18(1): Improper conduct Section 18(1)(f): prejudiced the administration	Unfair dismissal	Fair dismissal	Yes

[908] *SADTU obo Nozinja Evelyn Mofokeng v Department of Education Free State* PSES338-10/11FS.
[909] *SB Motwatswa v Department of Education Gauteng* PSES30 - 14/15GP.
[910] *JD Ngozo v Department of Education Free State* PSES91-15/16FS
[911] *SADTU obo Phalane S.K. v Department of Education Limpopo* PSES526-14/15.
[912] *SC Roelofze v Department of Education Free State* PSES559-14/15 FS.
[913] *PGP Sibiya v Department of Education KwaZulu-Natal* PSES278-16/17.
[914] *MS Tshabalala v Department of Education Free State* PSES435-14/15.
[915] *WD Vumendlini v Department of Education Free State* PSES157-13/14 FS.

All 16 arbitrations surveyed are described in the heading of the award as relating to "unfair dismissal – poor work performance". However, the awards also include ULPs and a section 188A inquiry by an arbitrator.[916] Furthermore, 14 of the awards expressly mention that the charges were based on misconduct, which is confirmed by the facts that were before the arbitrator. It should be noted that the arbitrations in *Maphalle*[917] involved a Technical and Vocational Education and Training ("TVET") College and *Kgosana*[918] and *Mashala*[919] involved FET Colleges.[920] This is important because it explains why employees in those matters were not charged in terms of the EOEA even though the poor performance amounted to misconduct.[921] The EOEA is only applicable to employees employed at public schools (excluding SGB appointed educators) or departmental education offices.[922] Even though this excludes employees employed at FET Colleges or TVET Colleges, these employees are still subject to the rules of SACE and have to be registered with SACE.[923] Jurisdiction of the ELRC is extended to the state as employer represented by the Department of Higher Education and Training in regard to TVET Colleges (which includes FET Colleges).[924] Employees at these colleges will therefore usually be charged in terms

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[916] See *Malatji v Department of Education Mpumalanga* PSES137-14/15 MP, *Kagiso Augustine Mashala v Department of Education Limpopo* ELRC 60-15/16 LP and *MS Tshabalala v Department of Education Free State* PSES435-14/15.

[917] *Maphalle v Department of Higher Education and Training Limpopo* PSES703 - 17/18LP.

[918] *NUPSAW obo Kgosana v Department of Education Western Cape* ELRC90-14/15.

[919] *Kagiso Augustine Mashala v Department of Education Limpopo* ELRC 60-15/16 LP.

[920] TVET Colleges and FET Colleges are administered by the Department of Higher Education and Training ("DHET") because these colleges are "post-school education and training". The functions relating to FET Colleges were transferred from provincial competence to national competence. The Further Education and Training Colleges Amendment Act 3 of 2012 amends the FET Colleges Act 16 of 2006 removing the functions from provincial education departments to the DHET. The Western Cape Annual Report 2013/2014 explained that: "The Department of Higher Education and Training (DHET) was established in May 2009 with the intention that it will ultimately be responsible for higher education institutions, including FET colleges, SETAs and Adult Education and Training Centres". Persons attending a TVET College must be 16 years or older but are not required to have completed grade 12 and passed the National Senior Certificate. Persons who have completed grade 9 can also be admitted to a TVET College. See the official DHET TVET Colleges website <http://www.tvetcolleges.co.za/Site_Overview.aspx> (accessed 16-09-2020).

[921] See *Matome Maphalle v Department of Higher Education and Training Limpopo* PSES703 - 17/18LP para 8 where the charges were "gross insubordination and dereliction of duties". See also *NUPSAW obo Kgosana v Department of Education Western Cape* ELRC90-14/15para 6 where the charges were "refusal to obey instructions and insubordination" and *Kagiso Augustine Mashala v Department of Education Limpopo* ELRC 60-15/16 LP para 2 noted a "contravention of invigilation guidelines, prejudiced the administration discipline and efficiency of the department and colluded with other lecturers to leak the examination paper".

[922] Section 2 of the EOEA.

[923] See s 3 of the SACE Act which expressly includes lecturers in terms of the FET Colleges Act 16 of 2006.

[924] See ELRC Constitution General Provisions Part A <https://www.elrc.org.za/publications/elrc-constitution> (accessed 10-06-2021).

of the SACE Code of Professional Ethics or contravention of a disciplinary code and subsequent arbitrations will be heard by the ELRC.

The remaining four arbitrations, namely *Mapendo*,[925] *Sibiya*,[926] *Mabusela*[927] *and Ngozo*[928] do not expressly mention misconduct or were based on charges levelled against educators in terms of sections 17 or 18 of the EOEA. From the facts in *Mapendo* and *Sibiya* it can be inferred that the issue at stake was in fact one of misconduct.[929] In *Mapendo* the arbitrator concluded that the conduct did breach the trust relationship between the educator and employer.[930] The trust relationship between employer and employee can only be broken or tarnished by misconduct. As incapacity is seen as faultless, it does not affect the trust relationship between the parties.

The award in *Sibiya* does not expressly mention misconduct or charges in terms of sections 17 or 18 of the EOEA, but the charges are summarised as disrespectful and insolent behaviour, prejudicing the discipline or efficiency of the school and a failure to carry out a lawful or routine instruction.[931] The facts furthermore reveal that there had been a disciplinary hearing. This also indicates the presence of misconduct. From the facts in *Mabusela* it is clear that the PDE did not follow any pre-dismissal procedure whatsoever. After not receiving his salary, the applicant (principal) enquired from the PDE as to the unilateral termination of his salary and was informed that he was in fact dismissed because "there have been complaints about him, relating to him failing to perform his duties".[932]

Put differently, the facts surrounding all these arbitrations show that they concerned misconduct rather than incapacity, which means that the potential confusion between poor performance as misconduct and poor performance as incapacity seems to extend to the ELRC itself (as far as classification of awards go). Two arbitrations may be used as examples to illustrate that this confusion – and even manipulation - of the underlying reason for steps against an educator extends to the PDEs as well.

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[925] *SADTU obo Mutambala, Mapendo v Department of Education Free State* PSES527-15/16FS.
[926] *PGP Sibiya v Department of Education KwaZulu-Natal* PSES278-16/17.
[927] *Mabusela v Department of Education Eastern Cape* PSES1097 EC.
[928] *JD Ngozo v Department of Education Free State* PSES91-15/16FS.
[929] See the arbitrators' analysis of the charges in *SADTU obo Mapendo v Department of Education Free State* PSES527-15/16FS para 40-52 and *Sibiya v Department of Education Kwazulu-Natal* PSES278-16/17 paras 63, 66 and 69-70.
[930] *SADTU obo Mapendo v Department of Education Free State* PSES527-15/16FS para 54.
[931] See *Sibiya v Department of Education Kwazulu-Natal* PSES278-16/17 para 7.
[932] See *Mabusela v Department of Education Eastern Cape* PSES1097 EC para 2.1.

In *Ngozo* the PDE used operational requirements as a reason to offer the principal of an underperforming school the option of early retirement or transfer to a different school.[933] The school had a grade 12 failure rate of 26% under the principal's leadership, which improved to a 100% pass rate after he was transferred to a different school.[934] The principal in question had been an educator since 1982, but it is unclear from the facts of the arbitration how long he had been a principal before being transferred in 2014.[935] The principal argued that his transfer was a ULP by the PDE, that it was irregular and in contravention of section 8(1)(a), (2) and (4) of the EOEA.[936] The problem faced by the arbitrator at the ELRC was that disputes arising from the transfer of employees do not fall under section 186(2) of the LRA, meaning that they are generally not arbitrated as a ULP.[937] The principal in this instance agreed to the transfer and retained his previous remuneration and benefits.[938] In light of the above, the arbitrator found that the employer's conduct was not a ULP in terms of section 186(2) of the LRA.[939] The arbitrator did mention that the principal elected to refer a dispute about a ULP to the ELRC, whereas he had the option to rely on unfair administrative action in a civil court which could have resulted in a review of the employer's decision.[940]

Considering the facts of this case, it may be argued that the PDE should not have transferred the principal in the first place and that an investigation into the reason for the school's underperformance would have been more appropriate. In this way, the PDE could have instituted disciplinary steps should such an investigation reveal negligence or intentional misconduct. Alternatively, the PDE could have identified whether the school's underperformance was due to the principal's incapacity and an absence of the necessary ability or skill to perform his duties or whether external factors were impacting the school's performance. Simply transferring the principal,

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[933] *Ngozo v Department of Education Free State* PSES91-15/16FS para 3.
[934] Para 4.
[935] Para 3.
[936] Para 5; Section 8(1)(a) determines that an HOD may transfer educators "with the prior approval of the person in that other department of State … and with the consent of that educator". Section 8(2) determines that "no transfer to any post on the educator establishment of a public school shall be made unless the recommendation of the governing body of the public school had been obtained". The argument by the applicant was that his transfer did not meet the above requirements regarding the approval obtained by the SGB.
[937] *Ngozo v Department of Education Free State* PSES91-15/16FS para 9.
[938] Para 9-10.
[939] Para 12.
[940] Para 12.

while providing possible immediate relief at the school in question, does not address the underlying issue and merely locates the problem elsewhere.

In *Roelofze v Department of Education Free State* ("*Roelofze*")[941] the PDE dismissed the principal for poor work performance in terms of section 18(1)(l) of the EOEA (poor performance as misconduct). It is worth mentioning that the principal was charged with poor work performance despite receiving a 74% performance assessment for the preceding three years in respect of his professional management of the school.[942] This is already indicative of the fact that the charge of poor performance was not related to the capacity of the principal. The PDE, however, wanted to hold the principal accountable for failing to act against an educator of the school who displayed the "old South African flag" (the flag used prior to the democratic era) and "pictures of monkeys with Julius Malema" (political figure) in his classroom.[943] The problem faced by the PDE as employer was that it could only hold the principal accountable for misconduct flowing from a failure concerning the professional management of the school[944] and not for governance issues that fall within the jurisdiction of the SGB.[945] The arbitrator mentioned that:

> "It has to be borne in mind that neither the display of the old flag, nor the display of the alleged offending image per se (in itself) constitutes any offence of any nature. It is for example not forbidden by legislation. It is very clear that the department realised this in the drafting of its charge sheet and attempted to be very innovative by connecting it to offences, stated in Section 18 of the Employment of Educators Act".[946]

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[941] PSES559-14/15 FS.

[942] *Roelofze v Department of Education Free State* PSES559-14/15 FS paras 139-140. It was mentioned by the arbitrator that the principal's performance measurement was "a rating similar or even higher than probably the norm of ratings for principals on similar levels in general".

[943] *Roelofze v Department of Education Free State* PSES559-14/15 FS para 5.

[944] Para 127. 124. Section 16(3) of SASA determines that "[s]ubject to this Act, and any applicable provincial law the professional management of a public school may be undertaken by the principal under the authority of the Head of Department", whereas Section 16(1) of SASA determines that "the governance of every public school is vested in its governing body and it may perform only such functions and obligations and exercise only such rights as prescribed by the Act".

[945] *Roelofze v Department of Education Free State* PSES559-14/15 FS para 123:
> "The South African Schools Act, Act 84 of 1996, differentiates between the governance on the one hand and the professional management of a public school in South Africa, on the other hand. Section 16(1) of the Act reads: "Subject to this Act, the governance of every public school is vested in its governing body and it may perform only such functions and obligations and exercise only such rights as prescribed by the Act".

[946] *Roelofze v Department of Education Free State* PSES559-14/15 FS para 129.

The PDE failed to prove a link between the principal's alleged failure to act against the educator and the charge of poor work performance relating to his responsibility for the professional management of the school.[947] The principal was reinstated in his position with back pay.[948]

What *Ngozo* and *Roelofze* illustrate is that it is imperative that the employer correctly and in a bona fide manner identify the issue at hand and utilise the legislative framework, including the EOEA and Dismissal Code, to ensure that discipline for misconduct or correction of underperformance due to incapacity is substantively and procedurally fair. Where the issue is one of misconduct, the educator should be charged in terms of sections 17 or 18 of the EOEA. If the employer correctly distinguishes between poor work performance due to incapacity and misconduct, it will ensure that the correct procedure is followed and that the employer bases discipline or correction on a fair reason. Should the matter reach the ELRC, it will already clarify whether the arbitrator is tasked with analysing the matter from an incapacity or misconduct perspective.

In conclusion, the 16 arbitrations surveyed reveal that there have been no referrals to the ELRC regarding a dismissal for poor work performance due to incapacity. There have, however, been referrals to the ELRC for unfair dismissal based on incapacity due to poor health.[949] Considering the state of basic education in South Africa – and also the concerns expressed about the capacity of educators earlier in this chapter and in preceding chapters – it is more probable that this is due to the PDE's failure to utilise the legislative framework to address underperformance rather than it being due to no educators performing poorly due to incapacity.

6 5 Tabulation of the deficiencies in the legislative regulation of individual educator performance

The preceding quantitative and qualitative analysis of discipline and incapacity in the public basic education sector highlighted several deficiencies in the legislative

[947] Paras 129, 147 and 160.
[948] Paras 164-169.
[949] See ELRC "Unfair dismissal: Incapacity – poor health" (2020) *ELRC* <https://www.elrc.org.za/awards?field_case_number_value=&field_issue_value=Unfair+Dismissal+-+Incapacity+-+Poor+Health&field_province_value=All&field_award_date_value%5Bvalue%5D%5Byear%5D=&keys=> (accessed 26-01-2021).

regulation of educator performance. If one juxtaposes the discussion in this chapter with the discussion in preceding chapters, it furthermore becomes apparent that some of the deficiencies evidenced by practice may well have their root cause in systemic deficiencies, a state of affairs which may also sensibly be addressed through adjustment in legislation. Below, these apparent deficiencies are listed, also with the goal to serve – along with further insights from the comparative study in chapter 7 – as the basis for proposals for legislative amendment in chapter 8.

6 5 1 Fragmentation of responsibility and rules

6 5 1 1 Inadequate alignment between the SACE Act and the EOEA and between different levels of government

The current system of regulation of educator performance is unduly fragmented as far as the division of responsibility between the professional body (SACE) and the employer is concerned, a division apparently premised on the fact that SACE deals with "ethics" and the employer with employment-related issues.[950] As far as employment-related issues are concerned, the earlier discussion also showed that public education is an area of (sometimes contested) concurrent competence between the national government and the different provincial governments.[951] Even so, with public education of critical importance to South African society – as is the transparency and accountability that goes with the responsibility of providing quality public basic education – it is commendable that the national government has taken the lead by endeavouring to regulate the performance of educators in the public basic education system through two pieces of national legislation: legislation designed to preserve the integrity of teaching as a profession (through the SACE Act) and legislation designed to regulate the employment of educators (inclusive of their performance) through the EOEA. Even so, the overlap between these two pieces of legislation is clear – ethics and professionalism cannot be divorced from educators' performance (conduct and capacity). One example is the "Proposed Standards of Teaching" currently tested by SACE,[952] which may (and arguably should) be incorporated into the EOEA provisions

[950] See SACE "How to lodge a complaint" (undated) *SACE.*
[951] See Chapter 4.
[952] See Chapter 5.

relating to incapacity as baseline standards of performance for all educators (this issue is further explored below).

A number of further gaps in the alignment between the SACE Act and the EOEA were identified. Three examples will suffice.

First, the SACE Act applies to all educators, inclusive of educators at public schools appointed by the SGBs of schools in addition to the provincial post establishment. In contrast, the EOEA only applies to educators at public schools appointed against the provincial post establishment (and not to educators appointed by the SGBs of public schools in addition to the provincial post establishment). This already sends out a message of a differentiated approach to educator performance at public schools. If the SACE Act applies to all educators at public schools, there is no reason why the EOEA – at least as far as discipline and capacity are concerned – cannot be made applicable to all educators working in the public school system. This would still mean a fragmentation of responsibility in dealing with educator performance (with the PDE as employer in case of educators appointed against the provincial post establishment and the SGB in case of employers appointed additional to the post establishment), but it would mean a consistency in approach to educator performance across public schools. It would also require a simple legislative amendment to the definition of "educator" in section 1 of the EOEA. This, of course, is not to say that the current approach to educator performance in terms of the EOEA is a good one. Below, the many deficiencies in the current regulatory framework are pointed out. But consistency in the approach remains a precondition for its success.

Second, section 26(2) of the SACE Act requires that the Council of Educators be informed in all cases of discipline of educators that result in a sanction other than a "caution or a reprimand". Section 26 of the EOEA contains a similar provision using the same terminology. The immediate problem here is that the EOEA does not use this terminology in its specific rules regulating misconduct. Rather, the sanctions provided for by the EOEA are listed in section 18(3) of that Act and includes counselling, a verbal warning, a written warning, a final written warning, a fine not exceeding one month's salary, suspension without pay for a period not exceeding three months, demotion, a combination of these sanctions, or dismissal. There simply is no mention of a "caution" or a "reprimand". Arguably, both these terms can be construed to include any disciplinary sanction up to and including a final warning, which would mean SACE only has to be informed of fines, suspension, demotions or

dismissal. This is despite broad recognition that at least a final warning already constitutes a serious disciplinary sanction. In short, there is further room for alignment between the SACE Act and the EOEA as far as the reporting obligation on the employer is concerned.

Third, it was also mentioned that reporting to SACE is haphazard and inconsistent across provinces, while SACE itself does not indicate the reasons for steps taken against educators by SACE to identify systemic challenges around certain types of conduct. This requires strengthening of the reporting, record keeping and publication duties in terms of legislation.[953] This, in turn, calls for adjustment of relevant provisions in legislation, such as section 20 of the SACE Act requiring SACE to compile annual reports about its activities. Such an adjustment will have to be done in light of the deficiencies and required adjustments to the system discussed below.

6 5 1 2 Fragmentation of responsibility between the PDE and the principals of public schools

The earlier discussion showed that the principal of a school remains responsible for the imposition of what may be called “informal discipline” in case of “less serious misconduct”, subject to delegation of this responsibility by the PDE.[954] Principals are authorised to impose up to and including a final warning in terms of this approach. At the same time, the principal has to identify and refer serious misconduct to the PDE, which remains responsible for conducting disciplinary enquiries in case of serious misconduct. Curiously, Schedule 2 of the EOEA provides that the delegation of powers to the principal must specify the types of misconduct in respect of which the principal has the power to impose discipline.[955] This despite the fact that Schedule 2 of the EOEA then continues to make it clear that imposition of discipline by the principal depends on the seriousness of the misconduct. “Seriousness” in this context is to be determined by the impact of the conduct on the school, the nature of the educator’s work and responsibilities and the circumstances of the misconduct.[956] While there is nothing wrong, in principle, to regard some types of misconduct as always serious (especially in the context of education) and as warranting a disciplinary enquiry, this

[953] See chapter 4.
[954] Item 4 of Schedule 2 of the EOEA.
[955] Item 4(1).
[956] Item 3(3).

can sensibly be clarified in the legislation. Furthermore, the list of factors determining the seriousness of discipline provides scant guidance to principals and may well lead to inconsistent or overly lenient treatment of misconduct, especially serious misconduct. In summary then, the EOEA itself (or Schedule 2 thereof) should make it clear that certain types of misconduct are always regarded as serious and always warrant a disciplinary enquiry, while it should also provide greater guidance to principals about the seriousness of other instances of misconduct through explanation of all the factors that influence the initial determination of seriousness. Such a preliminary determination should be done with reference to all the well-established factors considered in relation to the appropriateness of a sanction (see below).

6 5 1 3 Fragmentation in the rules applicable to misconduct and incapacity

The earlier discussion showed that the performance (conduct and capacity) of public school educators appointed against the provincial post establishment is regulated by provisions in the Act itself, provisions in Schedules 1 and 2 of the EOEA and also the LRA's Dismissal Code (which is expressly incorporated in Schedules 1 and 2 of the EOEA). At the same time, educators who are appointed by public schools in addition to the post establishment only fall under the LRA's Dismissal Code. Earlier, the point was made that last-mentioned educators (as far as conduct and capacity are concerned) should be brought in under the application of the EOEA. The point, for now, is that there is also room for greater alignment between the EOEA and the LRA's Dismissal Code. Most of these instances are addressed in the discussion below.

6 5 2 Inadequate statistics

The earlier discussion in this chapter analysed the statistics relating to discipline available from the different PDEs' annual reports. This was also done on the basis that the correct identification of specific systemic challenges relating to discipline across the whole system of public basic education and between departments depends on accurate description and record keeping. The fact that public basic education is of critical national concern also demands the accountability and transparency implied by accurate and published statistics. Even so, a number of deficiencies in the reporting system were identified. First, there is an absence of a link in the PDE statistics between the type of misconduct committed and the sanction (including dismissal) imposed.

Requiring record keeping about this will contribute a lot to address an apparent systemic (ab)use of sanctions short of dismissal in cases of what are actually very serious instances of misconduct (the discussion below shall return to this issue). Second, statistics about the use of precautionary suspensions during the disciplinary process – both as far as their duration and the cost to the public purse are concerned – should be mandatory. This will help to address not only the apparent failure to routinely impose precautionary suspensions in case of alleged serious misconduct (even where learners are victims), but also the inordinate delays that were identified to sometimes exist in bringing discipline to finalisation. Third, there is no indication whatsoever from the statistics that incapacity (poor performance) is being or has been addressed at all. Record keeping and the publication of statistics about this should also be mandatory. Fourth, the discussion also showed inconsistency of record keeping between provincial PDEs about misconduct, based on an apparent differentiated understanding of different types of misconduct in sections 17 and 18 of the EOEA. This may be addressed in two ways. The proposed adjustment of the description of misconduct in sections 17 and 18 of the EOEA (discussed below) and the express requirement that statistics should follow the categorisation of misconduct in legislation. In addition, there are questions about the accuracy of categorisation of disputes (by the ELRC) that reach the ELRC. The PDEs should be responsible for keeping statistics about the number of matters referred to the ELRC, the nature of these cases, what was in dispute and what the outcomes of these cases were. Given the national importance of the provision of public basic education there is no reason why this obligation to construct, keep and publish more detail cannot be imposed on all the PDEs and to do so in the EOEA. Lastly, the express obligation on principals to report to the PDE on disciplinary and incapacity procedures dealt with at school level should be included in legislation and included in the annual reports of the PDEs.

6 5 3 The substantive fairness of discipline

The earlier discussion showed that the basic requirements for the substantive fairness of discipline as contained in the LRA's Dismissal Code apply to the employment of educators in public basic education. These principles include the transgression of rules (which presupposes their existence), that these rules have to be valid and reasonable, that employees must be aware of rules, that discipline should be applied consistently

and that sanctions should be appropriate.[957] These principles in mind, the earlier discussion, which focused mainly on the meaning of rules in the public education sector, the sanctions imposed and consistency, provided a number of insights:

(1) Sections 17 and 18 of the EOEA contains an exhaustive list of types of misconduct applicable to the public basic education sector (which may only be augmented after consultation with the trade unions).
(2) Sections 17 and 18 distinguish types of misconduct for which educators must be dismissed and for which they may be dismissed.
(3) The description of the types of misconduct in section 17 – which mainly deals with sexual misconduct, dishonesty and assault – is unfortunate in that they clearly are not only based on a "criminal" approach to discipline but does not recognise and include the seriousness of all misconduct of a sexual nature (especially where learners are involved), dishonesty and assault which routinely result (and is generally recognised, should result) in dismissal. This results in inappropriate charges and, in worst cases, the manipulation of charges to avoid dismissal.
(4) Mindful that one of the goals of any disciplinary code also is to educate the workforce about unacceptable conduct, section 18 of the EOEA first of all shows a fundamental misconception of the nature of misconduct. In its preamble it describes misconduct as "refer[ring] to a breakdown of the employment relationship".[958] Misconduct does not only exist where there is a breakdown in the employment relationship, it exists where there is conduct the employer deems unacceptable. Whether there is a breakdown of the employment relationship relates to the appropriate sanction and may justify dismissal. The preamble to section 18 should be revisited and not only should the nature of misconduct be accurately described with reference to the basic duties of any employee, but it should be made clear that any conduct (even if not on the list) which meets this basic definition may be regarded as misconduct.
(5) While the list of types of misconduct in section 18(1) includes many of the types of misconduct routinely prohibited in all workplaces, the list requires attention in

[957] See generally schedule 8 of the LRA.
[958] Section 18(1) of the EOEA.

a number of ways. First, there is an apparent inconsistency between sections 17 and 18, which already means these two sections should be aligned or, preferably, repealed and combined into one. This will eliminate the identified danger of labelling misconduct so as to avoid dismissal and can be done in such a way that the current message section 17 tries to send (that certain types of misconduct are serious) is retained. Second, some of the types of misconduct (especially related to the sexual abuse of learners) should be aligned to legal developments in the broader field of labour law and criminal law, such as the express inclusion of sexual harassment. Third, some of the types of misconduct in section 18 call for explanation. While it is always a good idea to have catch-all provisions (such as "improper conduct") in any disciplinary code, section 18 will benefit from the replacement and clearer descriptions of some of the types of misconduct on that list. This includes "absenteeism" (which should be differentiated from the abscondment provided for in section 14 of the EOEA) and the often misunderstood "poor performance" (which should be rephrased to expressly include dereliction of duty and negligence). It also includes "unfair discrimination", which should be rephrased to make it clear that this includes any decision prejudicing or advantaging someone on a ground of discrimination. "Dishonesty" (which, in line with judicial precedent, should be described as any act or omission with the intent to deceive)[959] should become an all-encompassing serious type of misconduct (not only in case of examinations or promotional reports as section 17(1)(a) currently states) and be declared to include fraud, theft, corruption, falsification of records, misrepresentation and the like (without limiting the generality of the word "dishonesty"). Specific provision should be made for "sexual misconduct" and it should expressly include rape, sexual assault/violation/abuse, compelling or exposing a learner to sexual offences or acts, sexual harassment, sexual grooming and relationships with learners at any school[960] (without limiting the generality of the term "sexual misconduct"). It should be made clear that where a learner is the victim of sexual misconduct and due to the double nature of the power relationship involved in teaching

[959] *Nedcor Bank Ltd v Frank* (2002) 23 ILJ 1243 (LAC) para 15.

