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‘Irregular appointments relating to promotion posts in
South African public schools’

A full thesis submitted in fulfilment of the requirements for
the degree of Master of Laws

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Date: November 2022

DECLARATION

I, Michelle Mopp, do hereby declare that ‘Irregular appointments relating to promotion posts in South African public schools’ is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

MMopp

9 November 2022



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ACKNOWLEDGEMENTS

Thanks be to God. His love has never failed me. I walked this journey only by the grace of God and his divine promise. In times of struggle, I hold dear to your words Lord:

'I will lift up mine eyes unto the hills, from whence cometh my help. My help cometh from the Lord, which made heaven and earth'. (Psalm 121:1)

Thank you to my brilliant supervisors. Prof Kitty Malherbe, I started this journey not knowing what academic writing was all about. Thank you for teaching me through regular consultation and constructive criticism and for the overwhelming amount of effort you have poured into my work to ensure that I learn to write.

Thank you to Prof Paul Benjamin, your expertise in the field of labour law is inspiring and I am eternally grateful for your support, guidance and encouraging comments on my work. I am privileged to have read so many of your articles which gave me a better understanding and insight into my topic. You and Prof Malherbe have helped me overcome my fear of academic writing.

Thank you to the UWC Faculty of Law for accepting me into the LLM program. A special thank you to Rohan Meyer for your patience and willingness to always assisted me with all my issues. Thank you to Dr Chesne Albertus for always being available to give me speedy responses to my questions and for encouraging me to keep going. A huge thank you to my wonderful tutor Phoebe Oware, for always being encouraging, patient and kind. For availing yourself whenever I need assistance. I really appreciate your help.

Thank you to my colleagues at CPU and those who inspired me to do this degree. Prof Noleen Leach, words cannot express my gratitude for always making time to mentor me, advise me and teach me valuable lessons that I will apply in all facets of my life. Thank you to Dr Soraya Beukes. I am so grateful that you convinced me to do this degree and for always being there to answer my questions, advise me and for giving me a platform to rant! Also thank you to Mr Servious Hungwe, for regularly checking up on me and my progress and for the uplifting words that you offered me during very challenging times. Thank you to Ulrich Mackay, Allison Basson and Kay-Lynn Bailey for your support. You are all humble, wise, kind and inspirational.

Thank you to Dr Adeline Africa, Director, of the Stanford Programme in Cape Town, and Adrian Mopp, the Deputy Director of Public Prosecutions, for your continuous support, prayers, upliftment, guidance and sound advice.

A special thank you to Thirona Moodley PCEO NAPTOSA KZN and Ishara Dhanook, Executive Officer, for your support and guidance and for always being ready to provide me with the resources that I needed. I would also like to add a special thank you to our

friend and colleague, the late Dolin Singh, from the ELRC, that inspired me to choose this topic for my thesis.

Thank you to my friends from East London, Durban, London and Germany. We have come a long way together. Lynda, Roeshda, Virginia, Cheryl, Ros, Bashi, Simone, Lilian, and the Parkhill ladies, thank you, for standing by me and praying consistently for me.

Last but not least thank you to the most important people in my life, my family. To my husband Neil Mopp, thank you for being my witness in this life. From matric and throughout all my years of studies, you have always been the one person who consistently inspired me to keep going. Thank you for taking care of me and for giving me the time that I needed to do this thesis. Thank you to my daughter, for being my best friend and confidante. Dr Caylyn Maria Mopp, you have taught me how to stay strong in the face of adversity. Thank you for arranging all our family functions and my self-care activities, so that I could work on my thesis. To my son Kirsten Peter Mopp, your commitment to becoming a fully-fledged actuary is what inspires me to work hard. It was comforting to know that I was not alone working on weekends. I appreciated our Friday night study calls! Thank you all for believing in me, encouraging me and making me want to do better and also to be a better person.



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KEYWORDS

Irregular appointments

The Labour Relations Act

The Schools Act

Maladministration

Decentralisation

Devolution of power

Collective bargaining

Unfair labour practice

Promotion posts

School governing bodies



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LIST OF ABBREVIATIONS AND ACRONYMS

DWA:	Decent Work Agenda
CCMA:	Commission for Conciliation, Mediation and Arbitration
EEA:	Employment Equity Act 55 of 1996
Educators Act:	Employment of Educators Act 76 of 1998
ELRC:	Education Labour Relations Council
HOD:	Head of department
LRA:	Labour Relations Act 66 of 1995
PAM 2016:	Personnel Administration Measures
PEPUDA:	Prevention of Unfair Discrimination Act 4 of 2000
PAJA:	Promotion of Administrative Justice Act 3 of 2000
POPIA:	Protection of Personal Information Act 4 of 2013
PSCBC:	Public Service Co-ordinating Bargaining Council
UDHR:	Universal Declaration of Human Rights
ILO:	International Labour Organization
UNESCO:	United Nations Educational, Scientific and Cultural Organization
SACE Act:	South African Council for Educators Act 31 of 2000.
SASA:	South African Schools Act 84 of 1996
SGB:	School governing body
PAIA:	Promotion of Access to Information Act 2 of 2000

ABSTRACT

This research aims to illustrate that the education sector has not managed to circumvent unfair labour practices, specifically in its appointment processes relating to promotion posts. I use literature and case law to prove that irregular appointments are due to maladministration/malpractice by malfeasant officials, school governing bodies and trade unions. This thesis presents a detailed overview of the existing legislative framework governing the employer-employee relationship and includes a study of international law and constitutional rights pertaining to the principles of equality and justice, focusing on section 18 (freedom of association) and section 23 (labour relations) of the Constitution. Furthermore, the research presents an overview of the Labour Relations Act 66 of 1995 (LRA), and the Employment Equity Act 55 of 1996, which were enacted to give effect to the equality and labour rights enshrined in the Constitution and have been applied in education. In addition, the thesis presents an overview of the South African Schools Act 84 of 1996 and the Employment of Educators Act 76 of 1998. I argue that the supporting legislation and policies governing the processes involved in the appointment of educators to promotion posts do not offer sufficient safeguards against transgressions of the existing legislative framework as provided for by the Constitution, the LRA and other labour legislation.

I conclude the research with recommendations on how to promote fair decision-making by closing the gaps in the current legislative framework governing employment, therefore limiting the number of unfair labour practice disputes. The practical implication of this study is that it makes a contribution to the existing literature on appointments of educators to promotion posts in public schools, and it places new information in the public domain which will have bearing on the formation of new collective agreements to ensure fair decision making when making appointments to promotion posts. Further to this, it offers guidance to the commissioners of the Educators Labour Relations Council, the employer and employee representatives dealing with promotion disputes.

This research is needed for the creation of legislation that would limit the number of irregular appointments of educators to promotion posts in South Africa as a whole and therefore limit the number of disputes that reach the already overburdened teacher unions, the Educators Labour Relations Council and the state as the employer.



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CHAPTER ONE

INTRODUCTION AND RATIONALE FOR THE STUDY

1.1 BACKGROUND AND PROBLEM STATEMENT

The purpose of this research is to determine whether the enabling legislation and policies governing promotion processes in public education are consistently applied and implemented to ensure fair and equitable decisions. To this end, this thesis focuses on the recruitment and selection processes involved in appointing the school principal.

According to the Department of Basic Education School Realities Report 2019, published in 2020, there are 24 998 ordinary public schools in South Africa.¹ On average, each of these schools only has one principal post, making these sought-after positions scarce and increasing competition among eligible employees. The principal, as a leader of a school and a key role player in the community, must act with a certain standard of professionalism and morality.² There should be no question of corruption or unfairness surrounding this appointment. Therefore, the recruitment and selection process must be both procedurally and substantively fair in that the employer must be able to justify the appointment.³

The Constitution guarantees the right to equality, fair labour practices and the right to a fair remedy.⁴ The Employment Equity Act 55 of 1996 (EEA) and the Labour Relations Act 66 of 1995 (LRA) were enacted to give effect to these rights to ensure that no employee should be subjected to unfair labour practices.⁵

Subject to the Constitution, the EEA, and the LRA, the primary legislation governing the appointment of educators in South Africa is the South African Council for

¹ Department of Basic Education 'School Realities Report 2019' (2020) 1.

² Lashway L 'Ethical Leadership' (1996) <https://eric.ed.gov/?id=ED397463> (accessed 29 January 2021).

³ McGregor M *Labour Law Rules!* 2ed (2014) 101.

⁴ Constitution of the Republic of South Africa 1996 section 23(1).

⁵ *NEWU v CCMA* (2007) 28 ILJ 1223 (LAC) para 22.

Educators Act (SACE Act),⁶ the Employment of Educators Act (Educators Act),⁷ and the South African Schools Act (SASA).⁸

SASA⁹ when read together with the Educators Act¹⁰ creates a two-tier system of governance. As a result, the recruitment and selection processes have been placed in the hands of the school governing body (SGB) and the Head of the Department of Education (HOD), with the teachers' unions acting as observers.

Despite the strides made in developing South Africa's constitutional and labour law since 1994, the education sector has yet to circumvent the scourge of corruption, which is so prevalent in South Africa. Corruption Watch cited schools as one of the most prominent "hotspots" for corruption since 2013.¹¹ Also, in 2014 the Minister of Education appointed a task team to investigate allegations of irregular appointments. The report confirmed that irregular appointments and unfair labour practices concerning appointments in education are widespread.¹² Furthermore, irregular appointments have resulted in the appointment of incompetent school principals who are not fit to hold the position.¹³ In addition, in 2022, Corruption Watch identified school appointment processes as one of the main areas where corruption occurs.¹⁴

The enabling legislation, the Education Labour Relations Council (ELRC), consisting of the employer and unions, have concluded collective agreements, which serve as agreements for the processes involved and how disputes, when they arise, are handled.¹⁵ Despite the calls for improving policy regarding appointments to promotion posts, there has yet to be movement in this regard.¹⁶ The current policy is the Personnel

⁶ South African Council for Educators Act 31 of 2000.

⁷ Employment of Educators Act 76 of 1998.

⁸ South African Schools Act 84 of 1996.

⁹ SASA section 20(1)(i).

¹⁰ Employment of Educators Act 76 of 1998 chapter 3.

¹¹ Corruption Watch *Annual Report 2019* 12.

¹² Volmink J 'Report of the Ministerial Task Team' (2016) 16.

¹³ Public Service Commission (2016) 'Factsheet on irregular appointments'

<http://www.psc.gov.za/documents/reports/2016/Facts%20sheet-%20irregular%20appointments%20in%20the%20public%20service.pdf> (accessed 29 January 2021).

¹⁴ Corruption Watch 'Sound-the-Alarm-Sectoral-Report-Education' corruption in the education sector.' https://www.corruptionwatch.org.za/wp-content/uploads/2022/08/Sound-the-Alarm-Sectoral-Report-Education_Aug2022.pdf (accessed 27 August 2022).

¹⁵ ELRC CA 3 of 2016.

¹⁶ Volmink (2016) 202.

Administration Measures (PAM 2016),¹⁷ which is based on the ELRC Resolution 5 of 1998.

The principles of fairness, equity, and the right to fair procedures are fundamental constitutional principles. The absence of these fundamental principles when making an appointment makes the recruitment and promotion processes vulnerable to corruption and abuse. It may lead to unfair labour practices and possible irregular appointments. The Volmink Report confirmed the need for clear policy, training, and education to guide the processes involved in eradicating the widespread number of irregular appointments and unfair labour practices regarding appointments in education.¹⁸

1.2 SIGNIFICANCE OF THE PROBLEM OR ISSUE

Most of those who have written on recruitment and selection processes have highlighted the need for policy reforms but not specifically what those reforms should be. While there is a growing focus on eradicating corruption in South Africa, there needs to be more concern with reviewing policy and legislation to avoid irregularities in the appointment to promotion processes in South African Public Schools. This thesis will add to the body of research in that the main objective is to establish whether the laws applicable to the appointment processes in education are correctly implemented to afford protection against unfair labour practices and unfair discrimination for applicants applying for promotion posts in public schools.

This research endeavours to contribute further as follows:

- Concepts of fairness, equity, and rational decisions.

This research endeavours to provide a basic understanding of these critical constitutional concepts as it applies to the promotion processes.

- Legislative and Procedural Challenges

This research will provide a critical study of the legislation, policies and procedures relating to the appointment of educators to promotion posts to identify gaps that have the potential to allow for unfair labour practices. Furthermore, to address the

¹⁷ Personnel Administration Measures 2016 Chapter B (PAM 2016).

¹⁸ Volmink (2016) 16.

required changes to close the gaps within the context of the right to fair labour practice.

- Contributing to education

Education is a critical factor for the prosperity of a nation and its most important investment.¹⁹ This research examines the roles of those involved in decision-making when making appointments. In addition, it encourages fairness and equality by aligning these principles to legislation and policy in greater clarity to enhance education.

- Contributing to the Department of Education

The Volmink Report recommended that the Department of Basic Education regain control over the administration of education in the provinces by adjusting legislation to eliminate flaws in the recruitment processes.²⁰ To date, there have been no policy reforms. The last policy which was created²¹ in 2016, is based on Resolution 5 of 1998. This research endeavours to make recommendations on how existing legislation and policies can be adjusted to eliminate these flaws associated with the recruitment processes.

1.3 LITERATURE REVIEW

In 2003, Mulford²² investigated the role of the principal and called for the review of school leader appointment processes and criteria. However, the author does not interrogate or examine the specific pieces of legislation involved in the appointment process or the gaps that contribute to irregular appointments. The author focuses on the contribution of effective leadership to the education process.

Beckmann²³ has written about the powers conferred by the state on the school governing body in terms of the Schools Act²⁴ and briefly discusses the power of the SGB to appoint only in so far as it relates to supersession by the HOD. In this regard,

¹⁹ Mulford B 'School Leaders: Challenging Roles and impact on Teacher and School effectiveness' (2003) OECD Commissioned Paper 5.

²⁰ Corruption Watch 'Jobs for sale Report Finds numerous irregularities' (2016) <https://www.corruptionwatch.org.za/jobs-sale-report-finds-irregularities> (accessed 29 January 2021).

²¹ PAM 2016.

²² Mulford B (2003) *OECD*.

²³ Beckmann J 'Legislation on school governors' (2009)29 *SAJE* 171-184.

²⁴ SASA section 20(1)(i).

he argues that the HOD does not afford the school governing body real power to appoint because they are merely empowered to recommend a list of candidates in order of preference for a particular post. However, according to the author, the HOD has the power to appoint any of the recommended candidates from the list and this amounts to an infringement of a parent's democratic right to make decisions concerning their children's education. The author, therefore, focuses on the extent to which the state allows for the involvement of parents in the education of their children and does not deal with appointment processes fully or suggest any policy reforms in this regard.

Serfontein S²⁵ has written on corruption at schools, however, the author deals with all the categories of corruption, not specifically with appointments to promotion posts. The author acknowledges the role of a principal in combatting corruption in schools, however, does not deal specifically with the question of the irregular appointment to the promotion of the principal himself. The study by Wills²⁶ investigates whether qualifications and experience can be used as an appropriate signal of principal quality in the South African context by identifying whether a relationship exists between the principals' credentials and the performance of the schools they lead. The writer highlights the urgency to implement policies to support the 'right' appointments of new principals and stresses that this must be reiterated more, considering the substantial number of principal retirements.

This thesis is significant as no thesis concerning the effective implementation of legislation governing the appointment to promotion posts in education could be identified, nationally and internationally, during the research of this topic. This thesis is, therefore, unique as it will provide recommendations on how the appropriate legislation can be practically implemented to ensure protection against unfair labour practices(promotion).

A further premise on the significance of this research is that the Minister of Education appointed a task team in 2014 to investigate allegations of corrupt practices in these

²⁵ Serfontein S 'The corruption bogey in South Africa' (2015) 35 *SAJE* 1.

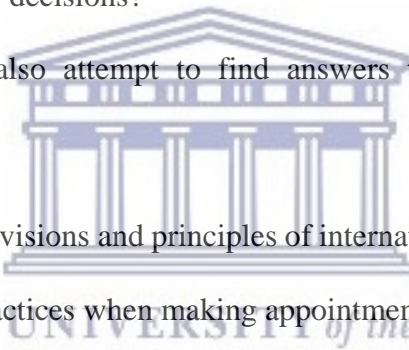
²⁶ Wills G 'A profile of the labour market for school principals in South Africa' (2015) Stellenbosch Economic Working Papers 12/15 1.

processes. The task team then recommended that the Department of Basic Education regain control over the administration of education in the provinces by adjusting legislation to eliminate flaws in the recruitment processes.²⁷ This research did not find any policy reforms that satisfied the recommendations of the ministerial task team or improve how the appropriate legislation is implemented to ensure that the principles of fairness and equity are consistently applied in the promotion processes in education. In addition, the authors mentioned above have researched specific aspects of schooling and the research done before the Volmink Report confirmed that irregular appointments in education are indeed rife.

1.4 RESEARCH QUESTION

This thesis seeks to address the question: In what ways do the existing legislative framework and procedures governing the promotion processes in the education sector promote rational and fair decisions?

This research will also attempt to find answers to, inter alia, the following questions:

- 
- a) What are the provisions and principles of international law that shape the right to fair labour practices when making appointments?
 - b) What is the national framework governing the right to fair labour practices when making appointments? Further: How does the national framework promote fair decision-making when making appointments for promotion?
 - c) What is the primary and subordinate legislative framework governing promotions in the education sector?

Further:

- i. Does the primary and subordinate legislation promote the concept of fairness and equality in the decision-making processes?
- ii. To what extent does it promote these concepts?

²⁷ Corruption Watch 'Jobs for sale Report Finds numerous irregularities' (2016) <https://www.corruptionwatch.org.za/jobs-sale-report-finds-irregularities> (accessed 29 January 2021).

- iii. And if not, how should the legislative framework be reformed to promote these concepts in decision-making?
- d) What flaws in the existing legislation and policies, if any, allow for corruption in the recruitment processes?
- e) What are the policy reforms needed to ensure that legislation and procedures governing promotions promote fair and rational decision-making?

1.5 METHODOLOGY

This thesis uses both primary and secondary resources. The primary sources reviewed include applicable case law relating to promotion disputes, legislation and policies involved in recruitment, and selection regarding appointments to promotion posts. Secondary sources include a literature review published in academic books, newspapers, and articles.

Legislation and related authority, specifically in the fields of labour law and education law, is considered. The relevant statutes and reports include the Constitution, the LRA, the SASA, the SACE Act, the EEA, the Educators Act, Education Labour Relations Council Annual Reports and arbitrations, the Volmink Report to the Minister of Education²⁸ and several other South African legislative measures and reports are also briefly discussed.

Finally, this thesis presents arguments and recommendations on how best to confront the issue of improper implementation of the appropriate legislation governing the recruitment, selection and appointment processes involved in promotions to ensure equity and fairness.

1.6 CHAPTER OUTLINE

Chapter one provides the background to the thesis, the problem that will be addressed, the significance of researching this area of the law, the research question that will be addressed, the research method, and the outline of the thesis.

²⁸Volmink J 'Report of the Ministerial Task Team' (2016).

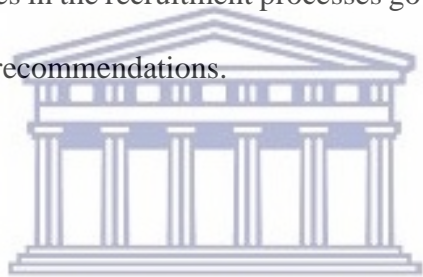
Chapter two explores the international framework governing the promotion of fair decision-making when making appointments.

Chapter three explores the national framework governing recruitment and selection processes in public education. This includes the analysis of the principles of equality, fair labour practices, fair remedies, and collective bargaining within the context of promotions.

Chapter four examines the primary and quasi-legislative framework governing recruitment and selection processes in public education.

Chapter five examines the primary legislation's application, interpretation, and implementation when read together with the quasi-legislation. This includes an overview of the procedures involved and the role played by the stakeholders when making appointments.

Chapter six highlights the research findings and the issues identified in examining the legislation and procedures in the recruitment processes governing promotions in public education and provides recommendations.



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CHAPTER TWO

INTERNATIONAL LAW GOVERNING FAIR LABOUR RELATIONS

2.1 INTRODUCTION

This chapter explores the international framework for promoting fair decision-making when making appointments. The purpose is to engender an understanding of universal human rights, focusing on the principle of equality, fairness, and a right to a fair remedy in the Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly. More importantly, this thesis focuses on the labour rights contained in the applicable instruments of the International Labour Organization (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) within the context of appointments to promotion posts.

This chapter first provides a brief overview of international law and secondly discusses how and why international law applies in South Africa. Thirdly this chapter examines the United Nations (UN) international human rights instruments, dealing with equality, fair labour practice and fair remedy. Fourthly, this chapter will focus on the ILO and UNESCO's instruments pertaining to equity, fair labour practice, and fair remedy in recruitment and selection processes.



2.2 OVERVIEW OF INTERNATIONAL LAW

As a point of departure, the discussion starts with examining the definition of international law and then proceeds to introduce the United Nations General Assembly and the ILO as the central governing bodies of international human rights and international labour standards, respectively, in so far as it is relevant to South Africa.

2.2.1 Defining international law

International law is defined 'as a body of rules and principles which are binding upon states and their relationship with one another'.²⁹ A rule becomes part of international

²⁹ Dugard (2018) 1.

law once the international community has accepted it. These rules can be found in various treaties and universally accepted customs.³⁰ The rules of international law come into effect once participating states formally conclude and ratify the general principles contained in the treaties and international customs.³¹ Conventions (or Protocols) are legally binding international treaties that contain the basic principles to be applied by ratifying countries and are supplemented by non-binding Recommendations. Once a convention is ratified, it will have the same effect as a treaty.³² Recommendations, although not binding, offer states an idea of how the precepts, as envisaged by international law, ought to be implemented.³³ International law can be recognised and applied in the domestic laws of the member states through legislation or by the organs of states. Where it is excluded, the judiciary may interpret domestic laws according to the principles of international law.³⁴ Included in the body of international law are international human rights. The United Nations General Assembly is responsible for creating international law policies.

2.2.2 The United Nations General Assembly

United Nations General Assembly, which consists of representatives of governments from all countries that are members of the UN, and is the UN's main body responsible for discussing and formulating policies relating to international law.³⁵ In 1948, United Nations General Assembly adopted the UDHR. The UDHR now serves as the standard by which the conduct of states towards their citizens is measured and, although non-binding, serves as an authoritative source for states when deciding whether there is a violation of the rights contained therein.³⁶ The UDHR not only became the benchmark for many states in the creation of their constitutions but served as the foundation for human rights conventions such as the Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly. More importantly, this

³⁰ Dugard (2018) 3.

³¹ Dugard (2018) 3.

³² Dugard (2018) 489.

³³ Dugard (2018) 1.

³⁴ Dugard (2018) 80.

³⁵ Article 11.

