ELRC Labour Bulletin

September 2010 Issue

In this Issue:

1. From the General Secretary's Desk

═══════════════════

The duty of ELRC panelists to promote the best interests of learners

As a starting point I think we need to talk about where ELRC arbitrators are working. A failure to contextualize our work can lead to problems in the jurisprudence we develop. There is a big difference working as a panellist in the ELRC as opposed to in the CCMA or a private sector Bargaining Council. The CCMA and private sector Bargaining Councils mostly deal with employers who are in business for profit. We, on the other hand hand, operate in a sector where the employer is not only a boss but also an agent seeking to achieve greater goals than mere profit. The education department is charged with a duty to provide quality education to children and thereby to bring about social transformation.

In the ELRC, we thus also have to cock an eye to the rights and interests of a silent and certainly not officially present party in labour disputes. Although the child leaner is not a party to labour disputes, they nevertheless retains a real and legitimate interest in the outcome of many of the cases we decide.

In the context of section 29 of the Constitution, which creates a right to basic education, read in conjunction with the preamble of SASA, it is clear that educators are employed by the state to give effect not only to contractual obligations but also to fundamental rights. The constitutional right that educators are hired to provide is the right to a basic education to the most vulnerable and deserving section of our population, the children. The people that generally should be working in the public service are those who, in addition to seeking remuneration and fair working conditions, equally have a commitment to serving the South African child and providing the progressively better education demanded by the Constitution and SASA.

Perusing some ELRC awards, I wonder whether these contextual elements are not missing. We do not always seem to insist that the teacher is a professional like a lawyer who gets admitted to a professional society such as a Law Society or Bar. We have forgotten that educators belong to the South African Council for Educators which has a Code of Ethics and Standards that all members must meet. A failure to hold teachers, of all public service employees, to high and exacting professional standard impacts

negatively on the ability of the State to realise its constitutional obligations because it is only with the exertions of a professional cadre of teachers that we will be able to redress the imbalances of the past and provide to learners quality education. A less than committed educator complement won't do the trick.

I am afraid however that we sometimes treat educators as if they are doing no more than producing a defective shoe when their absenteeism or poor performance comes before us in a dismissal dispute. We treat professional educators as if they are a class of worker as oppressed, exploited and unsophisticated as mineworkers when we consider the relief adequate to sick leave abuse or an episode of swearing at a supervisor.

It is this failure to keep our sectoral context in mind in some of our awards that threatens to undermine the administration of education law. People wonder how teachers can routinely come late to work and routinely get slaps on the wrist. When they are dismissed, the ELRC reinstates them because the sanction was too harsh or their tales of conspiracy, victimisation and stress are blithely believed. Most of the public regard it as far less acceptable for educators to be absent, insolent or to perform poorly than it is for an industrial worker to exhibit the same behaviour although one would not get that impression reading case law.

Surely, we have to move beyond the formula for adjudicating the fairness of disciplinary action that applies to factory workers.

In public education we are the custodians of the constitutionally recognised "paramountcy" of the interests of the child. So, for example, *Section 28 [2]* of the Constitution says, "*A child's best interest are of paramount importance in every matter concerning the child.".* Likewise section 29 of the Constitution provides a right to a basic education to which SASA has added a further quality in that such education must be of "progressively high quality for all learners". Section 39 (2) goes on to say that when interpreting any legislation, we must do so in a manner that promotes the spirit and purport of the Bill of Rights.

If one considers the main feature of the sector whose labour disputes you adjudicate, it is that of crisis. Indeed unless there is value and a return, public education may be abandoned by many users in favour of private education. Given unemployment and the unequal distribution of income and wealth, private education is not an option for the vast majority of our citizens. A reasonable panelist working for the ELRC must at least keep abreast of the issues in public education. What could be more important than to keep abreast of the crisis? So, on the 7th of January 2010 the Matric Results were released, uniquely by the President himself at the Union Buildings. What did they show? There was a decrease in the pass rate and in many schools there was an utterly dismal performance. So instead of the statutory imperative that the state provide education of a "progressive high quality", it is progressively getting lower. In light of this crisis, when matters come before us, either of poor performance or misconduct in a school or dealing with judgment calls about the appointment of a suitable candidate to a post, we have to ask ourselves, can we afford to treat this only as an industrial issue or does public interest also start featuring in how we decide these matters? In the ELRC we want you to pay attention to the crisis. One of the main reasons behind composing Bargaining Councils with dispute resolution functions is that arbitrators with a degree of foreknowledge about the sector in which they operate are available to parties.