[960] This is in line with Item 3 of the SACE Code of Professional Ethics and the Department of Basic Education "Protocol for the Management and Reporting of Sexual Abuse and Harassment in Schools" (2019) *Department of Basic Education* 2.

(teacher/learner and adult/child), consent may not be used as a defence (even where the learner is older than 16). These descriptions will also eliminate some undue duplication present in the current sections 17 and 18. Fourth, there are other instances of an apparent undue duplication or differentiation in sections 17 and 18, which should be addressed. For example, it is incomprehensible why the illegal possession of intoxicating or stupefying substances requires mandatory dismissal in terms of section 17(1)(e), but being under the influence of such substances is dealt with under section 18(1)(p) (discretionary dismissal). Both are serious in the employment context (the more so where educators also have to set an example).

(6) Perhaps the greatest need is for the EOEA to send out clearer signals about sanction for misconduct. The earlier discussion showed that there is apparent confusion created when one juxtaposes sections 17 and 18(3) of the EOEA. Section 18(5) adds to this confusion. The reason for the existence of section 18(5) is incomprehensible. As point of departure section 18(5) should simply be removed from the EOEA. And, if one combines sections 17 and 18 as argued above, then the new section should deal with the imposition of sanction in an appropriate way.

(7) In this regard, it became apparent (most notably illustrated by the cases involving repeat offenders who committed assault against learners) that provision in section 18(3) of at least three sanctions between a final warning and dismissal – a fine, suspension without pay and demotion – results in educators not being dismissed despite serious misconduct. In addition, section 18(3) provides for a combination of sanctions short of dismissal, which leads to the same result. This conclusion is supported by statistics that, on the one hand, showed how often final warnings, suspensions and fines were imposed at disciplinary enquiries and, on the other hand, the low percentage of dismissals that follow on enquiries (bearing in mind that enquiries are reserved for serious misconduct).[961] It was also pointed out that the question around sanction in the employment context is all about an appropriate “risk response” based on the intolerability of continued employment. It was also pointed out that disciplinary proceedings are not criminal proceedings. If it is justifiably perceived that a final warning will not cure the

[961] Graph 4.

educator's conduct, dismissal should follow. A fine or suspension without pay adds nothing to answer the question whether the risk has been addressed. There also is no general principle of labour law that these sanctions should be provided for. The possibility of the imposition of fines and suspension without pay should be removed. Demotion may be retained, but then only in limited circumstances where the nature and circumstances of the misconduct relates to employment at a certain level and in answering the question whether such a step will remove the risk of the misconduct re-occurring and make continued employment tolerable. This would mean that demotion (in conjunction with a final warning) is not imposed as an alternative to dismissal, but as an appropriate sanction. The current position - that demotion as a sanction is generally available but may only be imposed as an alternative to dismissal and with consent of the educator - simply is nonsensical. Once the decision has been reached that dismissal is appropriate, then dismissal should follow. The idea and effect behind and of discipline cannot be to create bargaining chips to preserve employment in case of serious misconduct. In short then, fines and suspension without pay as possible sanctions should be removed from the EOEA and demotion (even in the absence of consent) should be limited as explained above.[962]

(8) The reasoning in (7) above will restore the status and use of final warnings as a serious sanction and the only real alternative to dismissal.[963] This also implies that any conduct that may result in either a final warning or dismissal should be subject to a disciplinary enquiry and removed from the purview of school principals (as discussed above).[964] The time period of validity of final warnings should also be increased, in line with general practice, to at least twelve months (up from the current 6 months).[965]

(9) The current indications of the basis on which the EOEA views the seriousness of misconduct are the unfortunate provisions of sections 17 and 18(5) of the EOEA (discussed above), the bland assertion in section 18(3)(i) that dismissal may be

[962] This will require an amendment to s 18(3) of the EOEA and the corresponding provisions in Schedule 2 of the EOEA.

[963] For example, in *SADTU obo Macanda v HOD Western Cape Education Department PSES506-16/17WC,* the educator received three written warnings and six final written warnings, three of which were for insubordination and were valid during the same six-month period, before being dismissed on the 10th occasion of misconduct (for locking the principal in a classroom).[963]

[964] This would require an amendment to Schedule 2 of the EOEA.

[965] See item 4(5) of Schedule 2 of the EOEA.

imposed “if the nature and extent of the misconduct warrants dismissal”, the limited provisions of item 3(3) of Schedule 2 to the EOEA, and the provisions of item 8 of Schedule 2, which are also not very helpful. These provisions were all discussed earlier in the text. This already shows a confusing and fragmented approach to sanction (and the possible use of dismissal as such a sanction). Furthermore, the earlier discussion identified a number of principles and deficiencies relating to sanction that should be incorporated and addressed through a more comprehensive express provision in the legislation itself, or in Schedule 2 of the EOEA. First, Schedule 2 of the EOEA expressly incorporates the LRA’s Dismissal Code in the approach to discipline in the public basic education sector. Second, this means that the provisions of the Dismissal Code may be more explicitly incorporated - in particular, the principles that dismissal is generally reserved for serious or repeated misconduct, that the seriousness of misconduct is determined by whether continued employment is intolerable and, that this, in turn, is determined by the gravity of the misconduct, consistency, the employee’s circumstances (such as length of service, previous disciplinary record and work-related personal circumstances), the circumstances of the infringement itself and the nature of employment as an educator.[966] Third, this means that it is for the employer to identify what it regards as serious misconduct. And, fourth, clearly absent from legislation is proper recognition that where the victim of misconduct committed by an educator (who is also an adult) is a learner (who is also child), the misconduct invariably is exceptionally serious. Legislation should say so. And, on top of this, legislation should indicate – also in circumstances where learners are not necessarily the victims of misconduct - what types of misconduct are regarded as dismissible (notably, violence and dishonesty).

(10) The last substantive issue considered in this chapter was consistency. The discussion showed that in those instances where the ELRC considered challenges of inconsistency, the challenges were unsuccessful. Nevertheless, it may be useful to expressly incorporate the established principles around the consistent application of discipline into at least Schedule 2 of the EOEA. Notable, in this regard, is the approach that inconsistency challenges have to be raised

[966] See item 3 of the LRAs Dismissal Code.

properly by the educator, consistency is not a hard and fast rule, and that no employee stands to benefit from an earlier, clearly inappropriate decision.

6 5 4 Procedural fairness

As far as the fairness of disciplinary procedures is concerned, the earlier discussion of Schedule 2 of the EOEA showed that the approach in the basic education sector at face value is legalistic and formalistic and not in line with the more informal approach to disciplinary procedures advocated by the LRA and accepted by the courts. This already creates room for an express statement in at least Schedule 2 of the EOEA that its content should be seen as guidelines and may be deviated from with good reason. The discussion also showed that, while some provinces (such as the Western Cape) have a good record where procedural fairness is concerned, this is not the case with other provinces. The detail around the relevant ELRC arbitrations also showed that one fundamental problem is the undue delay experienced in finalisation of disciplinary enquiries, often at the instigation and in accommodation of demands for postponements made by employees and their trade union representatives (an issue which also closely relates to the use of precautionary suspensions discussed below). In this regard, Schedule 2 of the EOEA does not expressly deal with the approach to postponements but contain many provisions that may result in delays and impact on the discretion of the presiding officer. These include:

(1) The right of the educator to be represented by “a” trade union representative (which, it has to be added, is not the same as the right to be represented by a specific trade union representative);
(2) The right of the educator to legal representation if the presiding officer so directs. In this regard, it is noteworthy that the Rule 25(1)(c) of the Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration (“CCMA Rules”)[967] expressly excludes legal representation in case of disputes about the fairness of dismissal for misconduct or incapacity. That rule also provides that legal representation remains subject to the discretion of the commissioner (irrespective of agreement between the parties), which has to be exercised in light of certain factors.[968] These factors include the nature of the

[967] GN 194 in *GG* 43038 of 21-02-2020.
[968] Rule 25(1)(c)(i).

questions of law raised by the matter, the complexity of the dispute, the public interest and the comparative abilities of the parties to present their cases.[969] It should be added that most misconduct cases are relatively straightforward and do not warrant legal representation. It is suggested that Schedule 2 of the EOEA be strengthened to reflect these principles.

(3) Rather curiously, Schedule 2 of the EOEA provides that the employer must do everything possible to conclude a disciplinary enquiry within a month, but only where the educator has been suspended or transferred pending the enquiry. This, despite other indications in Schedule 2 that discipline must be prompt and enquiries concluded in the shortest possible time. This should remain the general goal and should be stated as such in Schedule 2. As mentioned, Schedule 2 also provides for a further process where the educator is suspended pending an enquiry – including an enquiry into the reasons why the enquiry is not finalised and the power to direct that a further suspension be without pay. Associated challenges may be addressed in two ways. First, as argued above, the requirement for all the different PDEs to also publish statistics about the number, duration and financial implications of all precautionary suspensions pending enquiries should go a long way to limit delays. Second, the authority to expeditiously rule that any further suspension will be without pay may fruitfully be given to the presiding officer him- or herself (and not be made dependent on an enquiry within an enquiry by the employer).

(4) The EOEA itself,[970] read with Schedule 2 of the EOEA,[971] provides for a cumbersome process of internal appeal to the MEC and also provides that the sanction imposed may not be implemented pending appeal. Furthermore, there is some uncertainty about the continuation of a precautionary suspension pending finalisation of the appeal. This is against the backdrop of the LRA's Dismissal Code, which does not even require an internal appeal for the process to be seen as fair (seeing that employees have quick and speedy recourse at the CCMA, or, in this case, the ELRC). Three commendable features of the appeal process are that it is limited to certain sanctions (which will be further reduced if the earlier suggestions are adopted), the employer may also appeal against the

[969] Rule 25(1)(c)(ii).
[970] Section 25 of the EOEA.
[971] Item 9 Schedule 2 of the EOEA.

outcome of an enquiry and the fact that a harsher sanction may be imposed on appeal which, as the earlier discussion showed, did happen in some cases. Even so, it is suggested that there are unfortunate aspects of this appeal process – it requires involvement of the MEC, it necessarily requires the full record of the enquiry to be made available and provision is made for further representations. It is suggested that the authority to consider any appeal should simply be given to a higher level of management within the PDE, the appeal should be reconstituted as a "reconsideration" of the outcome of the enquiry (which does not necessarily require the full record) and that no such reconsideration will take place in the absence of specific reasons raised by the educator that may warrant a different outcome.

(5) The last procedural issue identified by the earlier discussion relates to the use of section 188A of the LRA (a pre-dismissal enquiry by an arbitrator) in sexual misconduct cases. This is currently contained in a collective agreement, but, as the statistics showed, is hardly used in practice. The argument in favour of the use of section 188A enquiries is to eliminate the need for learners to testify on more than one occasion in sensitive and difficult circumstances. Use of section 188A, of course, also eliminates the possibility of an internal appeal (which addresses some of the reservations about delays expressed above). At the same time, the earlier discussion showed that arbitrators of the ELRC in general have a good understanding of the gravity of certain types of misconduct (especially sexual misconduct) in the basic education sector. Currently, the only provision in the EOEA itself or in Schedule 2 is provision for evidence to be given through an intermediary where the witness is under 18 years of age and would be exposed to undue mental stress or suffering.[972] This provision, which is not limited to sexual misconduct cases, should be retained and, as argued in light of the English experience, be expanded. Importantly, however, consideration should be given to use section 188A not only in sexual misconduct cases (with the definition of sexual misconduct to be amended as discussed earlier), but in any case, where the physical or emotional integrity of learners under the age of 18 was impacted on by the educator's misconduct and/or where testifying may cause undue mental stress or suffering.

[972] Item 7(10A) Schedule 2 of the EOEA.

6 5 5 The use of precautionary suspension

One, particularly concerning issue identified by the earlier discussion, is the lack of use of precautionary suspensions (above, the argument was made that punitive suspensions as a sanction should be done away with completely). Furthermore, only one of the PDEs provided detailed statistics on the use of precautionary suspensions including the cost to the PDE, which, as already mentioned above, should be addressed by strengthening the reporting requirements in legislation. The lack of use of precautionary suspensions becomes even more concerning in those instances where the alleged misconduct impacted on the physical or emotional integrity of learners. Furthermore, in those instances where suspension was imposed, the experience as evidenced by the ELRC awards analysed shows the inordinate delays (and cost) of these suspensions. The current regulation of suspension provides two possible reasons for suspension – the potential impact on the investigation or endangerment of the well-being or safety of any person. Bearing in mind the well-established principles of suspension in terms of the LRA (including the principle recently confirmed by the Constitutional Court that there is no right to a pre-suspension hearing),[973] the provisions of Schedule 2 of the EOEA about suspension should be strengthened to enable suspension where some credible evidence exists that the educator engaged in serious misconduct and that such a suspension is warranted by any one of the seriousness of the alleged misconduct itself, the need to conduct an unfettered investigation, the danger of the misconduct re-occurring, the impact of the alleged misconduct, or a combination of any of these considerations. Should the educator at any stage consider the suspension unfair, the educator may approach the ELRC to claim an ULP. However, as long as the suspension is on full pay and discipline takes place promptly, those challenges will simply be unsuccessful.

6 5 6 Poor performance as incapacity

One stark insight from the earlier chapters is that very little evidence, if at all, exists about incapacity (poor performance) in the basic education sector. This is so, despite the existence of section 16 of the EOEA (which provides for steps in case of an

[973] *Long v SA Breweries (Pty) Ltd & Others* (2019) 40 ILJ 965 (CC), para 24-25.

"incapable educator") and Schedule 1 of the EOEA, which describes what those steps should be. In principle, the provisions of Schedule 1 are in line with the general approach to poor performance (as incapacity), but the fundamental problem seems to be that there is no indication whatsoever in the EOEA about what the basic standards are according to which educators should perform their duties. What exactly these duties are, of course, will be subject to the conditions of every specific appointment. Furthermore, the discussion in chapter 5 provided an overview of initiatives in this regard taking place through negotiation at the ELRC. At the same time, and mindful of the need for alignment between the SACE Act and the EOEA, SACE has provided an important lead in disseminating proposed standards applicable to all educators at public schools. Further mindful of the need for transparency, accountability and public confidence in the public basic employment sector, there is no reason – much like the EOEA already includes a list of types of misconduct – why these standards cannot be included in section 16 of the EOEA as the baseline standards every educator should meet (and which may be made subject to the specifics of every appointment). If one follows the lead of SACE's proposed "Professional Teaching Standards" ("PTS")[974] (and reorder and adapt these standards somewhat) this would, for example, include:

"1. An overarching commitment to the learning and wellbeing of all learners.
2. Collaboration with others to support teaching, learning and their professional development.
3. Support of social justice and the redress of inequalities within their educational institutions.
4. Creating and maintaining well-managed and safe learning environments.
5. A fundamental understanding of the subject/s they teach.
6. The ability to make thoughtful choices about their teaching that lead to the achievement of learning goals for learners.
7. The planning of coherent sequences of learning experiences.
8. The understanding and effective application of teaching methodologies.
9. The timeous, accurate and constructive monitoring and assessment of learning.
10. The understanding that skills associated with learning in a particular subject may be dependent on associated skills, such as language understanding and use, and the ability to transfer these skills successfully."[975]

[974] SACE "Professional Teaching Standards" (2020) *SACE* <https://www.sace.org.za/assets/documents/uploads/sace_31561-2020-10-12-Professional%20Teaching%20Standards%20Brochure.pdf> (accessed 23-10-2021).
[975] SACE "Professional Teaching Standards" (2020) *SACE* 8-11.

What was also clear from the preceding discussion, was that allegations of "poor performance" were often levelled against school principals. In this regard, it must be emphasised that the standards that are (and should be) expected of principals are, of necessity, quite different from those involved in actual teaching. In this regard, it is worth reminding oneself that the functions and responsibilities of principals at public schools are provided for in section 16 and 16A of SASA. As mentioned in chapter 4, section 16(3) makes the principal responsible for the professional management of the school.[976] The term "professional management" is, however, not defined in SASA. In this regard, section 16A of SASA provides the necessary guidance.[977] It is proposed that a cross reference to section 16A of SASA be expressly included in section 16 of the EOEA (or those provisions should be duplicated in the EOEA).

Ultimately, however, maintaining standards of performance is, in the first instance a question of successful performance management (as a precondition for identification of deviations from those standards). It starts with the appointment of suitably qualified and committed individuals to do the job and to continuously monitor their performance. Bearing in mind that the duty to perform competently rests on every employee, there is nothing wrong with the employer making systemic adaptations or imposing requirements to ensure the delivery of quality basic education. In this regard, the steps taken in England (discussed in chapter 7) regarding the two-year induction period for new teachers as well as continuous appraisal are instructive. Future consideration could be given to the inclusion of a similar process in the EOEA. Furthermore, the earlier discussion also highlighted the use of and resistance to standardised assessments (also of teachers) to identify systemic lapses, if not individual underperformance. It is submitted that express provision could be made in legislation sanctioning the use of such assessments. As mentioned earlier, statistics about the use of incapacity procedures should be included in the statistics provided by the different PDEs.

[976] Section 16(3) of SASA.

[977] In an attempt to give meaning to the term, Van der Merwe noted that it requires "the management of classroom instruction". See S van der Merwe "The Constitutionality of Section 16A of the South African Schools Act 84 of 1996" (2013) *De Jure* 237 241.

6 6 Conclusion

This chapter provided an overview of the experience with discipline and incapacity in the basic education sector. It did so against the backdrop of chapters 4 and 5, which described the applicable regulatory framework.

The chapter first provided an overview of existing research into misconduct and incapacity in the basic education sector. The discussion showed that there is a widespread and shared concern among researchers about the impact of misconduct and incapacity on the delivery of quality basic education, particularly as far as absenteeism, sexual misconduct and general competence are concerned.

Against this background, the chapter provided a statistical overview of the experience with misconduct gathered from the annual reports of PDEs as well as arbitrations conducted by the ELRC for the period 2014 to 2019. This led to a number of insights, including the relatively low number of disciplinary enquiries and a low conversion rate at these enquiries into actual dismissal of educators, especially if it is borne in mind that enquiries are reserved for serious misconduct. The survey also showed that there is a differentiation between the different PDEs in dealing with misconduct as well as the level and detail of statistics provided by the different PDEs. Especially concerning is that no PDE keeps statistics about the actual reasons for dismissal, which means that there is no basis to fundamentally analyse how effectively specific types of misconduct are viewed and dealt with by the different PDEs. As mentioned, the effective management of specific types of misconduct and incapacity starts with an accurate description of the experience with those types of misconduct and incapacity. At least there is sufficient information to identify what the most prevalent types of misconduct dealt with at enquiries were. This information was also used to delimit consideration of actual ELRC arbitrations in paragraph 6 4 of the chapter. For the reasons explained, this was further limited to a consideration of awards in relation to the Western Cape, Free State, Limpopo ad the Eastern Cape provinces.

In paragraph 6 4, 138 arbitration awards of the ELRC issued in respect of these four provinces were considered to provide an overview of the experience in relation to the substantive and procedural fairness of steps based on misconduct, suspension and poor performance as incapacity.

As far as the substantive fairness of steps based on misconduct is concerned, the experience with seven types of misconduct as evidenced by these awards was analysed – poor performance (as misconduct), absenteeism, mismanagement of finances, dishonesty, improper conduct, sexual misconduct and assault. At a first level, this analysis showed the sometimes egregious nature of the misconduct that takes place in our schools. At a deeper level, this description led to a number of insights, including, for example, that while some of these types of misconduct are often relied on (such as poor performance and improper conduct), they often are not the primary misconduct involved and create the risk of sanitising what may be more serious misconduct; that some of these types of misconduct such as poor performance and mismanagement of finances, for the most part, were used to discipline and dismiss principals (and not first-line educators); that, as far as absenteeism is concerned, section 14 of the EOEA provides a strong mechanism to address this problem (even though it still is sometimes incorrectly applied); that sexual misconduct remains beset with difficulties due to the confusing approach of and terminology used by the EOEA; that the agreement of using section 188A of the LRA to address sexual misconduct has hardly been used at all; and that, in considering serious assault, the primary weakness perhaps lies in the availability of a number of sanctions short of dismissal in terms of section 18(3) of the EOEA, the resultant continued employment of educators guilty of assault and the obvious risk of re-offending. The analysis of the awards in relation to substantive fairness also exposed the sometimes poor decision-making and poor commitment of role players involved in the application of discipline, which ranged from inappropriate categorisation or description of misconduct to simply not being present at arbitrations at the ELRC. The chapter also provided a brief overview of the experience with consistency as part of substantive fairness and showed that educators have not been able to challenge consistency successfully.

As far as procedural fairness is concerned, one immediate insight was the difference in success across different PDE's in ensuring procedural fairness of discipline (with the Limpopo PDE being particularly poor). A further particularly alarming aspect of the disciplinary procedure in practice is the sometimes undue accommodation of requests for postponement (and resultant delays) of disciplinary enquiries, often where trade unions represent educators at these enquiries.

The discussion also considered 16 arbitrations where the fairness of suspension – both precautionary and punitive – was challenged. The earlier discussion had

already shown that precautionary suspension is not always used in conjunction with even serious misconduct (such as assault). Statistics from the Western Cape PDE confirmed that precautionary suspensions are used in only a fraction of disciplinary cases. Particularly concerning is that in several instances precautionary suspension was found to be unfair, typically as a result of the undue delay in disciplinary proceedings, which often originates in a lack of commitment from the PDE to pursue the matter. In the ordinary course of things, the fairness of a precautionary suspension is a straightforward matter and easily complied with, especially if it takes place in the context of a commitment to finalise the enquiry. And that commitment should arise not only from a commitment to a provision of quality basic education to learners but also from the realisation that delays result in wasted resources. As far as punitive suspensions are concerned, perhaps the greatest insight of this chapter is the extent of its use as a sanction in the basic education sector as an alternative to and sanction short of dismissal. Not surprisingly, punitive suspensions were found to be fair in most arbitration matters where this was at issue (considering that it is an alternative to dismissal which probably should have been imposed in the first instance).

The chapter also considered the experience with poor performance as incapacity. For this purpose, 16 awards issued by the ELRC since its inception and categorised as ‘dismissal – poor performance’ were analysed. The analysis showed that all of these awards concerned dismissal for misconduct, not incapacity. The analysis also showed the confusion that sometimes exists about the distinction between misconduct and incapacity. Ultimately, however, the rather depressing conclusion is that dismissal for poor performance as genuine incapacity has not come before the ELRC. This may be for four possible reasons – that no educator has shown incapacity that justified dismissal, that this has happened but all of these dismissed educators chose not to pursue a dispute at the ELRC, that incapacity exists, but is always dealt with successfully short of dismissal, or that there is no incapacity among the 400 000 or so educators in the basic education sector. That this is highly unlikely is evident from the clear challenges around, for example, content knowledge of educators in South Africa (let alone all the other skills required) discussed in this and earlier chapters. This leads to the inescapable conclusion that incapacity is simply not dealt with as such in the basic education sector.

Based on all of these insights, a host of deficiencies in the current regulation of educator performance were identified in the last part of this chapter. These

deficiencies and resultant proposals for legislative amendment are revisited in the concluding chapter (chapter 8) below.

CHAPTER 7: A COMPARATIVE OVERVIEW OF THE RIGHT TO EDUCATION AND THE LEGISLATIVE REGULATION OF THE EMPLOYMENT OF TEACHERS IN ENGLAND

7 1 Introduction

Throughout this research, consideration of the impact of the legislative regulation of individual educator performance on the delivery of quality basic education was confined to South Africa. This chapter considers the approach in England. The reasons for the choice of this comparative jurisdiction were touched on in chapter 1, namely the historical link between the education systems of the two countries, the fact that the education systems of England and South Africa are comparable based on their structure and the number of schools, educators and learners and, lastly, it is a country with a developed economy that delivers a high standard of education (in contrast to South Africa). Along the lines of the approach in the preceding chapters, this discussion concerns the operationalisation of the right to education in England as well as the legislative regulation of the employment of teachers.[1]

This is done against the background of a discussion of the composition of the education sector, an overview of the history of education and the current state of education in England. It is important to keep these contextual factors in mind when considering possible lessons for South Africa. This discussion shows that the quality of education in England is largely the result of the system's long history of development.

This chapter also considers the right to education and the regulation of the employment of teachers in England in some detail. As far as regulation of the right to education is concerned, the discussion shows that England has an uncodified constitution and relies on guidance provided by international instruments. Compared to South Africa, the legislative regulation of education started at an early stage in England. The most important pieces of legislation pertaining to education are considered which indicate that the regulation of education in England has surpassed basic education needs and focuses on more sophisticated issues in education, notably its quality.

[1] "Teacher" is the terminology used in England. "Educator" will still be used when referring to the situation in South Africa.

The same can be said for the regulation of the employment of teachers in England. Here the discussion shows that England follows much the same broad approach as in South Africa – with a professional body exercising jurisdiction over the teaching profession and the principles of labour law regulating the conduct and capacity of individual teachers in their immediate employment context. In anticipation of the discussion to follow, it may already be mentioned that the English system specifies high and clear standards of conduct and capacity for teachers, shows a comparatively greater integration of the whole system (especially between the professional body and schools) and does so in the absence of legislation (like South Africa's EOEA) specifically regulating the conduct and performance of teachers in the employment context.

This chapter concludes with reflections based on the position of the right to education and the regulation of educator performance in England and South Africa. Based on these insights, recommendations in addition to those made in chapter 6 are made for the legislative regulation of educator performance in South Africa.

