

CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK & DISCIPLINARY HEARINGS



1. LEGISLATIVE BACKGROUND

CONSTITUTION (Act 108 of 1996)

South African Schools Act

84 of 1996

-Provide for the uniform system for the organisation, governance and funding of schools.

Employment of Educators Act

76 of 1998

-Provide for the employment of educators by the state, regulation of conditions of service, discipline, retirement and discharge of educators and matters connected herewith

-Schedule 1 Incapacity code and procedures for poor work performance & ill health/injury

-Schedule 2 Disciplinary code and procedures for educators

- PAM (Personal Admin measures) which contains the regulations

Labour Relations Act

66 of 1995

- Regulates Employee/ Employer Relationship
-Give effect to section 27 of the constitution
- Regulate organisational rights of trade unions
- Promote employee participation in decision making through establishment of workplace forums
- Promote and facilitate collective bargaining etc.

Basic Conditions of Employment Act

75 of 1997

-Prescribes certain minimum conditions of employment which must be applied

-These are not inflexible conditions, in the sense that the employer may offer a better condition, but may not offer nor include in any contract a condition that is less favourable to the employee than the corresponding condition prescribed by the BCEA

Employment Equity Act

55 of 1998

- Promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination

- Implementation of affirmative action to redress the disadvantages in employment experienced by designated groups, to ensure their equitable representation in all occupational categories and levels in the workforce

Occupational Health & Safety Act

85 of 1993

- Regulates and promotes Health and Safety standards for all Employees



CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT, 1996

- Chapter 1 & Section 2 – supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.
- Chapter 2 – Bill of Rights
- Section 9 (1) – everyone is equal before the law and has the right to equal protection and benefit of the law
- Equality includes the full and equal enjoyment of all rights and freedoms. Discrimination is absolutely prohibited on any of the stated grounds.



CONSTITUTIONAL & LEGISLATIVE FRAMEWORK

- Section 10 – everyone has inherent dignity and the right to have their dignity respected and protected.
- Section 16 – everyone has the right to freedom of expression – which includes:
 - Freedom of the press and other media;
 - Freedom to receive and impart information or ideas;
 - Freedom of artistic creativity, and academic freedom and freedom of scientific research.
- Limitations to the right: propaganda for war, incitement of violence or advocacy of hatred based on race, ethnicity, gender, or religion that constitutes incitement to cause harm.



CONSTITUTIONAL & LEGISLATIVE FRAMEWORK

- Section 17 – everyone has the right , peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.
- Section 18 – everyone has the right to freedom of association.
- Section 23 – everyone has the right to fair labour practices and every worker has the right to form and join trade union, participate in activities and programmes of the trade union and to strike.
- Section 23 (4) – every trade union has the right to determine its own administration, programmes and activities – through a constitution that streamlines functions, duties to be performed and sub-committees allocated such functions.



CONSTITUTIONAL & LEGISLATIVE FRAMEWORK

- Section 32 (1) (b) – everyone has the right of access to any information that is held by another person and that is required for the exercise or protection of any right.
- Section 33 (1) – everyone has the right to administrative action that is lawful, reasonable and procedurally fair;
- Section 33 (2) – everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.



CONSTITUTIONAL & LEGISLATIVE FRAMEWORK

- Section 34 – everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum – i.e Education Labour Relations Council (ELRC) / General Public Service Sectoral Bargaining Council (GPSSBC) etc.



LABOUR RELATIONS ACT, 66 OF 1995

- Restate the rights conferred in the Bill of Rights such as freedom of association, which entails formation of trade unions/federation, to join a trade union, participate in its lawful activities, election of office bearers - Sections 4,
- Further protects employees and persons seeking employment by insulating them against discrimination i.e membership of a union or participation in union activities not to be used against employees to prejudice them – Section 5
- Entrenches the right to strike & picketing – Sections 64 & 69,
- Entrenches the right not to be unfairly dismissed or subjected to unfair labour practice – Section 185
- Dismissal can only be based on misconduct, (in)capacity or operational requirements – Section 188



LABOUR RELATIONS ACT

- Remedies for unfair dismissal may be – Reinstatement, Re-employment & Compensation,
- Invariably one remedy is applied in the resolution of such a dispute, however, compensation is entailed in reinstatement,



EMPLOYMENT OF EDUCATORS ACT, 1998

- Regulates employment relationship between education and department(s) of education, of all employees employed in terms of the Act,
- The HOD is the employer of all educators employed in terms of the Act;
- The Minister/MEC is the employer of those employed in terms of PUBLIC SERVICE ACT, but through delegations they report directly to the DG/HOD,
- It regulates conduct by legislating various forms of misconduct in sections 17 & 18 of the Act,
- It provides for deemed dismissals in terms of section 14 and the procedure for reinstatement,



SOUTH AFRICAN SCHOOLS ACT (SASA), 1996

- enforces compulsory attendance by learners of school going age, and places a duty on parents to ensure that learners remain in the school until the age of 15 or ninth grade.
- It gives effect to public and independent schools.
- Independent Schools must be registered with HOD of a provincial education department and are wholly responsible for their governance as opposed to public schools whose governance vest in the School Governing Bodies,



BASIC CONDITIONS OF EMPLOYMENT ACT,1997

- It establishes and enforces basic conditions of employment such as ordinary hours of work, overtime, meal intervals, daily and weekly rest periods, pay for work on Sunday and public holidays, night work, annual leave e.t.c
- In education sector, education specific conditions of service are further regulated by PAM (Document),
- Basic conditions can be varied by agreement between the parties, and where they are applicable to a sector, by Ministerial sectoral determination.