In most provinces in which panelists sit, there is a decline in matric pass rates. There is scandalous rates of absenteeism with some provinces reporting a general 10% absence of teachers on any given day and as high as 50% in some schools. There are even some schools with zero percent [0%] pass rates. Surely when deciding a dispute at a school, a panelist should be concerned enough to enquire, using their powers in terms of section 138 of the LRA, about the school's performance and to ask for argument on what the impact on the school will be of a decision, for instance reinstating somebody who did not perform in that school. It strikes me that even in matters where a dismissal was found to be substantively unfair, section 193 of the LRA allows panelists to restrict relief to compensation where a continued working relationship would, objectively, be impossible.

I know when it comes to poor performance, the Labour Relations Act and the Incapacity Code and Procedures for Poor Work Performance of the Employment of Educators Act say that the employer must make every effort to give the employee a reasonable opportunity to improve. If your child was in that school, being taught by a poorly performing Mathematics teacher, does one have the luxury that such a teacher be

given a year to improve teaching your child, or even a term? The answer is no. Yet, when panelists are called upon to assess how long a "reasonable period" for improvement must be, they give answers that run into months as opposed to weeks.

I am not calling on panelists to be harsh but to recognise that the effects of poor performance are much more keenly and harmfully felt in schools than in a factory. Unlike shoes, learners are themselves rights-bearing subjects and this justifies, a more stringent treatment of poorly performing employees who have chosen this sector in which to work. The consequences for a child in having an educator who is behaving or performing poorly is severe. They are likely to lose a year and the net effect of this remains forever. It will have a knock-on effect for the rest of the child's schooling life.

We receive a generally excellent service from our panelists. This input has looked only at the areas where improvements are needed or misunderstandings have arisen. Since the stakes in public education in getting things wrong are so high, no-one will blame me for speaking in a straightforward manner. I welcome feedback and debate. Be assured that communications with panelists like this will be a regular fixture into the future.

Is there a crisis in public education?

Two weeks after results were announced and after much analysis, the acting Director-General of Basic Education, Dr Bobby Soobrayan made an admission for the first time that Public Education is in crisis, and that we have to rethink how we are going to improve service delivery. So, clearly from the employer's perspective we have reached the point where things cannot go on as they did. It is not business as usual.

The ANC [African National Congress] realised this quite some time back, so at its conference in Polokwane it just did not focus on who was going to be the president of the ANC. One of the issues discussed was education. The governing party and its allies made a clear commitment that they stood for, "Every teacher must be in class on time, teaching and not abusing the children".

The Trade Unions equally have been working on a Quality Teaching and Learning Campaign for many years. This has gained importance after the Polokwane Resolution. On the 4th of September 2008, the then Minister of Education, Naledi Pandor, had a meeting with the Teachers Unions at Birchwood, south of Johannesburg, and they reached a number of Agreements. One of them was about the Quality Learning and Teaching Campaign, at behest of the Unions.

So the Trade Unions are just as much a partner in driving this Quality Learning and Teaching Campaign, and so, by December they were ready to issue and engage with the Department on a new social contract for Public Education. Its timing unfortunately was a bit bad. It only came after the release of the Matric results, but the commitment from the Unions is there to improve Public Education and between the three Unions, they cover over 80 percent of all teachers in this country. This is SADTU, NAPTOSA and SAOU.

The buy-in to the idea that it cannot be business as usual in public education and that educators need to be accountable for their behaviour to a greater extent is wide and deep in our society. We in the ELRC cannot afford to be the cog in the wheel where misbehaving or poorly performing educators are let off the hook.

There are obviously resource, infrastructural, training and other historical problems that play a role in the crisis. However, educator misconduct and inherent poor work performance are also a big issue. We look forward to NEEDU addressing infrastructural and developmental problems. It is the ELRC's role though to address misconduct issues that come before us as well as promotion disputes. And in so doing, the extent of the crisis and the public interest in sorting it out must inform our decision making.