7 2 Overview of the education system in England

Even though England, Scotland, Wales, and Northern Ireland are all countries that form part of the United Kingdom, the focal point of this discussion is England. The reason for this is because each one of these countries has a different education system which is regulated slightly differently.[2] There are similarities between the education systems in England and South Africa. With the British colonialisation of South Africa, missionary activity increased and led to the founding of missionary schools that taught basic literacy (to be able to read the Bible) and numeracy.[3] The first Department of Education in South Africa was created in 1839 as a result of British influence.[4] The education system in South Africa is similar to England in the sense that there are state schools that are government funded and there are independent schools that charge school fees.[5] Similar to South Africa, the education system in

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2 N Harris & S Gorard "Education Policy, Law and Governance in the United Kingdom" (2009) *Trends in Bildung International* 1.

3 J Fourie & C Swanepoel "When Selection Trumps Persistence: The Lasting Effect of Missionary Education in South Africa" (2015) *Tijdschrift voor Sociale en Economische Geschiedenis* 1 2-3, 10.

4 12.

5 See HMC Projects "The British Education System" (undated) *HMC Projects* <https://www.hmc.org.uk/about-hmc/projects/the-british-education-system/> (accessed 01-08-2021).

England is divided into different parts, namely primary, secondary, further and higher education.[6] After completing secondary education, which also marks the end of compulsory education at the age of 16, pupils may elect how to continue with their education but must stay in education until the age of 18.[7] Pupils have the option to continue their education after secondary school by enrolling in vocational courses, which is considered further education.[8] The other option prepares pupils for university education and requires an additional two years of school and that pupils have to write the Advanced Level Examinations.[9] Independent schools offer the International Baccalaureate ("IB") programme which is an alternative to the Advanced Level Examinations.[10] Independent schools deliver education of a high standard and most pupils proceed to attend prestigious universities after completing their school career.[11] The delivery of education in state schools is also of a high quality. All state schools in England follow the National Curriculum which applies to pupils from the age of five until the age of eighteen.[12] Full-time education is compulsory until the age of 16 when the General Certificate of Secondary Education ("GCSE") is written.[13] Independent schools may follow their own curriculum but are subject to regular inspections to ensure that the curriculum provides education of an adequate standard.[14] Around 7% of pupils in England attend independent schools which translate to around 620 000 pupils attending 2 500 schools.[15] There are a total of 24 360 schools in England (around 21 860 are state schools).[16] In total there are 8 890 357 pupils in England served by 530 172 teachers.[17] The education system in England in terms of its size, division between state and independent schools and the number of educators is similar to that of South Africa, although the teacher:pupil ratio in England is clearly

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6 See Aegis "An Introduction to the British Education System" (undated) *Aegis* <https://www.brightworldguardianships.com/en/guardianship/british-education-system/> (accessed 01-08-2021). See chapter 2 for a discussion of South Africa's education system.

7 See The Government of the United Kingdom "School leaving age" (undated) Gov.UK <https://www.gov.uk/know-when-you-can-leave-school> (accessed 10-11-2021); See also s 82 of the Education Act 2002 which explains the key stages of school in England.

8 See Aegis "An introduction to the British education system" (undated) *Aegis*.

9 See Aegis "An introduction to the British education system" (undated) *Aegis*.

10 Aegis "An introduction to the British education system" (undated) *Aegis*.

11 See HMC Projects "The British Education System" (undated) *HMC Projects*.

12 Section 80 of the Education Act of 2002.

13 HMC Projects "The British Education System" (undated) *HMC Projects.*

14 See HMC Projects "The British Education System" (undated) *HMC Projects.*

15 See Independent Schools Council "Research" (undated) *Independent Schools Council* <https://www.isc.co.uk/research/> (04-08-2021).

16 See British Educational Suppliers Association "Key UK education statistics" (undated) *BESA* <https://www.besa.org.uk/key-uk-education-statistics/> (accessed 04-08-2021).

17 British Educational Suppliers Association "Key UK education statistics" (undated) *BESA.*

lower. Furthermore, the quality of education delivered by state schools in England is higher.

Before discussing the quality of education in England, a brief history of education is provided. Historically, access to education in England was dependent on social status and class. Stone explains that education in society is based on seven factors, which are "social stratification, job opportunities, religion, theories of social control, demographic and family patterns, economic organization and resources, and finally, political theory and institutions".[18] A consideration of the impact of each factor on the development of education falls beyond the scope of this discussion. What is interesting to note, however, is that these seven factors impacted on access to education in England. Initially, the poorest section of society only acquired basic reading skills and the ability to sign their name.[19] The lower middle class was able to access training in reading, writing and basic mathematics at primary school level, with the middle class accessing secondary school preparing them for certain professions.[20] The history of education in England is one of conflict between the traditionalist elite and the poor insisting on access to education, which only intensified as literacy in England grew towards the 1700s.[21] University education was reserved for the elite, to such an extent that by 1900 England fell behind other Western countries in the number of certain professionals.[22] The twentieth century marked a shift in access to education in England. The manner in which policy and legislation increasingly promoted education is discussed below. For now, a brief overview is provided of the current quality of education in England.

The first important thing to note about the quality of education in England is that it differs greatly from the situation in South Africa. Although each jurisdiction faces unique challenges in education, the system in England is the product of extensive development.[23] As the discussion of legislation regulating education and employment in England below shows, the focus has shifted from the mere provision of basic education to more sophisticated issues. In this regard, there are lessons for South Africa.

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18 L Stone "Literacy and Education in England 1640-1900" (1969) *Past & Present* 69 70.
19 70.
20 70.
21 138.
22 70, 137.
23 70.

England topped a 2019 study's list for the best country for education based on three categories, which is its well-developed public (state) education system, international attraction to its universities and the overall quality of education.[24] Universal education has been prioritised in England since the early 1900s, whereas this has only become a priority in South Africa since 1994.[25] The United Kingdom's achievement in the OECD's Programme for International Student Assessment ("PISA") indicates that it (including England) is a global competitor in terms of the quality of its education. More than ten million students from 79 high- and middle-income countries participated in the 2018 edition of PISA.[26] PISA ranked the participating countries in terms of a mean score for reading, mathematics and science. According to this, the United Kingdom ranked fourteenth in reading, eighteenth in mathematics and fourteenth in science.[27] The education policies and legislation in England discussed below shows the development of a comprehensive legislative and policy framework that serves as the basis for the current focus on improving the quality of education even further. Where a country has achieved such a high level of service delivery in state-funded education, it has the opportunity to focus on detailed and intricate mechanisms to further enhance quality. In countries such as South Africa, most of the resources are invested in providing equitable access to education through basic necessities such as infrastructure, transport, learning materials and sufficient and qualified educators. The quality of education can only become the focus when these basic requirements are in place.

England's academic outcomes are perhaps the result of the Department for Education's ("DfE") commitment to the recruitment and retention of quality teachers.[28] What is interesting about education policies in England, as opposed to the situation in

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[24] See Study International "The UK is the best country in the world for education, says study" (28-01-2019) *Study International* <https://www.studyinternational.com/news/the-uk-is-the-best-country-in-the-world-for-education-says-study/> (accessed 04-08-2021).

[25] Harris & Gorard (2009) *Trends in Bildung International* 1. After South Africa's democratisation in 1994 and based on s 29(1)(a) of the Constitution which guarantees the right to a basic education, universal access to basic education was prioritized and has resulted in around 99% of children of a school going age being enrolled at a school.

[26] A Schleicher "PISA 2018: Insights and Interpretations" (2019) *OECD* 5 <https://www.oecd.org/pisa/PISA%202018%20Insights%20and%20Interpretations%20FINAL%20PDF.pdf> (accessed 03-08-2021).

[27] Schleicher "PISA 2018: Insights and Interpretations" (2019) *OECD* 6-8.

[28] See, eg, Department for Education "Teacher Recruitment and Retention Strategy" (2019) *Department for Education* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786856/DFE_Teacher_Retention_Strategy_Report.pdf> (accessed 02-08-2021).

South Africa, is that they are proactive and seek to create the environment necessary to provide quality education.[29] In this regard, the DfE's recent policy on Teacher Recruitment and Retention reveals a holistic approach to quality education by mentioning that:

> "Teaching is unique in combining such a rich range of professional skills and knowledge, deep personal challenge and a sense of being part of a wider mission. Each and every day, teachers inspire children, raising their eyes to a world of possibility and supporting them to fulfil their potential".[30]

A record number of pupils, including an increase in pupils from a disadvantaged background, received university placements in England in 2021.[31] This may be a result of summer schools hosted over the school holidays. It is reported that at least 74% of schools in England hosted these summer schools, which include academic and other activities to give pupils additional schooling time to counteract the education time lost during the pandemic.[32] This reveals the commitment of the education system during the Covid-19 pandemic to ensure that pupils successfully complete their school careers.

England's long development of its state school system, adequate regulation and proactive education policies ensure high-quality education. The next part of this chapter focuses on the regulation of education in England, followed by an analysis of the employment of teachers in the sector.

7 3 The right to education in England

7 3 1 An uncodified constitution

A discussion of the right to education in England requires consideration of the country's legal history. The legal system in England is based on the common law and

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[29] The Teacher Recruitment and Retention Strategy focusses on creating an attractive, rewarding and sustainable teaching environment for teachers, thereby improving the chances of retaining quality teachers in the education sector.

[30] Department for Education "Teacher Recruitment and Retention Strategy" (2019) *Department for Education* 4.

[31] DfE "Record numbers or students take up university places" (10-08-2021) *Gov.UK* <https://www.gov.uk/government/news/record-numbers-of-students-take-up-university-places> (accessed 03-08-2021).

[32] DfE "Majority of schools sign up to boost education over the summer" (2021) *Gov.UK* <https://www.gov.uk/government/news/majority-of-schools-sign-up-to-boost-education-over-the-summer> (accessed 18-08-2021).

therefore relies strongly on judicial interpretation.[33] There is no written constitution in England, which also means there is no bill of rights.[34] The discussion above referred to seven factors mentioned by Stone that impact on the development and importance attached to education in any society.[35] In South Africa, access to education was impacted on by cultural and political ideologies excluding certain persons from education, or at least, quality education.[36] Only after the adoption of a Constitution and a Bill of Rights in South Africa, was access to education a possibility for everyone. The position in England is different in that there was no cultural or political ideology excluding persons from education, although certain societal realities had an impact on the importance different classes of citizens attached to education. For instance, Stone explains that a literate farm labourer in the eighteenth century England did not have an advantage over his illiterate counterpart, thereby negating the financial investment in education.[37] In other words, the value of an investment in education to gain access to job opportunities did not translate into practice as a result of the clear class structure in English society at the time. On the other hand, religion was a factor that increased the value society placed on literacy. In simple terms, Christians wanted to read the Bible themselves and this fuelled their need for literacy and increased the value placed on education.[38] The importance of education in England was therefore impacted on by different societal needs and pressures throughout the country's history.

The impact of these contextual factors meant that even in the absence of a written constitution and a bill of rights entrenching the right to education in England, education was increasingly prioritised by society and government alike. Below, the regulation of the education system is analysed. This shows that there have been hundreds of laws regulating and furthering education in England dating back to as early as 1721.[39] Another factor influencing the prioritisation of education in England was and is the influence of the international community and international instruments furthering the right to education. The following section considers England's acceptance of these

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33 M Freeman "The Rights of the Child in England" (1981) 13 *Colum Hum Rts L Rev* 601.
34 602.
35 See paragraph 7 2 above.
36 As mentioned earlier, in South Africa this exclusion was based on race.
37 Stone (1969) *Past & Present* 74-75.
38 76-77.
39 See the list of "Legislation relating to children, schools and education" available at <http://www.educationengland.org.uk/documents/acts/index.html> (accessed 18-08-2021).

international obligations and how this has translated into the legislative regulation of education.

7 3 2 International obligations

Recognition (and to some extent, the description) of the right to basic education in international legal instruments were discussed in chapter 3. Table 11 below presents the most important international instruments promoting education as well as the ratification status and date in respect of England and South Africa. It should be mentioned that the Universal Declaration of Human Rights of 1948, which was the first instrument in the UN's International Bill of Human Rights ("IBHR"),[40] is not a treaty and does not have international legal binding power. It is therefore not listed in the table but should be mentioned as the universal benchmark for recognition that each person should have the right to education and that the early stages of such education should be free and compulsory.[41]

Table 11: International instruments pertaining to education and ratification status per jurisdiction

	International instrument	United Kingdom (of which England forms part)	South Africa
1	CADE[42]	9 March 1973	10 December 1998
2	ICERD[43]	7 March 1969	10 December 1998
3	ICESCR[44]	20 May 1976	12 January 2015
4	CRC[45]	16 December 1991	16 June 1995

[40] OHCHR "The International Bill of Human Rights" available at <https://www.ohchr.org/documents/publications/factsheet2rev.1en.pdf>; ESCR-Net "International Bill of Human Rights" available at <https://www.escr-net.org/resources/international-bill-human-rights>.

[41] Article 26 of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 (III).

[42] UNESCO Convention against Discrimination in Education (adopted 14 December 1960, entered into force 22 May 1962) 429 UNTS 93.

[43] International Covenant on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) UNGA Res 2106 (XX).

[44] International Convention on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS 3.

[45] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

5	CEDAW[46]	7 April 1986	15 December 1995
6	CRPD[47]	8 June 2009	20 November 2007

From this table, it can be seen that England ratified every important international instrument pertaining to education. Even in the absence of a written constitution, England is therefore subject to this international framework furthering the right to education.[48] Furthermore, in 1998 Parliament passed the Human Rights Act 1998 which is based on and gives effect to the human rights under the European Convention on Human Rights.[49] The right to education in the Act is described as follows:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions".[50]

The international instruments mentioned in Table 11 above were all analysed in chapter 3, but what may be repeated here is that, seen in conjunction, the minimum requirements for basic education are that everyone has a right thereto, that the early stages of education (elementary/fundamental) should be free and compulsory and that secondary education (included for purposes of this thesis in "basic education") should be accessible and available to all.[51] With these minimum requirements in mind, the following section provides an analysis of the regulation of education in England with reference to education laws and policy.

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46 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

47 Convention on the Rights of Persons with Disabilities (adopted on 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

48 Until recently, the United Kingdom was part of the European Union and was therefore subject to the Directives issued by the EU. The government website provides guidance to businesses and individuals in regard to the effect of Brexit and is available at <https://www.gov.uk/brexit> (accessed 09-11-2021). A discussion of the impact of Brexit, falls beyond the scope of this research.

49 The "European Convention on Human Rights" <https://www.echr.coe.int/Documents/Convention_ENG.pdf> (accessed 09-11-2021).

50 Article 2 of Part II, the First Protocol of the Human Rights Act 1998, ch. 42.

51 This is a summary of the provisions pertaining to education in some international instruments. See article Art 26 of the UDHR, Art 4 of the CADE, Art 13 of the ICESCR and Art 28 of the CRC.

7 3 3 Overview of the regulation of education in England

State schools in England are referred to as maintained schools.[52] This means that the local authority "maintains" the school[53] and it follows the National Curriculum.[54] Maintained schools are divided into different categories and the differences between these categories depend on the employment of staff, owner of the school property and admission arrangements. The different categories of maintained schools are contained in the Education Act of 2002 and are community, foundation or voluntary schools, as well as community or foundation special schools, or maintained nursery schools.[55] Children between the ages of five and sixteen are entitled to attend these state/maintained schools free of charge.[56] It is important to note that there is a difference between free schools in England and maintained schools. Free schools are non-profit organisations that can be run by, for example, a charity, community or religious group and do not have to follow the National Curriculum.[57] These schools determine the salaries and conditions of their staff.[58] Maintained schools are state schools and are funded by the local authority or by the government, depending on the category of the maintained school.[59]

As early as 1721, the Parliament of the United Kingdom passed laws relating to the regulation of education.[60] It was mentioned above that the quality of education enjoyed by pupils in England is a product of the system's long development. Seeing that England did not face the same colonial challenges as South Africa, there was no major change in the rule or governance of the country, which continues to be a constitutional monarchy.[61] This enabled it to consistently develop and refine the regulation of

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[52] New Schools Network "Comparison of different types of school: A guide to schools in England" (2015) *New Schools Network* <https://www.newschoolsnetwork.org/sites/default/files/files/pdf/Differences%20across%20school%20types.pdf> (accessed 09-11-2021).

[53] Previous education laws referred to the "local education authority", the Education Act of 2002 only refers to "local authority" and is the terminology used in this chapter.

[54] New Schools Network "Comparison of different types of school: A guide to schools in England" (2015) *New Schools Network* 4.

[55] Section 1(3) of the Education Act 2002, ch. 32.

[56] See The Government of the United Kingdom "Types of school" (undated) *Gov.UK* <https://www.gov.uk/types-of-school/free-schools> (accessed 04-08-2021)

[57] See The Government of the United Kingdom "Types of school" (undated) *Gov.UK.*

[58] See The Government of the United Kingdom "Types of school" (undated) *Gov.UK.*

[59] See The Government of the United Kingdom "Types of school" (undated) *Gov.UK.*

[60] See, eg, HDA "Education in England" (undated) *HDA* <http://www.educationengland.org.uk/documents/acts/index.html> (accessed 05-08-2021).

[61] British Monarchist League "Constitutional Monarchy" (undated) *British Monarchist League* <http://www.monarchist.org.uk/constitutional-monarchy.html> (accessed 10-11-2021).

education over centuries.[62] The early history of education was briefly discussed above. The following discussion focuses on the background to the current legal regulation of education in England.

The first piece of legislation that indicated government's willingness to take responsibility for the education of children in England was the Elementary Education Act of 1870.[63] The provision of state schools was prioritised and it was required that schools provide pupils with accommodation.[64] School boards had oversight over schools and elementary education was provided for learners aged five to thirteen years.[65] School boards were tasked with making by-laws for school attendance of the above category of children, which included penalties in case of a breach.[66] At this point, education was not free, but provision was made for the school board to pay school fees should parents be unable to pay fees.[67] Should the DfE be satisfied based on the reasons provided by the school board that the school was situated within a poor district, it was allowed to operate as a no-fee ("free") school.[68] This Act was followed by the Elementary Education Act 1900, which also provided for compulsory school attendance up to the age of thirteen years and included a fine of twenty shillings if a parent failed to ensure attendance of their child.[69] This piece of legislation also made certain provisions for disabled (blind and deaf) pupils,[70] transport arrangements to be paid for by the relevant authority[71] and boards of guardians[72] to contribute to the expenses of elementary schools.[73]

The Education Act of 1902 abolished school boards and school attendance committees that were established under previous Elementary Education Acts and their

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62 See the list of education laws at "Education in England" available at <http://www.educationengland.org.uk/documents/acts/index.html> (accessed 10-11-2021).
63 The Elementary Education Act of 1870, ch. 75.
64 Section 4-5.
65 Section 4-5.
66 Section 74.
67 Section 25.
68 Section 26 5.
69 See s 6 of the Elementary Education Act 1900, ch. 53.
70 See s 3.
71 See s 4.
72 The Boards of Guardians were authorities that implemented Poor Laws in the United Kingdom. Poor Laws date back to 1349 and regulated working and non-working poor persons in England. These were essentially welfare laws, meaning that poor persons received relief from the government under these laws. For a detailed background and analysis of Poor Laws see WP Quigley "Five Hundred Years of English Poor Laws, 1349-1834: Regulating. The Working and Nonworking Poor" (1996) 30 *Akron L Rev* 73-128.
73 See s 2 of the Elementary Education Act 1900 ch. 53.

powers and duties were extended to the local education authorities of each area.[74] Local authorities were therefore responsible for and had control over public elementary schools.[75] Practically this meant that local authorities maintained and ensured the efficiency of public schools and determined the expenditure required for each school, including the number, appointment and qualification requirements of teachers.[76] The local authority also had the power to dismiss teachers.[77] At this point, state schools were still allowed to charge school fees.[78] In 1914 a piece of legislation was passed to provide local education authorities with the power to provide meals to undernourished elementary school pupils.[79] This once again shows how early the basic needs of pupils were considered and provided for in the education system of England.

The Education Act of 1944 was an important piece of legislation as it addressed the post-World War II provision of education in England. Section 61 of the Act prohibited maintained schools (and county colleges) from charging school fees.[80] It also attempted to increase the completion of secondary school.[81] This was done by increasing the age for compulsory attendance to fifteen years.[82] This of course required of local education authorities to ensure that there were sufficient secondary schools in their area for children to attend.[83] Although no reference in the 1944 Act is made to the quality of education provided at primary and secondary public schools, it required that the local education authority "contribute towards the spiritual, moral, mental, and physical development of the community by securing that efficient education throughout those stages shall be available to meet the needs of the population of their area".[84] It was therefore a priority of the 1944 Act that education be provided in an "efficient" manner. It also required of local education authorities to make provision for early childhood development in the form of nursery schools for pupils below the age of five as well as providing special educational treatment to pupils with a disability.[85] The focus was therefore on access to and the acceptability of education,

74 See s 5 of the Elementary Education Act 1902 ch. 54.
75 Section 5.
76 Section 7(1).
77 Section 7(1)(a) and (c).
78 Section 14.
79 See the Education (Provision of Meals) Act 1914 ch. 20.
80 Section 61 of the Education Act of 1944, ch. 31.
81 Harris & Gorard (2009) *Trends in Bildung International* 1.
82 Section 35 of the Education Act of 1944, ch. 31.
83 See s 8.
84 See s 7.
85 Section 8(b) of the Education Act 1944 ch. 31.

in that early childhood development and the needs of disabled pupils were prioritised. These important needs have only recently gained traction in South Africa, revealing that the focus in South Africa in recent times has predominantly been on the availability of and access to education and not the acceptability of education.[86] In summary, the 1944 Education Act was an encompassing piece of legislation which, apart from the above provisions, also provided for aspects additional to teaching and learning such as medical examinations at school,[87] free milk and meals,[88] standards for school infrastructure as well as facilities for recreation and physical training,[89] provision of clothes to poor pupils,[90] and free transport.[91]

Numerous education laws were passed after 1944 that built on the already comprehensive protection and regulation of the right to education in England. The Education Act of 2002 was based on the 2001 White Paper Schools Achieving Success[92] and commences with a focus on an increase in educational standards in England.[93] This Act was also adopted as a result of England's enactment of the Human Rights Act 1998. The 2002 Education Act included provisions aimed at furthering innovation and modernising education structures with a focus on education quality.[94] The most recent piece of education legislation is the Education Act of 2011. One of the main features of this Act is that it aims to assist teachers to raise the standards of education.[95] These provisions are focused on pupil discipline and empower teachers to, for example, search learners for banned items and give pupils detention.[96] It also extends free "early years" education, which refers to pupils younger than the compulsory age for education.[97]

This overview shows that the education sector in England is highly regulated and addresses more than the basic needs of education. The next section analyses the

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86 See the discussion in Chapter 3 regarding the four A-scheme developed by Katarina Tomasevski.
87 Section 48 of the Education Act 1944 ch. 31.
88 Section 49.
89 Section 10.
90 Section 51.
91 Harris & Gorard (2009) *Trends in Bildung International* 1.
92 See "White Paper Schools Achieving Success" <http://www.educationengland.org.uk/documents/pdfs/2001-schools-achieving-success.pdf> (accessed 10-09-2021).
93 Section 1 of the Education Act of 2002, ch. 32.
94 Section 1 of the Education Act of 2002, ch. 32.
95 See The Government of the United Kingdom "Education Bill receives Royal Assent" (2011) *Gov.UK* <https://www.gov.uk/government/news/education-bill-receives-royal-assent> (accessed 10-09-2021).
96 Section 5 of the Education Act of 2011, ch. 21.
97 Section 1.

regulation of teachers' employment where it is seen that this aspect of education is also closely regulated and provides a clear framework for the standard expected of teachers in England. The discussion further shows that the capability, qualification and conduct requirements for teachers in England are similar to that of South Africa.

7 4 Regulation of the employment of teachers in England

7 4 1 The role of the Teaching Regulation Agency

The Teaching Regulation Agency ("TRA") is responsible for regulating the teaching profession in England, similar to the South African Council for Educators ("SACE"). It is an executive agency of the DfE and is funded by it.[98] The TRA has two operational units, namely the Teaching Qualification Unit ("TQU") and the Teacher Misconduct Unit ("TMU").[99] The TQU is the unit acting on behalf of the Secretary of State and has authority over education in England.[100] This unit awards teachers with Qualified Teacher Status ("QTS") and may recognise Overseas Trained Teachers by also providing them with QTS.[101] The requirements to be awarded QTS are discussed in paragraph 7 4 3 1 below. The unit's responsibilities include keeping a record of all teachers, trainee teachers and anyone holding a teacher reference number.[102] The purpose of this record is to provide prospective employers with the necessary information for pre-appointment checks.[103] The TRA has a database called "Teacher Services" which prospective employers can access to ascertain whether a job applicant (teacher) has been awarded QTS, has successfully completed the statutory induction period and the system contains any "prohibitions, sanctions or restrictions"

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98 See "Teaching Regulation Agency" <https://www.gov.uk/government/organisations/teaching-regulation-agency> (accessed 10-09-2021).

99 See TRA "Teaching Regulation Agency Annual report and accounts" (2019) *TRA* 7 <https://www.gov.uk/government/publications/teaching-regulation-agency-annual-report-and-accounts-2020-to-2021> (accessed 16-08-2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/823307/Teachers_Regulation_Agency_Text.pdf> (accessed 16-08-2021).

100 TRA "Teaching Regulation Agency Annual report and accounts" (2019) *TRA* 9. It also has the responsibility to ensure that the European Union Directive 2005/36/EC is implemented regarding the recognition of professional teaching qualifications. See "Directive 2005/36/EC of the European Parliament and of the Council" <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0036> (accessed 16-08-2021). Adherence to this Directive may be impacted by Brexit but was the position in 2019.

101 TRA "Teaching Regulation Agency Annual report and accounts" (2019) *TRA* 9.

102 See TRA "About us" (undated) *TRA* <https://www.gov.uk/government/organisations/teaching-regulation-agency/about> (accessed 28-07-2021).