³⁶ Dugard (2018) 460.

thesis aims to focus on the labour rights contained in the applicable instruments of the International Labour Organization (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO)³⁷ Today all covenants have some form of mechanism in place to deal with contraventions by states that are party to the ratification. Among these mechanisms are human rights treaty committees that monitor treaties, hear complaints from individuals and comment on reports from member states on the implementation thereof.³⁸

The UN Charter further made provision for the establishment of specialised agencies by agreement between states,³⁹ to bring about the development of higher standards of living, employment, economic and social progress, the development of health, education, and the promotion of human rights.⁴⁰ In this regard, there are currently 17 specialised agencies of the UN. However, this chapter will focus on two specialised agencies, namely, the ILO and UNESCO, because these agencies deal with sources of international labour standards that are most relevant to the study.

2.2.3 Sources of international labour standards

In 1946 the ILO became a specialised agency of the United Nations. The ILO aims to create an international policy to regulate the labour sector and promote social justice, equality, and peace between employees and employers within the member states.⁴¹ In this regard, the ILO has formulated several treaties,⁴² including the Freedom of Association and Protection of the Right to Organise Convention,⁴³ The Right to Organise and Collective Bargaining Convention,⁴⁴ the Forced Labour Convention,⁴⁵ the Abolition of Forced Labour Convention,⁴⁶ the Minimum Age Convention,⁴⁷ the

³⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS 3.

³⁸ Dugard (2018) 463.

³⁹ Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI Art 57.

⁴⁰ UN Charter Art 55.

⁴¹ Benjamin P 'International Labour Standards' (1991) 16(1) *South African Labour Law Bulletin* 83-85.

⁴² Dugard (2018) 489.

⁴³ ILO Convention 1948 (No. 87).

⁴⁴ ILO Convention 1949 (No. 98).

⁴⁵ ILO Convention 1930 (No. 29).

⁴⁶ ILO Convention 1957 (No. 105).

⁴⁷ ILO Convention, 1973 (No. 138).

Worst Forms of Child Labour Convention,⁴⁸ the Equal Remuneration Convention,⁴⁹ the Discrimination (Employment and Occupation) Convention⁵⁰ and the Termination of Employment Convention.⁵¹ These treaties identify and protect fundamental employment rights and are further confirmed in the ILO Declaration on Fundamental Principles and Rights at Work,⁵² declaring that all members, whether they have ratified the Declaration or not, have a duty to promote freedom of association, the right to collective bargaining, and the abolition of child labour, including a duty to eliminate unfair discrimination.⁵³

Further to this, in 1999, the ILO introduced the Decent Work Agenda (DWA), aimed at improving the work-life of men and women. As part of the DWA, a state is encouraged to create and implement programmes that provide decent work for citizens residing in the country.⁵⁴ The ILO DWA proposes the implementation of programmes that provide opportunities for 'productive and secure working conditions, fair remuneration, the freedom of workers to partake in the decision-making processes that affect their lives by being allowed to express their concerns and organise, and to be given equal opportunity and treatment'.⁵⁵ Decent Work Country Programmes (DWCPs) drive the ILO objectives for decent work. DWCPs are an essential part of national development programmes in achieving these objectives.⁵⁶

In furthering the objectives of the UN of achieving equality, economic growth and cultural development, specifically concerning the status and rights of teachers, artists, journalists, performers, and persons with disabilities, the ILO works in collaboration with UNESCO. UNESCO is a specialised agency of the UN established in 1945 to advance peace and human rights through five major areas: education, natural sciences,

⁴⁸ ILO Convention 1999 (No. 182).

⁴⁹ ILO Convention 1951 (No. 100).

⁵⁰ ILO Convention 1958 (No. 111).

⁵¹ ILO Convention 1982 (No.158).

⁵² ILO Declaration on Fundamental Principles and Rights at Work (1998).

⁵³ ILO Declaration on Fundamental Principles and Rights at Work, 1998 Art 2.

⁵⁴ D Ghai (ed) *Decent Work: Objectives and Strategies* (2006) 3.

⁵⁵ ILO 'Decent work' <https://www.ilo.org/global/topics/decent-work/lang--en/index.htm> (accessed 22 September 2021).

⁵⁶ ILO 'Decent Work Country Programmes' (DWCPs) [https://www.ilo.org/budapest/what-we-do/decent-work-country-programmes/lang--en/index.htm#:~:text=Decent%20Work%20Country%20Programmes%20\(DWCPs,%2C%20trade%20unions%2C%20and%20employers](https://www.ilo.org/budapest/what-we-do/decent-work-country-programmes/lang--en/index.htm#:~:text=Decent%20Work%20Country%20Programmes%20(DWCPs,%2C%20trade%20unions%2C%20and%20employers) (accessed 16 October 2021).

social/human sciences, culture, and communication.⁵⁷ The organisation's purpose is to bring about collaborations between nations to contribute to the achievement and furtherance of the objectives of the UN Charter concerning equality, freedom, the rule of law, and the elimination of unfair discrimination within the five major areas.⁵⁸ Equality in education is at the core of the organisation's agenda.

The inclusion and observation of the state's obligations in terms of international law must be used as a point of departure to ensure that the actual realisation of these rights is applied by those involved in the recruitment and selection processes in the education sector. Within this context, the following discussion will examine the role and importance of international law in South Africa.

2.3 THE ROLE OF INTERNATIONAL LAW IN SOUTH AFRICA

In 1994 South Africa adopted a human rights approach and joined the international community after many years of isolation and rejection because of the previous racist and discriminatory apartheid regime that governed the country.⁵⁹ Under the new democratic dispensation and as an actor in the international community, South Africa has ratified several international instruments. It is further constitutionally bound to enact laws aligned to international law prescripts, including, among other things, the right to equality, fair labour practice, an appropriate remedy and freedom of association.⁶⁰

2.3.1 The importance of international law in South Africa

South Africa was one of the founding members of the UN but was suspended in 1974 due to increased opposition to the apartheid system of governance adopted by the country then. In 1994, under the new democratic government, the suspension was

⁵⁷ Constitution of United Nations Educational, Scientific and Cultural Organization (1945) (UNESCO Constitution).

⁵⁸ Article 1.

⁵⁹ Beckmann J & Prinsloo I 'Legislation on school governors' power to appoint educators: friend or foe?' (2009) 29 *SAJE* 171.

⁶⁰ Constitution ss 233 and 39(1b).

lifted, and the country was welcomed back as a member of the UN.⁶¹ South Africa's return to the UN served as a declaration that the country was committed to promoting, respecting, and observing fundamental human rights and freedoms, as proclaimed in the UDHR.⁶² The South African Constitution is modelled against the framework of international human rights and further favours the alignment of domestic law and policy with global standards of international law.⁶³ South Africa is now described as having one of the most robust inclusions of international law principles in the Constitution.⁶⁴

In 1994, South Africa also became a member of the ILO.⁶⁵ The rights and obligations imposed on the member states as envisaged by the ILO are vindicated in Chapter 2 of the Constitution, the Bill of Rights (BOR), which enshrines the most fundamental rights relevant to employment, namely, the right to equality,⁶⁶ the right to freedom of association,⁶⁷ fair labour practice,⁶⁸ the right to join a trade union,⁶⁹ and the rights of employer and employee organisations to determine their administrative processes.⁷⁰ The BOR further provides for the right to have disputes settled by an impartial dispute resolution forum.⁷¹

In addition to the Constitution, the South African Parliament promulgated the Nedlac Act 35 of 1994. Based on this Act, the National Economic, Development and Labour Council (Nedlac) was formed.⁷² This committee consisting of members from government, commerce, trade unions and civil society, also included members from the ILO.⁷³ Through engagement, negotiation and agreement on labour policy,

⁶¹ South African History Online 'South Africa becomes a charter member of the United Nations' <https://www.sahistory.org.za/dated-event/south-africa-becomes-charter-member-united-nations> (accessed 21 September 2021).

⁶² Bradley C (ed) *The Oxford Handbook of Comparative Foreign Relations Law* (2019) 5.

⁶³ Roux N 'Public policy-making and policy analysis in South Africa amidst transformation, change and globalisation: Views on participants and role players in the policy analytic procedure' (2002) 37 *Journal of Public Administration* 420.

⁶⁴ Bradley (2019) 94.

⁶⁵ Benjamin P & Cooper C (2016) *South African Labour Law: A Twenty Year Assessment (2016)* R4D Working Paper 2016/6 Berne: World Trade Institute Swiss Programme on Global Issues for Development University of Berne 6.

⁶⁶ BOR section 9.

⁶⁷ Section 18.

⁶⁸ Section 23(1).

⁶⁹ Section 23(2).

⁷⁰ Section 23(4).

⁷¹ Section 34.

⁷² Nedlac Act section 2.

⁷³ Benjamin P 'Law and practice of private employment agency work in South Africa' (2013) Sector Working Paper No. 292 International Labour Office 2.

Parliament promulgated the LRA.⁷⁴ The LRA was promulgated to advance economic development, social justice, labour peace and the democratisation of the workplace by giving effect to the rights contained in the Constitution,⁷⁵ promoting and regulating the framework of collective bargaining⁷⁶ and creating dispute resolution forums, procedures, and measures to enforce the rights of both the employer and the employee.⁷⁷

Under South Africa's UN and ILO membership, the country rejoined UNESCO in 1994. Furthermore, in 1998, the South African National Commission for UNESCO was established to integrate and coordinate UNESCO activities in the country effectively.⁷⁸

2.3.2 The application of international law in South Africa

International agreements become binding only if approved by the National Assembly and the National Council of Provinces and become part of domestic law when enacted by national legislation.⁷⁹ Notwithstanding, the Constitution includes section 233, which provides that a court must give preference to an interpretation that favours international law as opposed to one that does not,⁸⁰ thereby encouraging decision-makers to favour an approach to domestic law that aligns with international law. The obligation to align domestic law with international is mandatory for all courts, tribunals, or forums in terms of section 39(1)(b), which provides that when interpreting the rights contained in the BOR, international law must be taken into account. Courts have held that by including section 39(1)(b), South Africa must consider all international treaties, regardless of whether they have been ratified.⁸¹

⁷⁴ Benjamin (2013) Sector Working Paper No. 292 International Labour Office 2.

⁷⁵ LRA section 1(a).

⁷⁶ Section 1(c).

⁷⁷ Section 1(d).

⁷⁸ South African Government 'The South African National Commission for UNESCO' <https://www.gov.za/about-government/contact-directory/international-orgs/international-orgs/south-african-national> (accessed 13 October 2021).

⁷⁹ Constitution s 231.

⁸⁰ Dugard (2018) 89.

⁸¹ Sucker F 'Approval of an international treaty in parliament: How does section 231(2) 'bind the Republic'?' (2015) *Constitutional Court Review* (2013).

The ratification of these conventions informs the interrelationship between international labour law standards and domestic labour law and warrants further investigation to determine the implications thereof for the state as the employer in the public sector. Due regard must be given to international labour standards because they are not only a constitutional requirement but also provide benchmarks and a point of reference for decision-makers when evaluating and interpreting domestic legislation.⁸²

The discussion that follows will first examine the international instruments, which govern human rights, and, secondly, examine the ILO conventions and recommendations about fair recruitment processes.⁸³ to determine how the recruitment processes involved in promotions in public education can be aligned with the universal labour standards.

2.4 INTERNATIONAL HUMAN RIGHTS INSTRUMENTS DEALING WITH EQUALITY, FAIR LABOUR PRACTICE AND THE RIGHT TO A FAIR REMEDY

Member states of the UN are obliged to afford citizens basic human rights,⁸⁴ as envisaged by international human rights instruments. These fundamental human rights include the right to be treated fairly and equally, the right to fair labour practice, and the right to an effective remedy when these rights are infringed. International human rights instruments can provide further insight into the scope and content of these prescripts, which may be used to strengthen and develop internal laws of the country in this regard.⁸⁵ To this end, the discussion that follows will focus on three international human rights instruments, namely, the UDHR, the ICCPR⁸⁶ and the ICESCR⁸⁷ to examine how these instruments contribute to developing the right to equality, the right to fair labour practice and access to a fair remedy.

⁸² Conradie M 'The constitutional right to fair labour practices: a consideration of the influence and continued importance of the historical regulation of (un)fair labour practices pre-1977' (2016) 22 (2) *Fundamina Pretoria* 198.

⁸³ ILO *General Principles and Operational Guidelines for Fair Recruitment* (2019).

⁸⁴ *Filartiga v Pena-Irala* 630 F 2d 876 (1980) 11.

⁸⁵ Mahaim E 'International labour law' (1996) 135 *International Labour Review* 290.

⁸⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171.

⁸⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS 3.

2.4.1 The UDHR

The UDHR was adopted by representatives from across the globe on 10 December 1948 and provided the most comprehensive understanding of the scope and application of human rights than any preceding document.⁸⁸ Further, this instrument has since played a pivotal role in developing human rights instruments by governments worldwide.⁸⁹ The importance of the UDHR is that it serves as a point of departure for interpreting domestic human rights instruments and is regarded as international customary law.⁹⁰

2.4.2. The right to equality and the prohibition of discrimination

In terms of the UDHR, the right to equality⁹¹ is a significant component of all the rights afforded to human beings.⁹² At the core of the right to equality is the prohibition against unfair discrimination.⁹³

The UDHR does not define unfair discrimination. However, Article 2 provides a list of prohibited grounds, namely, that no person may be discriminated against on the grounds of 'race, colour, sex, language, religion, political or opinion, national or social origin, property, birth or another status'.⁹⁴ The importance of these rights is further expounded by the inclusion of Article 7, which affords the individual equal protection of the law without discrimination,⁹⁵ where any rights contained in the UDHR are infringed.

2.4.3 The right to a fair remedy

⁸⁸ Schabas W (eds) *The Universal Declaration of Human Rights: The Travaux Préparatoires* (2013) Cambridge University Press, New York preface.

⁸⁹United for Human Rights (UHR) 'What are human rights '

<https://www.unitedforhumanrights.org.za/about-us/what-is-united-for-human-rights.html> (accessed 1 October 2021).

⁹⁰ Dugard (2018) 461.

⁹¹Universal Declaration of Human Rights (adopted 10 December 1948) United Nations General Assembly Res 217 (III) Article 1.

⁹² Article 1.

⁹³ Article 2.

⁹⁴ UDHR Article 2.

⁹⁵ Article 7.

The UDHR, Article 7, not only affords the individual equal protection of the law,⁹⁶ where any of the rights contained therein are infringed but also affords individuals general protection of human rights. To this end, Article 8 guarantees the right to an effective remedy when there is a violation of the fundamental rights afforded to him/her under domestic or international law.⁹⁷

The right to a procedural remedy is a fundamental principle of international human rights because, without a right to recourse, there would be no protection against violations of the constitutional rights afforded⁹⁸ under domestic law. Where there is a violation of human rights, the UDHR provides for the right to have that matter heard by an impartial dispute forum.⁹⁹

2.4.4 Consequences of the provisions of the Universal Declaration of Human Rights

The UDHR clarifies that every nation must implement measures promoting human rights. Included in this duty is that all members of the country must be educated on how to promote and respect human rights.¹⁰⁰ However, the Declaration is not a treaty and is therefore non-binding on states,¹⁰¹ and as a result, the UN Human Rights Commission, composed of experts in the field of human rights, was tasked with enacting conventions that support the enforcement of human rights as envisaged by the Declaration.¹⁰² The recommendatory nature of the UDHR motivated the General Assembly's adoption and ratification of the ICCPR and the ICESCR.

2.4.5 Relevance of the UDHR in South Africa

Constitutional supremacy is one of the founding principles of South Africa's domestic law.¹⁰³ The relevance of the UDHR in South Africa is that rights contained therein,

⁹⁶ UDHR Article 7.

⁹⁷ Article 8.

⁹⁸ Kergandberg E 'Fundamental rights, right of recourse to the courts and problems connected with the guaranteeing of the right of recourse to the courts in Estonian criminal procedure' (1999) 4 *Juridica International* 122-31.

⁹⁹ UDHR article 10.

¹⁰⁰ UDHR Preamble.

¹⁰¹ Dugard (2018) 462.

¹⁰² Dugard (2018) 460.

¹⁰³ Constitution s 1(c).

such as the right to equality, dignity, and a fair trial, are also contained in the Constitution.¹⁰⁴ The UDHR is not binding. On the other hand, the ICCPR and the ICESCR were ratified by South Africa in 1998 and 2015, respectively, and therefore binding on the country.

2.5 THE ICCPR AND THE ICESCR

The ICCPR and the ICESCR were adopted in 1966 and ratified in 1976 by the United Nations General Assembly.¹⁰⁵ Together with the UDHR, these two treaties are sometimes regarded as the 'International Bill of Human Rights'.¹⁰⁶ These treaties play a foundational role in the recognition and provision of the individual's right to equality, fair labour practice, fair remedy, and the right to freedom of association and have been ratified by South Africa, therefore warrant further investigation. The relevant provisions pertaining to these rights will be discussed below, including a discussion of South Africa's obligations under these covenants.

2.5.1 The ICCPR

The focus of the ICCPR is on the individual's right to self-determination¹⁰⁷ and obliges the state to make civil and political rights provisions allowing individuals to pursue their political, cultural, and economic goals.¹⁰⁸ The Preamble recognises the right to equality and dignity as an inalienable right afforded to all human beings and emphasises the role of the state and individuals among themselves to respect the fundamental rights and freedoms of others.¹⁰⁹ As with the Constitution, the obligations that flow from the Preamble govern the vertical relationship between the state and its citizens and the horizontal relationship between the citizens.¹¹⁰

¹⁰⁴ Dugard (2018) 461.

¹⁰⁵ Dugard (2018) 462.

¹⁰⁶ Dugard (2018) 462.

¹⁰⁷ Dugard (2018) 465.

¹⁰⁸ ICCPR Article 1.

¹⁰⁹ Preamble.

¹¹⁰ Gevers C, Govender K, De Vos P et al *South African Constitutional Law in Context* (2014) 259.

All parties concerned can only act in so far as domestic legislation allows. As such, according to Article 2, the state is obligated to incorporate the rights contained in the Covenant in the domestic laws of the country and to do so without discrimination on grounds such as 'race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status'.¹¹¹ A further qualification of the right to equality is found in Article 3. The laws enacted must ensure that all persons, both male and female, enjoy the benefits of the cultural, social, and economic rights contained in the Covenant,¹¹² and such enjoyment may only be limited in so far as a public emergency is threatening the country.¹¹³ However, the right to life and not be subjected to cruel, inhumane, degrading treatment or torture cannot be limited. Any limitation must be applied without any discrimination.¹¹⁴

The Covenant includes the right to a fair remedy¹¹⁵ and the state must ensure that there is a fair procedural remedy in place for parties alleging that a right/s has been infringed.¹¹⁶ A fair procedural remedy includes the right to be afforded equal protection by an impartial court or tribunal.¹¹⁷ The right to equality before courts and tribunals are unrestricted and must be applied by all judiciary bodies empowered by domestic law.¹¹⁸ Disputing parties must be afforded the right of access to fair procedures without discrimination or undue influence,¹¹⁹ and be assured that similar cases will be dealt with under similar procedures.¹²⁰

As previously mentioned, all parties that have ratified the Convention must ensure that these rights are immediately realised through implementation in the domestic laws of the member state. The Human Rights Committee (HRC) regulates these obligations. In addition, states must report to the HRC on the measures taken to implement the Covenant within a year of joining the UN and every five years after that.¹²¹ The HRC studies these reports, and general comments and observations are discussed with the

¹¹¹ ICCPR Article 2 (1).

¹¹² Article 3.

¹¹³ Article 4.

¹¹⁴ Dugard (2018) 466.

¹¹⁵ ICCPR Article 2(3)(a).

¹¹⁶ Article 2(1).

¹¹⁷ Article 14(1).

¹¹⁸ HRC General Comment no. 32 (2007) para 7.

¹¹⁹ Paragraph 8.

¹²⁰ Paragraph 14.

¹²¹ Dugard (2018) 467.

state's representative. The HRC may also consider individual grievances, provided all internal remedies have been exhausted.¹²² South Africa ratified this treaty,¹²³ and is, as such, bound by the provisions contained therein. The state is therefore obligated to implement individual rights contained in the Covenant and to provide a fair remedy where rights are violated. See the discussion below.

2.5.2 The ICESCR

The ICESCR recognises that the right to equality and the right not to be unfairly discriminated against are essential tenets of international law and are necessary for economic growth¹²⁴ and further, encompass all the rights afforded by the instrument. The Covenant validates the rights of every person to earn a living through freely chosen employment,¹²⁵ including the right to fair labour practice and joining a union. The right to join a union and further participate in its activities allows workers to partake in the decisions that affect them.¹²⁶

Another important feature of the ICESCR is that the state must ensure that provision is made for decent work, thus ensuring that provision is made for fair remuneration, working hours, holidays, and equal promotion opportunities.¹²⁷ A promotion is defined as an advancement of an employee to a higher position in terms of grading, salary, and responsibility, which is accompanied by a rise in salary based on experience, performance, equity, and external competition.¹²⁸ Regarding the Covenant, promotion must be accompanied by equality based on seniority and competence.¹²⁹

In order for the rights in the ICESCR to be realised, there is an obligation on the state to take 'appropriate steps' with the state having to determine what constitutes 'appropriate'. In this regard, General Comment 3 suggests that such steps should be given effect through the adoption of legislation,¹³⁰ providing effective judicial remedies

¹²² Dugard (2018) 468.

¹²³ Dugard (2018) 471.

¹²⁴ ICESCR article 2 (1).

¹²⁵ Article 6.

¹²⁶ Article 8.

¹²⁷ Article 7.

¹²⁸ *Mashegoane & Another v The University of the North* (1998) 1 BLLR 73 (LC) para 73.

¹²⁹ ICESCR article 7(c).

¹³⁰ General Comment 3(1990) para (3).

where rights have been violated,¹³¹ and this includes administrative, financial, educational and social measures.¹³²

The implementation of the Covenant is regulated by the Committee on Economic, Social and Cultural Rights (ECRC). States that are party to the ratification of the Covenant must report within two years after joining and every five years after that. The ECRC then provides general comments on the reports.¹³³ Individual complaints are dealt with under an optional Protocol, which came into effect in 2013.¹³⁴ South Africa is not a party to that Protocol. In this case, the Protocol allows for reasonable standards of review. To determine reasonableness, the committee must balance the violation against the backdrop of financing the competing needs and policies of the state.¹³⁵

For this study, what is important to note is that there is an obligation on the state to protect the right of all persons against unfair discrimination and to ensure that all persons are treated equally. Workers must be afforded a fair opportunity to compete for a promotion, and when deciding whom to appoint, seniority and competence must be taken into account. The unions are pivotal in protecting workers' rights from unfair labour practices and unjust working conditions.