Quality control of awards

In the ELRC we have instituted quality control steps before issuing panelists' awards. We need to have an open discussion about this. We have learned in the CCMA that quality control is important and the first issue is that if you want to work in the ELRC, then accept that there is quality control. No matter your seniority, your Award is quality controlled. When we talk of quality control, please accept that we go through the award in detail. We do not necessarily look at the award itself or the decision made, but we look at the issues that the arbitrator has considered in arriving at it. What we have found

is that some panellists write the awards with no reference to the circular that is in question, the Gazette, the Employment of Educators Act and write awards in such general terms that it is difficult discern the norms and standards that they rely upon.
In public education we have specific laws, policies and regulations that must be referred to and interpreted in arriving at decisions. An arbitrator cannot say that the law is wrong. That is for a Court to decide. An arbitrator cannot tell me the Employment of Educators Act is wrong, for instance in relation to "deemed dismissals" in *Section 14*. Those matters have been dealt with in the Courts. An objectively faulty award like this needs to be improved and corrected.

Clearly, some panellists have an aversion to the awards being quality controlled. We do not apologise for that. It is a mandatory requirement that there will be a quality control on all awards and rulings. It is not interference but an attempt to ensure that awards that rest on plainly mistaken foundations may be reconsidered and improved.

D Govender

---

2. Professional Development Workshop for ELRC Panellists

Between February and April 2010 the ELRC presented professional development workshops for ELRC panellists in all provinces. These workshops were held in Cape Town, Bloemfontein, Port Elizabeth, Durban and Centurion.

At these workshops ELRC senior panellists Mrs R De Wet, Adv L Bono, Adv DP Van Tonder and Mr KC Moodley discussed important issues which ELRC panellists have to deal with in their awards. Mr Moodley discussed Jurisdiction and Dismissal disputes, Mrs De Wet discussed Sexual harassment of learners, Adv Van Tonder discussed promotion and appointment disputes, unfair discrimination and affirmative action, and Adv Bono discussed FETC colleges.

What follows are summaries of some of the topics discussed at these workshops.

Appointments and Promotions

Arbitrators derive their jurisdiction to arbitrate promotion disputes from section 186(2)(a) of the LRA, which defines unfair labour practices with regard to promotion as any unfair act or omission that arises between and employer and an employee involving unfair conduct by the employer relating to the promotion of an employee. The onus is on the employee to prove the existence of the labour practice, the unfairness of the alleged unfair labour practice, as well as the fact that the labour practice does indeed relate to promotion.

Appointment disputes cannot be arbitrated as unfair labour practice disputes. Therefore, unless an educator is employed by the HOD of the province in which he or she applies for promotion, any dispute in relation to a promotion position he or she applies for does not qualify as a promotion dispute, and the ELRC will have no jurisdiction to determine the dispute. The reason for this is that in public education, a promotion dispute can only exist between an employee and her own employer.

In evaluating the fairness of an employer's conduct in a promotion dispute in public education and determining the appropriate relief, the best interests of the learners are of paramount importance because section 28(2) of the Constitution provides that *"A child's best interests are of paramount importance in every matter concerning the child".* The emphasis in promotion disputes in public education is therefore not primarily on the educator's right to fair labour practices, but on the best interests of the learners at the school where the promotion post exists

Promotions fall within the managerial prerogative and it is important to understand that for that reason arbitrators are not required to determine whether the employer has made the correct decision and has appointed the best candidate, but merely to determine whether the employer has made a reasonable decision. In the absence of gross unreasonableness, bad faith, irrational, arbitrary or capricious conduct, arbitrators should be hesitant to interfere with

the exercise of management's discretion in promotion disputes.

Governing bodies are part of the democratic process that unfolded after 1994 in terms of our Constitution and represent a significant decentralisation of power. Therefore, although a provincial Head of Department as employer may despite the order of preference of the governing body, appoint any suitable candidate on the list of candidates provided by the governing body, our Courts have held that the HOD must however place significant weight on the order of preference of the SGB because it is the SGB who has interviewed the candidates and not the HOD. Arbitrators too must respect the autonomy of school governing bodies and place significant weight on the order of preference of school governing bodies since governing bodies generally have more knowledge of the needs of the school than arbitrators and education departments. Arbitrators have no jurisdiction in respect of decisions take by school governing bodies, until those decisions have been ratified by the education department. Only once the HOD has made a decision based on the decision of a school governing body, will an arbitrator acquire jurisdiction to enquire into the fairness of the conduct of a governing body, because only then can it be said that the HOD has by implication ratified the conduct and decision of the governing body.