103 See TRA "About us" (undated) *TRA.*

preventing the person to be appointed to particular positions.[104] The Teacher Services database also indicates whether the teacher has a restriction from the Disclosure and Barring Service ("DBS").[105] Details surrounding DBS restrictions are not held by Teacher Services but may be obtained from the DBS.[106] The DBS holds records regarding criminal convictions, information kept by the police that may be relevant to the applicant's prospective role and whether the applicant is on the "adults' barred list" or "children's barred list" precluding them from working in certain positions (with children or vulnerable adults).[107] The DBS processes "Criminal Records Checks" which the employer will request them to do as part of pre-appointment checks.[108]

The other operating unit, the TMU, investigates referrals of possible teacher misconduct. The process for dealing with matters of teacher misconduct is discussed in paragraphs 7 4 4 and 7 4 5 below. The procedure to be followed by the TRA is prescribed by the Teachers' Disciplinary (England) Regulations of 2012 which is discussed in greater detail below.[109] The TMU represents the Secretary of State and investigates cases of alleged misconduct, considers whether an interim order of prohibition should be issued (to prevent a teacher from working during the investigation period) and administers the misconduct hearing.[110] A professional conduct panel hears the matter and makes a recommendation to the TMU who will then decide whether a "prohibition order"[111] should be issued in the circumstances.[112] The details of teachers who have been prohibited from teaching are kept by the TRA. Allegations of teacher misconduct are reported to the TRA who is tasked with

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[104] Teaching Regulation Agency "Teacher status checks: Information for employers" (2021) *Gov.UK* <https://www.gov.uk/guidance/teacher-status-checks-information-for-employers> (accessed 10-11-2021).

[105] Teaching Regulation Agency "Teacher status checks: Information for employers" (2021) *Gov.UK*.

[106] Teaching Regulation Agency "Teacher status checks: Information for employers" (2021) *Gov.UK*.

[107] Teaching Regulation Agency "Teacher status checks: Information for employers" (2021) *Gov.UK*; See also Disclosure and Barring Service "DBS checks: detailed guidance" (2013) *Gov.UK* <https://www.gov.uk/government/collections/dbs-checking-service-guidance--2> (accessed 10-11-2021).

[108] Teaching Regulation Agency "Teacher misconduct: The prohibition of teachers" (2021) *Gov.UK* <https://consult.education.gov.uk/safeguarding-in-schools-team/teacher-misconduct-the-prohibition-of-teachers-the/supporting_documents/Teacher%20misconduct%20the%20prohibition%20of%20teachers.pdf > (accessed 10-11-2021).

[109] These regulations were made in terms of ss 141A, 141D and 141E and Schedule 11A which were inserted in the Education Act 2002, ch 32 by s 8 of the Education Act 2011, ch 21.

[110] See TRA "About us" (undated) *TRA*.

[111] A prohibition order is a lifetime ban and such a decision bars a teacher from continuing their career in unsupervised teaching work. See paragraph 7 4 4 below.

[112] See TRA "About us" (undated) *TRA*.

supporting schools and head teachers in dealing with misconduct.[113] It also decides whether the teacher in question should be able to apply for a review of the panel's order after a period of time (which may not be less than two years).[114] This brief summary of the authority of the TRA is discussed in greater detail below.

7 4 2 The role of school governing bodies and the local authority

Section 19(1) of the Education Act 2002 determines that each maintained school must have a governing body.[115] The constitution of governing bodies is regulated by section 13 of the School Governance (Constitution) (England) Regulations 2012.[116] The governing body must consist of at least seven governors including at least two parents, one staff member and one local authority official.[117] It is important to mention here that the employer of teachers and other staff members differs depending on the type of school concerned. In terms of section 35 of the Education Act 2002, the local authority is the employer of teachers, including the head teacher and other staff members at community schools, voluntary controlled schools, community special schools and maintained nursery schools.[118] In terms of section 36 of the same Act, the governing body is the employer of teachers, including the head teacher and other staff members at foundation schools, voluntary aided schools and foundation special schools.[119] The School Staffing (England) Regulations 2009 ("Staffing Regulations") give further effect to these provisions relating to the employment of staff at schools. In terms of Part II of these regulations, the governing body is still involved in the process of appointing or dismissing teachers or head teachers, even where the local authority is the employer.[120] The difference is that the local authority is also involved and the governing body works with the local authority in these instances. For example, the governing body will recommend a candidate for appointment and if the local authority does not appoint that candidate, the governing body may provide a further

[113] See TRA "About us" (undated) *TRA*.
[114] This review does not refer to a review of the panel's decision, but rather that the prohibition order be reviewed after a certain period of time has lapsed, which may not be less than two years.
[115] The duties of governing bodies at maintained schools are contained in ss 19-23 of the Education Act 2002, ch. 32.
[116] These regulations were made in terms of ss 2 19(1A), (2), (3), (4A) and (4B), 20(2) and (3) and 210(7) of the Education Act 2002, ch. 32.
[117] Regulation 13(3) of the School Governance (Constitution) (England) Regulations 2012.
[118] Section 35 of the Education Act 2002, ch. 32.
[119] Section 36.
[120] Part II of the School Staffing (England) Regulations 2009.

recommendation.[121] Similarly, where the governing body is of the opinion that a staff member should be dismissed, it must inform the local authority in writing of its determination and provide reasons after which the local authority must respond within a certain time period and terminate the staff member's employment.[122] Part III of the Staffing Regulations contains similar provisions in respect of those schools where the governing body is the employer and makes decisions regarding the appointment and dismissal of staff.[123] The governing body may delegate this power to the head teacher.[124] The DfE has published a "Governor's Handbook" which contains the role and function of governing bodies as well as their legal duties.[125] This is a valuable resource as it provides governors with a detailed explanation of the relevant laws applicable to their role and function.

In terms of the "Staffing and Employment Advice for Schools" issued by the DfE, governing bodies are also tasked with developing procedures for dealing with discipline and grievances in a school.[126] Governing bodies are, however, guided in this regard by the "Code of Practice on Disciplinary and Grievance Procedures" ("ACAS code") issued by the Advisory Conciliation and Arbitration Service ("ACAS").[127] The ACAS code provides a step by step explanation of how employers, or in this case governing bodies, should deal with grievances or disciplinary issues in the workplace (this is discussed in greater detail in paragraph 7 4 6 below).[128] The government also provides advice to employers that governing bodies can also utilise to develop their grievance and disciplinary procedures.[129] Apart from this, the Staffing Regulations provide the governing bodies of maintained schools with the necessary procedure in case of disciplinary issues and, more specifically, the procedure to suspend and/or

[121] Regulation 16.
[122] Regulation 20.
[123] See Part III.
[124] Regulation 4.
[125] See Department for Education "Governor's Handbook" *Gov.UK* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/270398/Governors-Handbook-January-2014.pdf> (accessed 08-08-2021).
[126] Department for Education "Staffing and Employment Advice for Schools" (2021) *DfE* 22 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/953345/Staffing_and_employment_advice_for_schools_-_January_2021.pdf> (accessed 18-08-2021).
[127] ACAS is an Advisory, Conciliation and Arbitration Service for employers in the United Kingdom. See "About Us" <https://www.acas.org.uk/about-us> (accessed 09-11-2021).
[128] See ACAS "Disciplinary and Grievance Procedures (2021) *ACAS* <https://www.acas.org.uk/disciplinary-and-grievance-procedures> (accessed 18-08-2021).
[129] See The Government of the United Kingdom "Taking disciplinary action against an employee" (2021) *Gov.UK* <https://www.gov.uk/taking-disciplinary-action> (accessed 18-08-2021).

dismiss a teacher for misconduct.[130] As mentioned above and in terms of the Staffing Regulations, the governing body has the authority to appoint and dismiss teachers at certain types of schools and works together with the local authority to dismiss teachers at schools where the local authority is the employer.[131] Regulation 31 authorises the governing body or head teacher to impose a suspension if, in their opinion, it is necessary.[132] The School Governing Body ("SGB") is the first port of call in case of a complaint of teacher misconduct, while serious teacher misconduct is also investigated by the TRA.[133] This framework regulating the practice and conduct of teachers is discussed further below.

7 4 3 Regulation of the individual performance of teachers in England through the TRA

The individual performance of teachers in England is regulated by a number of instruments. Before discussing these instruments, it should be mentioned that the delivery of quality education is at the forefront of the regulation of the teaching profession in England. The point of departure is the Teachers' Standards which prescribe the minimum requirements for the practice and conduct[134] of teachers and came into effect on 1 September 2012.[135] The preamble to the Teacher's Standards determines that:

> "Teachers make the education of their pupils their first concern, and are accountable for achieving the highest possible standards in work and conduct. Teachers act with honesty and integrity; have strong subject knowledge, keep their knowledge and skills as teachers up-to-date and are self-critical; forge positive professional relationships; and work with parents in the best interests of their pupils".[136]

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[130] See generally the School Staffing (England) Regulations 2009.
[131] Regulation 20.
[132] Regulation 31.
[133] Teaching Regulation Agency "Teacher misconduct: The prohibition of teachers" (2021) *Gov.UK* 5.
[134] The terminology used in the Teachers' Standards is the "practice and conduct" of teachers. Throughout this research teachers' conduct and capacity was referred to from a South African labour law perspective. For purposes of this discussion, the terminology will be used in line with the relevant jurisdiction which is England. See "Teachers' Standards" available at <https://www.gov.uk/government/publications/teachers-standards> (accessed 11-08-2021).
[135] See Department for Education "Teachers' Standards: Guidance for school leaders, school staff and governing bodies" (2011) *Department for Education* <https://www.gov.uk/government/publications/teachers-standards> (accessed 11-08-2021).
[136] See the Preamble to the Teachers' Standards (2011) *Department for Education* 10.

These standards were issued in terms of regulation 6(8)(a) of the Education (School Teachers' Appraisal) (England) Regulations 2012 ("Appraisal Regulations"), meaning that it has statutory force.[137] The Teachers' Standards apply to trainee teachers, teachers completing their statutory induction period and teachers at maintained schools who are covered by the above-mentioned Appraisal Regulations.[138] The Teachers' Standards have two parts. Part 1 provides the standards for teaching and part 2 provides the standards for personal and professional conduct. Both of these are important aspects because it directly impacts the quality of education delivered. As such, both parts of the Teachers' Standards are discussed below, as well as other legal instruments that link to the practice and conduct of teachers in England.

7 4 3 1 Standards for teaching in England enforced by the TRA

Part 1 of the Teachers' Standards provides teachers (including trainee teachers) with the minimum level of practice required to gain QTS. This requires of teachers employed at schools in England to have a degree or equivalent qualification, successful completion of a programme of Initial Teacher Training ("ITT"), which includes a period of practical teaching experience, and assessment by the accredited institution to confirm that the above standards have been met.[139] The Teachers' Standards list and explain eight standards that teachers must adhere to. The following list contains the topic for each standard expected of teachers in England, which already provide insight into the high standard of work and practice required:

"1. Set high expectations which inspire, motivate and challenge pupils;
2. Promote good progress and outcomes by pupils;
3. Demonstrate good subject and curriculum knowledge;
4. Plan and teach well-structured lessons;
5. Adapt teaching to respond to the strengths and needs of all pupils;
6. Make accurate and productive use of assessment;
7. Manage behaviour effectively to ensure a good and safe learning environment; and
8. Fulfil wider professional responsibilities".[140]

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[137] These regulations were made in terms of ss 131(1) and 210(7) of the Education Act 2002, ch. 32.
[138] See Department for Education "Teachers' Standards: Guidance for school leaders, school staff and governing bodies" (2011) *Department for Education* <https://www.gov.uk/government/publications/teachers-standards> (accessed 11-08-2021).
[139] See Regulation 7 of Schedule 2 of the Education (School Teachers' Qualifications) (England) Regulations 1662 of 2003.
[140] See "Teachers' Standards: Guidance for school leaders, school staff and governing bodies" (2011) *Department for Education* 10-13.

The DfE recently issued guidance regarding induction for early career teachers which updates and replaces the Education (Induction Arrangements for School Teachers) (England) Regulations 2012.[141] The guidance came into force on 1 September 2021. It is important to take note of the guidance because it reveals a highly structured approach to ensure quality education when introducing teachers into the education system. This programme of statutory induction assists the teacher in transitioning from ITT to a career in teaching.[142] This also means that a qualified teacher cannot be employed at a maintained school before completing the statutory induction programme.[143] Before allowing an early career teacher ("ECT") to commence with their induction, the head teacher or the relevant school must do pre-appointment checks with the TRA and must confirm whether the teacher holds QTS.[144] The performance of the ECT is measured against the Teachers' Standards.

The guidance provides detailed requirements relating to the induction period, of which a few aspects deserve mention. The induction programme is conducted over a period of two years and the ECT must receive a tutor who monitors and supports them.[145] Apart from this, the ECT receives a mentor who is a QTS and experienced teacher and who mentors the ECT towards acquisition of the necessary skills and knowledge to be successful in his or her role as teacher.[146] The tutor reviews the ECT's progress and measures it against the Teachers' Standards.[147] The ECT is expected to complete two formal assessments.[148] At the end of the induction period, the head teacher makes a recommendation, having measured the ECT's progress against the Teachers' Standards, whether the ECT's performance was satisfactory.[149] Where the ECT fails induction, he or she must be dismissed within ten working days and the TRA must include the person's name on the list of people who failed induction.[150] Such a

[141] See "Induction for early career teachers (England)" (2021) *Department for Education* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972316/Statutory_Induction_Guidance_2021_final__002_____1___1_.pdf> (accessed 18-08-2021).
[142] DfE "Induction for early career teachers (England)" (2021) *Department for Education* 8.
[143] DfE "Induction for early career teachers (England)" (2021) *Department for Education* 9. There are certain exceptions pertaining to independent schools and schools which are not maintained schools.
[144] DfE "Induction for early career teachers (England)" (2021) *Department for Education* 13.
[145] DfE "Induction for early career teachers (England)" (2021) *Department for Education* 20.
[146] DfE "Induction for early career teachers (England)" (2021) *Department for Education* 20.
[147] DfE "Induction for early career teachers (England)" (2021) *Department for Education* 21.
[148] DfE "Induction for early career teachers (England)" (2021) *Department for Education* 22.
[149] DfE "Induction for early career teachers (England)" (2021) *Department for Education* 24.
[150] DfE "Induction for early career teachers (England)" (2021) *Department for Education* 24.

person may not be appointed as a teacher at a maintained school.[151] This procedure of introducing ECTs into the education system contains valuable lessons for South Africa. This may assist in attracting quality educators to the profession, leave room for removing educators from the system who fail their induction period at an early stage and introduce regular performance reviews valuable to both the teacher and the school. At the same time, it may well be met with resistance in South Africa, especially in a system known for its powerful trade unions.

The process from graduation to being employed as a teacher in England may be summarised as follows. The process starts with the TRA keeping record of all trainees and teachers in England. Before being eligible for appointment these teachers must gain Qualified Teaching Status from the TRA.[152] Thereafter head teachers are required to conduct pre-appointment checks with the TRA. Only then may an ECT be employed and will then be subject to the two-year induction period. This induction period consists of a structured programme and schools may elect to use one of three possible types of programmes. The first is a funded (by the DfE) provider-led programme where accredited providers design and deliver the programme at the school. Second, schools may deliver their own programme by using materials approved and accredited by the DfE. Third, schools design their own programme, which still needs to be accredited.[153] Only after the successful completion of all these steps may one teach at a maintained school in England. Even then, teachers are subject to the Appraisal Regulations and their performance is monitored by employers (discussed in paragraph 7 4 6 below). The following section considers the required standards of professional conduct of teachers and delves into the regulation of misconduct.

[151] DfE "Induction for early career teachers (England)" (2021) *Department for Education* 24.
[152] As mentioned above, this requires a degree or equivalent qualification, ITT and assessment by an accredited institution to ensure that the aforementioned requirements have been met. The induction period may only take place after the teacher has gained QTS.
[153] For more detail on these three approaches, see DfE "Induction for early career teachers (England)" (2021) *Department for Education* 19.

7 4 3 2 Standards for personal and professional conduct of teachers in England enforced through the TRA

Part 2 of the Teachers' Standards provide trainee teachers and teachers with a framework of the standard of professional conduct required of them.[154] The professional standards required of teachers rest on three pillars, which may be summarised as follows. Teachers must maintain public trust by ensuring high standards of ethics and behaviour not only at the school, but also outside of it.[155] Teachers must respect the policies and ethos of the school by, for instance, ensuring their own punctuality.[156] Lastly, teachers are expected to have a sound knowledge of the legal framework applicable to them with regard to their professional duties and responsibilities.[157] On a more practical note, teachers will be considered to uphold their professional standards by:

> "• Treating pupils with dignity, building relationships rooted in mutual respect, and at all times observing proper boundaries appropriate to a teacher's professional position having regard for the need to safeguard pupils' well-being, in accordance with statutory provisions;
> • Showing tolerance of and respect for the rights of others;
> • Not undermining fundamental British values, including democracy, the rule of law, individual liberty and mutual respect, and tolerance of those with different faiths and beliefs;
> • Ensuring that personal beliefs are not expressed in ways which exploit pupils' vulnerability or might lead them to break the law."[158]

A breach of these standards may result in disciplinary action under the Teachers' Disciplinary (England) Regulations 2012 and the Teachers' Disciplinary (Amendment) (England) Regulations 2014, which is discussed in greater detail below.

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[154] DfE "Teachers' Standards: Guidance for school leaders, school staff and governing bodies" (2011) *Department for Education* 14.
[155] DfE "Teachers' Standards: Guidance for school leaders, school staff and governing bodies" (2011) *Department for Education* 14.
[156] DfE "Teachers' Standards: Guidance for school leaders, school staff and governing bodies" (2011) *Department for Education* 14.
[157] DfE "Teachers' Standards: Guidance for school leaders, school staff and governing bodies" (2011) *Department for Education* 14.
[158] DfE "Teachers' Standards: Guidance for school leaders, school staff and governing bodies" (2011) *Department for Education* 14.

7 4 4 The TRA disciplinary process in case of teacher misconduct in England

The regulation of misconduct in the education sector of England is of importance to this research and requires a consideration of the Staffing Regulations, the Teachers' Disciplinary (England) Regulations 2012 ("Disciplinary Regulations") and the TRA's disciplinary procedure.[159] The process for reporting teacher misconduct first involves contacting the school, SGB or the local authority to make an informal complaint.[160] If the person reporting the misconduct is unsatisfied with the response to their informal complaint, the second step is to make a formal complaint to the TRA.[161] The TRA gets involved in the process if the misconduct is sufficiently serious.[162] "Serious misconduct" or "misconduct" is not defined in the Education Act of 2002 or the Disciplinary Regulations. However, a policy by the TRA, "Teacher Misconduct: The Prohibition of Teachers" provides guidance as to what types of conduct will be considered serious by the TRA in three broad categories.[163] These categories are, "unacceptable professional conduct", "conduct that may bring the profession into disrepute" or a "conviction, at any time, of a relevant offence".[164] The guidance provided by the TRA also contains the type of misconduct that typically falls within the above three categories.

The first category that was considered is a "conviction, at any time, of a relevant offence".[165] The TRA considers any offence on the list below to be relevant to evaluating whether serious misconduct had been committed by the teacher:

"
- Violence;
- Terrorism;
- Intolerance and/or hatred on the grounds of race/religion or sexual orientation
- Fraud or serious dishonesty;
- Theft from a person or other serious theft;

[159] TRA "Teacher misconduct: Disciplinary procedures for the teaching profession" (2020) *TRA* (accessed 12-08-2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886210/Teacher_misconduct_Disciplinary_Procedures_for_the_teaching_profession.pdf>.
[160] See The Government of the United Kingdom "Report teacher misconduct" (undated) *Gov.UK* <https://www.gov.uk/report-teacher-misconduct> (accessed 07-08-2021).
[161] See The Government of the United Kingdom "Report teacher misconduct" (undated) *Gov.UK*.
[162] Teaching Regulation Agency "Teacher misconduct: The prohibition of teachers" (2018) *Gov.UK* 5 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752668/Teacher_misconduct-the_prohibition_of_teachers_.pdf>.
[163] TRA "Teacher misconduct: The prohibition of teachers" (2018) *Gov.UK* 3-18.
[164] TRA "Teacher misconduct: The prohibition of teachers" (2018) *Gov.UK* 9-10.
[165] TRA "Teacher misconduct: The prohibition of teachers" (2018) *Gov.UK* 9-10.

- Possession of class A drugs [for example, heroin];
- Supplying of illegal substances of any classification;
- Sexual activity;
- Arson and other major criminal damage;
- Serious driving offences, particularly those involving alcohol or drugs;
- Serious offences involving alcohol;
- Serious offences involving gambling;
- Possession of prohibited firearms, knives or other weapons;
- Any activity involving viewing, taking, making, possessing, distributing or publishing any indecent photograph or image or pseudo photograph or image of a child, or permitting any such activity, including on[c]e off incidents."[166]

The TRA notes that certain offences (such as "minor driving offences; minor offences involving personal use of alcohol or class B [for example, cannabis] or C [for example, anabolic steroids] drugs away from children and education contexts; minor offences involving gambling; or isolated minor cases of theft") are "less likely" to be relevant in considering whether the teacher committed serious misconduct for purposes of the third category mentioned above.[167] However, these are mere guidelines and the merits and context of each case need to be considered by the TRA. Should the teacher be convicted of any of the above list of offences, it will be considered a relevant offence and therefore, serious misconduct. However, even if the teacher is not convicted, but the teacher "displayed behaviours associated with any of the offences", the TRA is likely to consider the conduct as amounting to "unacceptable professional conduct" (first category) or "conduct that may bring the profession into disrepute" (second category) and, therefore, serious misconduct.[168] In other words, the list of offences is also used to classify behaviour as serious misconduct resulting in unacceptable professional conduct bringing the profession into disrepute. It is, however, not a closed list for purposes of determining whether the misconduct was serious misconduct and fall within categories one and two. Teachers' Standards are also used as a benchmark of what will be considered professional conduct by a teacher.[169] The TRA also considers the influential role of teachers and the necessity of public trust in the profession when considering whether the misconduct was serious.[170] The list of factors

[166] TRA "Teacher misconduct: The prohibition of teachers" (2018) *Gov.UK* 10-11 (footnotes omitted).
[167] TRA "Teacher misconduct: The prohibition of teachers" (2018) *Gov.UK* 11.
[168] TRA "Teacher misconduct: The prohibition of teachers" (2018) *Gov.UK* 9.
[169] TRA "Teacher misconduct: The prohibition of teachers" (2018) *Gov.UK* 9.
[170] TRA "Teacher misconduct: The prohibition of teachers" (2018) *Gov.UK* 12.

below (which is also not exhaustive) is considered to determine whether an educator found guilty of serious misconduct as explained above, should also be issued with a prohibition order (own italics):

> "• *serious departure* from the personal and professional conduct elements of the Teachers' Standards;
> • misconduct *seriously affecting the education and/or well-being of pupils*, and particularly where there is a *continuing risk*;
> • actions or behaviours that undermine fundamental British values of democracy, the rule of law, individual liberty, and *mutual respect and tolerance* of those with different faiths and beliefs; or that promote political or religious *extremism*. This would encompass *deliberately* allowing the exposure of pupils to such actions or behaviours, including through contact with any individual(s) who are widely known to express views that support such activity, for example by inviting any such individuals to speak in schools;
> • a *deep-seated attitude* that leads to harmful behaviour;
> • *abuse of position or trust* (particularly involving vulnerable pupils) or violation of the rights of pupils;
> • dishonesty especially where there have been *serious consequences*, and/or it has been *repeated and/or covered up*;
> • *sustained* or serious bullying, or other *deliberate behaviour* that undermines pupils, the profession, the school or colleagues;
> • possession of prohibited firearms, knives or other weapons;
> • sexual misconduct e.g. involving actions that were *sexually motivated* or of a sexual nature and/or that use or *exploit the trust, knowledge or influence* derived from the individual's professional position;
> • any activity involving viewing, taking, making, possessing, distributing or publishing any indecent photograph or image or pseudo photograph or image of a child, or permitting such activity, including on[c]e off incidents;
> • the commission of a serious criminal offence, including those that resulted in a conviction or caution, paying particular attention to offences that are 'relevant matters' for the purposes of The Police Act 1997 and criminal record disclosures;
> • failure to refer to the police known female genital mutilation (FGM) cases involving girls under 18 where the individual is aware, or should have been aware, of the statutory duty to report such matters but deliberately chose not to do so".[171]

The TRA will only consider misconduct if the person alleged to have committed the misconduct is a teacher. The definition of "teacher" as found in the Disciplinary

[171] TRA "Teacher misconduct: The prohibition of teachers" (2018) *Gov.UK* 12-13 (footnotes omitted).

Regulations is broader than the definition of an educator in South Africa.[172] The reason for this is because it includes someone who does teaching work[173] at a school, sixth form college,[174] relevant youth accommodation, a children's home in England or an academy.[175] The Disciplinary Regulations, the Teachers' Disciplinary (Amendment) (England) Regulations 2014 as well as the TRA's disciplinary procedure applies to employees falling within the definition of a teacher as described above.

The Education Act of 2011, which came into effect on 1 April 2012, provides the Secretary of State with authority over the regulation of the teaching profession.[176] The TRA represents the Secretary of State and implements the Disciplinary Regulations to address teacher misconduct.[177] As mentioned above, these regulations are applicable in case of a possible breach of the Teachers' Standards. Apart from the procedure provided by the Disciplinary Regulations, the TRA developed a practical guide explaining the implementation of the regulations in case of teacher misconduct.[178] This guide contains additional information that simplifies and summarises the procedure.