As envisaged by the Covenant, social and economic rights are deeply embedded in South Africa's Constitution.¹³⁶ To this end, the Constitution provides for the right to equality,¹³⁷ the right not to be unfairly discriminated against,¹³⁸ the right to fair labour practice,¹³⁹ and the right to a fair remedy.¹⁴⁰ To fully appreciate the realisation of the right to equality, fair labour practices, and fair remedy in the recruitment processes governing public education, the following section will discuss international labour law conventions and recommendations regarding promotions.

¹³¹ Paragraph (4).

¹³² Paragraph (7).

¹³³ Dugard (2018) 473.

¹³⁴ ICESCR Optional Protocol (2013).

¹³⁵ Article 8(4).

¹³⁶ Dugard (2018) 471.

¹³⁷ Constitution s 1(a).

¹³⁸ Section 1(b).

¹³⁹ Section 23.

¹⁴⁰ Section 34.

2.6 RELEVANT INTERNATIONAL LABOUR STANDARDS

Contemporary international labour trends recognise the need for a country and all its institutions to provide measures that support basic human rights such as the right to equality, the right to fair labour practices and the right to a fair remedy where there is an infringement of these rights.¹⁴¹ The measures put in place must ensure that these rights are legislated and permeate every decision-making process to ensure a just and equitable outcome for the beneficiaries of those decisions, such as applicants applying for promotion posts.

It is within this context that recruitment and selection processes must therefore reflect human rights and include international labour law to promote policies and processes that are efficient and fair in an open democratic society.¹⁴² To this end, this section highlights international labour standards or the principles that have positively contributed to ensuring fair recruitment and selection processes in the applicable ILO and UNESCO conventions and recommendations.

2.6.1 ILO standards

The ILO has been developing standards of labour law since 1919, and these are contained in conventions, protocols, and recommendations, including those recommendations that are not necessarily linked to a convention.¹⁴³ In ensuring the realisation of human rights, such as freedom of association and the right to organise, collective bargaining, the prohibition on forced labour and the abolishment thereof, the minimum employment age, the abolishment of child labour, ensuring equal treatment with regards to remuneration, employment and occupation, within the employment arena, the ILO has ratified eight conventions. These conventions are: The Forced Labour Convention 1930 (No. 29); the Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87); the Right to Organise and Collective

¹⁴¹ Zolomphi N 'International trade and labour: a quest for moral legitimacy' (2009) 8 *Journal of International Trade Law and Policy* 12.

¹⁴² ILO *The general principles and operational guidelines for fair recruitment and definition of recruitment fees and related costs* (2019) 12.

¹⁴³ ILO (2019) 18.

Bargaining Convention 1949 (No. 98); the Equal Remuneration Convention 1951 (No. 100); the Abolition of Forced Labour Convention 1957 (No. 105); the Discrimination (Employment and Occupation) Convention 1958 (No. 111); the Minimum Age Convention 1973 (No. 138) and the Worst Forms of Child Labour Convention 1999 (No. 182)

Furthermore, the ILO's commitment to these fundamental rights is validated by the adoption of the Declaration on Fundamental Principles and Rights at Work,¹⁴⁴ declaring that all members, whether they have ratified the Declaration or not, have a duty to promote freedom of association, the right to collective bargaining, the abolition of child labour, and to eliminate discrimination.¹⁴⁵

The discussion that follows will deal with the core ILO instruments that pertain to fair recruitment in public education, namely, the Freedom of Association and Protection of the Right to Organise Convention (ILO Convention 1948)(No. 87), the Collective Bargaining Convention (ILO Convention 1981) (No. 154),¹⁴⁶ the Discrimination (Employment and Occupation) Convention(ILO Convention 1958 (No. 111))¹⁴⁷ and the Termination of Employment Convention (ILO Convention 1982 (No.158)).¹⁴⁸ In addition to these conventions, the discussion will deal with the ILO's General Principles and Operational Guidelines for Fair Recruitment and the Definition of Recruitment Fees and Related Costs of 2019.

2.6.1.1 ILO Convention 1948 (No. 87)

A vital feature of the ILO is that it is the only tripartite agency of the UN which allows employers and employees to participate in forming economic and social policies that support the principles of decent work for all.¹⁴⁹ To this end, the Freedom of Association and Protection of the Right to Organise Convention, 1948, recognises trade unions and employer organisations to determine their policies and procedures and prohibits state

¹⁴⁴ ILO Declaration on Fundamental Principles and Rights at Work (1998).

¹⁴⁵ ILO (1998) Art 2.

¹⁴⁶ ILO Convention 1981 (No. 154).

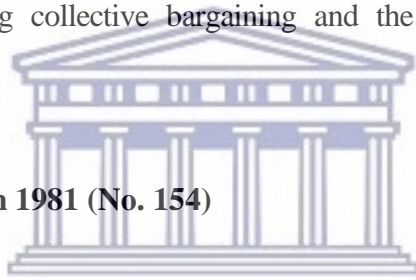
¹⁴⁷ ILO Convention 1958 (No. 111).

¹⁴⁸ ILO Convention 1982 (No.158).

¹⁴⁹ International Labour Organisation 'History of the ILO' <https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> (accessed 1 June 2021).

interference with their administrative functions and organisational rights.¹⁵⁰ Workers and employers, therefore, have a right to choose which organisation they want to join.¹⁵¹ Further subject to the Constitution of the said organisation, members may part-take in the lawful activities of that organisation.¹⁵² Article 11 of the Convention places a duty on the national government to create the legislative framework for workers to exercise the right to organise.¹⁵³ Freedom of association is a fundamental right and a core principle of the DWA.¹⁵⁴ It affords workers a say in conditions of service that affect their lives, and according to Ghai, this gives them a sense of dignity and fulfilment.¹⁵⁵

In South Africa, the Constitution provides for the right to join a union or, in the case of the employer, an employer organisation.¹⁵⁶ Within the context of the public education sector, several unions represent the rights of educators, and the state is the employer.¹⁵⁷ Chapter Three of this study will discuss these unions and the right to freedom of association. In the context of recruitment, workers have a choice as to which organisation will best represent their interests concerning collective bargaining and the rules governing recruitment processes.



2.6.1.2 ILO Convention 1981 (No. 154)

Collective bargaining allows employer and employee organisations to come together and negotiate matters of mutual interest relating to conditions of service¹⁵⁸ and further regulate the relationship between employer and employee organisations, and the relationship between employees and employers, themselves.¹⁵⁹ The Right to Organise and Collective Bargaining Convention protects workers against discrimination because they choose to belong to a particular union.¹⁶⁰ The Convention also recognises that collective bargaining is a voluntary process,¹⁶¹ therefore states must put measures in

¹⁵⁰ ILO Convention 1948 (No. 87) Art 3.

¹⁵¹ Article 2.

¹⁵² Article 8.

¹⁵³ Article 11.

¹⁵⁴ Ghai (2006) 27.

¹⁵⁵ Ghai (2006) 11.

¹⁵⁶ Abrahams, Calitz & Chicktay et al (2017)189.

¹⁵⁷ Abrahams, Calitz & Chicktay et al (2017) 308.

¹⁵⁸ ILO Collective Bargaining Convention, 1981 (No. 154), Article 2.

¹⁵⁹ Preamble.

¹⁶⁰ Article 1.

¹⁶¹ Preamble.

place to encourage and promote collective bargaining through consultation with employer and employee organisations that want to participate.¹⁶² The bargaining process allows employer and employee organisations to negotiate, discuss and design policies of mutual benefit.¹⁶³ It also allows members to determine fair procedures regarding social policies, governing the right to fair procedures.¹⁶⁴

The Constitution guarantees the right to fair labour practice and the right of employers and employees' organisations to bargain.¹⁶⁵ The Constitution also obligates the state to enact legislation that regulates the collective bargaining process.¹⁶⁶ To this end, the LRA was enacted and made provision for forming The Public Service Coordinating Bargaining Council, which serves as the bargaining council for public servants.¹⁶⁷ The ELRC is the division of the Public Service Coordinating Bargaining Council that serves educators in the public education sector, employed in terms of the Educators Act.¹⁶⁸ The unions governing education play an important role as observers during the recruitment processes and in the collective bargaining processes.¹⁶⁹

2.6.1.3 ILO Convention 1958 (No. 111)

The right to equality is a significant component of all the rights afforded to human beings¹⁷⁰ and further places a prohibition on unfair discrimination.¹⁷¹ One of the fundamental conventions dealing with the prohibition of discrimination is the Discrimination (Employment and Occupation) Convention, adopted by the General Assembly in 1958.¹⁷² The Convention describes discrimination as 'any distinction, exclusion or preference made based on race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation',¹⁷³ States that have

¹⁶² Article 5.

¹⁶³ Ghai (2006) 22.

¹⁶⁴ Ghai (2006) 34.

¹⁶⁵ Constitution, section 23(5).

¹⁶⁶ Section 23(5).

¹⁶⁷ LRA section 35.

¹⁶⁸ Section 37.

¹⁶⁹ Section 23.

¹⁷⁰ The Universal Declaration of Human Rights General Assembly Resolution No.217 A (1948) article 1.

¹⁷¹ Convention 1958 (No. 111) Article 2.

¹⁷² ILO Convention 1958 (No. 111).

¹⁷³ Article 1(a).

ratified the Convention must 'pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, to eliminate any discrimination in respect thereof'.¹⁷⁴

The Convention requires that national equality policy be effective and clear, with concrete and specific measures that eliminate direct and indirect discrimination and promotes equal treatment and equal opportunity in all aspects of employment.¹⁷⁵

Notwithstanding the prohibition, the Convention allows for discrimination on the grounds of 'inherent requirements' of the job.¹⁷⁶ According to Grogan, an inherent requirement refers to a particular characteristic that an employee must possess to do a particular job.¹⁷⁷ In the absence of that characteristic, discrimination would not be considered unfair. An example would be in cases where an applicant who is not qualified to teach Afrikaans First Language is not appointed to that position because of needing to be qualified to do so.

The Constitution echoes the prohibition against unfair discrimination, in accordance with Convention No. 111, and further guarantees the right of every person to equal treatment and protection of the law,¹⁷⁸ and equal enjoyment of fundamental rights and freedom.¹⁷⁹ Furthermore, the legislature has enacted The Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) that prohibits discrimination and provides that discrimination means 'any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly, imposes burdens, obligations or disadvantages on any person, or denies any person any benefits, opportunities or advantages, based on one or more of the prohibited grounds'.¹⁸⁰ The list of prohibited grounds in the Act is similar to those contained in Convention 111 and the BOR, namely 'race, gender, sex, pregnancy, marital status, ethnic or social origin, colour,

¹⁷⁴ Article 3.

¹⁷⁵ ILO *Rules of the game: An introduction to the standards-related work of the International Labour Organization International Labour Office* (2019) 48.

¹⁷⁶ Articles 1, 2.

¹⁷⁷ Grogan J *Dismissal, discrimination, and unfair labour practices* (2007) 254.

¹⁷⁸ Constitution Section 9(1).

¹⁷⁹ Section 9(2).

¹⁸⁰ Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) section 1.

sexual orientation, age, disability, religion, conscience, belief, culture, language and birth', is prohibited.¹⁸¹ The state has also enacted the Employment Equity Act 55 of 1996. This section will be further discussed in Chapter Three.

2.6.1.4 ILO Convention 1982 (No.158)

This Convention aims to promote job security and applies to all economic activities and employees.¹⁸² The Convention reflects the ILO's commitment to the right to equality and the prohibition of unfair discrimination,¹⁸³ the right to a fair remedy,¹⁸⁴ as well as the importance of collective bargaining.¹⁸⁵

The Termination of Employment Convention provides three valid grounds for termination of a contract of employment: 'the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment, or service'.¹⁸⁶

The Termination of Employment Convention also makes provision for consultation with worker organisations when terminating the employment contract on the operational requirements.¹⁸⁷

Article 5 provides grounds that will not constitute a valid reason for terminating an employment contract. In this regard, an employment contract cannot be terminated because an employee is a member of a union or participates in the union's activities or acts as a representative of the union.¹⁸⁸ In addition, Article 5(d) and (e) prohibits the termination of a contract of employment based on discrimination. In this regard, the grounds listed in the Convention are 'race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction, or social origin'¹⁸⁹ and absence from work during maternity leave.¹⁹⁰ The Convention further makes provisions for recourse through conciliation and arbitration.¹⁹¹

¹⁸¹ BOR section 9(3).

¹⁸² ILO Convention 1982 (No.158) article 2.

¹⁸³ Article 5.

¹⁸⁴ Article 1.

¹⁸⁵ Article 1.

¹⁸⁶ Article 4.

¹⁸⁷ Article 13.

¹⁸⁸ Article 5 (a) and (b).

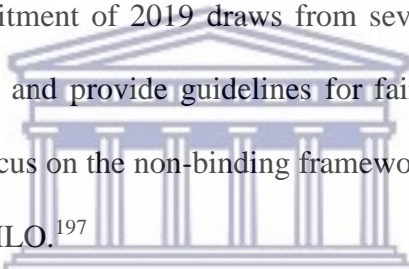
¹⁸⁹ Article 5(d).

¹⁹⁰ Article 5 (c).

¹⁹¹ Article 8.

Article one requires member states to enact laws and regulations to give effect to these provisions. In South Africa, the LRA further prohibits unfair dismissals and provides procedures for monitoring and applying legislation by specialised tribunals, like the CCMA and the labour courts.¹⁹² The Act prohibits discrimination against employees or employees that are seeking employment¹⁹³ and further provides grounds on which a dismissal will be unfair.¹⁹⁴ According to section 187, a dismissal will be unfair if the employer unfairly discriminates against an employee, directly or indirectly, on the grounds of pregnancy,¹⁹⁵ or on 'any arbitrary ground, including, but not limited to, race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language and marital status or family responsibility'.¹⁹⁶

In terms of ensuring fair recruitment and selection processes, this thesis examined the core binding conventions of the ILO. To this end, the general principles and operational guidelines for fair recruitment of 2019 draws from several international labour law sources and instruments and provide guidelines for fair recruitment processes. The discussion below will focus on the non-binding framework governing fair recruitment as recommended by the ILO.¹⁹⁷



2.6.2 The ILO's 2019 General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Related Costs

The objective of the principles and guidelines contained in the ILO General principles and operational guidelines for fair recruitment of 2019 is to provide nations and organisations with information on what constitutes fair recruitment.¹⁹⁸ The Guide consists of general principles that inform all levels of government on the implementation. The operational principles narrow down to the responsibilities of all the role-players intrinsically involved in the recruitment processes.¹⁹⁹ The following

¹⁹² Currie & De Waal (2013)473.

¹⁹³ LRA section 5 (1).

¹⁹⁴ LRA s 187.

¹⁹⁵ Section 187 (e).

¹⁹⁶ LRA s187(f).

¹⁹⁷ ILO (2019).

¹⁹⁸ ILO (2019) guideline I.

¹⁹⁹ Guideline I.

represents a breakdown and explanation of those principles as they apply to recruitment processes involved in promotions within the public sector.

Part A of the operational requirements deals with the state as the regulatory authority of the recruitment processes.²⁰⁰ According to these guidelines, the government, in its capacity as regulator and employer, must advance fair recruitment, reduce abuses practised against applicants, during recruitment, by closing the gaps in legislation and regulatory policies, and ensure that the applicable laws are enforced.²⁰¹ States are encouraged to ratify international legislation and further include international human rights and labour principles,²⁰² in the domestic legislation governing the recruitment processes.²⁰³ The relevant legislation and policies must cover all aspects of the recruitment process,²⁰⁴ and must be regularly evaluated and reviewed.²⁰⁵ Legislation and policy must also be continuously developed.

The state must also ensure that all the relevant actors involved in the recruitment process operate in accordance with the law and with due regard for internationally recognised human rights,²⁰⁶ further that these role-players are aware of the need for fair recruitment.²⁰⁷ Measures must be implemented to monitor whether all role-players involved in the recruitment processes comply with the applicable laws and policies.²⁰⁸

The state must also ensure that employees must be provided with free, comprehensive, and accurate information regarding their rights in respect of the conditions of employment, including recruitment,²⁰⁹ and must have access to effective grievance and other dispute resolution mechanisms to address alleged abuses and fraudulent practices in recruitment.²¹⁰

According to these principles, the state must ensure recruitment is regulated by law and that the policies and practices involved are fair and non-discriminatory. Furthermore

²⁰⁰ ILO *The general principles and operational guidelines for fair recruitment and definition of recruitment fees and related costs* (2019) Guideline 3.

²⁰¹ Guideline 3.

²⁰² Guideline 1.

²⁰³ Guideline 4.

²⁰⁴ Guideline 4.

²⁰⁵ Guideline 4.

²⁰⁶ Guideline 5.

²⁰⁷ Guideline 5.

²⁰⁸ Guideline 4.

²⁰⁹ Guideline 5.

²¹⁰ Guideline 8.

the state must ensure that policies and procedures promote and respect international human rights, including the right to freedom of association, collective bargaining, and the right to equality.²¹¹ This indicates the importance that international law places on forming policies and processes through the active participation of employers and employees in collective bargaining. The Guide is resourceful for ensuring fair labour practices in the private and public sectors.

2.6.3 Supervision of ILO instruments

The ILO has supervisory mechanisms in place to ensure that members who have ratified conventions implement those in the country's domestic laws.²¹² Member states must also implement recommendations within their domestic laws.²¹³ The member states must report on the conventions²¹⁴ and recommendations that have been implemented and put into practice. Trade unions and employer organisations are also expected to report how the state has observed these. Reports are submitted annually to the Committee of Experts on the Application of Conventions and Recommendations and the International Labour Conference's Tripartite Committee on the Application of Conventions and Recommendations.²¹⁵

International labour law requires that the conventions and recommendations²¹⁶ are implemented, and if a member state fails to do so, any other member may lodge a complaint with the International Labour Office. Once a complaint has been received, the governing body of the ILO will establish a Commission of Inquiry, consisting of three independent members, to investigate the complaint.²¹⁷ Upon completion of the investigation, the Commission of Inquiry will present a report to the member states concerned to decide whether the recommendations made by the Commission are

²¹¹ ILO *The general principles and operational guidelines for fair recruitment and definition of recruitment fees and related costs* (2019) Principle 1.

²¹² ILO Constitution article 19(5)(b).

²¹³ Article 19(6)(b).

²¹⁴ Article 22.

²¹⁵ ILO 'Applying and promoting International Labour Standards'

<https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang-en/index.htm#:~:text=International%20labour%20standards%20are%20backed,they%20could%20be%20better%20applied> (accessed 12 October 2021).

²¹⁶ ILO Constitution article 30.

²¹⁷ ILO Constitution article 26.

accepted.²¹⁸ In the event of a state not accepting the recommendations, the matter will then proceed to the International Court of Justice,²¹⁹ depending on the nature of the dispute.

The ILO works in collaboration with UNESCO, a specialised body of the UN responsible for overseeing the teaching profession.²²⁰ The following discussion will focus on the conventions and recommendations of UNESCO, focusing on the prohibition of unfair discrimination and the right to fair labour practices regarding recruitment.

2.6.4. UNESCO

The UNESCO Convention against Discrimination in Education was adopted by the General Conference of UNESCO on 14 December 1960.²²¹ This Convention aims to prohibit discrimination on the grounds of 'race, colour, sex, language, religion, political or other opinions, national or social origin, economic condition or birth',²²² and to promote equal opportunity for all persons involved in education.²²³ This includes the provision of training for the teaching profession without discrimination.²²⁴ The Convention further places a duty on the state to eliminate any legislation, administrative policy or practices that promote discrimination in education.²²⁵

UNESCO regards teachers as the most important drivers for achieving equity and quality education. However, admits that recruitment, training, and the conditions of service governing the profession remain an area of concern.²²⁶

The ILO/UNESCO Recommendation concerning the Status of Teachers (1966) and the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel (1997) are international instruments that offer guidance to states, employers,

²¹⁸ Article 29(1).

²¹⁹ Article 29(1).

²²⁰ Constitution of United Nations Educational, Scientific and Cultural Organization (1945) (UNESCO Constitution).

²²¹ UNESCO Convention against Discrimination in Education 1960.

²²² Article 1.

²²³ Article 4.

²²⁴ Article 4(d).

²²⁵ UNESCO Convention against Discrimination in Education 1960 article 3.

²²⁶ UNESCO 'Teachers' <https://en.unesco.org/themes/teachers> (accessed 18 October 2021).

and educator organisations when determining conditions of service governing educators. These recommendations, drafted by the ILO and UNESCO, are based on a collection of international labour standards.²²⁷ The principles contained therein provide sound guidance for those involved in appointment processes.

The policy governing the recruitment of educators should ensure that they possess the necessary moral, intellectual and physical skills, as well as professional knowledge,²²⁸ to advance education and to fill the needs of the learners they teach. Teacher unions are essential for the advancement of education and should be involved in the creation of policies,²²⁹ governing the sector.

According to the 1966 Recommendation, discrimination is prohibited in the training and recruitment of educators.²³⁰ Advancement and promotion should be based on an objective assessment of the qualifications of an educator²³¹ and senior positions should, as far as possible, be given to experienced applicants.²³² Teachers should also be protected against arbitrary actions affecting their careers.²³³ Measures should be put in place so that a common tribunal can deal with disputes arising out of conditions of service. In the cases of an undesirable outcome or a failure in negotiations, options must be available for organisations to defend their interests.²³⁴

The Recommendation highlights the importance of teachers in education and the intricate role that they play in the advancement of education. Recruiters should bear this in mind when making an appointment. Where a member state fails to adhere to the principles contained in the Recommendation, the matter may be referred to the ILO and UNESCO joint committee, called The Committee of Experts on the Application of the Recommendations concerning Teaching Personnel (CEART). The CEART will

²²⁷ILO/UNESCO Recommendation concerning the Status of Teachers 1966 and the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel (1997) 3.

²²⁸ Principle 11.

²²⁹ ILO/UNESCO Recommendation concerning the Status of Teachers 1966 and the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel (1997) Principle 9.

²³⁰ Principle 7.

²³¹ Principle 44.

²³² Principle 43.

²³³ Principle 46.

²³⁴ Principle 84.

study the case, make a finding, and then provide recommendations on how to remedy the issue.²³⁵

2.7 CONCLUSION

Chapter Two focuses on international law to determine the international values that shape the right to fair labour practices. This research established that the right to fair labour practices, the principle of equality, the right to an appropriate remedy and collective bargaining are fundamental principles of international law. South Africa as a member of the UN, the ILO and UNESCO²³⁶ has ratified several international instruments. South Africa is also constitutionally bound to enact laws aligned to international law prescripts, including the principle of equality, the right to fair labour practice and a fair remedy and freedom of association.