EMPLOYMENT EQUITY ACT, 55 OF 1998



- It promotes equal opportunity and fair treatment in employment by eliminating unfair discrimination,
- It enforces affirmative action measures to redress imbalances or disadvantages in employment experienced by designated groups such as blacks, women and people living with disabilities to ensure equitable representation in occupations/workforce,
- It prohibits unfair discrimination based on one or more grounds as stipulated in the Act – race, gender, sex, religion, marital status, belief, political opinion, culture, HIV status, language and birth,
- Medical Tests are outlawed unless justified by employment conditions, social policy, fair distribution of employee benefits or inherent requirements of a job,



OCCUPATIONAL HEALTH AND SAFETY ACT, 85 OF 1993

- It provides for health and safety of persons at work, health and safety of persons in connection with the use of plant and machinery, protects also persons from health hazards and promotes their safety even though not at work, and establishes advisory councils for occupational health and safety;
- Employers are obliged to provide and maintain a working environment that is safe and not risky to employees, to provide information and training to ensure the health and safety of employees,
- It enforces the establishment of health and safety representatives at the workplace – they are point of reference if an incident occurs,
- At common law employees have a (limited) right to refuse to work in a dangerous area.

COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 130 OF 1993

- COIDA provides for compensation for disablement due to occupational injuries and diseases sustained by employees in the course of employment and death resulting from such injuries or diseases,
- It covers all workers except domestic workers in private households, those employed outside of RSA in excess of 12 months, members of SAPS & SANDF,
- It establishes the Compensation Fund administered by the DG of Labour Department,
- No-fault principle applies to claims lodged against the Fund. Once accident/incident occurs it must be reported to the supervisor, followed by completion of relevant forms,
- If the Fund declines payment, an employee can lodge objection to such assessment in terms of section 91 and followed by appeal in the High Court



LRA & EEA CODE OF CONDUCT

- The Code of Good Practice contained in the LRA on poor performance, incapacity and ill-health is incorporated in the EEA,
- Schedule 2 of the EEA – purpose and scope of the hearing are – support constructive labour relations in education and promote mutual respect between educators and employer, have common understanding of misconduct and discipline, promote acceptable conduct, avert and correct unacceptable conduct,



RE A LEBOGA



PRINCIPLES OF DISCIPLINARY PROCEDURES



PRINCIPLES DISCIPLINARY PROCEDURES

- Discipline is a corrective and not a punitive measure,
- It must be applied in a prompt, fair, consistent and just manner,
- It is the function/responsibility of the employer to discipline;
- Disciplinary hearings must be held in terms of the Code of Discipline to ensure fair in a formal or informal setting,
- Employees must be timeously advised of the allegations against of misconduct and provided with reasons for any decision reached
- Employees must be advised of the right to appeal against a finding and sanction;



PRINCIPLES/ Cont.....



- Allegation of Misconduct
- Suspension
- Investigation / Fact Finding
- Depending on the circumstances, the allegations of misconduct may be closed if the investigation does not disclose any wrongdoing but if it does, the employer will proceed to convene a hearing,
- In that event, a notice to attend the disciplinary hearing, stating date, time and venue will be issued,

PRINCIPLES/Cont.....



- The employee to be advise of his/right to:
- Represented by a fellow employee/union
- To bring witnesses,
- To cross-examine,
- To appeal,
- Advised of the consequences of failing to attend the hearing.
- The time frame for convening the hearing must be in line with the Code.

PRINCIPLES/Cont.....



- Charge Sheet;
- It must provide the employee with sufficient particulars to be able to respond to the charge/s;
- If not, request further particulars to the charge/s from the employer,
- Always consider the charges to ensure that the charge sheet does not offend the rule against splitting of charges

PRINCIPLES/Cont.....



- Pre-hearing
- Discovery
- Preliminary Points
- Plea: Guilty/Not Guilty
- Evidence by Parties
- Hearsay Evidence, Parol Evidence, Documentary Evidence, Oral Evidence

PRINCIPLES/Cont.....



- Examination in Chief
- Cross Examination
- Re-examination
- Closing Argument
- Decision of the Presiding Officer
- Mitigating & Aggravating Factors
- Sanction
- Appeal: verdict & sanction

RE A LEBOGA