The first step is that an employer,[179] member of the public, police or other interested party refer a matter of possible misconduct to the TRA.[180] The alleged misconduct is usually also addressed by the employer (SGB or local authority) and this process is discussed in paragraph 7 4 6 below. The focus here is on the disciplinary procedure

[172] Regulation 1 of the Teachers' Disciplinary (England) Regulations 2012.
[173] Regulation 3(1) defines "teaching work" as "planning and preparing lessons and courses for pupils; (b) delivering lessons to pupils; (c) assessing the development, progress and attainment of pupils; and (d) reporting on the development, progress and attainment of pupils".
[174] A sixth form college refers to an educational institution that provides education to pupils between 16 and 18 years of age. The purpose is to prepare pupils for university or vocational training.
[175] Section 2 of the Teachers' Disciplinary (England) Regulations 2012. Teaching work is defined in s 3(1)(a)-(d) as "planning and preparing lessons and courses for pupils; delivering lessons to pupils; assessing the development, progress and attainment of pupils; and reporting on the development, progress and attainment of pupils".
[176] See TRA "Teaching Regulation Agency Annual report and accounts" (2019) *TRA* 19 (accessed 16-08-2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/823307/Teachers_Regulation_Agency_Text.pdf>.
[177] These regulations have been amended by the Teachers' Disciplinary (Amendment) (England) Regulations 2014. These amendments do not impact the disciplinary procedure as discussed in this section.
[178] TRA "Teacher misconduct: Disciplinary procedures for the teaching profession" (2020) *TRA* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886210/Teacher_misconduct_Disciplinary_Procedures_for_the_teaching_profession.pdf> (accessed 13-08-2021).
[179] The employer is either the governing body or the local authority, depending on the type of school. See paragraph 7 4 2 above.
[180] The discussion that follows summarises the disciplinary procedure as described in the TRA "Teacher misconduct: Disciplinary procedures for the teaching profession" (2020) *TRA* 6-8.

followed by the TRA. The second step is for the TRA to confirm whether the person is a teacher and whether the conduct falls within one of the three categories for serious misconduct as discussed above ("unacceptable professional conduct", "conduct bringing the profession into disrepute" or "convicted of a relevant offence").[181] The TRA will not investigate a matter if it does not fall within its jurisdiction. If it decides to investigate the alleged misconduct, the TRA will inform the teacher, the referrer and the employer.[182] The teacher must be informed of the allegation and be afforded an opportunity to respond by way of written representations, submitting evidence and commenting on any such evidence.[183]

After this, there are three phases to the disciplinary process. In the first phase, the TRA must determine whether to issue an Interim Prohibition Order ("IPO").[184] This is tantamount to a suspension, in that the teacher is prevented from teaching until the matter is concluded. The teacher has the right to respond to the IPO within ten working days providing evidence that may be relevant to the TRA's decision.[185] The second phase is the investigation stage and here the TRA formulates its allegation(s) (charges) of misconduct and the teacher has 28 days to respond by submitting written representations and evidence.[186] The TRA may even seek the input of experts if it deems it relevant to the matter.[187] When the investigation is concluded, the TRA decides whether to refer the matter to a professional conduct panel.[188] If no such referral is made, the matter is concluded and no further steps are taken against the teacher (by the TRA).[189]

The third phase involves the hearing, decision and review.[190] This phase only applies where the matter is referred to a professional conduct panel. A professional conduct panel is a Disciplinary Panel of the TRA and consists of three persons. The

[181] Section 141B(4) of the Education Act 2002 states that a "relevant offence, means (a) in the case of a conviction in England and Wales, a criminal offence other than one having no material relevance to the person's fitness to be a teacher, and (b) in the case of a conviction elsewhere, an offence which, if committed in England and Wales, would be within paragraph (a)". See also s 5 of the Teachers' Disciplinary (England) Regulations 2012.
[182] TRA "Teacher misconduct" (2020) *TRA* 7.
[183] Section 5(2) of the Teachers' Disciplinary (England) Regulations 2012.
[184] TRA "Teacher misconduct" (2020) *TRA* 7.
[185] TRA "Teacher misconduct" (2020) *TRA* 7.
[186] TRA "Teacher misconduct" (2020) *TRA* 7-8.
[187] TRA "Teacher misconduct" (2020) *TRA* 7.
[188] TRA "Teacher misconduct" (2020) *TRA* 7; Regulation 5(4) of the Teachers' Disciplinary (England) Regulations 2012.
[189] TRA "Teacher misconduct" (2020) *TRA* 8.
[190] TRA "Teacher misconduct" (2020) *TRA* 8.

panel must have one or more teachers with at least five years teaching experience and one or more other persons.[191] The TRA Teacher Misconduct guidance explains that these other persons may be someone who has never worked as a teacher and is/are the so-called lay panellist(s).[192] The TRA also appoints a legal advisor to the panel who is independent and advises the panel on legal questions, interpretation of policy, relevant panel or court decisions or any other issues relevant to the matter.[193] The person presenting the disciplinary matter to the panel is appointed by the TRA and may be an official of the DfE or a government or external lawyer.[194] The teacher may represent themselves or be represented by any other person, including a legal representative of the teacher's choice.[195] The independent legal advisor appointed by the TRA will also advise an unrepresented teacher of the procedure to be followed.[196]

The panel will invite the referrer and teacher to present further evidence. The procedure may include a hearing or may be decided without a hearing at the teacher's request.[197] Where the panel finds the teacher guilty of the allegation, it makes a recommendation to the Secretary of State (represented by the TRA) as to whether a prohibition order should be issued against the teacher.[198] A prohibition order is a lifetime ban and such a decision bars a teacher from continuing their career in unsupervised teaching work.[199] The representative of the Secretary of State must consider the recommendation by the panel and if a prohibition order is made, must indicate whether the teacher may make an application for review of the prohibition order as well as the time period within which the teacher may review the order (which may not be less than two years).[200] In other words, the professional conduct panel ("PCP") will consider the seriousness of the misconduct, taking into account that a prohibition order applies for life, and determine whether the teacher should be allowed to apply to review the order after a certain period of time (not within two years). The

[191] Regulation 6 of the Teachers' Disciplinary (England) Regulations 2012.
[192] TRA "Teacher misconduct: Disciplinary procedures for the teaching profession" (2020) *TRA* 18.
[193] TRA "Teacher misconduct: Disciplinary procedures for the teaching profession" (2020) *TRA* 18.
[194] TRA "Teacher misconduct: Disciplinary procedures for the teaching profession" (2020) *TRA* 20.
[195] TRA "Teacher misconduct: Disciplinary procedures for the teaching profession" (2020) *TRA* 20.
[196] TRA "Teacher misconduct: Disciplinary procedures for the teaching profession" (2020) *TRA* 19.
[197] Regulation 7(3) of the Teachers' Disciplinary (England) Regulations 2012.
[198] Regulation 7(5) of the Teachers' Disciplinary (England) Regulations 2012.
[199] TRA "Teacher misconduct: The prohibition of teachers" (2015) *TRA* 7 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752668/Teacher_misconduct-the_prohibition_of_teachers_.pdf> (accessed 16-08-2021). See also s 3(2) of the Teachers' Disciplinary (England) Regulations 2012 for the definition of "teaching work".
[200] Regulation 8(2) of the Teachers' Disciplinary (England) Regulations 2012.

prohibition order must be served on the teacher as well as on the teacher's employer.[201] The regulations also provide for an appeal procedure in terms of which a teacher may appeal a prohibition order by applying to the High Court within 28 days of service of the order on the teacher.[202] This discussion of the disciplinary process in case of misconduct shows a clear legal framework with regard to the professional conduct of teachers in England.

7 4 5 The TRA experience, with specific emphasis on sexual abuse in the education sector in England

Up to this point, this chapter highlighted the highly structured and effective nature of the education system in England. However, the discussion will be incomplete without a consideration of some of the challenges faced, even in an effective system such as England's. The annual reports of the DfE highlight risks faced by the sector and rank the risks as high, medium or low and assign the risk to a specific department/unit with authority to deal with it.[203] It also indicates whether the risk is headed in a stable, downward or upward trend.[204] For example, the 2020 DfE Annual Report identifies one of the risks as the fact that schools do not have a sufficient number of high standard, quality teachers and that this results in poor educational outcomes for pupils.[205] This risk is owned by an operational group of the DfE, the Early Years and Schools Group ("EYSG").[206] This risk is ranked as stable seeing that progress has been made by publishing the Teacher Recruitment and Retention Strategy in 2019.[207] Practical steps have been taken to address this risk, for example, improving the user experience of the Teacher Vacancies platform.[208]

Teacher misconduct is a challenge faced by both jurisdictions considered in this research. In England, as part of the TRA, the TMU has the responsibility to administer and address matters of teacher misconduct.[209] The annual reports of the TRA include

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[201] Regulation 13 of the Teachers' Disciplinary (England) Regulations 2012.
[202] Section 17 of the Teachers' Disciplinary (England) Regulations 2012.
[203] See "DfE Consolidated Annual Report and Accounts 2019-20" (2020) *DfE* 68 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/932905/DfE_consolidated_annual_report_and_accounts_2019_to_2020_-_print_ready_publication.pdf> (accessed 13-08-2021).
[204] DfE "DfE Consolidated Annual Report and Accounts 2019-20" (2020) *DfE* 68.
[205] DfE "DfE Consolidated Annual Report and Accounts 2019-20" (2020) *DfE* 67.
[206] DfE "DfE Consolidated Annual Report and Accounts 2019-20" (2020) *DfE* 67.
[207] DfE "DfE Consolidated Annual Report and Accounts 2019-20" (2020) *DfE* 67.
[208] DfE "DfE Consolidated Annual Report and Accounts 2019-20" (2020) *DfE* 67.
[209] See TRA "Teaching Regulation Agency Annual report and accounts" (2019) *TRA* 9.

valuable statistics regarding the number of misconduct matters per year in the education sector in England. The table below represents the number of misconduct matters referred to the TRA, whether action was taken and if so, the number of investigations. It also indicates the number of matters referred to a PCP and whether the TRA imposed an IPO pending the recommendation of the panel. The number of teachers against whom a prohibition order ("PO") was imposed can also be seen from the table. As discussed above, the recommendation by the panel must include whether the teacher is allowed a review of the prohibition order after a period of no less than two years. Lastly, the number of matters that resulted in an appeal to the High Court is also reflected.

Table 12: The TMU's administration of teacher misconduct matters in England[210]

Year	Referrals	No further action[211]	Matters investigated	PCP panels adminis-tered[212]	Imposed IPO's[213]	PO's	Review	Appeal
18/19	985	364	462	143	51	91	1	4
19/20	900	263	488	298	56	63	1	4
20/20	628	138	416	286	110	39	0	0

It should be noted that only a few of the cases included in these statistics were analysed for this research. A more detailed analysis will be valuable future research and will enable a comparison with the effectiveness of professional disciplinary procedures across different jurisdictions.

A few preliminary remarks may be made about these statistics. First, the number of appeals is exceptionally low compared to the number of decisions. This may be

[210] See the three annual reports which contain the data in the table. TRA "Teaching Regulation Agency Annual report and accounts" (2019) *TRA* 10; TRA "Annual report and accounts" (2020) *TRA* 11, 20-21 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919855/P3536_TRA_Annual_Report_2019-20_FINAL.pdf> (accessed 13-08-2021); TRA "Annual report and accounts" (2021) *TRA* 21 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1002728/TRA_Annual_Report_2020-21.pdf> (accessed 13-08-2021).

[211] There are two possible reasons for the TMU not taking further action. The first is a lack of jurisdiction. The second is that it does not consider the conduct to be serious misconduct.

[212] This means that the alleged misconduct was referred to a Professional Conduct Panel to conduct a hearing. This is similar to formal disciplinary hearings in South Africa.

[213] The purpose of Interim Prohibition Orders is to remove the teacher from the workplace, thereby protecting pupils and ensuring public confidence in the teaching profession.

indicative of the TRA dispensing with misconduct matters fairly and effectively. It should be noted that a review as reflected in Table 12 does not refer to a review of the PCP's decision, but rather that the PCP, after determining the seriousness of the misconduct, decides whether the prohibition order should be subject to a review after a period of time.[214] Over the period of three years, the PCP only allowed reviews in two cases. It can be seen from the decisions of PCP that it does not take the recommendation of a prohibition order lightly and where it is ordered, it is convinced that the person should be banned from teaching for his or her lifetime.[215]

Second, over the three years, an average of around 29% of matters required "no further action" by the TRA.[216] This means that the TRA either did not have jurisdiction to entertain the matter or the misconduct referred to the TRA was not of a serious enough nature. It is positive that such a high percentage of referrals require no further action because it shows that the regulatory framework is being used to refer matters even if the misconduct is only perceived to be serious. The severity of misconduct is determined by the TRA with reference to the Teachers' Standards and Teacher Misconduct: The Prohibition of Teachers discussed in section 7 4 3 2 above.

The third aspect to note is that not all complaints of teacher misconduct are referred to a PCP. On average, over the three years presented in the table, the TMU decides around 54% of the matters without referring it to a PCP.[217] This is an interesting aspect of the process. The reason for this is because the TMU investigates the complaint, takes into consideration the written representations of the teacher and then decides whether to refer the matter to a PCP.[218] If, after its investigation, the TMU decides not to refer the matter to a PCP, no further steps are taken and the referrer, teacher and

[214] See TRA "Mr Alexander Peredruk: Professional conduct panel outcome" (2021) *TRA* 15 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1006301/_WEB_DECISION__Peredruk__Andrew_-_S_of_S_Decision__REDACTED_.pdf> (accessed 13-08-2021).

[215] See, eg, the discussion of a prohibition order by the PCP in "Miss Nishi Shah: Professional conduct panel meeting outcome" available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1009538/OFFICIAL_SENSITIVE_Shah_Nishi_SOS_Web_Decision_Redacted.pdf> (accessed 13-08-2021).

[216] This percentage was calculated taking into account the number of referrals and matters where no action was taken, over a period of three years and calculating the average percentage which is 29,3%.

[217] This percentage was calculated taking into account the number of investigations and matters referred to a PCP, over a period of three years and calculating the average percentage which is 53,5%.

[218] TRA "Teacher misconduct: Disciplinary procedures for the teaching profession" (2020) *TRA* 7-8.

the employer are informed.[219] Even where matters are referred to a PCP, it is first subject to an investigation by the TMU. This means that where cases end up at a PCP, a preliminary investigation has already been done and the PCP only hears cases where the seriousness of the misconduct has been established. This is an efficient use of resources seeing that the TMU investigates and decides the majority of cases. The TRA only deals with matters of serious misconduct[220] and not any instances of incapability (poor performance) which is dealt with by the employer (SGB or local authority).[221] Details as to the specific type of misconduct are available in the panel decision of each case which is uploaded to the government website.[222]

As is the case with most countries, sexual abuse is a specific challenge faced by the education system in England - among pupils and between teachers and pupils. In 2014 it was reported that in the preceding five years, there were at least 959 teachers charged with having a sexual relationship with a pupil and that this number may be much higher due to under-reporting.[223] The government recognises this challenge and in January 2021 it announced a Tackling Child Sexual Abuse Strategy with funding of £ 2 million, which is described as a "whole-system approach" where different sectors work together to address sexual abuse.[224] One aspect of this strategy is to implement a new compulsory school subject – Relationships, Sex and Health Education – through which teachers must educate learners on different forms of abuse and related

[219] TRA "Teacher misconduct: Disciplinary procedures for the teaching profession" (2020) *TRA* 7-8.

[220] As mentioned above, informal complaints of teacher misconduct can be made to the school and be dealt with at school level. More serious matters of teacher misconduct are referred to the TRA under the broad description of "unacceptable professional conduct and/or conduct that may bring the profession into disrepute" or as mentioned in the regulations, "conviction of a relevant offence". See s 5 of the Teachers' Disciplinary (England) Regulations 2012. See also TRA "Teacher Misconduct: The Prohibition of Teachers" (2018) *Gov.UK* 9-10.

[221] TRA "Teacher misconduct: The prohibition of teachers" (2015) *TRA* 5 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752668/Teacher_misconduct-the_prohibition_of_teachers_.pdf> (accessed 13-08-2021).

[222] These decisions are available at <https://www.gov.uk/search/all?parent=&keywords=panel+outcome+misconduct&level_one_taxon=&manual=&organisations%5B%5D=teaching-regulation-agency&organisations%5B%5D=national-college-for-teaching-andleadership&public_timestamp%5Bfrom%5D=&public_timestamp%5Bto%5D=&order=updated-newest> (accessed 13-08-2021).

[223] IBB Law "Let's be clear on sexual relations between teachers and students over 16" (22-03-2017) *IBB Law* <https://www.ibbclaims.co.uk/site/blog/sexual-and-physical-abuse-claims/sexual-relations-between-teachers-and-students-over-16> (accessed 06-08-2021).

[224] The Tackling Child Sexual Abuse Strategy is available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/973236/Tackling_Child_Sexual_Abuse_Strategy_2021.pdf> (accessed 09-11-2021); See also DfE "New programme to protect children at risk of exploitation" (2019) *Gov.UK* <https://www.gov.uk/government/news/new-programme-to-protect-children-at-risk-of-exploitation> (accessed 09-11-2021).

concepts.[225] In this way, teachers are better informed and learners are equipped with knowledge regarding acceptable conduct. On 1 April 2021, a dedicated helpline was also created to assist victims of sexual abuse in schools.[226]

The facts of a few TRA decisions that concerns sexual abuse are discussed. This discussion illustrates the challenge that exists in the education sector, particularly conduct between teachers and pupils, as well as how it is dealt with by the TRA. In the matter involving *Mr Matthew Sides*,[227] it was alleged that the teacher engaged in sexual activity with a pupil after meeting the pupil on a social networking application, Grindr.[228] The child was not a pupil at the school where the teacher worked. The teacher was under the impression that the pupil was sixteen years of age. After realising that the pupil was in fact fourteen, the teacher informed the police and confessed to the sexual activity with the child.[229] The fact that the teacher came forward is laudable but what is concerning is the manner in which the PCP came to its conclusion. The following quotation from the case may be used to illustrate the issue:

> "The panel was satisfied, on the balance of probabilities, that Mr Sides had believed Child A had been 16 when he had engaged in sexual activity with Child A. However, the panel considered that Mr Sides had completely neglected his duty, as the adult and as a teacher, to take steps to ensure that Child A was in fact 16".[230]

The age of consent for children to engage in sexual activity in England is sixteen.[231] However, section 16 of the Sexual Offences Act 2003 determines that adults who hold a position of trust over children (such as a teacher),[232] may not engage in consensual

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[225] HM Government "Tackling Child Sexual Abuse Strategy" (2021) *Gov.UK* 55 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/973236/Tackling_Child_Sexual_Abuse_Strategy_2021.pdf> (accessed 09-11-2021).

[226] DfE "Government launches review into sexual abuse in schools" (2021) *Gov.UK* <https://www.gov.uk/government/news/government-launches-review-into-sexual-abuse-in-schools> (accessed 09-11-2021).

[227] TRA "Mr Matthew Sides: Professional conduct panel meeting outcome" (2021) *TRA* 17. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1009015/Professional_conduct_panel_outcome_-_Matthew_Sides.pdf> (accessed 09-11-2021).

[228] TRA "Mr Matthew Sides: Professional conduct panel meeting outcome" (2021) *TRA* 5.

[229] TRA "Mr Matthew Sides: Professional conduct panel meeting outcome" (2021) *TRA* 5-6.

[230] TRA "Mr Matthew Sides: Professional conduct panel meeting outcome" (2021) *TRA* 7.

[231] See "Children and the Law" which is available at < https://learning.nspcc.org.uk/child-protection-system/children-the-law>.

[232] Section 22(4) of the Sexual Offences Act determines that there is a position of trust where "A person receives education at an educational institution if— he is registered or otherwise enrolled as a pupil or student at the institution, or he receives education at the institution under arrangements with another educational institution at which he is so registered or otherwise enrolled".

sexual activity with children under the age of 18. In other words, even if Mr Sides believed that the child was 16, he was still a teacher, who is in a position of trust over children and should not engage in sexual activity with children (even if they are not pupils at the school where he works). The statement by the PCP does not take into account the teacher's position of trust and reveals a shortcoming in the application of the law. The outcome of the PCP hearing was, however, a prohibition order which means the teacher may no longer be part of the teaching profession.[233] As mentioned in the South African context, there is a need for clear rules regarding sexual misconduct, sexual harassment and sexual relationships in education due to the nature of a school setting. There should be higher standards expected of the educator toward the learner than what is expected of citizens. No matter the age of the child/learner, sexual relationships should always be prohibited due to the position of trust of the educator and, as often mentioned in the English context, the important objective of maintaining public trust in the profession.

As mentioned above, the education sector in England is not free from misconduct, but the manner in which it is dealt with by the professional body is effective. In the matter of *Mr Alexander Peredruk*,[234] a teacher at the St Cuthbert's Roman Catholic High School was charged with searching, downloading, receiving and/or viewing indecent pictures of children and that his conduct was sexually motivated.[235] The pictures were not of pupils from the school at which he worked, nor was a pupil involved in the matter. A prohibition order was issued against the teacher, even though the teacher resigned from the school after the police investigation started.[236] What is significant about this case is that the teacher had not sexually abused a pupil at the school, but his conduct in accessing explicit content involving children, resulted in him being prohibited from ever working as a teacher in future. Even his resignation did not prevent the TRA from pursuing the matter, because he was considered a risk in

[233] TRA "Mr Matthew Sides: Professional conduct panel meeting outcome" (2021) *TRA* 17.
[234] TRA "Mr Alexander Peredruk: Professional conduct panel outcome" (2021) *TRA* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1006301/_WEB_DECISION__Peredruk__Andrew_-_S_of_S_Decision__REDACTED_.pdf> (accessed 09-11-2021).
[235] TRA "Mr Alexander Peredruk: Professional conduct panel outcome" (2021) *TRA* 4. The school received the information from the National Crime Agency who believed the teacher was accessing the pictures via the internet.
[236] TRA "Mr Alexander Peredruk: Professional conduct panel outcome" (2021) *TRA* 7, 18-19.

working with children.[237] This is an indication of the seriousness with which sexual abuse, in any form, is viewed by the TRA.

What is also evidenced by TRA misconduct cases is the level of communication between different spheres of government. For example, in the cases of *Mr Andrew Freethy*[238] and *Mr Paul Harry Symonds*[239] both teachers were prohibited from teaching due to convictions for offences. In the *Symonds* case, the teacher was convicted of three charges under section 1(a) of the Protection of Children Act 1978 for "making an indecent photograph or pseudo-photograph of a child".[240] At the time of the offence, the teacher had worked for the school for three years, but was suspended and later dismissed by the school after it became aware of the charges against him.[241] His criminal conviction resulted in a sentence to carry out 200 hours of unpaid work over two years,[242] his name was included in the Sex Offender's list for five years, he had to commence with rehabilitation for a maximum of 30 days, a fine and a sexual harm prevention order ("SHPO") for five years.[243] Apart from this sentence and his dismissal from the school, a prohibition order was also issued against the teacher ensuring that he does not work with children in his lifetime.[244] The school dismissed the teacher, the police investigation resulted in his criminal conviction and the TRA decision resulted in a prohibition order. This is evidence of a whole-system approach followed in case of sexual abuse, which ensures that pupils are protected and that similar conduct by this teacher should never again take place.

In the *Freethy* case, the teacher was also convicted of making and/or distributing indecent pictures of children in contravention of the Child Protection Act of 1978. The teacher was sentenced to 16 months' imprisonment and was placed on the Sex

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[237] TRA "Mr Alexander Peredruk: Professional conduct panel outcome" (2021) *TRA* 14.

[238] TRA "Mr Matthew Freethy: Professional conduct panel outcome" (2021) TRA <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1006641/_OFFICIAL_SENSITIVE__SoS_decision_for_Andrew_Freethy.pdf> (accessed 09-11-2021).

[239] TRA "Mr Paul Harry Symonds: Professional conduct panel outcome" (2021) *TRA* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1002221/_OFFICIAL_SENSITIVE__Symonds__Paul_S_of_S_Decision__redacted_.pdf> (accessed 09-11-2021).

[240] TRA "Mr Paul Harry Symonds: Professional conduct panel outcome" (2021) *TRA* 4.

[241] TRA "Mr Paul Harry Symonds: Professional conduct panel outcome" (2021) *TRA* 5-6.

[242] This community service by Symonds will of course not involve working with children.

[243] Sexual harm prevention orders are discussed below. See Stop It Now "Sexual Harm Prevention Order" (undated) *Stop It Now* <https://www.stopitnow.org.uk/concerned-about-your-own-thoughts-or-behaviour/concerned-about-use-of-the-internet/get-the-facts/consequences/being-subject-to-a-sexual-harm-prevention-order-shpo/> (accessed 27-07-2021).

[244] TRA "Mr Paul Harry Symonds: Professional conduct panel outcome" (2021) *TRA* 14.

Offenders Register for ten years.[245] Even though the teacher resigned before the above conviction, the TRA pursued the matter, and a prohibition order was issued against the teacher.[246]

The above discussion shows that authorities in England work together to root out sexual abuse in education. There is communication between the police, the school and the TRA. Apart from pre-appointment checks, relevant convictions that occur after appointment result in investigations by the TRA and often these teachers are issued with prohibition orders. Even where the teacher is sentenced by a court, the TRA pursues the case to ensure that teachers guilty of sexual abuse are removed from the system entirely and indefinitely.