For this research, the relevant principles drawn from the fundamental Conventions and Recommendations inform recruiters of principles that should be born in mind making appointments to ensure fair labour practices. These principles include the requirements that legislation and policies are to be enacted in accordance with fundamental principles such as fairness, transparency, accountability, and the right of access to redress allegations of infringements by making provisions for a fair remedy. Also, that legislation, administrative policy or practices that promote discrimination must be eliminated.²³⁷ Furthermore, advancement and promotion should be based on an objective assessment of the qualifications of an educator²³⁸ and experience should be taken into account when making appointments to senior positions.²³⁹ In addition, all the relevant actors involved in the recruitment process must operate in accordance with the law and with due regard for internationally recognised human rights.²⁴⁰ Measures must be implemented to monitor whether all role-players involved in the recruitment

²³⁵ ILO/UNESCO 'Committee of Experts on the Application of the Recommendations concerning Teaching Personnel (CEART)' https://www.ilo.org/global/industries-and-sectors/education/WCMS_364850/lang--en/index.htm (accessed 1 October 2021).

²³⁶ See 2.6. above.

²³⁷ ILO/UNESCO Recommendation concerning the Status of Teachers 1966 and the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel (1997) Article 3.

²³⁸ Principle 44.

²³⁹ Principle 43.

²⁴⁰ Guideline 5.

processes comply with the applicable laws and policies.²⁴¹ Furthermore, that trade unions should be involved in formulating legislation, policies and procedures. International principles also provide that teachers should be protected against arbitrary actions affecting their careers.²⁴² The state must provide common tribunals to deal with disputes. In the cases of an undesirable outcome, or a failure in negotiations, options must be available for organisations to defend their interests.²⁴³

Although the ratification of these conventions by South Africa informs the interrelationship between international labour law standards and domestic labour law, further investigation is required to determine the implications for the state as the employer in the public sector. As a microcosm of South African society, the public education sector is not exempt from applying international laws and practices.

In light of the above, this research identified essential principles that apply to recruitment and selection that will be used as a benchmark when evaluating whether the existing legislative framework and procedures governing the promotion processes in the South African education sector promote rational and fair decisions. The next chapter will examine the national legislative framework governing appointments to promotions in the education sector to determine whether the enabling legislation promotes fairness and equality in the decision-making process in so far as it applies to the recruitment and selection processes.

²⁴¹ ILO/UNESCO Recommendation concerning the Status of Teachers 1966 and the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel (1997) Guideline 4.

²⁴² Principle 46.

²⁴³ Principle 84.

CHAPTER THREE

THE NATIONAL FRAMEWORK GOVERNING FAIR DECISIONS

3.1 INTRODUCTION

The purpose of this Chapter is to examine the national legal framework governing the right to fair labour practices when making appointments. Chapter Two examined the international principles governing the right to fair labour practices when making appointments. South Africa is constitutionally bound to enact laws aligned with international law as part of the international community. This part of the thesis endeavours to analyse the concept of equality, the right to fair labour practice, the right to freedom of association and a fair remedy within the context of the Constitution, the EEA and the LRA. This provides a point of departure for further deliberations on whether the national framework governing recruitment and selection processes in public education promotes fair decision-making.

3.2 THE NATIONAL LEGISLATIVE FRAMEWORK GOVERNING THE RIGHT TO EQUALITY

3.2.1 The Constitution



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The right to equality is a fundamental principle of South African constitutional law and essential to all rights.²⁴⁴ In its simplest meaning, equality is described as 'the right of different groups of people to have a similar social position and receive the same treatment'.²⁴⁵

A distinction is made between formal equality and substantive equality.²⁴⁶ Formal equality means that individuals in the same or similar situations must be afforded the same rights. Substantive equality involves an investigation of the actual circumstances of the person or group of persons to determine whether there is compliance with the

²⁴⁴ *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC) para 22.

²⁴⁵ Cambridge Dictionary | English Dictionary

<https://dictionary.cambridge.org/dictionary/english/reasonable> (accessed 3 August 2021).

²⁴⁶ Currie I, De Waal J. *Bill of Rights Handbook* 6 ed (2013) 213.

Constitution.²⁴⁷ In addition, the constitutional right to equality does not require that all persons be treated the same and makes provision for differentiation between persons or classes of persons.²⁴⁸ However, if the favour, prejudice, or bias shown is not based on any discernible rules or is without a justifiable reason,²⁴⁹ then the differentiation amounts to unfair discrimination.

The Constitution echoes the grounds for unfair discrimination under ILO Convention 1958 (No. 111) and the UNESCO Convention against Discrimination in Education 1960. Furthermore, the Constitution prohibits direct and indirect discrimination.²⁵⁰ Currie & De Waal submits that the Constitutional Assembly included direct and indirect discrimination to ensure that discrimination is not only covered in terms of the listed grounds but also all other forms of discrimination that may not be covered. Furthermore, unlike direct discrimination, where personal characteristics that are immutable to people can be determined, indirect discrimination can ostensibly impair a person's dignity or group of persons.²⁵¹

According to Du Toit, the main purpose of the Constitution is to determine the powers and functions of the state, whereas legislation ensures that the rights contained therein are implemented and applied in procedures and practices.²⁵² Within this context, section 9 of the Constitution further provides that the state must put measures in place to protect or advance persons or categories of persons disadvantaged by unfair discrimination.²⁵³ To this end, the LRA was enacted to prevent unfair labour practices, and the EEA was enacted to promote employment equity and prevent unfair discrimination in the workplace.²⁵⁴

In summary, the Constitution obligates the state to protect all people from unfair discrimination. However, applicants for promotions will not rely directly on the

²⁴⁷ Currie & De Waal (2013) 213.

²⁴⁸ Currie & De Waal (2013) 218.

²⁴⁹ *Kadiaka v Amalgamated Beverage Industries* (1999) 20 ILJ 373 (LC) para 42.

²⁵⁰ BOR section 9(3).

²⁵¹ Currie & De Waal (2013) 239.

²⁵² Du Toit D 'Protection against unfair discrimination in the workplace: Are the courts getting it right?' (2007) 11 (1) *Law Democracy and Development Journal of UWC Faculty of Law* 1.

²⁵³ BOR section 9(2).

²⁵⁴ Currie & De Waal (2013) 497.

Constitution. The employee alleging unfair discrimination will rely on the enabling legislation such as the BCEA, the LRA and the EEA.

3.2.2 The LRA

The LRA, like all legislation, must be interpreted in such a manner that it is aligned with section 9 of the Constitution. The LRA was the first statute to establish legislation by specialised tribunals, like the Commission for Conciliation, Mediation and Arbitration (CCMA) and the labour courts.²⁵⁵ A litigant alleging unfair discrimination will rely on the EEA to bring a dispute before the CCMA.²⁵⁶

3.2.3 The EEA

In terms of appointments, employees alleging that they have been unfairly discriminated against in the workplace will rely on the provisions of the EEA to deal with disputes. First, the EEA more broadly implements the right to equality and prohibits unfair discrimination. Also, the Act places a duty on an employer to ensure that employment policies are implemented to eliminate unfair workplace discrimination.²⁵⁷ Secondly, the Act extends protection against unfair discrimination to applicants for employment.²⁵⁸ Thirdly, in addition to the prohibited grounds for discrimination contained in the Constitution and the LRA, the EEA has extended the prohibition to persons with HIV and employees faced with harassment.²⁵⁹

The EEA makes provisions for the promotion of equal opportunity, fair treatment, and non-discrimination and also provides for dispute resolution in cases where there are allegations of unfair discrimination.²⁶⁰ Accordingly, when there is an allegation of unfair discrimination within the employment context, the EEA provides that parties must first attempt to settle the matter between themselves. If the issue cannot be resolved, a party may refer the matter to the CCMA.²⁶¹ The commissioner of the

²⁵⁵ Currie & De Waal (2013) 473.

²⁵⁶ EEA section 10 (2).

²⁵⁷ Section 5.

²⁵⁸ BOR section 9.

²⁵⁹ EEA section 6 (1).

²⁶⁰ Section 10.

²⁶¹ Section 10 (2).

CCMA must attempt to resolve the dispute through conciliation.²⁶² If the matter remains unresolved, an aggrieved party can approach the labour court (LC) to have the case adjudicated.²⁶³ Alternatively, the parties may agree to arbitration of the dispute.²⁶⁴

In cases where there are allegations of unfair discrimination, whether under the Constitution or the EEA, the Harksen Test from *Harksen v Lane* is used by the courts to determine whether the discrimination has impaired the dignity of the claimant.²⁶⁵ The equality clause sets out more fully where discrimination on a listed ground is proven or is assumed to be unfair until the contrary is proven.²⁶⁶ According to the Constitutional Court (CC) in *Harksen v Lane*, the approach to determining whether there is unfair discrimination involves a two-stage analysis.²⁶⁷ Further, these stages must be done separately because there are instances where discrimination will not amount to unfair discrimination.²⁶⁸

The first part of the test is to establish whether there has been differentiation. The onus is on the claimant to prove that there has been direct or indirect differentiation on one or more of the grounds listed in section 6(1) or on any other unlisted grounds.²⁶⁹ If it is established that there is differentiation on one of the listed grounds, then there is discrimination, and further, the discrimination will be presumed to be unfair.²⁷⁰ However, when alleging discrimination on one or more unlisted grounds, the claimant must prove that the discrimination was unfair.²⁷¹ There is no presumption of fairness as in the case of discrimination on the listed grounds. Further, whether the differentiation on an unlisted ground amounts to unfair discrimination is an objective test. The question that must be answered is whether the ground has the potential to 'impair the human dignity of the claimant or 'adversely affect them in a 'comparable

²⁶² EEA section 10(5).

²⁶³ Section 10(6)(a).

²⁶⁴ Section 10(6)(b).

²⁶⁵ McConnachie C 'Human Dignity, Unfair Discrimination and Guidance' (2014) 34(3) *Oxford Journal of Legal Studies* 612.

²⁶⁶ BOR s 9(5).

²⁶⁷ *Harksen v Lane* NO 1998 (1) SA 300 (CC) para 45.

²⁶⁸ Para 45.

²⁶⁹ Para 45.

²⁷⁰ Para 53(b)(i).

²⁷¹ Para 53(b)(i).

serious manner'.²⁷² If the answer is yes, there is discrimination, and the inquiry must proceed to the next stage.²⁷³

Once it has been established that there is discrimination, the second part of the inquiry is to establish whether that infringement has impaired the claimant's dignity. In other words, it must be determined whether the discrimination was unfair.²⁷⁴ If the discrimination was on a listed ground, it is presumed to be unfair, and the onus shifts to the employer to prove that the discrimination was fair. If the discrimination is on an unlisted ground, the employees must prove that the discrimination was unfair.²⁷⁵ Once the discrimination has been identified as unfair, it must be determined whether it can be justified in terms of the limitation clause.²⁷⁶

The limitation clause is found in Section 36 of the Constitution. Section 36 provides that:

‘The rights in the BOR may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.’

For example, in the case of *Harksen v Lane*, the CC used a historical approach to determine whether the complainant was part of a previously disadvantaged group,²⁷⁷ and the nature of the provision to determine whether the purpose of the provision was consistent with the values in section 8(2), now 9(2) of the Constitution.²⁷⁸

In terms of the EEA, an employee includes those who work for the state.²⁷⁹ Therefore educators in the public sector employed by the state fall within the ambit of the EEA

²⁷² 1998 (1) SA 300 (CC) para 53(b)(i).

²⁷³ Para 53(b)(i).

²⁷⁴ Para 53(b)(i).

²⁷⁵ *McConnachie* (2014) 612.

²⁷⁶ 1998 (1) SA 300 (CC) para 53(c).

²⁷⁷ EEA section 2(b).

²⁷⁸ 1998 (1) SA 300 (CC) para 63.

²⁷⁹ EEA section 1.

and are subject to the provisions of the Act. Accordingly, where a state-employed educator has been overlooked for a promotion and wants to challenge the decision not to promote based on unfair discrimination, that educator will first have to use internal grievance procedures.²⁸⁰ If the grievance outcome is unsuccessful, the educator must lodge a dispute with the CCMA to pursue the case.²⁸¹ In the case of state-employed educators, the dispute must be lodged with the Education Labour Relations Council (ELRC).²⁸²

The EEA provides two grounds for an employer to rebut a claim of unfair discrimination. The first is an affirmative action, and the second is discrimination based on inherent requirements.²⁸³

3.2.3.1 Affirmative Action

Affirmative action (AA) is embedded in section 9(2) of the Constitution's equality clause. To this end, the EEA is designed to promote employment equity in favour of the designated groups, which are Africans, Indians, Coloureds²⁸⁴, women, and persons with disabilities.²⁸⁵ AA includes more than just race but also the representativity of gender and disability in the workplace. AA measures aim to provide redress for previously disadvantaged groups identified as designated groups.²⁸⁶

Within the context of promotions, an applicant that has been overlooked for a promotion may raise the issue of discrimination based on race, gender, or disability.²⁸⁷

For example, in the Labour Appeal Court (LAC), *Naidoo v Minister of Safety and Security*, the Applicant challenged the appointment on the grounds of unfair discrimination based on race and gender.²⁸⁸ Accordingly, the LAC held that Indians were underrepresented and that SAPS had unfairly discriminated against the Applicant

²⁸⁰ EEA section 10(4)(b).

²⁸¹ Section 10 (3).

²⁸² LRA section 37. (The ELRC will be discussed further in Chapter Four).

²⁸³ Section 6 (2).

²⁸⁴ Section 1.

²⁸⁵ EEA section 1(e).

²⁸⁶ Currie & De Waal (2013) 241.

²⁸⁷ EEA section 1(e).

²⁸⁸ *Naidoo v Minister of Safety and Security* (2013) 3 SA 486 (LC) para 8.

based on race and gender.²⁸⁹ However, the CC in *South African Police Service v Solidarity obo Barnard* had to deal with questions of equality, race, and equity in the workplace. Captain Barnard, a white female employed by SAP, was recommended for a promotion but not appointed on two occasions.²⁹⁰ Jafta J held that 'the National Commissioner exercised his discretion not to appoint Ms Barnard rationally, reasonably, and according to the criteria in the instruction, in pursuit of employment equity targets envisaged in section 6(2) of the Act'.²⁹¹

Applicants for promotion may also challenge employers' failure to appoint on the basis that they should have been appointed because they are part of the designated group.²⁹² According to McGregor, AA is not a right.²⁹³ Where the designated groups are appointed, there is a presumption that the appointment is fair. However, that does not mean that affirmative action and the implementation thereof cannot be unfair.²⁹⁴ To this end, a rational explanation for appointing a person would be that the person is suitably qualified.²⁹⁵ Furthermore, an employer may not rely on equity as a defence if no equity plan is in place.²⁹⁶

In light of the above, within the context of education promotions, employers must have an EEP in place to rely on AA as a defence. Also, an applicant for a promotion post can claim unfair discrimination on the grounds of race, gender, or disability or a claim that they should have been appointed because they are part of the designated group. In such instances, a complainant must first attempt to settle the matter with the employer by lodging an internal grievance before lodging a dispute with the CCMA. However, the complainant must meet the requirements in terms of formal qualification, prior learning, and relevant experience or have the capacity to acquire the necessary skills to do the job.²⁹⁷

²⁸⁹ (2013) 3 SA 486 (LC) para 232.

²⁹⁰ *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 1.

²⁹¹ Para 227.

²⁹² EEA section 15.

²⁹³ McGregor M 'Blowing the whistle? The future of affirmative action in South Africa (part 1)' (2014) 26 *South African Mercantile Law Journal* 72.

²⁹⁴ Abrahams, Calitz & Chicktay et al (2017) 70.

²⁹⁵ EEA section 15.

²⁹⁶ *Public Service Association of South Africa and Another v Minister of Safety and Security and Another* (2004) D 322/04 ZALC 89 para 8.

²⁹⁷ EEA section 20 (3)(a)-(e).

3.2.3.2 Inherent requirements as a defence

In terms of the EEA, inherent requirements may be used as a defence to rebut an allegation of unfair discrimination.²⁹⁸ According to Grogan, the EEA does not define inherent requirements. However, the preferred employee must have a specific personal attribute or skill set that renders the employee capable of carrying out specific tasks that are essentially part of the position or job.²⁹⁹

Where an employer uses inherent requirements as a defence against an allegation of unfair discrimination, the following court decisions must be considered.

- a) The candidate's ability must be considered as opposed to gender stereotyping.³⁰⁰ In *Association of Professional Teachers & another v Minister of Education & others*, the Industrial Court held that the stereotyping of women should be prohibited on the grounds of unfair discrimination. The ability of the person to do the job must be the deciding factor on which differentiation is based and not the race or sex of that person.³⁰¹ However, the LAC in *Woolworths (Pty) Ltd v Whitehead* took a different position in terms of stereotyping.³⁰² In this regard, the LAC in *Woolworths (Pty) Ltd v Whitehead* dealt with the requirements of the position or the job concerning the employee and whether, because of her pregnancy, she could fulfil the demands required for the job for 12 consecutive months.³⁰³ The LAC held that due to the demands of the position, to rule in favour of the employee would prejudice or burden not just the employer but the economy and society as a whole, as it would deprive prospective employees of jobs.³⁰⁴
- b) HIV may not be used as an inherent requirement. For example, in *Hoffmann v South African Airways*,³⁰⁵ the CC held that HIV-negative is not an inherent requirement

²⁹⁸ EEA section 6 (2)(b).

²⁹⁹ Grogan J *Workplace Law* 13ed (2020) 104.

³⁰⁰ *Association of Professional Teachers & another v Minister of Education & others* (1995) 16 ILJ 1048 (IC).

³⁰¹ Para D.

³⁰² Dupper O 'Justifying unfair discrimination: the development of a 'general fairness defence' in South African (labour) law' (2001) *Acta Juridica* 170.

³⁰³ *Woolworths (Pty) Ltd v Whitehead* 2000 (3) SA 529 (LAC) para 2.

³⁰⁴ Para 149.

³⁰⁵ *Hoffman v South African Airways* 2000 (2) SA 628 (CC) para 2.

for the flight attendant position.³⁰⁶ Similarly, age was not considered an inherent requirement for the pilot job in *SA Airways (Pty) Ltd v Jansen van Vuuren & another* fitness to fly and not age was an inherent requirement of the job.³⁰⁷

- c) In *Dlamini and Others, v Green Four Security*³⁰⁸ the LC held that discrimination on the grounds of religious belief was not unfair as long as an employer attempted to make reasonable accommodation, but not to the extent that the employer suffered undue hardship.³⁰⁹
- d) The non-appointment of an applicant that lacks academic requirements for a particular position will not amount to discrimination. For example, in *Lagadien v the University of Cape Town*,³¹⁰ the LC held that the Respondent did not discriminate against Lagadien because, based on the inherent requirements for the academic position, the Applicant had failed on the merits.³¹¹

In summary, the non-appointment of an applicant for a promotion post does not amount to discrimination if the applicant does not satisfy the inherent requirements for that position. The tests by the courts are based on the facts of the case and must be used to determine whether an inherent job requirement amounts to unfair discrimination. Also, inherent requirements as a defence will succeed if an applicant does not meet the requirements for the position regarding skills, knowledge, experience, or academic qualifications.

In addition, where there is a claim of alleged discrimination, the EEA protects the employer and the employee. All rights must be interpreted to give full effect to human rights contained in the Constitution, including labour rights.

3.3 THE NATIONAL FRAMEWORK GOVERNING LABOUR RIGHTS

3.3.1 The Constitution

³⁰⁶ 2000 (2) SA 628 (CC) para 2.

³⁰⁷ *SA Airways (Pty) Ltd v Jansen van Vuuren & another* (2014) 35 ILJ 2774 (LAC) para 22.

³⁰⁸ *Dlamini and Others v Green Four Security* (2006) 11 BLLR 1074 (LC) para 2.

³⁰⁹ Para 5.

³¹⁰ *Lagadien v University of Cape Town* (2000) 21 ILJ 2469 (LC) para 1.

³¹¹ Para 18.

Labour relations are governed by section 23 of the Constitution.³¹² In terms of section 23(1),³¹³ everyone has the right to fair labour practices. Cohen submits that the Constitution does not define the term fair labour practices because this right was intended to balance the interest of the employer and the employee through the enactment of legislation, the contract of employment and constitutional interpretation. In addition, the flexibility has resulted in uncertainty regarding the 'meaning, scope, and the appropriate forum to make a determination' as to what constitutes fair labour practices.³¹⁴ According to Cheadle, fairness is central to the principle of fair labour practice.³¹⁵

The Constitution also makes provisions for the right to join trade unions and employer organisations.³¹⁶ Also, employers, employer organisations and unions have the right to engage in collective bargaining subject to National legislation enacted to regulate collective bargaining. Furthermore, that the legislation may limit a right in this chapter, provided that the limitation complies with section 36(1).³¹⁷

The Constitution further obligates the state to enact national legislation to give effect to the rights contained in Section 23. Within the context of recruitment and selection processes in public education, an aggrieved party will rely on the enabling legislation and not Constitution to lodge grievances or disputes.³¹⁸ The legislation ensures that the rights contained in the Constitution are implemented and applied in procedures and practices.³¹⁹ The LRA was enacted to effect labour rights contained in the Constitution.³²⁰

3.3.2 The LRA

³¹² Du Toit D & Sirkhotte M 'Human rights in the evolution of South African labour law' in Bellace J & ter Haar B(eds) *Research Handbook on Labour, Business and Human Rights Law* (2019) 171.

³¹³ LRA section 23(1).

³¹⁴ Cohen T 'Understanding Fair Labour Practices- *NEWU v CCMA*' (2004) 20 *SAJHR* 482.

³¹⁵ Cheadle H 'Regulated Flexibility and Small Business: Revisiting the LRA and the BCEA' (2006) University of Cape Town Development Policy Research Unit Working Papers 12.

³¹⁶ BOR section 23 (2).

³¹⁷ Section 23(5).

³¹⁸ *South African Defence Union v Minister of Defence & Others* 2007 (5) SA 400 (CC) para 52.

³¹⁹ Du Toit (2007) 11 (1) *Law Democracy and Development Journal of UWC Faculty of Law* 1.

³²⁰ *NEHAWU v University of Cape Town and Others* (2003) 3 SA 1 (CC) para 14.

The LRA aims to fulfil South Africa's international labour law obligations to promote and facilitate freedom of association and collective bargaining and promote employee participation in decisions that affect the working environment.³²¹ The discussion below will deal with unfair labour practices, collective labour rights, and the remedies available under the LRA within the context of promotions.

3.3.2.1 Unfair labour practices

The Act prohibits any unfair act or conduct that relates to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee; the unfair suspension of an employee or unfair disciplinary action short of dismissal; the failure or refusal by an employer to reinstate or re-employ a former employee in terms of an agreement to do so and occupational detriment in contravention of the Protected Disclosures Act as a result of the employee having made a protected disclosure as defined therein.³²²

Applicants alleging that the employer committed an unfair labour practice regarding the promotion must be an employee in terms of the LRA.³²³ The unfairness complained of must have occurred during the employment relationship.³²⁴ In section 200A of the LRA, the applicant is presumed to be an employee. The onus is on the employer to prove the non-existence of an employment relationship.³²⁵ For example, in *Member of the Executive Council for Transport: KwaZulu-Natal & others v Jele*³²⁶, the employee had been refused a promotion in another department of state instead of the department in which he worked. The LAC held that the state was the employer in all provincial departments unless prohibited by statute.³²⁷ It is clear that irrespective of provincial boundaries or the government department where an employee works, the state remains the employer.