Although PAM sets out the procedures to be followed in selecting suitable candidates for teaching positions the High Court has held, with reference to paragraph 3 of Chapter B of PAM, that strict compliance with PAM is not necessary, that form must not be elevated above substance and that: "One does not go digging to find points to stymie the process of appointing suitable candidates to teaching positions". Arbitrators should therefore be careful not to make findings too easily that an unfair labour practice was committed when there was some sort of procedural irregularity. Provided that there was substantial (as opposed to strict) compliance with PAM, it cannot be said that an unfair labour practice has necessarily been committed merely because PAM has not been followed to the letter.

In granting relief, arbitrators also have limited jurisdiction. Unless an applicant has proved that he or she was the best of all the candidates who applied for the post, it will constitute a gross irregularity for an arbitrator to provide any form of substantive relief, such as appointment to the post, or setting aside the appointment of the successful candidate. Where compensation is awarded for procedural unfairness, it must be reasonable and not out of kilter with what our Courts would award for non patrimonial damages.

DP Van Tonder

3. Case Law and Articles

The public service manager's constitutional duty to interfere with bad personnel decisions

In the recent case of ***MEC Department of Education Kwazulu-Natal v Khumalo and Richie (D749/08) [2010] ZALC 79 (6 July 2010),*** **a**n employee, Mr Khumalo, was appointed to the position of Chief Personnel Officer in April 2004 despite not meeting the minimum requirements for the job. Another candidate, Mr Ritchie, who did meet the minimum requirements, but was not shortlisted, launched an unfair promotion dispute. The outcome was that Ritchie was granted protected promotion to the same post through a settlement agreement.

Eleven other employees, some of whom had been shortlisted, also claimed promotion to the same post. Faced with this onslaught but after a long delay, the MEC applied to the Labour Court to intervene to remedy the irregularities that this case presented. In the first place there was a person in a post who should never have been promoted to it. Second, there was an agreement to grant a protected promotion to another employee that the department had, according to the MEC, never authorized and it was thus illegal.

The MEC asked that both appointments be set aside in terms of section 158 (1) (h) of the LRA. She argued that since her officials had exercised a public power in granting the promotions, she was *functus officio* and the only way of undoing the illegality was to approach the Court. She denied circumventing the procedures of the LRA by bringing such an application as she sought no relief in terms of the LRA but rather the Public Service Act. She mentioned that neither Khumalo nor Ritchie

could point to any substantive reason why they were entitled to the positions that they held.

The employees claimed that the employer's claim had prescribed after three years. In the event that prescription did not apply, the employer's delay in bringing the application was excessive. Both employees had since acquired vested rights that could not easily be taken away from them. The employees claimed that the MEC had never been *functus officio*. If at any stage the MEC had qualms about Khumalo's promotion she had the authority to overturn this promotion "domestically" and off her own bat. If she had retracted Khumalo's promotion, he would have had the opportunity to refer a dispute. Now, however, it was too late.

As for the settlement agreement with Ritchie, this dispute was *res judicata*. Aside from fraud or an error of law the MEC cannot challenge a settlement agreement.

The employees questioned the MEC's reliance on the constitutional right to just administrative action, arguing that the provisions of PAJA may not be circumvented through a direct appeal to the constitution. Furthermore an organ of state is not owed this constitutional right, only natural persons. Even if PAJA were invoked, it does not apply to contractual disputes in the realm of labour law, they argued.

The Court found that it did enjoy jurisdiction to consider the MEC's claims as set out. It found that although the matter ought to have been brought years before and that no condonation application had been brought by the MEC, it would nevertheless hear the matter on the merits as it was in the public interest that the underlying issues be decided to promote "ethical, accountable and transparent public administration".