There is a lot to learn from this holistic approach in combatting and preventing sexual abuse in schools. In the South African context, there is often a disconnect in communication between different authorities resulting in a lack of accountability and a lack of public trust in schools, the police, SACE and the Provincial Department of Education ("PDE"). The sanctions against perpetrators of sexual misconduct are often – at most – dismissal. Only in very few instances is SACE informed of events. It was only in April 2021 that the Minister of Basic Education sought to introduce an indefinite ban on educators guilty of sexual misconduct.[247] This requires that different role players ensure proper procedure is followed and that perpetrators are held accountable. South Africa should take note of the serious sentences imposed on teachers guilty of sexual abuse in England. This is reinforced by continued accountability after the sentence, such as the imposition of an SHPO. An SHPO is an order imposed against persons convicted of sexual offences involving children. The conditions of the order may be that the person may not visit parks or places where children are likely to be, may not search the internet without computer monitoring software and may not delete their internet search history.[248] The police may visit such

[245] TRA "Mr Matthew Freethy: Professional conduct panel outcome" (2021) TRA 7.
[246] TRA "Mr Matthew Freethy: Professional conduct panel outcome" (2021) TRA 7, 15.
[247] This is in terms of the Regulations regarding Terms and Conditions of Employment of Educators in terms of section 4 of the EOEA GN 331 in *GG* 44433 of 09-04-2021. Item 4 determines that once an educator is dismissed from the public service, the "mandatory period of prevention from re-employment" is applicable which, in the case of sexual misconduct, is indefinite.
[248] See "Sexual Harm Prevention Order" which is available at <https://www.stopitnow.org.uk/concerned-about-your-own-thoughts-or-behaviour/concerned-about-use-of-the-internet/get-the-facts/consequences/being-subject-to-a-sexual-harm-prevention-order-shpo/> (accessed 09-11-2021).

a person's home at any time to confirm whether the conditions are being met.[249] This once again speaks to the ownership of risks and challenges, revealing the need to have one department/body responsible for a particular challenge in education while communicating with other spheres of government that have an interest in the matter.

7 4 6 Discipline and incapability in the context of the employment of teachers in England

While the preceding discussion focused on the regulation of the teaching profession in England (similar to the function of SACE in South Africa), this section focuses on the regulation of educator performance in the employment context.

In England, there is a single system regulating the employment of all employees – including the employment of teachers. This already differs from the South African position where the employment of educators on the provincial post establishment of public schools is regulated by a separate piece of labour legislation, the EOEA. According to Ruff, teachers in England have similar employment rights to other employees, contained in ordinary legislation and case law.[250] Along the lines of chapter 6, which focused on the possibility of dismissal of educators for misconduct or incapacity in the South African context, the position in England with regard to these two determinants (misconduct and incapability) of teacher performance are considered below.

The point of departure is the Employment Rights Act 1996 ("ERA").[251] Chapter 1 of the ERA contains the right not to be unfairly dismissed.[252] Unfair dismissal is claimed in terms of the ERA, whereas "wrongful dismissal" may be claimed based on a breach of contract.[253] It should also be mentioned that only persons whose employment status is that of an "employee"[254] may claim unfair dismissal under the ERA. In case of a dispute regarding unfair dismissal, the employee may approach the Employment

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[249] See "Sexual Harm Prevention Order".
[250] A Ruff "England and Wales" in CJ Russo & J DeGroof (eds) *The Employment Rights of Teachers: Exploring Education Law Worldwide* (2009) 75.
[251] Employment Rights Act 1996 ch. 18.
[252] Chapter 1 of the Employment Rights Act 1996 ch. 18.
[253] See, eg, *SB Reader v South Tyneside Council* [2019] UKET 2500359 para 1. Employees may base their claim to the Employment Tribunal on unfair dismissal as well as wrongful dismissal.
[254] To determine a person's employment status, see The Government of the United Kingdom "Employment Status" (undated) *Gov.UK* <https://www.gov.uk/employment-status/employee> (accessed 07-11-2021).

Tribunal. This forum derives its powers from the Employment Tribunals Act 1996,[255] and its jurisdiction is determined by the Employment Tribunals Rules of Procedure 2013.[256] The Employment Tribunal hears employment disputes, including unfair dismissal claims based on conduct or capability. However, employees and employers must first approach ACAS in case of a dispute and attempt to resolve the dispute through conciliation (discussed below).[257]

Section 98(1) of the ERA determines that the onus rests on the employer to show the fairness of a dismissal and will depend, first, on the principal reason for dismissal. There are more than two possible reasons in the ERA, but the two reasons relevant to this research are the "capability or qualifications of the employee" or the "conduct of the employee".[258] Section 98(3) defines employees' "capability" as "assessed by reference to skill, aptitude, health or any other physical or mental quality" and "qualifications" mean "any degree, diploma or other academic, technical or professional qualification relevant to the position".[259]

After the employer has shown the principal reason for dismissal to be capability and/or qualifications, or conduct, section 98(4) determines that the acceptability of dismissal will depend on the reasonableness of the employer's decision (this is in contrast to the South African requirement of fairness).[260] To determine reasonableness, the specific circumstances of the employer will be taken into account, "including the size and administrative resources of the employer's undertaking".[261] A finding will be made taking into account equity and the merits of the case.[262] Guidelines have been provided by the courts, which should be applied by the Employment Tribunal. As far as misconduct is concerned, the court in *British Home Stores v Burchell* ("*British Home Stores*")[263] stated that the employer must show a "genuine

[255] Employment Tribunals Act 1996 ch. 17.
[256] Employment Tribunals Rules of Procedure 2013.
[257] A "qualifying period" exists which means than an employee must work for his or her employer for a specific time period (usually two years) before being eligible to approach the Employment Tribunal and claim unfair dismissal. See The Government of the United Kingdom "Dismissal: your rights" (undated) *Gov.UK* <https://www.gov.uk/dismissal/what-to-do-if-youre-dismissed> (accessed 07-11-2021).
[258] Section 98(2)(a) and (b) of the ERA.
[259] Section 98(3).
[260] It deserves mention that in *Sidumo and Another v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) the Constitutional Court expressly rejected the so-called "reasonable employer test" in the context of the LRA's requirement of fairness.
[261] Section 98(4) of the ERA.
[262] Section 98(4).
[263] 1978 IRLR 379.

belief" that the employee committed misconduct and must proceed to apply a "neutral burden of proof" which requires that the employer has "reasonable grounds to sustain that belief at the stage it was formed".[264] In other words, the genuine belief that the employee committed misconduct must be based on reasonable grounds. This must be followed by a reasonable investigation into the misconduct.[265] In *Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* ("*Graham*")[266] the Court of Appeal confirmed these guidelines and described the role of the Employment Tribunal to include consideration of three aspects of the employer's decision after confirming that it was valid (taking into account the provisions of the ERA and, more specifically, section 98 of the ERA).[267] First, whether the employer commenced with investigating the allegations of possible misconduct and whether such an investigation was reasonable in the circumstances.[268] Second, whether the employer actually believed that the employee was guilty of the alleged misconduct.[269] Third, whether there were reasonable grounds for the employer's belief that the employee was guilty of the alleged misconduct.[270] Once these questions have been answered in the affirmative, the Employment Tribunal must assess the reasonableness of the employer's response to the alleged misconduct.[271] This is an objective standard and the employer's conduct is assessed by the standard of the "hypothetical reasonable employer".[272] What this means is that the Employment Tribunal cannot substitute the employer's decision with its own subjective interpretation or view of the facts, but rather must assess whether the employer's conduct falls within a "band or range of reasonable responses" in the specific circumstances.[273] This also means that the tribunal is not tasked to determine whether the circumstances of the case called for lighter sanction which would have been reasonable.[274] As mentioned in *Janice Brown-Simpson v Arbor Academy Trust* ("*Janice Brown*"),[275] different employers may come to different conclusions regarding

[264] *British Home Stores v Burchell* 1978 IRLR 379.
[265] *British Home Stores v Burchell* 1978 IRLR 379.
[266] 2012 EWCA Civ 903 2012 IRLR 75.
[267] *Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* 2012 EWCA Civ 903 para 35; See also *Mrs Rachael Lockwood v St. Margaret's Clitherow Catholic Academy Trust* [2020] UKET 1804626 para 43 where the Employment Tribunal follows this approach.
[268] Para 35.
[269] Para 35.
[270] Para 36.
[271] Para 36.
[272] Para 36.
[273] Para 36.
[274] *Janice Brown-Simpson v Arbor Academy Trust* 3213547/2020 para 20.
[275] [2020] UKET 3213547.

the decision to dismiss, but both employers' decisions may be reasonable.[276] If the Employment Tribunal finds that the response of the employer falls within this band or range of reasonable responses, the decision to dismiss the particular employee will be considered reasonable.[277] In the context of dismissal for incapability, the employer carries the same burden of proof to show that the principal reason for dismissal was the capability of the employee (pertaining to their capability and/or qualifications). In *Janice Brown* the tribunal said that this does not require of the employer to show that the particular employee (teacher) is objectively incapable.[278] This can be explained with reference to *Alidair Ltd v Taylor* ("*Alidair*"),[279] where the court stated that:

> "Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent".[280]

This brings us to the procedure to be followed by employers in implementing discipline for misconduct or addressing poor performance in their workplaces. In terms of section 199 of the Trade Union and Labour Relations (Consolidation) Act 1992, ACAS may issue "Codes of Practice" to provide role players in employment with the necessary practical guidance and principles to ensure sound labour relations.[281] ACAS issued such a code which came into effect in 2015 and provides the procedure that needs to be followed by the employer in case of misconduct or incapability (poor performance). This code is the "ACAS Code of Practice on Disciplinary and Grievance Procedures" ("ACAS code").[282] Employers (including SGBs and the local authority) may adopt their own disciplinary codes for their specific workplaces, but it must be based on the principles contained in the ACAS code. Should a complaint be made by the employee to the Employment Tribunal, the procedure followed by the employer to, for example, dismiss the employee, will be analysed. Unreasonable failure by the employer to follow

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[276] *Janice Brown-Simpson v Arbor Academy Trust* [2020] UKET 3213547.
[277] Para 36.
[278] Para 16.
[279] 1978 ICR 445, CA.
[280] *Alidair Ltd v Taylor* 1978 ICR 445, CA as cited in *Janice Brown-Simpson v Arbor Academy Trust* 3213547/2020 para 16.
[281] See s 199 of the Trade Union and Labour Relations (Consolidation) Act 1992 ch. 52.
[282] ACAS "Code of Practice 1: Code of Practice on disciplinary and grievance procedures" (11-03-2015) *ACAS* <https://www.acas.org.uk/acas-code-of-practice-for-disciplinary-and-grievance-procedures/html#the-code-of-practice> (accessed 06-11-2021).

the code may result in a larger compensation award (up to 25% more) in favour of the employee.[283] In dealing with discipline or grievances in the workplace, the ACAS code prescribes a number of points that the employer should take into account to ensure that the matter is dealt with fairly:

> "• Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.
> • Employers and employees should act consistently.
> • Employers should carry out any necessary investigations, to establish the facts of the case.
> • Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
> • Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
> • Employers should allow an employee to appeal against any formal decision made".[284]

The practical implementation of this Code of Practice may briefly be considered. The first step, once disciplinary issues arise in the workplace, is that the employer "establish the facts of each case".[285] This refers to the investigation phase of disciplinary action and may include that the employer arranges an "investigative meeting" [286] which is not yet a disciplinary hearing. The purpose of this meeting is to collect evidence and hear all the facts before proceeding to a possible disciplinary hearing. During this step, the employer may deem it necessary to suspend the employee (with pay), but the ACAS code expressly states that the period of suspension should be "as brief as possible".[287] The ACAS code does not provide detail regarding suspensions (as part of the disciplinary procedure) but allows for it, if it is "considered necessary" by the employer.[288] Suspension should therefore not be an automatic response by the employer in case of alleged misconduct. It is also stated in

[283] See S 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ch. 52; See also ss 118-124 Employment Rights Act 1996 ch. 18.
[284] ACAS "Code of Practice 1: Code of Practice on disciplinary and grievance procedures" (11-03-2015) *ACAS*.
[285] ACAS "Code of Practice 1: Code of Practice on disciplinary and grievance procedures" (11-03-2015) *ACAS* para 5.
[286] See, eg, *Mrs Rachael Lockwood v St. Margaret's Clitherow Catholic Academy Trust* [2020] UKET 1804626 para 10.
[287] ACAS "Code of Practice 1: Code of Practice on disciplinary and grievance procedures" (11-03-2015) *ACAS* para 8.
[288] ACAS "Code of Practice 1: Code of Practice on disciplinary and grievance procedures" (11-03-2015) *ACAS* para 8.

the ACAS code that, should the employer impose a suspension, it is not considered disciplinary action against the employee.[289] Concerning suspensions, it is necessary to look to the ACAS Discipline and Grievances at Work guide ("ACAS guide").[290] The ACAS guide determines that suspension may be imposed for the employer to investigate the alleged misconduct, but that it should be with full pay.[291] The employer's right to suspend arises from the employment contract and it is therefore possible that the employer and employee contractually agree that suspension will be without pay.[292] The maximum period for suspension may also be contained in the employment contract.[293] In the absence thereof and as mentioned above, the ACAS code determines that suspension should be as brief as possible. The ACAS guide states that suspension should be reserved for a "serious allegation of misconduct" and where one or more of the following possibilities exist. First, the employer believes that the employee may interfere with the investigation, possible evidence or witnesses.[294] Second, the trust relationship between the employer and employee is tarnished, with the result that the employee's continued presence at the workplace may be a risk to the organisation's interests, property, clients or colleagues.[295] Lastly, if criminal charges are pending against the employee which may impact whether the employee may continue with their job.[296] Where the right to suspend is not contained in the employment contract, but there is a serious allegation of misconduct and the employer therefore has a good reason to impose a suspension, it may be a reasonable response by employers, especially if there is no prejudice to the employee (full pay and benefits).[297]

The second step in terms of the ACAS code, and this is only where the employer decides that a disciplinary hearing is necessary, is to "inform the employee of the

[289] ACAS "Code of Practice 1: Code of Practice on disciplinary and grievance procedures" (11-03-2015) *ACAS* para 8.
[290] ACAS "Discipline and Grievances at work: The ACAS guide" (2020) *ACAS* <https://www.acas.org.uk/sites/default/files/2021-03/discipline-and-grievances-at-work-the-acas-guide.pdf> (accessed 06-11-2021).
[291] ACAS "Discipline and Grievances at work: The ACAS guide" (2020) *ACAS* 18.
[292] ACAS "Discipline and Grievances at work: The ACAS guide" (2020) *ACAS* 18.
[293] ACAS "Discipline and Grievances at work: The ACAS guide" (2020) *ACAS* 18.
[294] ACAS "Discipline and Grievances at work: The ACAS guide" (2020) *ACAS* 18.
[295] ACAS "Discipline and Grievances at work: The ACAS guide" (2020) *ACAS* 18.
[296] ACAS "Discipline and Grievances at work: The ACAS guide" (2020) *ACAS* 18.
[297] Landu Law "Suspension" (undated) *Landu Law* <https://landaulaw.co.uk/suspension/> (accessed 06-11-2021).

problem".[298] This letter should provide the employee with the necessary information to know exactly what the allegations of misconduct or poor performance are, what consequences may ensue and provide the employee with enough time to prepare a response for the hearing/meeting.[299]

The employee has a right to be "accompanied at the meeting" and this refers to representation by a trade union representative or colleague.[300] Should the representative be unavailable on the day of the hearing/meeting, it must be postponed, provided that the second date is no more than five days after the original hearing date.[301] However, where the employee is "persistently unable or unwilling to attend" the meeting without a good reason, the employer should consider the evidence and make a decision.[302] This provision expressly provides for the situation, as often happens in South Africa, where employees or their representatives use postponements as a delay tactic and allows the employer to proceed with the meeting in the absence of the employee and make a decision based on the available evidence.

After the meeting, the employer must decide whether disciplinary action will be taken in the circumstances and the employee must be notified in writing of the employer's decision.[303] The ACAS code provides guidance on the appropriate sanctions. In case of misconduct or poor performance, the employee is usually given a written warning.[304] Should the employee commit further misconduct or is provided a time period to improve his or her performance and fails to do so, it may result in a final written warning.[305] Considering the seriousness of the misconduct or poor performance, the employer may impose a final written warning immediately.[306] This will be in cases where the employee's conduct may have a "serious or harmful impact

[298] ACAS "Code of Practice 1: Code of Practice on disciplinary and grievance procedures" (11-03-2015) *ACAS* para 9.
[299] ACAS "Code of Practice 1: Code of Practice on disciplinary and grievance procedures" (11-03-2015) *ACAS* paras 9-12.
[300] ACAS "Code of Practice 1: Code of Practice on disciplinary and grievance procedures" (11-03-2015) *ACAS* para 13.
[301] ACAS "Code of Practice 1: Code of Practice on disciplinary and grievance procedures" (11-03-2015) *ACAS* para 16.
[302] ACAS "Code of Practice 1: Code of Practice on disciplinary and grievance procedures" (11-03-2015) *ACAS* para 25.
[303] ACAS "Code of Practice 1: Code of Practice on disciplinary and grievance procedures" (11-03-2015) *ACAS* para 18.
[304] ACAS "Code of Practice 1: Code of Practice on disciplinary and grievance procedures" (11-03-2015) *ACAS* para 19.
[305] ACAS "Code of Practice 1: Code of Practice on disciplinary and grievance procedures" (11-03-2015) *ACAS* para 19.
[306] ACAS "Code of Practice 1: Code of Practice on disciplinary and grievance procedures" (11-03-2015) *ACAS* para 20.

on the organisation".[307] The employer must inform the employee of the time period for which the written warning or final written warning will remain valid. This includes that the employee be notified that further misconduct or persisting poor performance (within a time period) will result in dismissal or "some other contractual penalty such as demotion or loss of seniority".[308] In the case of "gross misconduct" that is of a serious nature dismissal may be appropriate, even for a first offence.[309] The employer is still required to follow a fair procedure, even where the sanction is summary dismissal. Employers are required to include examples of "gross misconduct" in their disciplinary rules.[310] The ACAS code includes "theft or fraud, physical violence, gross negligence or serious insubordination" as examples of gross misconduct.[311] After the sanction is imposed against the employee, and the employee believes that it is wrong or unjust, they have the opportunity to appeal.[312] The ACAS code does not expressly state whether the employee is entitled to a re-hearing of the facts on appeal or whether it is based on the record of the disciplinary hearing. In *Mrs Rachael Lockwood v St. Margaret's Clitherow Catholic Academy Trust* ("*Lockwood*"),[313] the teacher appealed against her dismissal and the appeal hearing was a re-hearing of the facts and evidence.[314] The ACAS code provides for these procedural guidelines but does allow for flexibility in their implementation. Based on the decision of the Employment Appeal Tribunal in *Fuller v Lloyd's Bank*,[315] an employer is not required to meticulously implement procedure. The overall procedure will be considered, as will the question of whether the procedural aspect, which was absent, was "intrinsically unfair".[316] It is also possible that procedural defects at the disciplinary hearing be remedied on

[307] ACAS "Code of Practice 1: Code of Practice on disciplinary and grievance procedures" (11-03-2015) *ACAS* para 20.
[308] ACAS "Code of Practice 1: Code of Practice on disciplinary and grievance procedures" (11-03-2015) *ACAS* para 21.
[309] ACAS "Code of Practice 1: Code of Practice on disciplinary and grievance procedures" (11-03-2015) *ACAS* para 23.
[310] ACAS "Code of Practice 1: Code of Practice on disciplinary and grievance procedures" (11-03-2015) *ACAS* para 24.
[311] ACAS "Code of Practice 1: Code of Practice on disciplinary and grievance procedures" (11-03-2015) *ACAS* para 24.
[312] ACAS "Code of Practice 1: Code of Practice on disciplinary and grievance procedures" (11-03-2015) *ACAS* para 26-29.
[313] 1804626/2020.
[314] *Mrs Rachael Lockwood v St. Margaret's Clitherow Catholic Academy Trust* [2020] UKET 1804626 para 33.
[315] [1991] IRLR 336, EAT.
[316] *Fuller v Lloyd's Bank* [1991] IRLR 336, EAT) as cited in *SB Reader v South Tyneside Council* 2500359/2019 para 25.

appeal, removing the prejudice of an unfair procedure. In this regard, the Court of Appeal in *Taylor v OCS Group Ltd* ("*Taylor*") stated that a tribunal should:

> "determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it, the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage".[317]

The principles in the ACAS code discussed above also apply in the case of an employer taking steps against an employee for incapability due to poor performance. Regulation 8 of the Staffing Regulations determines that the "governing body must establish procedures for dealing with [a] lack of capability on the part of staff at the school".[318] According to ACAS, each employee should be aware of the performance standards applicable to him or her and this is either contained in the terms of employment or policies applicable to the workplace.[319] In the case of teachers and head teachers, the DfE developed a model policy for Teacher Appraisal and Capability and schools (through school governing bodies) may develop their own policies based on the model policy.[320] The model policy has two parts. Part A deals with the appraisal policy applicable to teachers which reflects the Education (School Teachers' Appraisal) (England) Regulations 2012 ("Appraisal Regulations"). Part B contains the capability procedure which is in line with the ACAS code and Staffing Regulations. The performance of head teachers and teachers should be monitored through the appraisal process and concerns regarding the performance of a teacher/head teacher should then be addressed using the capability procedure. It should be mentioned that the Appraisal Regulations do not apply to teachers engaged in their statutory induction period.[321]

The appraisal procedure is discussed first. The appraisal of teachers is used to measure their performance and is designed to support and develop their skills as teachers.[322] The appraisal period runs continuously over 12 months and teachers will

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[317] *Taylor v OCS Group Ltd* [2006] IRLR 613 as cited in *SB Reader v South Tyneside Council* 2500359/2019 para 26.
[318] Item 8 of the School Staffing (England) Regulations 2009.
[319] ACAS "Capability Procedures" (undated) *ACAS* <https://www.acas.org.uk/capability-procedures> (accessed 18-08-2021).
[320] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786143/Teacher_appraisal_and_capability-model_policy.pdf> (accessed 06-11-2021).
[321] Item 1(4) of Education (School Teachers' Appraisal) (England) Regulations 2012.
[322] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 7.

be appraised by someone appointed for this purpose by the head teacher.[323] The head teacher is appraised by the SGB supported by an externally appointed expert advisor.[324] This process will contain clear objectives tailored to each teacher using the "SMART" method, which is an acronym for "specific, measurable, achievable, realistic and time-bound" objectives.[325] The standards against which teachers' performance is measured are the Teachers' Standards of 2011 discussed below. The teacher's performance is reviewed over a 12 month period through observation of classroom teaching, development and support, constructive feedback and is based on evidence collected during this process.[326] Thereafter the teacher receives an annual appraisal report which assesses the teacher's performance, their professional development needs and makes a recommendation regarding pay.[327] Should the head teacher or SGB (together with their advisor) be unsatisfied with the teacher's performance as evidenced by the annual appraisal, they may commence the capability procedure (Part B).

The capability procedure's point of departure is that, in case of serious underperformance that could not be addressed through the appraisal process, the employer should follow Part B of the Teacher Appraisal and Capability policy.[328] The teacher must be informed that there are concerns about performance and invited to a "formal capability meeting" with five working days' notice.[329] Enough information, such as written evidence, should be provided to the teacher to be able to engage at the meeting.[330] Teachers have the right to a representative at this meeting, such as a trade union representative or colleague.[331] Where the performance of the head teacher is in question, the chairperson of the SGB will conduct the capability meeting and in the case of a teacher, the head teacher will conduct the meeting.[332] During this meeting, the first thing is to identify "professional shortcomings".[333] The Teachers' Standards are used as the benchmark and it is explained to the teacher/head teacher how these

[323] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 7.
[324] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 7; Item 4 of Education (School Teachers' Appraisal) (England) Regulations 2012.
[325] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 7.
[326] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 8-9.
[327] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 10.
[328] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 11.
[329] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 11.
[330] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 11.
[331] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 11.
[332] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 11.
[333] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 11.

standards are not being met.[334] Second, guidance is provided on the "improved standard of performance" that is expected of the teacher.[335] Third, the teacher is informed of the support that will be provided to assist him or her to improve.[336] Fourth, a "timetable for improvement" is determined and it is explained how the performance of the teacher will be monitored.[337] Last, the teacher is formally warned that a failure to improve within the above time period may result in dismissal.[338] The policy also provides that, where the poor performance is of a serious nature, a final written warning may be given at this meeting or the teacher may be precluded from pay progression.[339]

The above process is followed by a "formal review meeting".[340] If the teacher's performance has improved, this will mark the end of the capability procedure and the appraisal process discussed above will once again commence.[341] Where the teacher has shown some progress and is likely to improve his or her performance, the review period may be extended to provide them with more time to improve.[342] Where no progress or improvement has been made, the teacher will receive a final written warning.[343] In the aforementioned two cases, after the extended review period, a "decision meeting" is conducted.[344] This meeting may result in the capability procedure ending, provided the teacher's performance indicated improvement. However, where the SGB chairperson or head teacher continues to be unsatisfied with the teacher's performance, a recommendation is made to the SGB that the teacher be dismissed.[345]

It should be noted that the SGB is the employer at foundation schools, voluntary aided schools and foundation special schools but the power to dismiss a teacher may be delegated to the head teacher, individual SGB members (or both the head teacher and SGB members).[346] In the case of community, voluntary controlled, community special and maintained nursery schools, the employer is the local authority who may

[334] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 11.
[335] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 11.
[336] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 11.
[337] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 12.
[338] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 12.
[339] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 12.
[340] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 12.
[341] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 12.
[342] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 12.
[343] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 12.
[344] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 13.
[345] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 13.
[346] See, eg, DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 13.

also delegate the power to the SGB or head teacher to conduct the process and decide the outcome, but the local authority actually implements the dismissal of teachers.[347]

Should the employee be of the opinion that the dismissal (for misconduct or incapability) was unfair, he or she should approach ACAS who will assist the parties with free "early conciliation", which entails that ACAS speaks to the parties about the dispute.[348] The purpose is to conciliate the dispute without having to approach the Employment Tribunal. Should conciliation fail, ACAS provides the employee with an "early conciliation certificate" and the employee may make a claim of unfair dismissal at the Employment Tribunal (provided it is within three months of the date of dismissal).[349] Chapter II of the ERA makes provision for remedies where the Employment Tribunal determines that the complaint is "well-founded".[350] In terms of section 113 of the ERA, the tribunal may order that the employee (teacher) be reinstated or re-engaged. However, section 112(2) determines that the tribunal must enquire whether the teacher wishes to be reinstated or re-engaged (after having explained what these remedies entail) and shall make such an order in terms of section 113 of the ERA. Reinstatement requires that the employee be treated "in all respects as if he had not been dismissed".[351] This includes that the employer reimburses the employee for a loss of benefits and remuneration due to the dismissal and that the employer restores the employee's previous rights and privileges (for example, seniority).[352] Re-engagement requires that the employer engage the employee on "comparable" or "suitable employment".[353] An order for re-employment also requires of employers, as is the case with reinstatement, to restore a loss of benefits and remuneration due to dismissal, as well as rights and benefits.[354] If the tribunal does not make an order for reinstatement or re-engagement, compensation may be awarded for unfair dismissal.[355]

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[347] DfE "Teacher appraisal and capability: A model policy for schools" (2019) *DfE* 13.
[348] See ACAS "How early conciliation works" (undated) *ACAS* <https://www.acas.org.uk/early-conciliation/how-early-conciliation-works> (accessed 05-11-2021).
[349] Section 111 of the ERA.
[350] Section 112.
[351] Section 114(1).
[352] Section 114(1)-(2).
[353] Section 115(1).
[354] Section 115(2)(d)-(f).
[355] The ERA contains a detailed explanation as to the compensation the tribunal may award. Section 118 explains that a "basic award" may be made in terms of ss 119-122 which contains specific requirements as to the award's calculation and a "compensatory award" is the amount which the tribunal finds "just and equitable" in the circumstances of the dismissal.