³²¹ LRA section 1.

³²² Section 186(2).

³²³ LRA section 200A.

³²⁴ Grogan (2020) 58.

³²⁵ LRA section 200A.

³²⁶ *Member of the Executive Council for Transport: KwaZulu-Natal & others v Jele* (2004) 12 BLLR 1238 (LAC).

³²⁷ Para 17.

In addition, in *Apollo Tyres South Africa (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*, the LAC held that unfairness exists where there is a failure to meet an objective standard and may include either negligent or intentional conduct that is ‘arbitrary, capricious or inconsistent’.³²⁸

According to Grogan, unfair conduct refers to the employer's conduct and never the employee's.³²⁹ To succeed with an unfair labour practice claim, an employee must prove that the unfair conduct is based on one or more grounds listed in 186(2).³³⁰ Included in unfair labour practice is unfair conduct or omissions regarding promotions.³³¹ The discussion below will focus on how unfair labour practices are dealt with in promotion matters.

3.3.2.2 Unfair labour practices: promotions

The LC in *Mashegoane & Another v The University of the North* defined promotion as an ‘advance, or preferment, raise to a higher rank or position, advancement in position or preferment’,³³² indicating that a promotion carries a raise in status and authority.

The LRA does not create a right to promotion. However, when applying for promotion, the applicant does have a right to be reasonably considered for the position.³³³ In addition, the appointment process must be both procedurally and substantively fair and the employer must be able to justify a decision to appoint.³³⁴

3.3.2.2.1. Substantive and procedural fairness

Procedural fairness speaks to how the processes are carried out, and the rationale of the decision by the employer determines substantive fairness. According to Cheadle, if there is no discrimination against an applicant or a transgression of the procedures relating to a decision to promote, then there is no reason to interfere with an employer's

³²⁸ *Apollo Tyres South Africa (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* (2013) 34 ILJ 1120 (LAC) para 53.

³²⁹ Grogan (2020) 62.

³³⁰ Grogan (2020) 57.

³³¹ Grogan (2020) 58.

³³² *Mashegoane & Another v The University of the North* (1998) 1 BLLR 73 (LC) para 73.

³³³ *South African Police Services v Safety and Security Sectoral Bargaining Council and Others* (2010) 8 BLLR 892 (LC) para 15.

³³⁴ McGregor M (2014) 101.

decision to promote.³³⁵ The author submits that if the decision-makers have followed proper procedures regarding the enabling legislation and treated all the applicants equally, there should be no reason to interfere with the employer's right to appoint.³³⁶ However, according to Grogan, a claim of unfair labour practice regarding promotions is not limited to discrimination, it may also include a failure of an employer to apply an agreed policy or criteria or for other irrelevant reasons.³³⁷

In *Arries v CCMA & others*, the LC provided principles to determine whether a decision not to appoint is unfair. A decision will be unfair if it is determined that the decision was based on the following principles:

- The employer's conduct was 'unacceptable, irrelevant or consisted of an 'invidious comparison' made by the employer?
- Was the employer's conduct 'discriminatory or activated by bad faith' or 'arbitrary, capricious, or inconsistent'?
- The employer failed to 'apply its mind', or the employer's reasoning was defective.
- The employer's conduct was 'so grossly unreasonable' that it warrants an inference that they failed to apply their mind.³³⁸

In summary, a decision based on procedural and substantive fairness will be rational and reasonable. To determine whether a decision is fair and rational, it is imperative first to understand the interrelatedness between decisions and what constitutes a fair and rational decision.

3.3.2.2 Rational or Reasonable Decisions

The Department of Justice's Code of good administrative conduct' was drafted in accordance with section 10(5A) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The Code provides guidelines to ensure that public officials make 'lawful, reasonable and procedurally fair decisions. The 'Code of good administrative

³³⁵ Cheadle (2006) 22.

³³⁶ Cheadle (2006) 22.

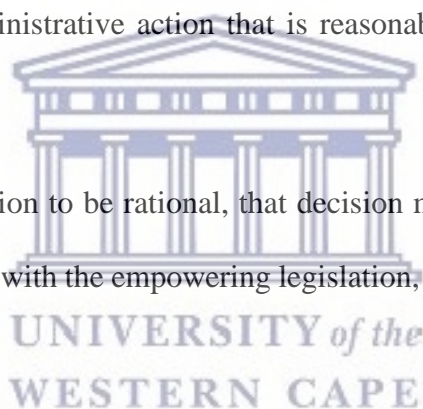
³³⁷ Grogan (2020) 59.

³³⁸ *Arries v CCMA & others* (2006) 27 ILJ 2324 (LC) para 40.

conduct' advises that reasonableness dictates that a decision must be supported by sound, logical reasons and made according to the applicable empowering legislative provisions. Further, that rational administrative action requires that such decisions make sense.³³⁹ In *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association*, Jafta J held that the reasons given must justify the actions taken because if not, the action leads to discrimination.³⁴⁰ Furthermore, a decision without a rational explanation would inevitably lead to unequal treatment.³⁴¹

In addition, the decision must measure up to the reasonableness test. The CC in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,³⁴² held that the question must be asked is whether the 'decision reached by the commissioner one that the reasonable decision-maker could not reach?'.³⁴³ The CC held that when the reasonable test is applied, the outcome will give effect to the right to fair labour practice and further to the right to just administrative action that is reasonable, lawful and procedurally fair.³⁴⁴

In summary, for a decision to be rational, that decision must be clear and reasonable and made in accordance with the empowering legislation, according to the information available at the time.



3.3.2.3 Promotions in the public education sector

Public education appointments to promotion involve administrative processes as provided by enabling legislation, and the application thereof will result in the decision to appoint. These processes include the advertising of vacancies, the application for the position, the sifting and shortlisting of the applicants, an interview, the selection of the

³³⁹ Department of Justice 'Code of good administrative conduct' (2006) 28 https://www.justice.gov.za/paja/docs/unit/PAJA_Code_draft_v2_2006.pdf. (accessed 3 August 2021).

³⁴⁰ *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* (2018) ZACC 20 para 49.

³⁴¹ Para 52.

³⁴² *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2008) 2 SA 24 (CC).

³⁴³ Para 145.

³⁴⁴ Para 145.

preferred candidate, the ratification of the appointment and then informing applicants as to whether they were successful or not.³⁴⁵ All these processes are administrative.

Section 195(1) of the Constitution provides for the decision-making processes in public education and serves as a reminder that all processes must be done according to the principles contained in the Constitution. Section 195 places a duty on those involved in the decision-making processes to bear in mind that when deciding to appoint, the process must be governed by transparency and accountability.³⁴⁶ Furthermore, the processes must be accompanied by accurate records.³⁴⁷ These records should be timeously available if so requested.³⁴⁸ Also, decision-makers must act ethically, impartially, reasonably, and without prejudice. They must ensure that proper consideration is given to the development of the applicants,³⁴⁹ the person's ability and the need to correct past imbalances and equity.³⁵⁰ The decision to promote is an administrative act, and as such, the applicants involved have a constitutional right to just administrative action.³⁵¹ Further, this encompasses a right to fair administrative procedures done according to the law and a right to be given reasons where a person suffers prejudice.³⁵²

In light of the above, for a promotion to be fair, the applicant must be provided with fair procedures and treatment.³⁵³ The decision to promote must be made in terms of enabling legislation, supported by justifiable reasons that are rational and not arbitrary.³⁵⁴ A rational decision must reflect the requirements or purpose of the vacancy and that the procedures undertaken to fill that vacancy were done according to the applicable laws and based on the facts available when the decision was taken.³⁵⁵ Also, the aggrieved applicant must have the right to a fair remedy to vindicate allegations of

³⁴⁵ PAM 2016 chapter B (5).

³⁴⁶ Constitution s 195(1)(f).

³⁴⁷ Section 195(1)(g).

³⁴⁸ Section 195(1)(g).

³⁴⁹ Section 195(1)(h).

³⁵⁰ Section 195(1)(i).

³⁵¹ Section 33(2).

³⁵² Section 33(2).

³⁵³ Grogan (2020) 59.

³⁵⁴ Rycroft (2007) 28 *ILJ* 2192.

³⁵⁵ (2008) 2 SA 24 (CC) para 145.

infringements.³⁵⁶ These constitutionally supported principles are afforded to every applicant applying for a promotion, and disputes fall within the ambit of the LRA.

3.4 THE NATIONAL FRAMEWORK GOVERNING THE RIGHT TO A FAIR REMEDY

A remedy is a process that a complainant may use to have a matter heard by an independent and impartial court or other non-judicial bodies or tribunals where a substantive right is infringed.³⁵⁷ Mbazira highlights the link between rights and remedies and submits that one cannot exist without the other.³⁵⁸ In other words, substantive rights are of no value if they cannot be enforced, and procedural rights cannot be enforced if there are no substantive rights.

The right to a procedural remedy is a fundamental principle of international human rights because, without a right to recourse, there would be no protection against violations of the constitutional rights afforded to citizens³⁵⁹ under domestic law. Such protection is found in the Constitution, section 34.

Section 34 provides that everyone has a right to have a dispute heard and resolved by a court of law or any independent tribunal.³⁶⁰ The CC in *Zondi v MEC for Traditional and Local Government Affairs* held that the right to access the courts, or other independent and impartial tribunals, is important to ensure fairness, prevent vigilantism and promote social unity. Aggrieved parties are deterred from taking matters into their own hands, and parties can compete on equal footing to resolve conflict.³⁶¹

Within the context of unfair labour practices promotion, disputes fall within the ambit of the LRA.³⁶² The CCMA is a dispute resolution body established in terms of the LRA.³⁶³ It is an independent body that does not belong to and is not controlled by any political party, trade union or business.³⁶⁴ In terms of section 191, the employee

³⁵⁶ Mbazira C *You are the "weakest link" in realising socio-economic rights: Goodbye* (2008) 8.

Provide a proper reference for this work.

³⁵⁷ Mbazira (2008) 3.

³⁵⁸ Mbazira (2008) 8.

³⁵⁹ Kergandberg (1999) 4 *Juridica International* 122.

³⁶⁰ BOR section 34.

³⁶¹ *Zondi v MEC for Traditional and Local Government Affairs* (2005) (3) SA 589 (CC) para 63.

³⁶² LRA section 186(2).

³⁶³ Section 112.

³⁶⁴ LRA section 113.

alleging unfair labour practices may refer the dispute to the CCMA or the bargaining council of that sector.³⁶⁵

Regarding the public sector, the bargaining council for public service is the Public Service Co-ordinating Bargaining Council (PSCBC).³⁶⁶ The LRA, section 37 (1), provides further that the PSCBC may establish bargaining councils within the different sectors of public service in accordance with the Constitution of the PSCBC and by resolution. To this end, ELRC was established³⁶⁷ and has exclusive jurisdiction within the education sector to resolve disputes and conclude collective agreements.³⁶⁸

Within the context of promotion disputes in the education sector, an aggrieved party may refer the dispute³⁶⁹ to the ELRC.³⁷⁰ The dispute must be referred to ELRC within 90 days from the date that the cause of action arose or within 90 days from the date on which the employee became aware of the cause of action.³⁷¹ The cause of action in the case of the promotions would be that an appointment has been made.³⁷² The ELRC will appoint a commissioner to resolve the dispute through a process of conciliation within 30 days after the matter is referred.³⁷³ The matter must be referred for arbitration if the commissioner cannot resolve a dispute.³⁷⁴ The arbitration award issued by a commissioner is final and binding on the parties.³⁷⁵ However, where the arbitrator has issued an award, an aggrieved party may refer the award for review by the LC within six weeks of receiving such an award.³⁷⁶

In light of the above, within the public education sector, an aggrieved applicant for promotion has the right to refer a dispute to the ELRC, after the appointment is made. If the matter cannot be resolved through conciliation, the matter may proceed to

³⁶⁵ Section 191 (1)(a).

³⁶⁶ Section 35.

³⁶⁷ Section 37.

³⁶⁸ Section 37(5).

³⁶⁹ Section 191 (1)(a).

³⁷⁰ Schedule 7 item 16.

³⁷¹ Section 191(1) (b)(ii).

³⁷² *Reddy v KZN Department of Education & Culture* (2003) 24 ILJ 1358 (LAC) para 36.

³⁷³ LRA section 135.

³⁷⁴ Section 136.

³⁷⁵ Section 143.

³⁷⁶ Section 145.

arbitration. If the party is dissatisfied with an arbitrator's findings, the award may be referred to the LC for review.

3.5 THE NATIONAL LEGISLATIVE FRAMEWORK GOVERNING COLLECTIVE LABOUR LAW

The ILO labour standards and the Constitution encourage freedom of association and worker participation through the right to join a trade union and collective bargaining.³⁷⁷ The Constitution also makes provisions for the right to freedom of association.³⁷⁸ It is within this context that employees are free to join trade unions³⁷⁹ and employers may join organisations.³⁸⁰ Trade unions and employer organisations are encouraged to engage in collective bargaining, subject to National Legislation.³⁸¹ To this end, the LRA is one of the most critical pieces of legislation enacted governing freedom of association and collective bargaining rights.³⁸²

The right to freedom of association is provided for under section 4 of the LRA. Employees have a right to join a trade union,³⁸³ participate in the lawful activities of the union,³⁸⁴ and elect representatives or officials to serve as office bearers for that union.³⁸⁵

According to Beckmann, all educators have a right to join a union.³⁸⁶ Unions offer protection of conditions of service, representation in grievances and disputes and serve as mediators between educators and the Department of Education as the employer.³⁸⁷

The LRA makes provision for trade unions' active participation in determining conditions of service on behalf of their members through the formulation of legally binding collective agreements.³⁸⁸ Through collective labour bargaining, trade unions

³⁷⁷ BOR section 23.

³⁷⁸ Section 18.

³⁷⁹ Section 23(3).

³⁸⁰ Section 23(4).

³⁸¹ Section 23(5).

³⁸² Abrahams, Calitz & Chicktay et al (2017) 16.

³⁸³ LRA section 4(1).

³⁸⁴ Section 4(2)(a).

³⁸⁵ Section 4(2)(b).

³⁸⁶ Beckmann JL 'Competent educators in every class: The law and the provision of educators' (2018) 43(2) *Journal for Juridical Science* 4.

³⁸⁷ Mzangwa S 'Legislation and employment relations in South Africa: A narrative overview of workplace disputes' (2015) 4 (1) *Journal of Governance and Regulation* 175.

³⁸⁸ LRA section 31.

can contribute to creating a fair policy that promotes equity and effective grievance and dispute procedures. Regarding the education sector, it is within the ELRC where policy and instruments can be agreed upon to ensure that the procedures governing promotions are fair and equitable and make provisions for fair decision-making.³⁸⁹ In addition, according to Liwane, policies should be created at the bargaining council to limit personal gain and ensure that quality educators are employed.³⁹⁰

One of the main aims of the LRA is to promote labour peace within the employment relationship.³⁹¹ The regulation of a voluntary process of collective bargaining is one of the ways of allowing trade unions and employers to negotiate on an equal footing,³⁹² thereby promoting industrial peace. According to Hepple, trade unions are important drivers of democracy.³⁹³ Also, Govender contends that unions not affiliated with the African National Congress (ANC) are in a better position to act in the best interest of their members. They can work in partnership with the education department to develop policy while maintaining a position of opposition to the state.³⁹⁴

The registered trade unions in the education sector of South Africa are the National Professional Teachers Union of South Africa (NAPTOSA), Professional Educators Union (PEU), South Africa Teacher' Union (SADTU), Suid-Afrikaanse Onderwysersunie (SAOU), and National Teachers' Union (NATU).³⁹⁵ Chapter Five will investigate the role of unions in public education.

3.4 CONCLUSION

Chapter Three examined the national legislative framework governing appointments to promotions in the education sector to determine whether the enabling legislation

³⁸⁹ Section 37.

³⁹⁰ Liwane N *Quality education and professionalism in South African public education – an Education Law perspective* (unpublished PhD in Education Law thesis, University of the North-West, 2017) 256.

³⁹¹ LRA section 1.

³⁹² Du Toit D 'What is the Future of Collective Bargaining (And Labour Law) in South Africa?' (2007) 28 *ILJ* 1407.

³⁹³ Hepple B 'Can collective labour law transplants work? The South African example' (1999) 20 *ILJ* 11.

³⁹⁴ Govender L 'Teacher unions' participation in policy-making: a South African case study' (2015) 45 (2) *Compare: A Journal of Comparative and International Education* 199.

³⁹⁵ ELRC Collective Agreement 1 of 2022 para 4.

promotes the concept of fairness and equality in the decision-making process in so far as it applies to the recruitment and selection processes.

This thesis confirmed that the Constitution makes provisions for the protection of the right to equality, the right to fair labour practice, the right to a fair remedy and collective bargaining. In addition, section 195 of the Constitution outlines the duties of those involved in decision-making processes. Decision-makers are constitutionally bound to act transparently, to be held accountable and keep accurate records. Records of the proceeding should be timeously available if so requested. Also, decision-makers must act ethically, impartially, fairly, and without prejudice. Furthermore, they must ensure that proper consideration is given to the development of the applicants, the ability of the person, and the need to correct past imbalances and equity.³⁹⁶ However, claimants in promotion matters will rely on domestic legislation, such as the EEA and the LRA, to enforce the rights contained in the Constitution.

The Constitution prohibits direct and indirect unfair discrimination, and the EEA was enacted to achieve equality in the workplace by eliminating unfair discrimination through policies and practices. Where a state-employed educator has been overlooked for a promotion and wants to challenge the decision not to promote based on unfair discrimination, that educator will rely on the EEA. The aggrieved educator will first have to use internal grievance procedures. If the grievance remains unresolved, the educator may lodge a dispute with the ELRC, for conciliation, before approaching the LC.³⁹⁷ The applicant claiming unfair discrimination must meet the requirements in terms of formal qualification, prior learning, and relevant experience or have the capacity to acquire the necessary skills to do the job. In addition, the EEA makes provision for an employer to rebut a claim of unfair discrimination. Where the employer's rebuttal is based on affirmative action, the employer must have an equity plan. Suppose the employer relies on inherent requirements as a defence. In that case, the employer will only succeed if an applicant meets the requirements for the position in terms of skills, knowledge, experience, or academic qualifications.

³⁹⁶ Constitution s 195.

³⁹⁷ EEA section 10.

This thesis also established that the LRA was enacted to promote labour peace by providing an effective legislative framework for the right to freedom of association and collective bargaining. The LRA also regulates collective bargaining by providing a legislative framework for voluntary bargaining between employees and employers.³⁹⁸ This allows both the employer and the unions representing the employees to negotiate collective agreements that provide for fair recruitment processes. In addition, the LRA also prohibits any unfair act or conduct that relates to the promotion. Accordingly, the research established that the decision to appoint must be substantively and procedurally fair. Therefore, the decision to promote must be made in terms of enabling legislation, supported by justifiable reasons that are rational and not arbitrary.³⁹⁹ Furthermore, the LRA protects applicants against unfair labour practices by making a provision for aggrieved parties to refer disputes may refer the dispute to the ELRC.⁴⁰⁰

Although the national legislative framework affords applicants to promotion posts within the education sector protection against arbitrary decisions affecting their careers, the question of whether the primary legislation governing appointments to promotion promotes fair decision-making warrants further discussion. The next chapter will discuss the primary legislation governing appointments in education, namely, the SACE Act, the EOEA, and the SASA. It will also include an overview of quasi-legislation governing promotion processes in the sector.

³⁹⁸ Du Toit (2007) 1407.

³⁹⁹ Rycroft (2007) 2192.

⁴⁰⁰ Schedule 7 item 16.

CHAPTER FOUR

THE PRIMARY LEGISLATION AND QUASI-LEGISLATION GOVERNING APPOINTMENTS IN PUBLIC EDUCATION

4.1 INTRODUCTION

Appointments within the education sector are governed by an array of legislation which must reflect and advance the fundamental values of the Constitution. This chapter endeavours to study the primary and quasi-legislation governing the recruitment processes in public education to determine whether these allow for fair and rational decision-making among all stakeholders involved and further determine the extent to which these rights are contained in the recruitment processes governing the education sector. The discussion will begin with an overview of the legislation governing appointments in education.

4.2 OVERVIEW OF LEGISLATION GOVERNING APPOINTMENTS

4.2.1 National Level

The Public Service Act 103 of 1994 (PSA) governs the conditions of service of public servants. The PSA empowers the Minister of Basic Education to determine the processes that must be followed when making an appointment and the roles played by the various officials in the provincial departments.⁴⁰¹ These roles are further outlined in the Department of Basic Education Policy on the organisation, roles and responsibilities of education districts Notice 180 of 2012 (Notice 180 of 2012) was enacted. Notice 180 of 2012 provides for the ‘national framework for the organisation of education districts and outlines the delegated powers, roles and responsibilities of district officials for the institutions’ within the Department of Education.⁴⁰²

4.2.2 Provincial level

⁴⁰¹ Public Service Act 103 of 1994 s 6.

⁴⁰² Department of Basic Education Policy on the organisation roles and responsibilities of education districts Notice 180 of 2012 section 1.

Section seven of the PSA provides that the Member of the Executive Council (MEC) is responsible for human resources planning, which includes creating posts and dealing with individual matters concerning an employee's career. The MEC's functions include dealing with appeals where disputes or grievances have failed at the provincial department level.⁴⁰³ At the provincial level, we also find the office of the Head of the Provincial Education Department (HOD). According to the PSA, the HOD is responsible for appointing and promoting educators to the posts created by the MEC after recommendations by the school governing body (SGB).⁴⁰⁴

Appointment processes in the public education sector are also subject to the Constitution, the EEA and the LRA. Within this context, primary legislation governing appointments in the education sector, namely, the SACE Act, the Educators Act, and the SASA, was enacted.

4.3 THE SACE ACT 31 OF 2000

The SACE Act⁴⁰⁵ provides the legislative mandate for the South African Council for Educators (SACE). The SACE Code of Conduct regulates the professional conduct of educators and a code of ethics that all teaching professionals must observe.⁴⁰⁶ The first step for an educator wanting to pursue a career in education is to be registered with SACE.⁴⁰⁷ Educators must adhere to a code of conduct to remain part of SACE and, by implication, the profession.⁴⁰⁸

The SACE Code of Conduct contains prescripts for what is considered ethical behaviour of the educator in their capacity as professional members of SACE, in relation to the learners, parents, the community, colleagues, the employer, and the teaching profession.⁴⁰⁹ According to these prescripts, the educator is expected to respect and abide by the Constitutional principles according to which the state is

⁴⁰³ PSA section 7.

⁴⁰⁴ PSA section 9.

⁴⁰⁵ SACE Act 31 of 2000.

⁴⁰⁶ Section 2(c).