On the point of *res judicata* raised in respect of Ritchie's settlement agreement, the Court found that while there is a general rule not to interfere in these agreements, this principle does not apply to agreements concluded unethically, illegally and contrary to the values of openness, accountability and efficiency. Any such agreement would be a nullity and *res judicata* would not apply.

The next notion the Labour dispensed with was that of *functus officio*. This means "having performed her duties or functions" and prevents a public official making up and then changing her mind to revoke or revisit decisions. This is important to enable certainty in decision-making. The converse is also true, the Court found. If allowing a bad decision to stand would result in injustice, it must be revoked. Case law clearly creates an obligation to reverse an illegal decision at the MEC's own instance. She had a duty, discussed below, to expressly disavow reliance on a wrongfully taken decision and the doctrine of *functus officio* does not bar her undoing manifest irregularities.

Surveying recent case law on the interplay between administrative and labour law in the context of promotion disputes, particularly *Gcaba*, the Court reaffirmed that both the constitutional right to just administrative action and PAJA were not engaged in this dispute. Even though the MEC sought to found her application on the provisions of the PSA and not the LRA, the fact remained that the underlying issue concerned a promotion. The PSA does not compete but operates in tandem with the LRA and it is the machinery of the LRA that must be used to determine promotion disputes that arise within the domain of the PSA.

Turning to the effect of the constitution on this case, the Court noted that the principle of legality in section 2 would be violated should an action not authorized by law and fair procedure be allowed to stand. Similarly, the constitutional imperative to establish a system of democratic government to ensure accountability was also at stake. Section 195 of the Constitution also impacts upon employment issues in public administration in that efficient use of resources, good career management practices and ethical public administration are expected to be achieved.

According to the Court these constitutional principles compel public officials to "behave honourably". In the present case, the MEC and all officials of state involved in the promotion of Khumalo and Ritchie "violated every principle of legality and every tenet of ethical, accountable and transparent public administration".

Officials involved in promoting Khumalo must have known he did not meet the minimum requirements and must have known that there were other candidates for the job who did. Persal records alone would have alerted officials that Khumalo's appointment was irregular. Those agreeing to Ritchie's protected promotion must have known that Khumalo's appointment was unsustainable and there was thus no cause to defend it and conceal it.

The MEC became aware of these irregularities in October 2005 when the eleven candidates laid a grievance. At that point she could have invited representations from both employees about why their promotions should not be set aside. The lengthy investigation process was unnecessary and uncalled for. At the end of the investigation, not a single official is identified as being responsible for the "fiasco". The court finds this to be "incredible" as public employment is bureaucratic and rule-driven and decisions are thus traceable. The MEC abdicated her responsibility to hold accountable those officials involved in the irregular appointment of Khumalo.

The Court observed that there was a duty on managers to correct irregularities and that this did not involve asking the Court's assistance to do so. The MEC's understanding that she was functus officio is not a valid reason for failing to overturn irregular promotions. Her explanation for her indecisiveness is at best sloppiness and at worst, a cover for official misconduct.

The Court noted that no basis existed for Khumalo's promotion. Interestingly, the Court rejects the evidence of the MEC that no mandate was given to settle with Ritchie. However, the official who agreed to Ritchie's protected promotion was acting *ultra vires* since Khumalo's promotion should not have been defended.

Khumalo, the Court found, acted unethically by not disclosing that he did not meet the minimum requirements and Ritchie erred in not disclosing to those with whom he agreed a settlement that he had not been shortlisted. As Personnel officers, their behaviour was even more problematic. The Court had harsh words for the cloak of secrecy that had been thrown around the various wrong-doers in the matter, especially those recommending the promotion and then omitting to take steps to remedy it when the irregularity was obvious. The Court stated that once it had been invited by the MEC to intervene, it could not ignore the "shocking lacking of good governance" in her department.

The Application sought by the MEC was granted but without costs. Khumalo and Ritchie's promotions were set aside and the MEC was directed to provide the Court with a report on disciplinary action taken against officials involved in the matter.

This matter makes law left, right and centre and is sure to create waves for all public sector managers who are left in no doubt that they have a constitutional duty to interfere with bad personnel decisions by their sub-ordinates.