While the purpose of this chapter is not to address the multitude of Employment Tribunal cases where the fairness of the dismissal of teachers was considered, there is one aspect that deserves further consideration. In chapter 6 it was mentioned that assault and serious assault of learners by educators is the type of misconduct that was most often addressed at formal disciplinary hearings conducted by four selected PDEs between 2014 and 2019. It also often featured at arbitration before the ELRC.[356] It is safe to say that assault is a major concern in schools in South Africa, especially considering its egregious nature in many of the cases discussed. In England, a survey of cases shows that assault of pupils by teachers also occurs. The big difference, however, is in the nature and severity of the assault and the resultant accountability. In *Mrs Rachael Lockwood v St. Margaret's Clitherow Catholic Academy Trust* ("*Lockwood*")[357] the teacher was dismissed for conduct involving a 6-year-old child and unsuccessfully claimed unfair dismissal. The teacher was charged with making inappropriate comments and pushing the pupil causing him to fall backwards onto his backside.[358] The child's parents were divorced, and the teacher was concerned over his poor behaviour after a weekend with his father. During her discussion with the pupil about his behaviour, she stated that she should call social services so that they stop him from seeing his father.[359] She went on to question the pupil about an alleged incident where he pushed another pupil and, demonstrating the push, caused the pupil to fall backwards onto the floor.[360] The teacher apologised to the pupil and on the same day entered a report onto the Child Protection Online Management System ("CPOMS") and admitted to giving the pupil a "gentle push".[361] The teacher was subsequently suspended on full pay and an investigatory interview was scheduled with the head teacher (investigating officer) and human resources.[362]

As part of the investigation into the conduct of the teacher, the pupil was interviewed. This interview was conducted by a person who, as required, "is suitably qualified to interview young children in line with safeguarding guidance and good practice".[363] At the investigating interview, the head teacher asked the teacher

[356] See chapter 6.
[357] [2020] UKET 1804626.
[358] *Mrs Rachael Lockwood v St. Margaret's Clitherow Catholic Academy Trust* [2020] UKET 1804626 para 1.
[359] Para 6.
[360] Para 6.
[361] Para 7.
[362] Para 9.
[363] Para 12.

questions and enquired whether the conduct was in line with the Teachers' Standards.[364] The head teacher concluded that there were "sufficient grounds" for a disciplinary hearing based on two allegations, that the teacher made inappropriate comments to the pupil, thereby upsetting him, and deliberately pushing the pupil.[365] The letter informing the teacher of the disciplinary hearing stated that, if proven, her conduct would be considered "gross misconduct".[366] In the letter, it was explained to the teacher what the process would be at the hearing and which policies were applicable – The School's Behaviour and Disciplinary Policy, the School's Strategic Child Protection and Safeguarding Policy, the Staff Code of Conduct and the Professional Teachers Code of Conduct.[367] At the disciplinary hearing, it was established that a breach of the above policies took place and that it amounted to gross misconduct.[368] In deciding what sanction would be appropriate in the circumstances, the teacher's long service, clean disciplinary record, the financial impact of dismissal on the teacher and two character references were taken into account.[369] It was also taken into account that the teacher had reflected on her comments to the pupil and understood the seriousness thereof.[370] It was also found that the teacher's conduct towards learners needed to be trusted and that such conduct would not be repeated.[371] While it was considered whether a voluntary demotion or final written warning would be appropriate, summary dismissal was imposed bearing in mind that the teacher would continue to work with children and that the position required "absolute integrity".[372] On appeal, the dismissal was confirmed and the panel stated that "touching a child, especially a vulnerable child, was a very poor decision".[373]

The tribunal was satisfied that the decision of the employer was based on a genuine belief that the teacher committed the misconduct in question (the teacher self-reported), had reasonable grounds supporting the belief (the teacher and interview with the pupil confirmed the facts) and conducted a reasonable investigation (in

[364] Para 15.
[365] Para 16.
[366] Para 17.
[367] Para 17.
[368] Para 28.
[369] Para 26.
[370] Para 26.
[371] Para 26.
[372] Para 26.
[373] Para 39.

relation to which the tribunal found no shortcomings).[374] In assessing whether dismissal fell in the "band of reasonable responses", the tribunal was satisfied that the employer is best placed to assess the potential risk of allowing the teacher back to the school, who, throughout the proceedings, did not acknowledge the seriousness of her misconduct (in pushing the pupil) or her fault in the matter.[375] The tribunal concluded that dismissal was a reasonable response.[376]

In *SB Reader v South Tyneside Council* ("*Reader*"),[377] a head teacher was dismissed for four incidents of misconduct that included grabbing child 1 by the arm and dragging him out of the room while shouting at him, shouting at child 2 (who was 3 years old), restraining child 3 (an autistic child) in a "headlock" and, lastly, dragging child 4 from under a desk, scratching his arm.[378] The assistant head teacher was concerned about this conduct and spoke to the vice-chairperson of the SGB.[379] The parties decided to involve the Head of Learning and Early Help at the local council, who decided to suspend the head teacher.[380] The Local Authority Designated Safeguarding Officer ("LADO") was also informed due to the possible safeguarding issues that arose from the head teacher's conduct.[381] This LADO is appointed by the Local Authority and is involved in any complaints about adult staff members who work with children. LADO's scope of authority includes possible future harm to children or behaviour by an adult that has the potential of harming children.[382] Should a complaint be made to a LADO about the behaviour of teachers, the officer conducts a separate procedure involving the school (such as the assistant head teacher and SGB member mentioned above).[383] In this case, the LADO's report found that the head teacher shouted at and physically inappropriately chastised pupils.[384] A disciplinary hearing was convened. The main issues to be addressed at the hearing (broadly worded in the notice of the disciplinary hearing) included the head teacher's failure to implement

[374] ParaS 47-48.
[375] Para 57.
[376] Para 57.
[377] [2019] UKET 2500359.
[378] *SB Reader v South Tyneside Council* [2019] UKET 2500359.
[379] Para 49.
[380] Para 52.
[381] Para 49.
[382] See, eg, City of York "Local Authority Designated Officer and allegations against childcare professionals and volunteers" (undated) *City of York Safeguarding Children Partnership* <https://www.saferchildrenyork.org.uk/allegations-against-childcare-professionals-and-volunteers.htm> (accessed 07-11-2021)
[383] *SB Reader v South Tyneside Council* [2019] UKET 2500359 para 79.
[384] Para 81.

the safeguarding procedure, to report the incidents he was party to, to ensure the well-being of pupils and a safe environment, thereby failing in his duties as head teacher (as a result of the alleged misconduct).[385] The employer alleged it lost trust and confidence in the head teacher's ability to manage the school effectively, safeguard pupils, ensure professional boundaries and disclose incidents of possible misconduct.[386] The head teacher was dismissed, but his dismissal was overturned on appeal. He was reinstated as head teacher and given a final written warning.[387]

However, after receiving the decision of the appeal panel, the employer decided to go ahead and dismiss the head teacher, because it believed the head teacher posed a risk to pupils.[388] The reason for the decision was based on the appeal panel's confirmation of some of the alleged instances of misconduct. For example, the panel agreed that the head teacher lost his temper and shouted when dealing with child 1, but that he did not drag the child by his arm.[389] The Employment Tribunal found that the reason for the dismissal was based on conduct, a potentially fair reason for dismissal in terms of the ERA. However, in examining reasonableness, the tribunal applied the test in section 98(4) of the ERA and found that the employer based its (second) decision to dismiss on the incorrect belief that the appeal panel upheld the allegations against the head teacher, whereas it had only accepted that the head teacher shouted at child 1 (and did not uphold the rest of the allegations in respect of children 2, 3 and 4).[390] The tribunal concluded that the employer did not have reasonable grounds to believe that the appeal panel upheld all the allegations against the head teacher since it made its own inferences based on the appeal panel's report.[391] The tribunal found that the employer's incorrect understanding of the appeal panel's finding undermined the decision to dismiss, thereby rendering the decision of the employer to dismiss, unreasonable.[392] Compensation was awarded to the head teacher.[393]

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[385] Para 89.
[386] Para 90.
[387] Para 98.
[388] Para 106.
[389] Para 102.1.
[390] Para 126.
[391] Para 127.
[392] Paras 128-129.
[393] See paras 85-88 and 146-149. Compensation was awarded for procedural unfairness in that the employer unreasonably delayed in scheduling the disciplinary hearing, provided the head teacher with a late and vague letter informing him of the allegations against him impeding his ability to prepare for the hearing, provided evidence of the allegations and the witness list late.

Although *Lockwood* and *Reader* provide little evidence about the prevalence of assault in schools in England, they do illustrate the seriousness with which any form of assault, physical contact or so-called chastisement by a teacher toward a pupil is considered. This is also reflected by the sanctions imposed in these two cases, where the employer moved to dismiss. Conduct such as that of the head teacher in *Reader* rarely (if ever) would reach the formal disciplinary hearing stage in South Africa.

There are three insights from these cases relating to what may be described as accountability procedures in place at schools in England. In *Lockwood*, the teacher self-reported the incident on the Child Protection Online Management System. This already speaks to accountability and proper record keeping of possible instances of misconduct. Perhaps more important is the fact that the self-report was actually followed up by the employer and resulted in disciplinary action being taken against the teacher (who was ultimately dismissed). Second, the pupil in *Lockwood* was interviewed by someone who was suitably qualified to conduct such an interview with a young child and whose interview follows the "safeguarding guidance and good practice".[394] The record of the interview was used at the disciplinary hearing, appeal and Employment Tribunal.[395] This means that the child witness was not called to testify at any of the hearings. In chapter 6 some of the issues relating to securing witnesses in the South African context was emphasised, as well as attempts to protect vulnerable witnesses through Schedule 2 of the EOEA and the use of section 188A of the Labour Relations Act 66 of 1995 ("LRA") enquiries. The English approach described above – that is, using an interview record by an independent, objective and qualified person to get the testimony of child witnesses – should be strongly considered in the South African context. Third, in *Reader* the LADO was part of the process and conducted a separate investigation and met with the school to determine whether there were issues related to the safeguarding of children. The decision to take disciplinary action, in this case, was ultimately based on the LADO's report. This indicates the value of a designated officer responsible for ensuring that children are safeguarded in the school system.[396] There is a lot to learn from England's commitment to have structures in place to safeguard children. Apart from a disciplinary process, the school in *Reader*

[394] *Mrs Rachael Lockwood v St. Margaret's Clitherow Catholic Academy Trust* [2020] UKET 1804626 para 12.
[395] Para 12.
[396] Para 84.

also had a "safeguarding procedure".[397] This procedure is also aimed at protecting children from the behaviour of adults that may not be misconduct per se but has the potential to emotionally harm children. For example, the policy states that it includes treatment by an adult which makes the child feel "worthless or unloved, inadequate, or valued only insofar as they meet the needs of another person. It may include not giving the child opportunities to express their views, deliberately silencing them or 'making fun' of what they say or how they communicate".[398] Where a complaint of this nature is received, the safeguarding procedure contains a disciplinary process and disciplinary steps may be taken against a teacher should the investigating officer deem it appropriate in the circumstances.[399]

In summary, this discussion showed that general legislation regulates the conduct and capability of teachers in England from an employment perspective, which is supplemented by model policies (such as those provided by ACAS or the DfE). Each school (through the SGB) remains responsible to tailor these policies to its workplace. This does not require of schools to reinvent the wheel but to simply complete the model policies with their details and delete the provisions that do not apply to them (that is, based on the type of school). This does require a measure of administrative capability by the head teacher and SGB, as well as a commitment to implement the policies and keep teachers accountable. This also means that there is a wide discretion delegated to head teachers and SGBs in terms of enforcing the rules applicable to conduct and capability. However, the earlier discussion showed a high level of integration between employment decisions and the transparent and accessible functioning of the TRA (as the gatekeeper of the teaching profession in England), integration between the activities of individual schools and the local authority, as well as a great measure of sensitivity to the plight of learners as children. This integration fosters accountability and ensures that misconduct by teachers is addressed when necessary.

7 7 Conclusion

This chapter discussed the legislative regulation of education and the employment of teachers in England. England was chosen as a comparative jurisdiction based on (to some extent) a shared history, a shared size and composition of its basic education

[397] Para 46.
[398] See *SB Reader v South Tyneside Council* [2019] UKET 2500359 para 47.
[399] Para 48.

sector, and a shared approach to the regulation of the performance of educators through a combination of a professional body and legal principles governing the conduct and capability of educators within employment. One interesting aspect of the English approach is that, unlike South Africa with its EOEA, the employment of teachers is regulated by the general principles of labour law, a system which seems to work well in the context of a highly functioning professional body that provides clear standards for all teachers and where those standards translate into practice in individual schools.

In this regard, the discussion illustrated the English experience and the integration of the two pillars – a professional body and employment law principles – on which the regulation of the performance of educators rest and the transparency and accountability that this system displays and fosters. The absence of such integration in the South African context was pointed out during the earlier discussion and some proposals were made to address deficiencies in the South African context. The absence of such a highly functioning professional body in South Africa, coupled with the need to instil confidence through transparency and accountability in the South African basic education system, probably means (as was suggested in chapter 6) that the EOEA should be retained, but adapted. In this regard, the argument was also made in chapter 6 that there is greater scope for the clear incorporation of the well-established general principles of labour law into the EOEA.

What particularly stood out from the discussion in this chapter – and which may be added to the proposals already made in chapter 6 – is, first, the obligation on the employer in England to conduct a pre-appointment check with the TRA before the appointment of a teacher. Currently, the only similar provision in legislation in the South African context is contained in the recently promulgated regulations issued in terms of the EOEA. These regulations require of the PDE to ensure that the prospective employee's name does not appear in the National Child Protection Register[400] and that the person is in possession of a clearance certificate from the Registrar that their name does not appear in the National Register for Sex Offenders before such can be appointed or re-appointed to work with children.[401] Arguably this information should be available through SACE, but depends, as the English system

[400] Section 111 of the Children's Act 38 of 2005.
[401] Section 42 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

illustrates, on effective cooperation between the professional teachers' body, the criminal justice system and the role players (the PDEs, SGBs and principals) involved in the actual delivery of basic education. The discussion showed, for example, that addressing the sexual abuse of pupils by teachers requires a holistic approach by various spheres of government, including the police. Furthermore, any pre-appointment check with SACE should not be limited to this type of information, as other circumstances may also prevent employment.

Second, as mentioned, the English system also shows a great deal of clarity about the standards expected of teachers (by the professional body) and the translation of those standards into practice within schools. One particularly important example, which relates to the capacity of teachers, is the two-year induction period through which new teachers enter the profession. It stands to reason that the best way to eliminate poor performance (in the sense of incapacity) is pro-actively to identify it at the earliest possible stage of employment. It is suggested that a provision be included in the EOEA (in its section 16 dealing with incapacity) along these lines and to link its operation to the generally applicable standards to be included in section 16 (what these standards are, were discussed in chapter 6). Third, given the identified sensitivity around some types of misconduct and the possible undue (often repeated) exposure of young children (as learners) to legal processes, it was mentioned that Schedule 2 of the EOEA does afford the chairperson of an enquiry the discretion to direct that evidence be heard through an intermediary. In line with the English approach, it is suggested that this discretion be extended to, in appropriate cases, allow evidence in the form of a report by a suitably qualified individual tasked with interviewing the child.

CHAPTER 8: CONCLUSION AND RECOMMENDATIONS FOR LEGISLATIVE REFORM

8 1 A note on the motivation and scope of the study

This study investigated the impact of the legislative regulation of individual educator performance on the delivery of quality basic education. As explained in chapter 1, the motivation for the study was located in the juxtaposition of the importance of education, the poor state of basic education in South Africa, the central role of the educator in delivering a quality basic education, as well as the apparent fragmented approach to the legislative regulation of educator performance and apparent deficiencies in legislative provisions dealing specifically with the capacity and conduct of educators. In line with the regulation of the teaching profession in South Africa through the South African Council for Educators ("SACE") Act, "educator performance" was defined to encompass both the capacity and conduct of educators. Furthermore, for the reasons already explained in chapter 1, the study focused on the regulation of the performance of so-called "departmental educators" in the public basic education system, but by implication also considered the position of other educators in this system.

8 2 A quality basic education in the South African context

The primary purpose of chapter 2 was to explore the meaning of a "quality basic education" as a yardstick for subsequent discussion. Attention was paid to all three constituent, yet interrelated elements of the phrase "quality basic education". As far as the meaning of "basic" is concerned, an overview was provided of the sometimes divergent use of terminology and approaches at an international level and in different countries (South Africa included). The discussion showed that at an international level, the term "basic" is given content with reference to both the period of schooling as well as the content and outcomes of that education. In South Africa, and despite the use of the word "basic" in legal documents, the clearest indication of the meaning of the word "basic" is to be found in the organisation of the Department of Basic Education (DBE) around the delivery of education up to and including grade 12, which is also the approach this thesis took.

Consideration of the meaning of the word "education" showed that education is a process of development that goes beyond the availability of education and the transfer

of knowledge, to the development of individual skills. Education is a process that develops autonomous, responsible individuals with sound future prospects and contributes to the prosperity of society through its direct and indirect impact on the economy. However, education in South Africa cannot be divorced from its socio-economic context. The discussion showed that continued structural inequality remains a fundamental challenge in the delivery and success of basic education. Closely connected to this reality, is the fact that education has also been politicised over the years, which may yet further hamper its delivery.

The meaning of "quality" in the phrase "quality basic education" is a reactive term and is largely determined by the needs and realities of the individual and of society. Its meaning is derived from the meaning of "education" and locating that meaning in the South African context. At the same time, it presupposes at least appropriate content knowledge on the side of educators and the ability to transfer that knowledge. The discussion also showed that the quality of basic education in South Africa, measured in terms of a number of indicators used in numerous studies, is poor, especially in so-called no-fee schools in poor or rural areas. One of the reasons for this is the performance of educators. "Performance" means the capacity (qualifications, competence, content knowledge, and skills) and conduct (professionalism) of individual educators in delivering basic education. Some of the challenges impacting on the continued capacity of educators were identified – including the legacy of apartheid, the fact that relatively low performers at school become (often reluctantly) educators, the disparity in quality between teacher qualifications offered by different institutions and the reluctance of management to deal with instances of identified incapacity. Focusing on the conduct (or lack of professionalism) of educators and in anticipation of the much more detailed discussion of this issue in subsequent chapters, some examples were provided of the sometimes egregious nature of misconduct by educators, all impacting on the delivery of quality basic education.

8 3 Insights from international and constitutional law

Chapter 3 provided an overview of the recognition of the right to basic education in international and constitutional law as the first step in describing the legal framework applicable to the regulation of individual educator performance. Consideration of

international law already added to the insight into the meaning of a "quality basic education" from chapter 2 by emphasising that the role of the educator encompasses more than a mere transfer of knowledge and that such a transfer should be seen as a vehicle to transfer and develop the full array of tools and content (in the wide sense of these words) any learner needs to be successful in this world. Several further important insights were identified. First, the importance of basic education is embodied in its clear legal recognition – both in several international instruments and in the South African Constitution. Second, international instruments provide guidelines for its promotion and implementation. Third, the right to basic education is included in the South African Constitution as an unqualified right not subject to progressive realisation by the state. Fourth, South African courts have not really attempted to give meaning to at least the "minimum core obligation" (as envisaged by the Committee on Economic, Social and Cultural Rights) of the right to a basic education. The courts have dealt with specific instances of alleged violations of this right (relating more to infrastructure) and have embarked on a case-by-case jurisprudence gradually giving content to this right. Fifth, this emphasises the fundamental challenge of reliance on a rights regime to ensure a quality basic education – it is reactive and individualised in nature. Sixth, this, in turn, emphasises the need for appropriate policies and legislation to provide for the adequate and proactive realisation of this right (including the role of educators). Seventh, the discussion showed that in giving meaning to the content of the right to basic education through legislation, two further considerations should be borne in mind, namely the rights of learners as children (children's rights) and the rights of educators as employees. On the one hand, this means a school is not a traditional workplace, but one where a triangular relationship exists between learner, educator and employer. On the other hand, educators as employees are, in principle, entitled to the full array of employee rights. Any attempt at the legislative regulation of educator performance should always aim for an appropriate balance between the dictates of a basic education, learners' rights (as children) and employee rights.

8 4 The operationalisation of basic education in South Africa

The discussion in chapter 4 showed that the Constitution declares education to be a matter of concurrent competence between national and provincial governments and that there are many role players required to fulfil their functions for the education

system to operate effectively. The authority of each role player was discussed, including, at a national level, the Minister of Basic Education and, at provincial level and the level of specific schools, the Member of the Executive, Head of Department ("HOD"), School Governing Body ("SGB"), principal, parents and learners. The discussion also showed that the vision of the Constitution and South African Schools Act 84 of 1996 ("SASA") of cooperative governance and participatory democracy in basic education is not without its challenges. There often is divergence between the law and its implementation in practice. This often is due to the heterogeneous nature of our society and the political history of education in South Africa. There continues to be a power struggle between role players as to where the ultimate decision-making power lies. The discussion showed that implementation of legislation depends on individual exercises of discretion within a complicated legislative fragmentation of authority, which may well have a detrimental effect on the delivery of basic education. If one places the management of educator performance at the centre of the enquiry, it requires consideration of the Constitution and SASA, National Education Policy Act 27 of 1996 ("NEPA"), the SACE Act, the Labour Relations Act 66 of 1995 ("LRA"), the Employment of Educators Act 76 of 1998 ("EOEA"), collective agreements and the employment contract. This is no easy task and already points to perhaps undue fragmentation to the detriment of the delivery of a quality basic education.

8 5 The specific rules applicable to educator performance

Chapter 5 described and analysed the specific rules applicable to educator performance. This necessitated an overview of the applicable LRA principles because the LRA applies to both types of educators employed in the public basic education system, as well as the provisions of the EOEA (which specifically apply to educators in the public basic education system appointed against the provincial post establishment).

While the provisions of the LRA are well known and were surveyed for the sake of completeness, this is not the case with the EOEA. As far as its regulation of misconduct is concerned – bearing in mind the general requirements of substantive fairness – the discussion showed that the EOEA already makes a curious distinction between "serious misconduct" (in section 17) for which educators "must" be dismissed and "misconduct" in section 18. Both sections 17 and 18 deal with the same types of

misconduct – dishonesty, sexual misconduct and assault – but the distinction drawn between the sections seem arbitrary. A cursory glance at the exhaustive list of types of misconduct provided for in section 18 shows that many of these types of misconduct may rightfully be viewed as equally serious. Section 18(3) of the EOEA provides for the possibility of serious sanctions also in case of section 18 misconduct. This includes an array of sanctions short of dismissal not ordinarily encountered in workplaces – such as a fine, a suspension without pay or demotion. Section 18(5) also seems to limit the possibility of dismissal to certain types of misconduct. There also seems to be a general trend to put the cart before the horse – that is, to judge the seriousness of misconduct in light of the sanction that may be imposed and not, in the first instance, its inherent nature and circumstances. This already is evident from the introduction to section 18 (which describes misconduct in general as referring to a breach of the trust relationship) as well as the manner in which Schedule 2 of the EOEA provides for the delegation of authority to deal with misconduct by the HOD to the school principal. The EOEA shows a peculiar conflation of transgression and sanction as two of the requirements of substantive fairness of discipline. The EOEA shows little appreciation for the fact that some types of misconduct (many more than what the EOEA contains in section 17) are more serious than others, or for the fact that even relatively minor types of misconduct may be very serious depending on the context. It was also pointed out that, as far as basic education is concerned, the unique nature of schools and the paramount importance of the interests of mostly young learners (children) should provide decisive guidance in relation to the appropriateness of any sanction for misconduct.

As far as disciplinary procedures are concerned, the focus fell on Schedule 2 of the EOEA, which contains the disciplinary code and procedure for departmental educators. Two immediate areas of concern were identified when comparing this code with the Dismissal Code contained in the LRA. While the latter clearly is seen as containing no more than guidelines and have been interpreted to promote a relatively informal approach to discipline, the EOEA code not only contains a host of detailed requirements but does so in legislation (which may not allow for any deviation). At face value then, the EOEA creates a formalistic and inflexible approach to discipline. What this discussion also showed is that there is discretion built into the system about, for example, whether discipline should be dealt with formally or informally and, if formal, what the educator should be charged with, how the case should be presented at the

enquiry and what the finding of the chairperson should be. In the end, these rules will only be as effective as the decision-making around their application.