⁴⁰⁷ Employment Equity Act 55 of 1996 section 3(b)(iii).

⁴⁰⁸ SACE 'Code of Professional Ethics' <https://www.sace.org.za/pages/the-code-of-professional-ethics> (accessed 7 October 2022).

⁴⁰⁹ SACE 'Code of Professional Ethics' <https://www.sace.org.za/pages/the-code-of-professional-ethics> (accessed 7 October 2022).

governed.⁴¹⁰ Educators, therefore, must take into account democratic values such as human dignity, the achievement of equality,⁴¹¹ non-racism, non-sexism and the advancement of human rights and freedoms contained in the BOR.⁴¹² Furthermore, educators must act with integrity, accountability, and transparency, respect the community's values, norms, and beliefs, and refrain from illegal activity. Educators are explicitly warned against offering parents bribes.⁴¹³

Establishing SACE was intended to create a certain degree of professionalism within the teaching profession. The Organisation for Economic Cooperation and Development (OECD) is an international forum where governments come together 'to find solutions to common challenges, develop global standards, share experiences and identify best practices to promote better policies for better lives'.⁴¹⁴ A Review of the National Policies for Education in South Africa by the OECD found that SACE was ideally situated to assist DBE with recruitment and uplifting the profession's standards in South Africa.⁴¹⁵ The functioning and role played by SACE and the impact on the recruitment and selection processes will be further examined and discussed in Chapter 5.

4.4 THE SOUTH AFRICAN SCHOOLS ACT 84 OF 1996

4.4.1 The aim of the South African Schools Act 84 of 1996

The SASA was adopted shortly after the Constitution came into effect. The SASA was enacted to make provisions for how schools are structured, governed, and funded.⁴¹⁶ The aim was to create uniformity among schools under the democratic principles of the new constitutional order. The idea is to bring about equality and address the racial divides of the past regime so that all learners receive the same standard and quality of education.⁴¹⁷ Further to this, SASA introduced a new democratic system of school

⁴¹⁰ Constitution Preamble.

⁴¹¹ Section 1(a).

⁴¹² Section 1(b).

⁴¹³ SACE 'Code of Professional Ethics' <https://www.sace.org.za/pages/the-code-of-professional-ethics> (accessed 7 October 2022).

⁴¹⁴ OECD 'Discover the OECD' <https://www.oecd.org/general/Key-information-about-the-OECD.pdf> (accessed 7 October 2022).

⁴¹⁵ OECD 'Reviews of National Policies for Education: South Africa 2008' (2008) 322.

⁴¹⁶ SASA Title.

⁴¹⁷ SASA Preamble.

governance,⁴¹⁸ which allows for the participation of parents, learners, and the community together with DBE through cooperative governance.

4.4.2 Cooperative Governance of Schools

SASA, section 16, provides that the SGB is responsible for the governance of a school.⁴¹⁹ The SGB consists of democratically elected members from the parents of learners at the school;⁴²⁰ educator representatives from the school;⁴²¹ representatives for non-educator members of staff;⁴²² learner representatives;⁴²³ the principal in an ex-officio capacity;⁴²⁴ and co-opted members.⁴²⁵ Co-opted members may be elected to act as advisors only.⁴²⁶ In addition, SASA provides that the professional management of the school is vested in the principal acting under the authority of the Head of the Department of Education (HOD).⁴²⁷

According to UNESCO, the role of governance is first to provide the vision and goals of the institution through the formulation of policies, while management must oversee the implementation and day-to-day monitoring thereof. Secondly, governance must oversee the institution's administration and performance, while management must implement the governing body's decisions. Thirdly, governance ensures that the institution is managed in a manner that is ethical and legal, and management must ensure that the governing body is kept informed and given all the relative information regarding education.⁴²⁸ Therefore, governance refers to structures and processes designed to ensure 'accountability, transparency, responsiveness, the rule of law, stability, equity and inclusiveness, empowerment, and broad-based participation.'⁴²⁹ A better understanding of how these concepts are applied in terms of recruitment and

⁴¹⁸ SASA section 16.

⁴¹⁹ Section 16(1).

⁴²⁰ Section 23 (2)(a).

⁴²¹ Section 23 (2)(b).

⁴²² Section 23 (2)(c).

⁴²³ Section 23 (2)(d).

⁴²⁴ Section 23 (1)(b).

⁴²⁵ Section 23 (5)-(8).

⁴²⁶ Section 23 (5)-(8).

⁴²⁷ Section 16(3).

⁴²⁸ UNESCO 'General Education Quality Analysis/Diagnosis Framework (GEQAF)' (2014) <http://www.ibe.unesco.org/en/geqaf/technical-notes/concept-governance> (accessed 31 January 2022).

⁴²⁹ UNESCO 'General Education Quality Analysis/Diagnosis Framework (GEQAF)' (2014) <http://www.ibe.unesco.org/en/geqaf/technical-notes/concept-governance> (accessed 31 January 2022).

selection in education can be found in the specific roles of the SGB, the principal, the HOD and the MEC, as provided by SASA.

4.4.2.1 Functions of the SGB

SASA section 20 provides that the SGB must ensure the development of quality education,⁴³⁰ including the adoption of a school's constitution,⁴³¹ mission statement and learner code of conduct.⁴³² Regarding the appointment of educators, the SGB must shortlist, interview, and then recommend a list of candidates, from which the HOD will make an appointment to the post.⁴³³

4.4.2.2 The role of the principal

SASA section 16 provides that the principal is responsible for the professional management of a school, subject to the authority of the HOD.⁴³⁴ Included in the professional management of the school is the management of staff.⁴³⁵ The principal does not appoint staff but must assist the SGB with legislation and policy applicable to education,⁴³⁶ including recruitment and selection.

4.4.2.3 The role of the HOD

The HOD for education is tasked with the overall functioning of schools in the province, including the monitoring, implementation, and evaluation of policies. Therefore, the provincial government determines practices and procedures within the boundaries of national norms and standards governing the public sector. SASA also empowers the HOD to delegate certain functions to officials in the province.⁴³⁷

Regarding recruitment and selection, section 62 of SASA provides that district managers are empowered to appoint or promote an employee only under the authority

⁴³⁰ SASA section 20(1)(a).

⁴³¹ Section 20(1)(b).

⁴³² Section 20(1)(d).

⁴³³ Section 20(1) (i).

⁴³⁴ Section 16(A).

⁴³⁵ SASA section 16(A)(2)(a)(ii).

⁴³⁶ Section 16(A)(2)

⁴³⁷ Section 62(2).

and with the permission of the HOD. District managers must also provide resource support to the SBG when filling vacant state-funded educator posts.⁴³⁸

Each district is further divided into circuits, managed by Circuit Managers who act on a mandate received from district offices. As far as the promotion processes in education are concerned, the circuit managers act as communicators between a school and the district office and serve as resource persons in promotion matters.⁴³⁹ In addition, circuit managers also serve as advisors on recruitment and promotion committees as required.⁴⁴⁰

SASA provides for how schools should operate in terms of professional management and governance. SASA is, however, not a stand-alone piece of legislation and must be read together with the Educators Act when it comes to appointments because in public schools.⁴⁴¹

4.5 THE EMPLOYMENT OF EDUCATORS ACT 76 OF 1998

The Educators Act was enacted to regulate the conditions of service, including appointments and promotions, discipline and dismissal or termination of educators employed by the state.⁴⁴² Appointments, including promotions, are dealt with in accordance with section 6 of the Educators Act. The Act provides that the HOD of the province makes appointments,⁴⁴³ in accordance with the LRA, applicable collective agreements, and the procedures and requirements laid down by the Minister of Education.⁴⁴⁴

The HOD may only make the appointment upon receiving the lists of recommendations made by the SGB, containing the names of the selected candidates in order of preference.⁴⁴⁵ According to Beckham, in terms of section 6 of the Educators Act, if an SGB does not make a recommendation within two months of an instruction to do so,

⁴³⁸ SASA section 62(2).

⁴³⁹ Notice 180 of 2012 para 59.

⁴⁴⁰ Para 2.

⁴⁴¹ *Head of Department, Department of Education, Free State Province v Welkom High School and Another* (2014) (2) SA 228 (CC) para 50.

⁴⁴² Educators Act Preamble.

⁴⁴³ Section 6(1).

⁴⁴⁴ Section 6(2).

⁴⁴⁵ Section 6(3)(a).

the HOD may then make the appointment.⁴⁴⁶ However, the Supreme Court in *Kimberley Junior School v The Head of the Northern Cape Education Department* confirmed that the HOD could not appoint in the absence of recommendations by the SGB.⁴⁴⁷

Section 3(b) provides that when deciding whom to appoint, an SGB must consider democratic values, such as equity, redress and representativity.⁴⁴⁸ Furthermore, the appointment must be made in accordance with the procedures and requirements made by the MEC and collective agreements.⁴⁴⁹ In addition, the SGB must avoid undue influence by its members.⁴⁵⁰

The SGB must also establish whether the applicant is registered with SACE.⁴⁵¹ Once the SGB has conducted the procedures and processes in section 3, they must submit a list of the recommended candidates in the order of preference to the HOD.⁴⁵²

In section 3(d), the HOD may make the appointment if the SGB has met all the requirements listed in section 3(b).⁴⁵³ However, if the SGB does not meet the requirements, the HOD must decline the appointment and then s/he may appoint any suitable candidate from the list.⁴⁵⁴ Where a HOD declines the recommendation, he may, after considering all the applications for the post,⁴⁵⁵ either appoint a candidate in a temporary capacity or re-advertise.⁴⁵⁶ The SGB has 14 days⁴⁵⁷ to appeal against the decision of the HOD with the MEC. The MEC has 30 days⁴⁵⁸ within which to conclude the matter. If the SGB does not appeal and the HOD has made a temporary appointment, the HOD may convert that appointment to a permanent one.⁴⁵⁹

⁴⁴⁶ Beckmann J 'Legislation on school governors' (2009) 29 SAJE 177.

⁴⁴⁷ *Kimberley Junior School v The Head of the Northern Cape Education Department* (2010) 1 SA 217 (SCA) 58 para 9.

⁴⁴⁸ Educators Act section 6(3)(b)(i) and(ii).

⁴⁴⁹ Section 6(3)(b)(iii).

⁴⁵⁰ Section 6(3)(b)(v).

⁴⁵¹ Section 6(3)(b)(iv).

⁴⁵² Section 6(3)(c).

⁴⁵³ Section 6(3)(d).

⁴⁵⁴ Section 6(3)(e).

⁴⁵⁵ Section 6(3)(g)(i).

⁴⁵⁶ Section 6(3)(g)(ii).

⁴⁵⁷ Section 6(3)(k).

⁴⁵⁸ Section 6(3)(i).

⁴⁵⁹ Section 6(3)(k).

The Educators Act section 6 also allows the union and the employer to conclude collective agreements regarding the procedures that must be followed for recruitment and selection through collective bargaining.⁴⁶⁰ In terms of recruitment and selection processes in education, it is at the ELRC where educators' service conditions are agreed upon through collective bargaining.⁴⁶¹

In summary, the Educators Act, when read together with SASA,⁴⁶² creates a system of participatory democracy when appointing or promoting educators in the public service. The involvement of community members, such as parents, in the appointment processes of education, is unique to the education sector. The Acts are silent regarding qualifications, knowledge, or skills that a parent must have to serve on the SGB. For example, the employment of doctors is done by local or regional health officials.⁴⁶³ and similarly, the appointment of a policeman is made by the national commissioner of police or by magistrates.⁴⁶⁴ In these state departments, the officials involved in the appointment processes are knowledgeable and skilled within the respective field. This is not the case in education.

The roles played by the principal, the HOD and the SGB according to SASA and the Educators Act will be examined further in the section below. While the Acts provide the framework for decision-makers in terms of governance, accountability and coordination of promotions processes, the practical implementation of those processes is expounded in quasi-legislation, specifically, the PAM 2016, Collective Resolution 5⁴⁶⁵ and Collective Agreement 3 of 2016,⁴⁶⁶ respectively. A discussion on these pieces of quasi-legislation will now follow.

4.6 POLICY GOVERNING APPOINTMENTS TO PROMOTION POSTS IN EDUCATION AND APPLICABLE COLLECTIVE AGREEMENTS

⁴⁶⁰ Educators Act section 6(2).

⁴⁶¹ Section 6(2).

⁴⁶² Section 20.

⁴⁶³ National Health Act 61 of 2003 section 7.

⁴⁶⁴ The South African Police Service Act 68 of 1995 section 28.

⁴⁶⁵ Resolution 5 of 1998.

⁴⁶⁶ Education Labour Relations Council Collective Agreement 3 of 2016.

All policies and procedures must be read together with the Constitution⁴⁶⁷, the LRA,⁴⁶⁸ and primary legislation such as the SACE Act,⁴⁶⁹ the Educators Act,⁴⁷⁰ the SASA,⁴⁷¹ and the Educators Act.⁴⁷² Accordingly, the procedure for appointments to promotion posts is set out in Chapter B of PAM 2016, which is informed by the primary legislation and the respective collective agreements.⁴⁷³

The most important collective agreements for this research are the Education Labour Relations Council Collective Resolution 5 of 1998 (Resolution 5 of 1998) and the Education Labour Relations Council Collective Agreement 3 of 2016 (CA 3 of 2016). ELRC Resolution 5 makes provision for the procedures that must be followed when transferring an educator⁴⁷⁴ and secondly when appointing educators.⁴⁷⁵ Unfair labour practices concerning promotions are dealt with according to CA 3 of 2016, which provides guidelines for arbitrators when dealing with promotion disputes.

4.7 CONCLUSION

This chapter focuses on the primary legislative framework governing the appointments of educators in public schools. The aim is to determine whether the legislation allows for fair and rational decision-making among all stakeholders involved in appointing educators to promotion posts. In addition, to determine the extent to which rights to fair labour practice, equity, and legal remedy are contained in the education sector's recruitment processes.

This part of the thesis established that the most important provisions for recruiting and selecting educators could be found in the SACE Act, the SASA and the Educators Act. According to the SACE Act, an educator must be registered with SACE as the professional body to be appointed to a post. To democratise education, both the SASA and Educators Act make provisions for cooperative governance. In terms of this,

⁴⁶⁷ Constitution, section 23(1).

⁴⁶⁸ LRA section 23 & 186(2).

⁴⁶⁹ SACE Act 31 of 2000.

⁴⁷⁰ Educators Act 76 of 1998.

⁴⁷¹ SASA Act 84 of 1996.

⁴⁷² EEA Act 55 of 1996.

⁴⁷³ PAM 2016 section B.5.4.10.

⁴⁷⁴ Resolution 5 section 1.

⁴⁷⁵ Section 2.

provision is made for the participation of parents, teacher unions and the HOD in recruiting and selecting educators for promotions. The Acts are silent on what qualifications the stakeholders need when making appointments.

The thesis also established that the Educators Act makes provision for collective bargaining.⁴⁷⁶ The last agreement reached in terms of appointments in education is contained in Resolution 5 of 1998. These processes are further consolidated in the PAM 2016.

While Chapter Four provided an overview of the primary legislation governing the appointment to education, whether the primary legislation governing appointments to promotion posts in education promotes fair decision-making requires further discussion. To this end, Chapter Five will discuss the implementation and application of the PAM 2016, and collective agreements, such as Resolution 5 of 1998 and CA 3 of 2016.



⁴⁷⁶ Educators Act section 6(2).

CHAPTER FIVE

THE IMPLEMENTATION AND APPLICATION OF LEGISLATION INVOLVED IN APPOINTMENTS

5.1 INTRODUCTION

Chapter Five examines whether implementing the primary legislation, when read together with the quasi-legislation, promotes equality and fairness in the decision-making processes. If so, to what extent it promotes these concepts?

As a point of departure, the discussion will first focus on the appointment of principals in particular. Secondly, the discussion will discuss the procedures involved in the recruitment and selection processes. Thirdly, the role played by teacher unions and collective bargaining will be discussed, followed by an overview of the implications on the applicant's rights to equality, the right to fair labour practice and the right to a fair remedy.

5.2 THE IMPORTANCE OF THE PRINCIPAL

The focus of this thesis will be on the appointment of principals in particular for the following reasons:



First, according to the DBE, how a principal manages matters in their school concerning the curriculum and human resources will reflect important societal, educational, and professional values, which, together with knowledge and skills, will determine the nature and direction of leadership and management in the school.⁴⁷⁷

Secondly, according to the Volmink Report, appointing suitably qualified principals contributes to a school's success and further limits nepotism and corruption.⁴⁷⁸ Also, weak principals contribute to the decay of quality education and are more inclined to succumb to undue influence by aggressive unions.⁴⁷⁹

⁴⁷⁷ Department of Basic Education 'The Importance of Principals'
<https://www.education.gov.za/Informationfor/Principals.aspx> (accessed 13 August 2021).

⁴⁷⁸ Volmink (2016) 269.

⁴⁷⁹ Volmink (2016) 17.

Thirdly, Wills submits that there has been a growing recognition of improving accountability within education by raising the calibre of school leadership.⁴⁸⁰

Fourthly, the principal is also vital in guiding the SGB regarding the legislation and policies applicable to ensure fair recruitment and selection processes.⁴⁸¹ According to Beckmann & Prinsloo, regarding appointments, the SGB, the principal and the school management team are best positioned to determine the school's needs.⁴⁸² On the other hand, the Volmink Report suggests that principals act as resources in the interview process in many cases, leaving the recruitment process vulnerable to manipulation.⁴⁸³

In summary, a suitably qualified principal is one of the most critical drivers of ensuring that undue influence, nepotism, and corruption are excluded from the recruitment and selection processes. In this regard, the principal can advise the SGB on the applicable policies, thereby limiting the influence of aggressive unions when deciding whom to appoint.

5.3 THE PROCEDURES INVOLVED IN RECRUITMENT AND SELECTION

When read with SASA, the EEA provides the framework for decision-makers in governance, accountability and coordination of promotion processes. The practical implementation of those processes is expounded in the PAM 2016, Resolution 5⁴⁸⁴ and CA 3 of 2016,⁴⁸⁵ respectively.

5.3.1 Procedures involved when making appointments

According to section six of the Educators Act, the application of procedures involved in appointments in education, as envisaged by the Act, is subject to the provisions of the LRA, collective agreements concluded by the ELRC, and the directives issued by the Minister of Education.⁴⁸⁶

⁴⁸⁰Wills (2015) 15.

⁴⁸¹ Educators Act section 16(A)(2).

⁴⁸² Beckmann & Prinsloo (2009) 181.

⁴⁸³ Volmink (2016) 45.

⁴⁸⁴ Resolution 5 of 1998.

⁴⁸⁵ CA 3 of 2016.

⁴⁸⁶ Educators Act section 6 (2)

The ELRC provides a platform to deal with disputes and regulate collective bargaining concerning matters of mutual interest, including enacting collective agreements regulating conditions of service within the sector.⁴⁸⁷ To this end, the bargaining processes of the ELRC are regulated by the ELRC Constitution Part B.⁴⁸⁸ Therefore, this bargaining council negotiates and agrees to recruitment and selection processes.⁴⁸⁹ Such agreements are then captured in legally binding collective agreements.⁴⁹⁰

In terms of the ELRC Constitution, collective agreements come into operation once the majority of the parties sign them.⁴⁹¹ The ELRC Constitution Part A allocates twenty-five seats to trade unions and twenty-five to the Department of Education.⁴⁹² The union with the most members will have the most seats and, therefore, the most voting weight.⁴⁹³ The General Secretary of the ELRC determines vote weights.⁴⁹⁴ The voting weights of unions are regulated by collective agreements enacted in the ELRC.⁴⁹⁵ The union with the most votes is SADTU, followed by the Combined Trade Unions of Autonomous Union (CTU-ATU), which comprises smaller unions in the sector.⁴⁹⁶ To this end, the CTU-ATU consists of NAPTOSA, the SAOU, NATU, the PEU, the PSA and HOSPERSA.⁴⁹⁷ At the ELRC, policies and instruments can be agreed upon to ensure that the procedures governing promotions are fair and equitable.⁴⁹⁸

In light of the above, the evidence indicates that collective agreements are important instruments in ensuring fair recruitment and selection procedures are applied. Also, collective agreements come into force by majority vote. At the ELRC, SADTU, as the largest union, has the power to effect change because the majority vote weights the union holds. This union, therefore, has the power to change the current agreements governing recruitment and selection in the education sector.

⁴⁸⁷ LRA section 23 1(c).

⁴⁸⁸ ELRC Constitution.

⁴⁸⁹ Section 37(5).

⁴⁹⁰ Section 1(a).

⁴⁹¹ ELRC Constitution section 3.4.

⁴⁹² Part A s11.1.-11.2.

⁴⁹³ ELRC Constitution section 12.

⁴⁹⁴ Section 12.

⁴⁹⁵ Annexure A.

⁴⁹⁶ Annexure A.

⁴⁹⁷ Annexure A.

⁴⁹⁸ Section 37.

In terms of recruitment and selection, this thesis will examine the most important collective agreements governing the procedures involved are Resolution 5⁴⁹⁹ and CA 3 of 2016.⁵⁰⁰ Resolution 5 provides the procedures that must be followed when making an appointment.⁵⁰¹ Furthermore, CA 3 of 2016 deals with how arbitrators must deal with alleged unfair labour practices in promotion disputes.⁵⁰² These agreements have also been incorporated in the PAM 2016.⁵⁰³

Based on these collective agreements, some provinces have attempted to produce guidelines for those involved. The discussion will use the most comprehensive of these guidelines, namely, the Department of Education KZN Human Management Resource Circular No 13,⁵⁰⁴ the Province of the Eastern Cape Education Appointments and Promotions (2013)⁵⁰⁵ and the Western Cape Education Department (WCED) Practical Guide to the Recruitment and Selection of Educators (2018)⁵⁰⁶ as examples of non-binding guidelines that inform decision-makers in the recruitment processes.

The discussion will begin with the preliminary requirements, processes and procedures involved in making appointments.

5.3.2 Preliminary requirements, processes and procedures

The recruitment and selection process begins when a post is vacated because of retirement, resignation, death, or dismissal. The vacant post must then be filled as follows:

5.3.2.1 Identification of vacant posts

⁴⁹⁹ Resolution 5 of 1998.

⁵⁰⁰ CA 3 of 2016.

⁵⁰¹ Resolution 5 of 1998 para 2(e).

⁵⁰² CA 3 of 2016 para 1.

⁵⁰³ PAM 2016 Chapter B.

⁵⁰⁴ Department of Education KZN 'Human Management Resource' Circular' No 13 (2020) KwaZulu-Natal Department of Education. (DOE KZN HRM 13 2020).

⁵⁰⁵ Province of the Eastern Cape Education 'Appointments and Promotions (2013) Department of Education Eastern Cape.

⁵⁰⁶ Western Cape Education Department (WCED) 'Practical Guide to the Recruitment and Selection of Educators' (2018) Department of Education Western Cape.