H Bohmke

---

4. Teacher Laptop Initiative Launches

The TLI launches are part of the communication strategy of the initiative supporting the other channels of communication that we have been pursuing to ensure that we reach as many teachers as possible and create awareness within the general public.

Advertisements
We have placed advertisements with the support of the consortium and strategic partners in newspapers like the Teacher which is a supplement of the Mail & Guardian and the City Press weekly newspaper. These advertisements gave the TLI the required exposure because that resulted in us starting to get many calls from teachers all over the country enquiring as to how to get laptops.

Websites
We have developed a website specifically for this initiative to ensure that we have access in electronic format especially considering what we are rolling out is ICT.
The website is populated with all the information regarding the teacher laptop which includes the process of acquiring a laptop, pricing of packages available, information about the suppliers, training programmes been developed, etc.

TLI Launches
The launches are the physical part of the communication which complements the other channels of communication mentioned above to reach many teachers and other stakeholders.
The objective of the launches is to mark the official roll out of the laptops to teachers after working very hard to reach this stage.
It's also to create general public awareness of the roll out to teachers and educating the teachers and public on how the initiative will benefit them.

We also want to get the teachers to actual see the laptops because teachers talk to each teacher and information would also flow through informal means of communication that tends to be more powerful than the formal channels.

National Launch
The National TLI Launch was held on 15 July 2010 at Lotus Primary school in Lotus Gardens Pretoria. The launched was attended by the President of SADTU Mr Thobile Ntola and the President of NAPTOSA Mr Ezra Ramasehla who both addressed the audience about the importance of this initiative to the teaching profession. The Deputy Minister of Basic Education Mr Enver Surty also attended the event and was the key speaker.The launch was well attended and got good print coverage and electronic through the SABC news.

Provincial Launches
We have been holding provincial launches based on the requests from the respective provinces. The objective is to bring the launches closer to the teachers and make it a reality.

Kwazulu-Natal: This launch was held on the 26 July 2010 at Adams College in Amazamtoti. The launch was attended by MEC of Education in the province **Mr Senzo Mchunu**, President of SADTU **Mr Thobile Ntola**, Secretary of SADTU **Mr Mugwena Maluleka** and the Provincial Secretary of NAPTOSA..... The attendance for the launch was very good and attracted a lot of interest. In fact we got media coverage from the local press which resulted in increased calls from the Kwazulu-Natal province.

Lessons Demonstration: A few teachers from the school were trained in advance to use laptops in delivering their lessons. The teachers were comfortable with laptop usage within a day of been trained and in this case some of them have never used a laptop before. The pupils received the lessons very well and with excitement considering that it's a new method of lessons delivery.

Product Display: All consortiums were represented and stalls for all present to see laptops that are been availed to the teachers. The consortiums displayed all their laptops with connectivity. The teachers that were present, the media and other officials were very impressed with the initiative and packages offered to teachers. The teachers were so keen and just kept on asking as to when they can receive their laptops.

Mpumalanga: This Launch should have been held on 24 August 2010 however due to the public sector industrial action it had to be postponed, the new date would be finalised soon.

Limpopo: We have a tentative date for the provincial launch that still need to be are finalised and would be communicated in due course.

Western Cape: We have a tentative date for the provincial launch that is been finalised in consultation with the Provincial Education Department and would be communicated in due course.

Free State: The province would be providing soon with their proposed launch date after consulting the relevant stakeholders in the province and would be communicated in due course.

Conclusion
We are very excited with the interest from the teachers and the general public about the initiative. The interest is going to grow even bigger as we continue with the provincial launches. We are also looking at other ways of communicating to teachers about the initiative like a call centre that could answer any questions that they may have about the initiative.

The Education Labour Conference 2011

The ELRC in association with the Nelson Mandela Metropolitan University will be hosting an Education Labour Conference in 2011. It is anticipated that the conference will be held from 17 to 20 February 2011 in Port Elizabeth at the Nelson Mandela Metropolitan University. The full program of the conference and further details will be made available before the end of November 2010.

Professional Development Workshop for Dispute Resolution Practitioners

The ELRC takes pleasure in announcing that it will be hosting professional development workshops in all provinces for disputes resolution practitioners of parties to the council during October 2010. The aim of these workshops will be to enhance the skills of practitioners who appear before the ELRC in conciliations and arbitrations.