As far as poor performance as incapacity is concerned, the discussion in chapter 5 showed that the EOEA, through section 16 read with Schedule 1, adopts a very formalistic and legalistic approach to the procedure required prior to decision-making about an educator's poor performance. This is especially true for those cases where a more serious sanction, including transfer, demotion or termination, is considered. In such a case, a formal enquiry is required in respect of which many of the requirements applicable to disciplinary enquiries (dealt with in Schedule 2 of the EOEA) also apply. As far as the substantive fairness of the employer's conduct in dealing with incapacity is concerned, the discussion showed that the EOEA itself and Schedule 1 of the EOEA simply say nothing. Various initiatives at ministerial level and at the Education Labour Relations Council ("ELRC") to establish educator standards of performance were considered. The point of departure in this regard is that the successful management of incapacity starts with clarity about the standards expected of educators. The discussion considered how registration as an educator with SACE as a prerequisite for employment may impact on the ability of the educator to continue as an educator (and also showed the apparent disconnect between SACE and the actual management of discipline and performance at the level of schools, which already calls for greater alignment). The chapter also considered initiatives related to the minimum qualifications expected of educators and the headway made with the identification of the core competences expected of educators in the public basic education system. Specific attention was paid to the new (broadly accepted) Quality Management System ("QMS") and initiatives from the side of SACE, which should, in future, contribute a lot to the timeous and specific identification of underperformance by educators and to serve as a sound basis for addressing such poor performance.

8 6 The experience with educator misconduct and incapacity

Chapter 6 provided an overview of the experience with discipline and incapacity in the basic education sector. This included a survey of existing research which showed the general concern among researchers about the impact of misconduct and incapacity on the delivery of quality basic education and, particularly, the impact of absenteeism, sexual misconduct and general competence. The chapter also provided a statistical

overview of the experience with misconduct gathered from the annual reports of PDEs as well as arbitrations conducted by the ELRC for the period 2014 to 2019. This led to a number of insights that included:

- the relatively low number of disciplinary enquiries;
- a low conversion rate at these enquiries into actual dismissal of educators;
- a differentiation between the different PDEs in dealing with misconduct;
- differentiation in the level and detail of statistics provided by the different PDEs;
- the absence of detailed statistics about the prevalence of precautionary suspensions and their duration and cost;
- that at least there is sufficient information to identify what the most prevalent types of misconduct dealt with at enquiries were;
- the prevalence of the use of fines and suspensions without pay as alternatives to dismissal in case of serious misconduct;
- the absence of statistics about the actual reasons for dismissal (which means there is no basis to fundamentally analyse how effectively specific types of misconduct are viewed and dealt with by the different PDEs). As mentioned, the effective management of specific types of misconduct and incapacity starts with an accurate description of the experience with those types of misconduct and incapacity;
- the absence of any statistics of instances of incapacity and how these were dealt with.

The chapter also provided an analysis of 138 arbitration awards of the ELRC issued in respect of the Western Cape, Free State, Eastern Cape and Limpopo provinces. This qualitative analysis was done to provide an overview of the experience in relation to the substantive and procedural fairness of steps based on misconduct, suspension and poor performance as incapacity and to gather further insights into potential deficiencies in regulation and implementation. As far as the substantive fairness of steps based on misconduct is concerned, the experience with seven types of misconduct as evidenced by these awards was analysed – poor performance (as misconduct), absenteeism, mismanagement of finances, dishonesty, improper conduct, sexual misconduct and assault. This analysis showed not only the nature of the misconduct that takes place in our schools but also provided further insights. These insights include that while some of these types of misconduct are often relied

on (such as poor performance and improper conduct), they often are not the primary misconduct involved and create the risk of sanitising what may be more serious misconduct; that some of these types of misconduct such as poor performance and mismanagement of finances were often used to discipline and dismiss principals (and not first-line educators); that, as far as absenteeism is concerned, section 14 of the EOEA provides a strong mechanism to address this problem (even though it still is sometimes incorrectly applied); that sexual misconduct is not properly addressed and remains beset with difficulties due to the confusing approach of and terminology used by the EOEA;[1] that the agreement to use section 188A of the LRA to address sexual misconduct has hardly been used at all; and that one primary weakness in section 18(3) of the EOEA lies in the availability of a wide array of sanctions short of dismissal, which leads to the continued employment of educators guilty of serious misconduct (especially assault) and the risk of re-offending. The discussion also illustrated the sometimes poor decision-making and poor commitment of role players involved in the application of discipline. This ranged from inappropriate categorisation or description of misconduct to simply not being present at arbitrations at the ELRC. The chapter also provided a brief overview of the relatively smooth experience with consistency as part of substantive fairness of discipline.

As far as procedural fairness is concerned, the discussion in chapter 6 showed that there is a difference in success across different PDE's in ensuring procedural fairness of discipline (with the Limpopo PDE being notably poor). Furthermore, there is evidence of the undue accommodation of requests for postponement of (and resultant delays in) disciplinary enquiries, often where trade unions represent educators at these enquiries.

The discussion also considered the use of suspension – both precautionary and punitive – as part of the disciplinary process. The discussion showed that precautionary suspension is used in very few instances, even where the misconduct is serious. In several instances precautionary suspension was found to be unfair, typically as a result of the undue delay in disciplinary proceedings. This often was the consequence of a lack of commitment on the side of the relevant PDE to pursue disciplinary matters. As far as the use of punitive suspensions is concerned, perhaps

[1] This confusion extends to the use of terminology by the PDEs (in policy documents, for example) and SACE.

the greatest insight from chapter 6 relates to the extent of its use as a sanction in the basic education sector as an alternative to and sanction short of dismissal. Punitive suspensions were found to be fair in most arbitration matters where this was at issue (considering that the educator probably should have been dismissed).

In chapter 6 the experience with poor performance as incapacity was also considered. The analysis showed a confusion that sometimes exists about the distinction between misconduct and incapacity. It also showed that dismissal for poor performance (as incapacity) has not come before the ELRC. There is no acceptable explanation for this especially in light of the established concern of researchers about the content knowledge of educators in South Africa (let alone all the other skills required). This leads to the inescapable conclusion that incapacity is simply not dealt with as such in the basic education sector.

Based on all of these insights, a whole number of deficiencies in the current regulation of educator performance were identified in chapter 6, deficiencies which may conveniently be grouped under the headings “fragmentation”, “record keeping and publication”, “substantive fairness in discipline”, “procedural fairness in discipline”, “suspension” and “incapacity”. These deficiencies will not be repeated here but are revisited in paragraph 8 8 below, where specific proposals for legislative amendment are made.

8 7 Comparative insights

England was chosen as a comparative jurisdiction for this study based on a shared history of education, a shared size and composition of its basic education sector, and a shared approach to the regulation of the performance of educators through a combination of a professional body and legal principles governing the conduct and capability of educators within employment. Unlike South Africa, the employment of teachers is regulated by the general principles of labour law, a system that seems to work well in the context of a highly functioning professional body that provides clear standards for all teachers and where those standards translate into practice in individual schools. This is in contrast to the absence of such integration in the South African context as pointed out during the earlier discussion. What particularly stood out from consideration of the English example were: the obligation on the employer in England to conduct a pre-appointment check with the Teaching Regulation Agency

("TRA") before the appointment of a teacher (and not that the employee provides the necessary proof as is the case in South Africa); that addressing misconduct (especially the sexual abuse of pupils by teachers) requires a holistic approach by various spheres of government, including the police; the great deal of clarity about the standards expected of teachers (by the professional body) and the translation of those standards into practice within schools through an appraisal process; the two-year induction period through which new teachers enter the profession and which pro-actively identifies incapacity at the earliest possible stage of employment; and, given the identified sensitivity around some types of misconduct and the possible undue (often repeated) exposure of young children (as learners) to legal processes, the provision that allows for evidence in the form of a report by a suitably qualified individual tasked with interviewing the child. All of these insights should be accommodated in South African legislation.

8 8 Proposals for legislative reform

Specific proposals for legislative reform are made below. These proposals mainly relate to amendments to the SACE Act and the EOEA. By implication, this means that a choice was exercised that the EOEA should be retained. This is in contrast to, for example, the English position, where general principles of labour law govern the conduct and capacity of educators. However, in the South African context and especially for reasons of public trust and confidence in the system based on transparency and accountability, it is felt the EOEA should be retained.

8 8 1 Amendments to address fragmentation in the system

The following amendments are proposed;

- The amendment of the definition of "educator" in section 1 of the EOEA to include educators appointed by the SGB of a school in terms of section 20(4) of SASA additional to educators on the provincial post establishment. This must be done for purposes of the application of sections 16 to 18 of the EOEA and the application of Schedules 1 and 2 of the EOEA only and with the proviso that the word "employer" used in the relevant provisions of the EOEA shall mean the SGB in respect of these educators.

- The amendment of section 6 of the EOEA to expressly include the obligation on the SGB and/or PDE to do a pre-employment check in respect of every educator considered and recommended for appointment against the provincial post establishment. A similar requirement should be built into section 20(4) of SASA in respect of appointments made by the SGB additional to the provincial post establishment. A pre-employment check by the SGB and/or PDE should also include the obligation to obtain police clearance in respect of the applicant, to ensure that the person has not been convicted of a "relevant" (in line with the English approach) offence. The SGB and/or PDE should also have a responsibility to inform SACE (and vice versa) should the pre-employment check reveal that the prospective educator's name appears on the National Child Protection Register, the National Register for Sex Offenders or that he or she has been convicted of a relevant offence.
- The amendment of both section 26 of the SACE Act and section 26 of the EOEA to remove the reference to "caution and reprimand" and to place an obligation on the relevant parties to report to SACE on any disciplinary steps where at least a formal written warning was imposed on an educator.
- The retention of the provision in Schedule 2 of the EOEA that principals in schools may impose informal discipline. However, the provision must be amended to exclude the possibility of imposition of a final written warning and the factors influencing the seriousness of the misconduct (and, by implication, whether informal discipline is imposed) has to be strengthened. This should be done with reference to the provisions of the EOEA itself as to what is regarded as serious misconduct (see below) and the other well-established factors considered in relation to the appropriateness of a sanction, namely the nature of employment as an educator, the circumstances of the infringement itself (especially its impact on learners as children), whether it is repeated, consistency and the employee's circumstances (such as length of service, previous disciplinary record and work-related personal circumstances).
- The insertion into section 16 of the EOEA of the basic standards of performance determined by SACE of all educators in the public basic education system in light of the specific duties attached to any educator post (see further below).

- The insertion of at least a cross reference in section 16 of the EOEA to the professional management duties of a principal in terms of section 16 of SASA and the Policy of the South African Standard for Principals under NEPA as the generally applicable standards of performance of all principals in the public education system (see further below).

8 8 2 Amendments to address inadequate statistics

- As far as record keeping by SACE is concerned, the insertion into section 20 of the SACE Act of the requirement that in its annual report, it has to publish statistics about at least
    - the number of complaints referred to it;
    - the source(s) of those referrals (schools/public/police);
    - the nature of the misconduct involved;
    - the outcomes of investigations in relation to the nature of the misconduct in question;
    - the outcomes of formal disciplinary steps in relation to the nature of the misconduct in question;
- As far as record keeping by the PDEs is concerned, an appropriate (sub)section should be inserted into the EOEA which requires of every PDE to annually publish accurate statistics. In this regard –
    - all statistics about misconduct should follow the categorisation of misconduct in the EOEA; and it should reflect;
    - the number of disciplinary referrals to the department, also reflecting the nature of the misconduct in question;
    - the number of cases where no further action was taken, also reflecting the nature of the misconduct in question;
    - the number of disciplinary enquiries, also reflecting the nature of the misconduct in question;
    - the outcomes of these enquiries (a final warning or dismissal – see below), also reflecting the nature of the misconduct in question;
    - the number of referrals to SACE, also reflecting the nature of the misconduct in question;

- the number of precautionary suspensions imposed, the duration of each (not only averages) and their cost to the PDE;
- the number of cases referred to the ELRC, the nature of those cases and the outcome of those cases, also reflecting the nature of the misconduct in question;
- the number of instances where section 14 of the EOEA was used to terminate an educator's employment;
- the number of instances where incapacity procedures were instituted against educators and the outcomes of those procedures; and
- the number of instances where principals imposed at least a formal warning (also reflecting the types of misconduct involved).

8 8 3 Amendments to address challenges around the substantive fairness of discipline

8 8 3 1 Description of misconduct

- Sections 17 and 18 in their present guise should be repealed and substituted by a new section 17 headed "Misconduct".
- The new section 17 should include a subsection (1) that provides a general definition of misconduct along the following lines:
  - "Misconduct is any intentional or negligent breach of the following fundamental duties of an educator:
    - the duty to enter into and remain in service;
    - the duty to perform diligently;
    - the duty to show respect and to obey the lawful and reasonable instructions of the employer; and
    - the duty to act in good faith towards the employer and to promote the interests of the employer.

    Notwithstanding the specific examples of misconduct listed in section 17(2), the employer may take disciplinary steps where an educator's conduct does not fall under the list in section 17(2) but the conduct constitutes a breach of the general definition of misconduct contained in this subsection."

The insertion of this section will also require an amendment to Schedule 2 of the EOEA, which currently requires[2] that new types of misconduct may only be added to the EOEA after consultation with trade unions.

- Section 17(2) of the new section 17 should include a list of types of misconduct expressly prohibited. While many of the types of misconduct currently found in sections 17 and 18 of the EOEA may be retained, this new list should at least:
    - Make specific provision for "sexual misconduct" which may be defined, without limiting the generality of the term "sexual misconduct", as including rape, sexual assault, - violation, and - abuse, compelling and/or exposing someone to sexual offences or acts, sexual harassment, sexual grooming, relationships with learners at any school,[3] and/or conviction for any offence in terms of the SOA. Each one of these terms may be further defined to provide clarity (for example, the earlier discussion pointed out that sexual harassment may be defined in line with the amended Code of Good Practice issued in terms of the Employment Equity Act 55 of 1998 ("EEA")). The section should also make it clear that where a learner is the victim of sexual misconduct consent may not be used as a defence (even where the learner is older than 16).
    - Make specific provision for an all-encompassing definition of "dishonesty" that is generally defined to mean "any conduct displaying an intention to deceive" and then declared (without limiting the generality of the term) to specifically include fraud, theft, corruption, falsification of records, submission of fraudulent documentation, the deliberate failure to disclose to the employer information that may impact on the decision of the employer to appoint the educator and the like. If necessary, terms such as fraud, theft and corruption may be further defined.

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2 Item 3(2) of Schedule 2 of the EOEA.

3 This is in line with Item 3 of the SACE Code of Professional Ethics and the Department of Basic Education "Protocol for the Management and Reporting of Sexual Abuse and Harassment in Schools" (2019) *Department of Basic Education* 2.

- Instead of including assault as an independent type of misconduct, the new section 17(2) may well include a general type of misconduct, namely “violent behaviour or behaviour that threatens violence” with a definition that includes assault, intimidation (or threatening behaviour), fighting and the like.
- The possession of alcohol and substances (drugs) should not be made subject to its illegality (it is for the employer to decide whether to allow this, even if the alcohol or substances are legal) and should be combined with its consumption and provision to another person. All of these types of misconduct are serious in a school context.
- Unauthorised absenteeism should be distinguished from abscondment and a clear obligation should be placed on the employer to deal with abscondment promptly in terms of section 14 of the EOEA.
- “Unfair discrimination” should be explained to include prejudicing, threatening to prejudice, advantaging, or promising to advantage someone based on the (retained) grounds of discrimination.
- “Poor performance” should be clearly described as the “intentional dereliction of duty or the negligent failure to carry out a duty or the negligent failure to carry out a duty to the required standard”.

8 8 3 2 Sanction

Should sections 17 and 18 in their current form be repealed, it would mean two things: that the current distinction between the two sections as to the approach to sanction falls by the wayside and section 18(5) (that is, in any event, confusing) no longer exists.

With this in mind, the new section 17 should, in its subsection (3) deal with the sanction for misconduct as follows:

- Provide that the only sanctions available in case of misconduct are counselling, a verbal warning, a written warning (valid for 6 months), a final warning (valid for 12 months), demotion (but only where such a demotion is the result of misconduct linked to the performance of a job at a certain level), or dismissal.
- The section should make it clear that at least sexual misconduct, dishonesty, violence (as described above), drug and alcohol-related misconduct and unfair

discrimination is always regarded as serious and will warrant dismissal for a first offence.

- The section should expressly make it clear that where a learner is the victim of misconduct, it is always regarded as serious and will warrant dismissal.
- The section should make it clear that despite the indication that some types of misconduct are declared to warrant dismissal for a first offence, this does not mean dismissal may not be imposed in other instances of misconduct.
- The section should expressly incorporate the principles of the LRA's Dismissal Code relating to sanction. In this regard, it should mention that the sanction depends on:
    - the gravity of the misconduct;
    - the nature of employment as an educator;
    - the circumstances of the infringement itself (especially its impact on learners as children);
    - consistency (but subject to the reservations expressed below);
    - the employee's work-related personal circumstances (such as length of service, previous disciplinary record).
- The section should also make it clear that dismissal is reserved for serious or repeated misconduct and by the question whether continued employment is intolerable.
- The section should also make it clear that consistency in sanctions imposed requires a material similarity with another matter properly identified by the educator and that no educator stands to benefit from a clearly inappropriate decision in another materially similar disciplinary matter (this may also be included in Schedule 2 of the EOEA).

8 8 4 Amendments to address challenges around the procedural fairness of discipline

In light of earlier insights, it is proposed that Schedule 2 of the EOEA be amended as follows:

- express provision be made that its content should be seen as guidelines and may be deviated from with good reason;

- all instances of serious misconduct, as described by the new section 17 Schedule 2 and which may result in a final warning or dismissal, must be referred to the PDE for formal disciplinary steps;
- express provision be made that the right to be represented by a trade union representative does not necessarily mean that the educator may insist on being represented by a specific trade union representative;
- express provision be made that legal representation at disciplinary enquiries are, in general, excluded, but may be allowed on application at least three days prior to an enquiry and remains subject to the discretion of the chairperson, which discretion has to be exercised in light of the nature of the questions of law raised by the matter, the complexity of the dispute, the public interest and the comparative abilities of the parties to present their cases;
- express provision be made that postponements will only be considered on the proper application in light of prior arrangements relating to postponement, the delay in finalising an enquiry, the reasons for the requested postponement and potential prejudice to the parties;
- to remove the link between the obligation on the employer to do everything possible to conclude a disciplinary enquiry within a month only where the educator has been suspended or transferred pending the enquiry.

In addition:

- Section 25 of the EOEA and item 9 of Schedule 2 of the EOEA (dealing with the internal appeal process) should be amended to give the authority to consider an internal appeal to a higher level of management within the PDE (and not the MEC), the appeal process should be reconstituted as a "reconsideration" of the outcome of the enquiry (which does not necessarily require the full record) and that no such reconsideration will take place in the absence of specific reasons raised by the educator that are, at face value, sufficient to warrant a different outcome.
- The provision that section 188A of the LRA (a pre-dismissal enquiry by an arbitrator) be used in sexual misconduct cases where learners are involved, should be included in legislation and should be extended to situations where the victim is a learner and the misconduct impacted on the physical and/or psychological integrity of the learner. The provision in Schedule 2 of the EOEA

that allows for evidence at an enquiry to be given through an intermediary where the witness is under 18 years of age and would be exposed to undue mental stress or suffering should be strengthened. This may be done by including a discretion given to a chairperson in appropriate circumstances to appoint a suitably qualified person to take the evidence of a witness, to report on that evidence to the enquiry and to be questioned on that report.

8 8 5 Amendments to address the use of precautionary suspension

The provisions of item 6 of Schedule 2 of the EOEA should be strengthened to enable suspension on the following terms:

- where some credible evidence exists that the educator engaged in serious misconduct (especially where a learner is the victim) and
- where any one or more of the following circumstances apply
    - the seriousness of the alleged misconduct itself and its potential impact on continued employment justifies it;
    - the need to conduct an unfettered investigation;
    - the danger of the misconduct re-occurring;
    - the impact of the alleged misconduct; and
- it must be on full pay and with retention of benefits.

The discretion to direct that continuation of suspension should be without pay, should be given to the chairperson of the enquiry in terms of Schedule 2 of the EOEA (on application by the PDE).

Schedule 2 of the EOEA should expressly declare that where an educator is on precautionary suspension, the suspension shall remain in place pending finalisation of the appeal.

(The reservations about the general lack of use of precautionary suspensions in serious disciplinary matters, should also be addressed through the requirement for accurate record keeping and publication of statistics about precautionary suspensions listed above.)

8 8 6 Amendments to address incapacity

As far as incapacity is concerned, it is proposed that

- section 1 of the EOEA also contain an express statement that its requirements be seen as guidelines, which may be deviated from with good reason;
- section 16 of the EOEA be amended through the insertion of a new subsection 16(2) that should read: “the generally applicable performance standard for all educators are:
    - an overarching commitment to the learning and well-being of all learners;
    - collaboration with others to support teaching, learning and their professional development;
    - support of social justice and the redress of inequalities within their educational institutions;
    - creating and maintaining well-managed and safe learning environments;
    - a fundamental understanding of the subject(s) they teach;
    - the ability to make thoughtful choices about their teaching that lead to the achievement of learning goals for learners;
    - the planning of coherent sequences of learning experiences;
    - the understanding and effective application of teaching methodologies;
    - the timeous, accurate and constructive monitoring and assessment of learning; and
    - the understanding that skills associated with learning in a particular subject may be dependent on associated skills, such as language understanding and use, and the ability to transfer these skills successfully.”
- A further amendment to section 16 of the EOEA should see the insertion of a new section 16(3) about the standard of performance expected of school principals with regard to the professional management of schools. It is proposed that a cross reference to section 16A of SASA and the Policy of the South African Standard for Principals under NEPA be expressly included in this new section 16(3) of the EOEA (or those provisions should be duplicated in the EOEA).
- Inclusion of an induction process along the lines of the English experience in a new subsection 16(4) of the EOEA with full SACE registration being dependent on successful completion of the induction process.

8 9 Final remarks

Apart from the above proposed legislative amendments, there are a number of practical suggestions that may assist in simplifying the legal framework to make it more accessible to all role players. The basic education system operates through various pieces of legislation and policy documents in the form of circulars, protocols, handbooks and the like. There is a need for the existing framework to be cohesive. One way in which to do this, and this is a recommendation from the comparative perspective of England, is that every single document, from annual reports to regulations, in the education sphere use a uniform template developed and approved by the DBE. Each document released by role players in the Ministry, DBE or PDE should commence with an explanation from where it derives its authority (which Act and/or regulation). It should also state who the document applies to and who is responsible for its implementation.

On the topic of uniformity, there is a trend in the education sector of issuing informal looking documents, even in the case of some authoritative documents, such as statistical reports. Although these documents are issued in the basic education sector, it need not look informal as it detracts from the important information being conveyed. This includes government websites. The framework regulating public basic education should be easily accessible to all role players, including the public. The fact that each year's annual report by the DBE, PDE, SACE and ELRC is not readily available to the public is problematic. Even where these reports are available, the same information is not contained in all of them, as was mentioned above in the context of misconduct addressed by different PDEs. This once again calls for uniformity even though the PDEs are decentralised. Valuable statistics may be collated if the DBE and PDEs issue uniform annual reports and keep their websites updated. Similarly, during 2021 the ELRC had its website updated, with the result that arbitration awards of over twenty years (for all provinces and issues (such as misconduct)) were all collated under one link without case names (only numbers), making it impossible to search for an award without having to manually open each award. Considering the various pieces of legislation and number of policies applicable to the public basic education sector, the legal department of each PDE should take responsibility for keeping their websites updated and ensuring that the most recent pieces of legislation, regulations, policies,

annual and statistical reports are available to the public. This will also be valuable to principals and educators who will then know where to find the most recent documents and which have been repealed or are no longer applicable (as often happens in the sector). This includes that there should be uniformity in the use of terminology (in line with legislation) in every single document or website pertaining to public basic education, starting with the SACE website's link on "how to lodge a complaint".

Similar to the approach in England, the annual reports of the PDEs and SACE should identify risk areas and categorise it as a low, medium, or high risk. The specific risk area should be assigned to a specific department and role player(s) who has a responsibility to address the issue within a specific time period and report back to the PDE/DBE. If the report reveals that the situation has improved, the risk category may be reduced (for example, from high to medium). The Schools Evaluation Authority that was established by the Western Cape Provincial School Education Amendment Act 4 of 2018 is an example of such a body that could employ experts in the accounting, managerial, education and legal fields to determine risks at different schools. The implementation of the recently accepted QMS should also be closely monitored by this independent body to ensure that the benefits, awards or incentives received by educators based on their QMS are a true reflection of their performance

Educators who aspire to become principals should be required to obtain a further qualification before being eligible for the position. Each competency in terms of the Policy on the South African Standard for Principals should be considered and incorporated by tertiary institutions into the curriculum of such a qualification (especially financial, legal and managerial skills). This qualification can be offered in a hybrid model. Theory can be presented online with workshops or practicals presented (in person) during the "school holidays". After this qualification, the candidate should write and pass a (challenging) standardised board examination administered by an independent body (such as SACE). Education law should form part of all education qualification curricula. This will enable educators to understand the profession within the regulatory framework, especially their expected performance in regard to conduct and capacity.

The above proposed legislative amendments and practical suggestions may have a positive impact on the regulation of educator performance in the public basic education sector. It was mentioned earlier that the quality of the educator and the education delivered depends on the quality of the regulatory framework. Any

advancement in the delivery of quality basic education in South Africa starts with the clear regulation of the expected standard of performance of educators – including their conduct and capacity. The proposed amendments will go a long way in addressing current regulatory shortcomings.

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