In terms of the PAM 2016, the number of posts per school is established by the HOD of a Province.⁵⁰⁷ When a vacancy arises, the SGB.⁵⁰⁸ together with the school management team (SMT) of a school must inform the circuit office.⁵⁰⁹ The SMT consists of the Departmental Heads,⁵¹⁰ the Deputy Principal,⁵¹¹ and the Principal.⁵¹² The SGB must also determine what the requirements and criteria will be for the filling of the vacant post.⁵¹³

The inclusion of the SGB in establishing criteria for a post may result in unequal treatment based on the following reasons: First, the SGBs may need more capacity to develop recruitment criteria because of the lack of parents' representation in the SGB in some communities.⁵¹⁴ According to Adams & Waghid, sub-economic communities have issues like unemployment and drug and alcohol abuse. Therefore, schools in these areas find it difficult to get parents to serve on the SGB.⁵¹⁵ Secondly, the SGB parent representatives may need to gain the skills to develop criteria. Parents may need to gain the necessary knowledge of school functioning and the needs of the school that may be required to determine the criteria for a vacant post.⁵¹⁶ The Volmink Report confirmed that parents in rural or sub-economic areas lack the necessary skills and knowledge and need to learn the roles of the SMT or educators.⁵¹⁷

In the event of the above, the recruitment and selection processes are vulnerable to undue influence by teacher⁵¹⁸ representatives or SMT members or unions.⁵¹⁹ In such instances, the SGB must rely on the advice of the educator representatives or union representatives to assist in outlining the requirements and criteria of the post.⁵²⁰ Herein lies the risk of unequal treatment based on nepotism, favouritism or prior agreement on

⁵⁰⁷ PAM 2016 section A.2.1.3.

⁵⁰⁸ Section A 3.6.1.3.

⁵⁰⁹ Section A.3.7.2

⁵¹⁰ Annexure A.5.

⁵¹¹ Annexure A.6.

⁵¹² Annexure A.7.

⁵¹³ WCED (2018)13.

⁵¹⁴ Adams F & Waghid Y 'In defence of deliberative democracy: challenging less democratic school governing body practices' (2005) 25(1) *SAJE* 30.

⁵¹⁵ Adams & Waghid (2005) 30.

⁵¹⁶ Volmink (2016) 44.

⁵¹⁷ Volmink (2016) 44.

⁵¹⁸ Kira M 'Education sector corruption: How to assess it and ways to address it' (2019) <https://www.u4.no/publications/education-sector-corruption-how-to-assess-it-and-ways-to-address-it> (accessed 10 October 2022).

⁵¹⁹ Adams & Waghid (2005) 30.

⁵²⁰ Volmink (2016) 44.

who should be appointed or even manipulation of the criteria to ensure that the preferred candidate is appointed.⁵²¹ The effect is that some applicants may not get an opportunity to compete fairly for a particular position,⁵²² and also may exclude the opportunity for an outside person to get appointed.⁵²³

In light of the above, there is also the risk of an unsuitable or unqualified person being appointed.⁵²⁴ Such an appointment, especially concerning a principal as the manager, can negatively impact the success of a school⁵²⁵ and the quality of education.⁵²⁶ In addition, the research in paragraph 5.3. established that weak principals are more inclined to succumb to undue influence by aggressive unions.⁵²⁷ Within this context, the discussion below will deal with the requirements and criteria for the post of principal in terms of the PAM 2016.

5.3.2.2 Grading, requirements, and criteria for principal posts

The number of educator posts is determined according to the National Post Provisioning Norms. The post of principal and remuneration is based on a school's grading. A school's grading is determined according to the number of educator posts.⁵²⁸ allocated to the school by the HOD, and the number of educator posts is determined by the number of learners enrolled at a school.⁵²⁹ Therefore, the school's grading determines the salary level of the principal. The higher the grading, the higher the salary notch, and therefore the more money a principal will earn.⁵³⁰ The graph below illustrates the relationship between the number of educators' posts, the grading of a school and the salary notch. Furthermore, the coding for these notches is contained in the PAM 2016, Chapter B 113.

⁵²¹ Kira (2019) 'Education sector corruption: How to assess it and ways to address it' <https://www.u4.no/publications/education-sector-corruption-how-to-assess-it-and-ways-to-address-it> (accessed 10 October 2022).

⁵²² Adams & Waghid (2005) 31.

⁵²³ Adams & Waghid (2005) 31.

⁵²⁴ Kira (2019) 'Education sector corruption: How to assess it and ways to address it' <https://www.u4.no/publications/education-sector-corruption-how-to-assess-it-and-ways-to-address-it> (accessed 10 October 2022).

⁵²⁵ Volmink (2016) 269.

⁵²⁶ Volmink (2016) 269.

⁵²⁷ Volmink (2016) 17.

⁵²⁸ PAM 2016 section A.3.2.

⁵²⁹ Section A.3.6.

⁵³⁰ Section A.3.1.

No of Educator Post	Grading of Principal Post Level	Salary Notch: Indicating the range of the salaries paid per post level of a principal.
2 – 3	P1	Minimum notch code:108 Maximum notch code: 186
4 – 12	P2	Minimum notch code: 126 Maximum notch code: 201
13 – 24	P3	Minimum notch code: 144 Maximum notch code: 215
25 – 45	P4	Minimum notch code: 159 Maximum notch code: 218
46 +	P5	Minimum notch code: 180 Maximum notch code: 221

*Table 1.1. Post levels of principals*⁵³¹

Accordingly, the more educators and learners, the bigger the school that a principal must manage. However, irrespective of the school size, all applicants must meet the same minimum standards or requirements to be eligible to apply for the principal position.⁵³²

The PAM 2016 sets out the minimum requirements that an applicant must have to be eligible to apply for a promotion post. These requirements are that the applicant must: be registered with SACE, have a recognised three- or four-year qualification, which includes professional teacher education, have good knowledge of teaching as provided for in the professional qualification, and lastly, have good management and leadership skills.⁵³³ The PAM further states that the applicant must possess good co-curricular skills, people management skills, administrative skills, communication skills, and

⁵³¹ Section A.3.1.

⁵³² PAM 2016 section B.3.2.1

⁵³³ Section B.3.2.2.1.

knowledge of applicable educator legislation, regulations, and policies. The applicant must also have seven years of actual teaching experience.⁵³⁴

According to these requirements, a level one educator with seven years of teaching experience may be promoted to principal. A post-level one educator only manages a class. In contrast, a principal must manage the educators and learners of the whole school.⁵³⁵ According to the Volmink Report, a post-level one educator must not be allowed to apply for the principal position.⁵³⁶

According to Wills, the policy governing recruitment and selection has to be formulated to ensure that the best candidate is appointed to the principal role, as this will increase the quality of performance within the school's management.⁵³⁷ In addition, there should be some form of 'competency-based testing' during recruitment to establish whether an applicant is competent to fulfil the role. Further, this would also ensure that better managers are appointed and will limit the interference by corrupt union officials.⁵³⁸

International law provides that experience and seniority should be considered when filling leadership positions and that posts with special responsibilities should be given to experienced educators.⁵³⁹ In light of the above, this is different in South Africa. The requirements as contained in the PAM 2016 assume that a post-level one educator possesses the same managerial experience as that of a departmental head, a deputy principal or a principal and is therefore allowed to apply for a promotion. Also, there is no testing to determine whether an applicant is competent to fulfil the role. Given the seriousness of a principal's role as the school's leader, these factors can also impact the ability of a principal to deal with undue influence from unions and the delivery of quality education.⁵⁴⁰

⁵³⁴ Section B.3.2.2.1.

⁵³⁵ Wills (2015) 3.

⁵³⁶ Volmink (2016) 204.

⁵³⁷ Wills (2015) 3.

⁵³⁸ Wills (2015) 42.

⁵³⁹ ILO/UNESCO Recommendation concerning the Status of Teachers (1966) no 43.

⁵⁴⁰ Volmink (2016) 269.

Once the SGB has identified the vacancy, the provincial department advertises the post in the newspapers, and Government Gazette and further circulates it to all the schools within the province. For example, see the Human Management Resource circular (KZN HRM Circular no. 13 of 2020).⁵⁴¹

5.3.2.3 The advertisement for principal posts

The department of education advertises vacancies in education.⁵⁴² To this end, the advert will consist of a list of all vacant positions in the province, from post-level one educators to principal positions.⁵⁴³ PAM 2016 provides that the post must be advertised in a gazette, bulletin or circular and further made public using an advertisement in the public media, both provincially and nationally.⁵⁴⁴

According to the PAM 2016, the advert must be clear, and it must state: the minimum requirements for the post,⁵⁴⁵ the date of the appointment, the contact person, and how a post must be advertised. Rycroft submits that one of the criteria for fair promotion procedures is that the advert must contain the 'minimum requirements, as well as the preferred requirements' suitable for the position.⁵⁴⁶ This is not the case in advertising posts in the public education sector. For example, although KZN HRM Circular 13 refers to the requirements in the PAM 2016, the advert does not contain any material or inherent requirements for a specific post.⁵⁴⁷ Notwithstanding, the LC in *Sedibeng District Municipality v South African Local Governing Bargaining Council and Others* held that while there is no need to mention every requirement for the position in the advert, the employer cannot later add a requirement which will disqualify a candidate.⁵⁴⁸

⁵⁴¹ PAM 2016 section B.5.2.2.

⁵⁴² Volmink (2016) 31.

⁵⁴³ KZN HRM Circular 13 para 44.

⁵⁴⁴ PAM 2016 section B.5.2.2.

⁵⁴⁵ Section B.5.2.2.

⁵⁴⁶ Rycroft A (2007)28 ILJ 2192.

⁵⁴⁷ KZN HRM Circular 13 para 44.

⁵⁴⁸ *Sedibeng District Municipality v South African Local Governing Bargaining Council and Others* (2012) JR 1559/09 (ZALCJHB 45) para 23.

In addition, Rycroft submits that a fair promotion requires that the particular criteria for a position should remain the same once the position has been advertised.⁵⁴⁹ For example, in the ELRC dispute, *NAPTOSA obo Strauss v Eastern Cape Department of Education*, Afrikaans was listed as one of the requirements for the post because the medium of instruction at the school is Afrikaans. The interviewing panel ignored this criterion and appointed the second respondent, who was not qualified in Afrikaans. The arbitrator found that the employer had committed an unfair labour practice. Had the employer intended that the requirement of Afrikaans be a criterion that was not inherent to the position, the employer ought to have re-advertised the post reflecting this requirement.⁵⁵⁰

Another example of the power of an interview committee to change the criteria for a post may also be found in the *NAPTOSA obo Mzwamadoda v Department of Education Eastern Cape*.⁵⁵¹ In this ELRC dispute, the arbitrator held that the SGB could set higher requirements than those in the PAM 2016. According to Kira, allowing for criteria variation could result in the SGB or interested parties serving on the SGB, like educators or unions, tailor-making criteria to suit a particular applicant, thereby encouraging nepotism and corruption.⁵⁵²

In summary, the power of an SGB to change the criteria for a position may give rise to inconsistencies, and this may impact the applicant's right to be treated fairly.⁵⁵³ In *Member of the Executive Council for Transport: KwaZulu-Natal & others v Jele*.⁵⁵⁴, the LAC confirmed that the state was the employer in all provincial departments unless prohibited by statute.⁵⁵⁵ Irrespective of provincial boundaries or the government department where an employee works, the state remains the employer.⁵⁵⁶ However, although there is one employer, some applicants may be subjected to tougher

⁵⁴⁹ Rycroft (2007) 28 ILJ 2192.

⁵⁵⁰ *NAPTOSA obo Strauss v Eastern Cape Department of Education* PSES 383-20/21.

⁵⁵¹ PSES336-19/20EC para 19.

⁵⁵² Kira (2019) 'Education sector corruption: How to assess it and ways to address it' <https://www.u4.no/publications/education-sector-corruption-how-to-assess-it-and-ways-to-address-it> (accessed 10 October 2022).

⁵⁵³ (2004) 12 BLLR 1238 (LAC) para 17.

⁵⁵⁴ *Member of the Executive Council for Transport: KwaZulu-Natal & others v Jele* (2004) 12 BLLR 1238 (LAC).

⁵⁵⁵ Para 17.

⁵⁵⁶ See 3.3.2.1.

requirements than others applying for the same position at another school. The implication is that the treatment of applicants applying for a post differs from one school to another and could impact an applicant's right to equality and fair treatment.

5.3.2.4 The application forms

The PAM 2016 provides no guidelines as to how to apply. For example, in KwaZulu Natal, these are dealt with along with the application form and accompanying documents in the KZN HRM.⁵⁵⁷ The CV must accompany the application form known as the Z83. In the case of the validation of these documents, it is only the Z83 that must be validated by a district manager or the principal of the school where an applicant is teaching.⁵⁵⁸ There is no verification of the CV of the applicant. Also, in Chapter Four, it was established that SACE, as a professional body for educators, could not assist in this regard because SACE maintains that it is the role of the DOE as the employer to verify the credibility of an educator's qualifications.⁵⁵⁹ SASA has passed this role onto the SGB.⁵⁶⁰

The non-verification of a CV can negatively impact an applicant's right to compete fairly for a post. For example, in the ELRC, *NAPTOSA obo Ogle and one other v Department of Education Kwazulu-Natal*, a post-level four principal post was advertised at Austerville Primary School.⁵⁶¹ Three employees from the school applied for the post. The first applicant was the acting principal and a post-level three deputy principal of the school. The second applicant was a post-level two head of the department, and the second respondent was Mr Singh, a post-level one educator at the school.⁵⁶² Mr Singh, the second respondent was appointed.⁵⁶³ The applicants lodged a dispute with the ELRC, challenging the appointment of the second respondent.⁵⁶⁴ During the arbitration, it emerged that the second respondent had falsified information

⁵⁵⁷ KZN HRM Circular no. 13 of 2020 para 5.

⁵⁵⁸ Para 5.7.

⁵⁵⁹ Kgosana R 'Educator caught with fake qualifications after 20 years of teaching' *The Citizen* 14 November 2016.

⁵⁶⁰ SASA section 20.

⁵⁶¹ *Ogle and another v Department of Education Kwazulu-Natal* PSES 790-15/16KZN para 7.

⁵⁶² PSES 790-15/16KZN para 8.

⁵⁶³ PSES 790-15/16KZN para 10.

⁵⁶⁴ PSES 790-15/16KZN para 10.

regarding his experience and qualifications on his CV. The ex-principal of Austerville Primary School testified that he had verified the Z83 form contained in the second respondent's application. However, he did not see the CV, as this was optional.⁵⁶⁵ The arbitrator held that the misrepresentation in the CV of the second respondent, and the failure of the SGB to follow procedures as contained in the HRM 38 of 2015, denied the applicants the right to substantive and procedural fairness.⁵⁶⁶ In this case, had the applicants not taken the matter to the ELRC, they would not have been privy to the CV of the second respondent, and hence his appointment would have gone unchallenged.

The purpose of a CV is to convince the reader of an applicant's skills, experience, and knowledge. In *Government Printing Works v Mathala NO and Others*, the LC held that 'there will always be an inherent variation in the conduct of different people, which is random, always present and will affect the outcome of subsequent assessments of it'.⁵⁶⁷ In this case, the respondent had falsified his matric qualifications on the Z83 form and was dismissed.⁵⁶⁸ Therefore, sometimes applicants falsify their credentials.⁵⁶⁹

In light of the above, without the proper checks and balances, the quasi-legislation does not prevent fraudulent bolstering of an applicant's qualifications and experience in his or her CV. Where an applicant has held numerous posts at different schools, some of which may no longer exist, verification of the CV becomes a challenge. Validation of the Z83 is insufficient to stop applicants from misrepresenting the CV. The quasi-legislation does not provide sufficient protection for unsuccessful candidates against undue influence and unfair labour practices regarding the CV. According to SASA, the SGB must verify the CV of the applicants.⁵⁷⁰ The risk is that a decision to appoint may be based on misrepresentation by an applicant. To this end, an applicant cannot compete fairly for a position which may result in the appointment of a suitably qualified person.

⁵⁶⁵ PSES 790-15/16KZN para 35.

⁵⁶⁶ Para 39.

⁵⁶⁷ *Government Printing Works v Mathala NO and Others* (2016) (JR583/14) ZALCJHB 358 para 37.

⁵⁶⁸ (2016) (JR583/14) ZALCJHB 358 para 42.

⁵⁶⁹ (2016) (JR583/14) ZALCJHB 358 para 37.

⁵⁷⁰ SASA section 20.

5.3.2.5 The delivery of the application

The mode of delivery of an application for a post may also need to be revised. For example, in the ELRC dispute, *Mhlanga N v Western Cape Department of Education*.⁵⁷¹ In this case, the applicant claimed to have submitted an application for a post and placed it in a box provided by the Department of Education,⁵⁷² and the respondent claimed that the application was not received.⁵⁷³ The arbitrator held the onus on the applicant to prove the application was delivered.⁵⁷⁴ On a balance of probabilities, the arbitrator found the respondent's version to be more probable and dismissed the applicant's claim,⁵⁷⁵ even though she had a witness testify that she deposited the application in the box.⁵⁷⁶

Given the above, how applications are delivered needs to be revised. Applications left in a box are vulnerable to theft or removal by third parties. In addition, the onus of proving that the application has reached the employer is placed on the applicant and in the absence of concrete evidence, this may not be easy to prove.

5.3.2.6 The sifting processes

In terms of the PAM 2016, section 5,⁵⁷⁷ once the District Office has received the applications, the clerks will sift through the applications with union representatives present. CVs with technical defects or where an applicant does not meet the requirements are removed and put on the rejected list.⁵⁷⁸ All those CVs that qualify are then sent to the interview committee of a school.⁵⁷⁹ Unions are invited to observe this process; however, the identities of the applicants are kept confidential during this process.⁵⁸⁰ They are present as observers and must give a full report to the union in terms of those candidates that made a list for sifting and those who were rejected.⁵⁸¹

⁵⁷¹ *Mhlanga N v Western Cape Department of Education* PSES 377-08/09WC.

⁵⁷² PSES 377-08/09WC para 4.

⁵⁷³ Para 3.

⁵⁷⁴ Para 16.

⁵⁷⁵ PSES 377-08/09WC the Award.

⁵⁷⁶ Para 4.

⁵⁷⁷ PAM 2016 S 5.3.

⁵⁷⁸ Para 10.9.

⁵⁷⁹ Volmink (2016) 31.

⁵⁸⁰ Volmink (2016) 32.

⁵⁸¹ PAM 2016 para B.5.3.3.1

The process of sifting at the District Office is not spared from allegations of undue influence.⁵⁸² In addition, unions like SADTU are aware long before a post is advertised that a principal is about to retire. Therefore, come to these meetings with a prepared list of candidates who will fill vacant posts.⁵⁸³ District officials also fear not giving in to the demands of SADTU. Many are also SADTU members.⁵⁸⁴ Those who do not obey the union's demands are met with smear campaigns, intimidation, and threats.⁵⁸⁵ Observers from the union interfere with the processes at all levels, including the district level.⁵⁸⁶

In light of the above, the current sifting processes are not safeguarded against the risk of undue influence. Given that many of the department clerks are union members, one has to question whether an applicant is guaranteed a right to fair treatment, free of undue influence. To this end, the risk is that a decision to shortlist an applicant may not always be fair.

5.3.2.7 Selecting an interview committee

According to the PAM 2016, where a vacant post has been advertised, the SGB must choose an interview committee.⁵⁸⁷ The interview committee for the appointment of a school principal must consist of a resource person, which would generally be the District Manager,⁵⁸⁸ members of the SGB,⁵⁸⁹ one union representative from all unions that are part of the ELRC,⁵⁹⁰ and co-opted members, who are experts if needed.⁵⁹¹ Each interview committee must appoint a chairperson and a secretary from amongst its members.⁵⁹²

The PAM 2016 and the HRM are silent on the number of persons that should serve on the interview committee. The only information in this regard is that each interview

⁵⁸² Volmink (2016) 104.

⁵⁸³ Volmink (2016) 90.

⁵⁸⁴ Volmink (2016) 93.

⁵⁸⁵ Volmink (2016) 106.

⁵⁸⁶ Volmink (2016) 103.

⁵⁸⁷ PAM 2016 para B. 5.4.1.

⁵⁸⁸ Para B.5.4.2.1.

⁵⁸⁹ Para B.5.4.2.3.

⁵⁹⁰ Para B.5.4.3.4.

⁵⁹¹ KZN HRM Circular no. 13 of 2020 para 10.2.5.

⁵⁹² Para 10.2.5.

committee should have one resource person and a union representative from each union represented at the ELRC.⁵⁹³ Without such information, the committee selection is vulnerable to undue influences if an SGB is not au fait with the process involved.⁵⁹⁴ For example, *Ndlovu v Department of Education Kwazulu-Natal*.⁵⁹⁵ In this dispute at the ELRC, the applicant alleged that the interview committee was flawed in that the school's principal acted on his own accord and unlawfully chose a co-opted member because of her legal skills. In addition, the co-opted member was allowed to score the interviewees. The principal also selected an educator who was not an SGB representative. As a resource person, he invited another principal from his district, who was his union representative in another matter and his close friend.⁵⁹⁶ The arbitrator ruled that the principal's unilateral selection of the interview committee was an unfair labour practice.⁵⁹⁷ In this case, unfair labour practice was found at the institutional level. The principal had manipulated the SGB to appoint close associates who would ensure that the candidate he preferred was appointed. If the applicant had not taken the matter to the ELRC, the department would not have known as the HOD approved the appointment.

The PAM 2016 does not stipulate how an interview committee must be selected, and in such instances, the resource person, unions, or teacher representatives can influence the process.⁵⁹⁸ For example, the LAC in *The Department of Education, Eastern Cape v The Educators Labour Relations Council* found it unfair that the chosen resource person played that role and scored applicants in the interview.⁵⁹⁹

In summary, the SGB may not always be familiar with the procedures involved in selecting an interview committee. In such cases, malfeasant officials and union members may unduly influence the composition of the interview committee.

⁵⁹³ Para 10.2.5.

⁵⁹⁴ Volmink (2016) 44.

⁵⁹⁵ *Ndlovu v Department of Education Kwazulu-Natal* PSES 716 - 16/17KZN

⁵⁹⁶ PSES 716 - 16/17KZN para 19.

⁵⁹⁷ Para 32.

⁵⁹⁸ Volmink (2016) 82.

⁵⁹⁹ *The Department of Education, Eastern Cape v The Educators Labour Relations Council* (2018) PR 206/14 (LAC) para 3.

5.3.2.8 Roles of Persons on the interview committee

Each person on the interview committee has a specific role to play. The discussion will now look at the role played by the resource person,⁶⁰⁰ members of the SGB,⁶⁰¹ and the union representative.⁶⁰²

5.3.2.8.1 The resource person

The interview committee relies heavily on the competence and guidance of the resource person. The resource person must act as an observer and provide the necessary resources for the process.⁶⁰³ S/he must also ensure that the process is fair, transparent, and aligned with the prescripts of the Constitution.⁶⁰⁴ The resource person must ensure that the interview committee represents the demographics of the SGB and where there is a conflict of interest, such a person is removed from the interview committee. In addition, the resource person also provides a capacity-building session for the interview committee and orientates them on how to conduct the interviews.⁶⁰⁵

Regarding the functions afforded to the resource source person, it is clear that such a person has a lot of control and power over how recruitment and selection processes are carried out. For example, in *Ndlovu v Department of Education Kwazulu-Natal*,⁶⁰⁶ the resource person also unduly influenced the interview committee. Here, the principal unilaterally selected the resource person, his close friend and union representative, to ensure a specific pre-approved candidate was appointed.⁶⁰⁷

Undue influence by the resource person was also confirmed in the Volmink Report. To this end, during their investigation, NAPTOSA reported to Volmink and the Task Team that resource persons are aligned with unions and exert undue influence on the SGB.⁶⁰⁸ In addition, the Volmink Report confirmed that undue influence is less prevalent in

⁶⁰⁰ PAM 2016 para B.5.4.2.1.

⁶⁰¹ Para B.5.4.2.3.

⁶⁰² KZN HRM Circular no. 13 of 2020 para 10.2.5.

⁶⁰³ PAM 2016 para B.5.4.2.1

⁶⁰⁴ KZN HRM Circular no. 13 of 2020 para 10.4.

⁶⁰⁵ KZN HRM Circular no. 13 of 2020 para 12.1.

⁶⁰⁶ See 5.3.2.8.

⁶⁰⁷ PSES 716 - 16/17KZN, para 19.

⁶⁰⁸ Volmink (2016) 150.

districts where managers and officials alike strictly observe procedures and processes. In such instances, unions are deterred from interfering in the decision-making processes.⁶⁰⁹

5.3.2.8.2 The Chairperson of the interview committee

The PAM 2016 provides that the interview committee must appoint a chairperson from its members,⁶¹⁰ excluding educators and learners serving on the SGB.⁶¹¹ The chairperson of the interview committee presides over the interview processes and is responsible for briefing the interview committee on the recruitment processes. The chairperson must also plan the date, time and venue for the sifting and interview process and ensure that the relevant documents, for example, the CVs and applications of those candidates that were interviewed, minutes of the shortlisting, interviews and ratification, and the recommendation list are duly signed and delivered to the department.

The functions listed above assume the chairperson knows the procedures and processes for selecting and recruiting applicants. This is, however, not always the case. For example, in *Ogle and one other v Department of Education Kwazulu-Natal*, the applicant's witness testified that the entire interview process was chaotic because the resource person did not provide adequate guidance for the members regarding the applicable HRM. However, the arbitrator held that it was the chairperson's responsibility rather than the resource person's to ensure the proceedings were manageable.⁶¹²

A strong chairperson is knowledgeable of the processes involved in recruitment and selection and will not be easily manipulated. According to the Volmink Report, there will always be some influence on SGBs, which could be avoided if the SGBs were sufficiently trained.⁶¹³ To this end, the Volmink Report confirmed that unions take control of the recruitment processes because the SGB members are not adequately

⁶⁰⁹ Volmink (2016) 17.

⁶¹⁰ PAM 2016 para B.5.4.3.

⁶¹¹ Volmink (2016) 31.

⁶¹² PSES 790-15/16KZN para 27.

⁶¹³ Volmink (2016) 86.

trained.⁶¹⁴ One of the biggest threats to the proper functioning of the interview committee and the SGB is the involvement and influence of unions, especially where the officials overseeing the process are weak.⁶¹⁵

5.3.2.8.3 Union representative

When an application for a post is received, teacher unions must receive notice of the recruitment processes' date, time, and place.⁶¹⁶ Unions must act as observers.⁶¹⁷ Furthermore, unions must not influence the decision or outcome. The observer has only to ensure that the processes meet the requirements of substantive and procedural fairness. A union official may object to any substantive and procedural unfairness by bringing it to the attention of the chairperson.⁶¹⁸ If a grievance does arise, the observer must first attempt to resolve it with the interview committee, after which they may lodge a grievance with the Department of Education.⁶¹⁹

Unions may not interfere with how candidates are scored but merely observe that all procedures and rules are fairly applied and that all candidates receive equal treatment. However, Volmink found that where district officials are weak, teacher unions dictate how procedures must be followed and exercise undue influence in determining whom to appoint.⁶²⁰ For example, in *Ogle and one other v Department of Education Kwazulu-Natal* in the ELRC, the evidence showed that the SADTU union representative had influenced the scoring of the applicants in the case by forcing the interview committee to reduce their scores yet allowed them to proceed without deliberating the scoring of the second respondent, who was a member of SADTU.⁶²¹ The arbitrator found that the unsuccessful applicants were treated unfairly.⁶²²

5.3.2.8.4 The secretary

⁶¹⁴ Volmink (2016) 82.

⁶¹⁵ Volmink (2016) 18.

⁶¹⁶ PAM 2016 section B.5.4.3.4.

⁶¹⁷ Section B.5.4.3.4.

⁶¹⁸ KZN HRM Circular no. 13 of 2020 para 15.4.

⁶¹⁹ Para 15.6.

⁶²⁰ Volmink (2016) 18.

⁶²¹ PSES 790-15/16KZN para 35.

⁶²² Para 1.

The PAM 2016 also provides for the election of a secretary to serve on the interview committee.⁶²³ The resource person controls the processes; however, the secretary is responsible for accurate record-keeping and the safekeeping of all documents relating to the processes. To this end, documents include the shortlisting, interviews, and ratification minutes.⁶²⁴ The PAM 2016 is silent on the requirements and skills that the secretary must possess.

5.3.2.9 Confidentiality

All members of the interview committee must sign a declaration of confidentiality.⁶²⁵ Confidentiality includes not divulging any information regarding the names on the lists for shortlisting or interviews and any discussions held with a third party during the recruitment process.⁶²⁶ The relevant HRM will contain the document that must be signed by all those involved in the recruitments and selection processes. In ensuring that the process is fair, no third person should be privy to any information that may give them an unfair advantage over another applicant.

5.3.2.10 Minutes of proceedings

Another critical aspect of the interview process is the keeping of accurate minutes. The resource person must ensure that all processes are recorded and accurately minuted by the secretary of the interview committee.⁶²⁷ The secretary of the interview committee is chosen from the members of the SGB.⁶²⁸ In many instances, a secretary of an SGB may not be a secretary by profession, so this requires training and guidance.⁶²⁹

The PAM 2016 offers no guidance on how minutes should be formatted or what the content should be; therefore, the resource person should provide such guidance. If there is a dispute, the minutes will be crucial evidence of what happened during the process.

⁶²³ PAM 2016, section B.5.4.3.

⁶²⁴ WCED (2018) 31.

⁶²⁵ KZN HRM Circular no. 13 of 2020, para 18.

⁶²⁶ Province of the Eastern Cape Education *'Appointments and Promotions'* (2013) Department of Eastern Cape para 5.

⁶²⁷ KZN HRM Circular no. 13 of 2020 para 10.4.

⁶²⁸ PAM 2016 para B.5.4.3.

⁶²⁹ See Chapter Four para 4.5 above.

Furthermore, the minutes of proceedings are essential for transparency and accountability.⁶³⁰

5.3.3 The shortlisting, sifting, interviews and ratification

PAM 2016 provides that DOE must hand over all applications that meet the minimum requirements and provisions of the advertisement to the SGB responsible for that specific school where the vacancy arose.⁶³¹ The discussion below will include provincial guidelines, KZN HRM 13 (2020), Province of the Eastern Cape Education (2013) and WCED (2018) as examples.

5.3.3.1 The shortlisting

The interview committee will receive the envelope containing the CVs that the DOE has sifted.⁶³² The criteria for the shortlisting must be agreed upon, and the interview committee may add additional criteria in consultation with the present union representatives.⁶³³ The criteria must be aligned with the requirements contained in the advert regarding the skills, knowledge, and competencies required for the incumbent's role.⁶³⁴ During the shortlisting process, the interview committee will sift out 5 of the applicants that will be interviewed.⁶³⁵ The interview committee must ensure that all relevant persons/trade unions are informed of the date, time, and venue at least five working days before the shortlisting.⁶³⁶

The interview committee must also consider the rights to redress, representativity, and non-discrimination, as well as the curricular needs of the school and the minimum requirements for the post, as contained in the PAM 2016.⁶³⁷ This section implies that the interview committee must know the school's needs and the principal's role and further understand the content and application of the principles of redress,

⁶³⁰ *Bohmer E v WCED and C Joseph* PSES 259-06/07WC para 41.

⁶³¹ PAM 2016 para B.5.4.4.

⁶³² Para B.5.4.4.

⁶³³ WCED (2018) 41.

⁶³⁴ PAM 2016 para B.5.4.7.3.

⁶³⁵ Para B.5.4.9.

⁶³⁶ KZN HRM Circular no. 13 of 2020 para 10.4.

⁶³⁷ Para 10.8.

representivity and non-discrimination.⁶³⁸ This is only sometimes the case. For example, in the ELRC, *SAOU obo Bennet Napoleon v Department of Education Eastern Cape*, the SGB re-advertised a post citing equity considerations. The applicant averred that this was an unfair labour practice because, according to the EEA, an employer is regarded as one with more than 50 employees; therefore, the school was not the employer. Further, the SGB had no authority to implement affirmative action as this amounted to usurping the functions of the Department of Education as the employer. The arbitrator held that the SGB had no authority to do so; however, they merely recommended that the post be re-advertised, and the employer advertised the post.⁶³⁹ The evidence indicated that the interview panel recommended the applicant in the first round; however, he was not appointed by the HOD. In the second round, he was not shortlisted because he was not an African person in that he was coloured. The arbitrator found that this amounted to unfair discrimination. However, the matter was out of the jurisdiction of the ELRC because unfair discrimination must be referred to the LC⁶⁴⁰ after conciliation at the ELRC.⁶⁴¹

In cases where the SGB is not au fait with democratic principles, such as equality, equity, human dignity, non-sexism, and non-racism, they will rely on third parties, like the resource person, the unions or the educator representatives serving on the interview committee for direction. One of the main threats to the proper functioning of the interview committee is undue influence due to the need for proper training of the SGB by the Department of Education.⁶⁴² The HC in *Hartswater High School and Another v Head of the Department of Education: Northern Cape* held that compliance with the democratic principles could not be left in the hands of the SGB only, as expecting compliance from them in this regard is burdensome because they did not have all the

⁶³⁸ *SAOU obo Bennet Napoleon v Department of Education Eastern Cape* ELRC850-19/20EC para 10.8.

⁶³⁹ LRA s 37.

⁶⁴⁰ LRA s 37.

⁶⁴¹ *SAOU obo Bennet Napoleon v Department of Education Eastern Cape* ELRC850-19/20EC para 11.

⁶⁴² Volmink (2016), 18.

information needed to apply these rights.⁶⁴³ The unions, or the principal and departmental officials, will assist in such instances.

Also, the interview committee must ensure that procedures are adopted to avoid interference or undue influence. The interview committee must also ensure that the members are not subjected to threats, bribery, and corrupt practices that will result in unequal treatment.⁶⁴⁴ Leaving this function in the hands of the interview committee may be problematic. According to Pillay, corruption is difficult to uncover because of loyalty, a culture of silence or financial benefit.⁶⁴⁵

In summary, the interview committee is not always au fait with the principles of democracy or the requirements of a particular promotion post.⁶⁴⁶ The current legislative framework assumes that the SGB members possess the necessary skills and knowledge to conduct interviews.⁶⁴⁷ The Volmink Report confirmed that one of the threats to the recruitment processes is that the SGB needs more training to handle recruitment processes.⁶⁴⁸

Once the sifting procedure has been concluded, the interview committee must produce a list of five candidates or more and include a person/s who acted in that position for 12 months prior who will be interviewed.⁶⁴⁹

5.3.3.2 The Interviews

The interview process is one of the most important parts of recruitment. Here, the interview committee interacts with shortlisted applicants and must ensure that all candidates are treated equally.⁶⁵⁰ Ensuring consistency during the interviews means that the interview committee must have a plan regarding the date, time, venue, questions that will be posted and how the candidates will be scored.

⁶⁴³ *Hartswater High School and Another v Head of the Department of Education: Northern Cape* (2006) (765/2006) ZANHC 67 para 30.

⁶⁴⁴ Province of the Eastern Cape Education 'Appointments and Promotions' (2013) Department of Eastern Cape 18.

⁶⁴⁵ Pillay S 'Corruption - the challenge to good governance: a South African perspective.' (2004) 17 *6/7 International Journal of Public Sector Management* 599.

⁶⁴⁶ Volmink (2016) 95.

⁶⁴⁷ Volmink (2016) 44.

⁶⁴⁸ Volmink (2016) 110.

⁶⁴⁹ PAM 2016 para B.5.4.9.

⁶⁵⁰ Para B.5.4.11.

a) Date, time, and venue

First, the SGB must ensure that all interview committee members and trade unions are informed at least five working days before about the date, time and venue for the shortlisting, interviews, and the drawing up of the preference list.⁶⁵¹ Secondly, applicants who have been shortlisted must be given five days' notice of the interview's date, time, and venue. *Mazula and Pama v Department of Education – Western Cape*, the arbitrator found that failing to give an applicant five days' notice of the day the interviews would take place amounted to an unfair labour practice.⁶⁵²

b) The questions

The interview committee must draw up and agree to the questions that will be asked, which will be linked to the criteria used for the shortlisting.⁶⁵³ The PAM 2016 does not guide how questions should be dealt with to ensure confidentiality. For example, there is no guidance concerning when the questions must be drawn up or how to deal with members who arrive with predetermined questions.

Also, there are currently no rules governing the use of electronic devices such as laptops and cell phones during the interview process. Using these devices during the interview may compromise confidentiality, and questions could be leaked. In addition, Resolution 5 was drafted in 1998 between the unions and the DOE, when the interview committees had minimal contact with the outside world during the interview processes.

c) The scoring

ELRC Resolution 11 provides the criteria for scoring a candidate for a post.⁶⁵⁴ The interview committee scores a candidate based on leadership, administrative and managerial, organisational ability and experience, professional development and insight, leadership in the community, personality, and human relations.⁶⁵⁵ The interview committee uses a 7-point scale to rate a candidate.⁶⁵⁶

⁶⁵¹ KZN HRM Circular no. 13 of 2020 para 10.4.

⁶⁵² *Mazula and Pama v Department of Education Western Cape* PSES679-18/19WC para 47.

⁶⁵³ PAM 2016 para B.5.4.10.

⁶⁵⁴ ELRC Resolution 11 of 1997 para 2.

⁶⁵⁵ Para 1(b).

⁶⁵⁶ Para 2.

SCORE	SCALE	DESCRIPTION
1	Weak	Does not meet any requirement
2	Poor	Far below the minimum requirement
3	Fair, just below average	Meets some requirements
4	Satisfactory, Adequate	Meets most of the requirements
5	Good, above average	Meets requirements more than adequately
6	Very good, way above average	Meets requirements considerably more than adequately
7	Excellent, outstanding	Exceptional. Very little room for improvement

*Table 2. Rating scale.*⁶⁵⁷

The scales for the scoring are agreed to at the ELRC.⁶⁵⁸ However, most of the scoring is left in the hands of the interview committee. The parent component of the SGB is not a party to the agreement. The policy framework presumes that the parents on the interview committee possess the necessary knowledge and skills concerning school management. However, some parents serving may not have the necessary knowledge and skills.⁶⁵⁹ The Volmink Report found that, in most instances, the interview committee did not know the roles of the principal, the deputy principal, and the departmental head.⁶⁶⁰ Furthermore, District Officials complained that the interview committee scoring was 'biased and skewed'.⁶⁶¹ In addition, the need for the necessary skills to conduct interviews leads to the interview committee depending on the unions and the resource person to direct the process, making those processes vulnerable to corruption.⁶⁶²

⁶⁵⁷ Para 5.

⁶⁵⁸ Para 3.7.

⁶⁵⁹ Volmink (2016) 44.

⁶⁶⁰ Volmink (2016) 44.

⁶⁶¹ Volmink (2016) 93.

⁶⁶² Volmink (2016) 44.

In addition, according to Kirya, it is not uncommon for educator members serving on the interview committee to exert undue influence on the SGB.⁶⁶³ For example, in the ELRC matter of *NAPTOSA obo Namba vs DOE-EC*,⁶⁶⁴ two educators arranged secret meetings between the union, SADTU and the interview committee members responsible for scoring. They instructed them to score the incumbent, an external candidate, higher than the applicant. The interview committee, however, scored the applicant higher. At the ratification, the educators unduly influenced the SGB by objecting to the applicant's appointment, which resulted in the appointment of the incumbent.⁶⁶⁵ The arbitrator found that the SGB had been unduly influenced. Had it not been for the unfair conduct of the two educators, the applicant would have been appointed, and therefore the employer committed an unfair labour practice.⁶⁶⁶

In summary, leaving the scoring of the applicants in the hands of interview committee members that do not have the required knowledge and skills is problematic because this makes the interview committee vulnerable to undue influence by third parties. Also, the current policies governing the interview processes need to provide protection or safeguards to ensure that questions are not leaked. In addition, there are no clear guidelines for the use of technology, such as cell phones and laptops, allowing for communication with parties outside the interview room. Furthermore, interviewees can be scored and rated by parties that may not be au fait with the roles and functions of the post for which they are being interviewed or the school's needs. In some instances, unions use threats to intimidate and force the interview committee to score in favour of the preferred candidate.⁶⁶⁷ These factors make the interview process vulnerable to undue influence and unfair decisions.

5.3.3.3 Ranking of the candidates

⁶⁶³ Kirya M *Education sector corruption: How to assess it and ways to address it* (2019) 13.

⁶⁶⁴ *NAPTOSA obo Namba vs DOE-EC* ELRC454-19 20EC.

⁶⁶⁵ Para. 19.

⁶⁶⁶ ELRC454-19 20EC para. 21.

⁶⁶⁷ Volmink (2016) para 6.5.

The national guidelines as contained in the PAM 2016 paragraph B.5.4.12. provides that after the conclusion of the interviews, the interview committee must rank the interviewees according to preference and present that to the entire sitting of the SGB for ratification.⁶⁶⁸

The rules agreed upon at the ELRC provide that to appoint solely based on the applicant's performance during the interviews is unfair.⁶⁶⁹ To this end, the experience and qualifications of an applicant, as reflected on the CV, must be taken into account.⁶⁷⁰

When deciding on the ranking of an interviewee, scoring should serve as a guide and not as the deciding factor of who should be appointed.⁶⁷¹

5.3.3.4 Ratification by the SGB

PAM 2016 provides that the entire sitting of the SGB must, after deliberation, submit the final list of 3 candidates, ranked in order of preference, to the HOD.⁶⁷² Deliberations include ensuring that the recommended candidate has the necessary qualifications and experience.⁶⁷³

The rule regarding ratification is only sometimes followed. For example, the SABC reported that at Homevale High School in Kimberley, parents locked the school and thereby closed it down to force the DOE to remove the newly appointed principal because they had reason to believe that the SGB took a unilateral decision to recommend a candidate who was rumoured, not to have the necessary qualifications.⁶⁷⁴

Also, in the ELRC matter of *NAPTOSA obo Ogle and one other v Department of Education Kwazulu-Natal*,⁶⁷⁵ the arbitrator held that the SGB ratified the appointment of a candidate who had fraudulently represented his qualifications in his CV.⁶⁷⁶

⁶⁶⁸ PAM 2016 para B.5.4.12.

⁶⁶⁹ CA 3 of 2016 para 41.

⁶⁷⁰ Para 43.

⁶⁷¹ Para 42.

⁶⁷² PAM 2016 para B.5.4.12.

⁶⁷³ Para B.5.4.12.

⁶⁷⁴ Nowapane N 'Parents shut down school over principal appointment dispute'

<https://www.sabcnews.com/sabcnews/parents-shut-down-school-over-principal-appointment-dispute/>
21 May 2018.

⁶⁷⁵ PSES 790-15/16KZN para 7.

⁶⁷⁶ PAM 2016 para B.5.4.12.

In addition, the SGB must ensure that there is no undue influence in making the recommendation.⁶⁷⁷ For example, in *NAPTOSA obo Ogle and one other v Department of Education Kwazulu-Natal*,⁶⁷⁸ the rule was not followed. The Chairperson of the SGB served as the chairperson of the interview committee. The applicants alleged that the NAPTOSA union representative,⁶⁷⁹ the secretary of the interview committee and the co-opted member were prevented from attending the ratification meeting⁶⁸⁰ because the chairperson feared that they would inform the members of the full SGB of the irregularities during the interview process. The arbitrator held that such exclusion was a breach of the procedures in that unions were to be present at the ratification meeting of the SGB. Therefore, the chairperson's actions were irregular and unfair to applicants. To this end, the PAM 1998 provides that the SGB had to ensure all relevant persons/trade unions are informed at least five working days before the date, time and venue for the shortlisting, interviews, and ratification process.⁶⁸¹

Under the PAM 2016, union members are only invited to the shortlisting and interviews, and their involvement ends once the preference list is drawn up after the interviews.⁶⁸² According to Volmink, whereas unions such as SADTU dominate, exert undue influence and contribute to corruption and the devaluing of education, the involvement of other important teacher unions 'prevent the collapse of the Department of Education'.⁶⁸³ In 2019 the MEC for education in KZN warned SADTU to rid itself of corruption relating to appointments.⁶⁸⁴ For example, in *NAPTOSA obo Ogle and one other v Department of Education Kwazulu-Natal*,⁶⁸⁵ had the unions not been present at the full sitting of the SGB, the members who did not serve on the interview committee would not have been aware of the irregularities that occurred during the interview process.

⁶⁷⁷ PAM 2016 para B 5.4.7.4.

⁶⁷⁸ PSES 790-15/16KZN para 7.

⁶⁷⁹ Para 29.

⁶⁸⁰ PSES 790-15/16KZN para 32.

⁶⁸¹ KZN HRM Circular no. 13 of 2020 para 10.4.

⁶⁸² Para 10.4.

⁶⁸³ Volmink (2016) 26.

⁶⁸⁴ Mavuso S 'Sadtu urged to rid itself of the corruption stigma.' *IOL* 24 June 2019.

⁶⁸⁵ PSES 790-15/16KZN para 7.

In summary, the current ratification process is not free from undue influence and abuse. In addition, the exclusion of the unions from the ratification process was to deal with corruption. However, one of the side effects is that it has closed the gap for scrutiny by unions that can prevent corruption and contribute to the uplift of education.

5.3.4 The Appointment

According to the PAM 2016, once the HOD has received the list of preferred candidates from the SGB,⁶⁸⁶ s/he must determine whether the candidates have satisfied the requirements of equity, redress and representativity.⁶⁸⁷ The HOD may only supersede the recommendation of a candidate by the SGB where they have failed to consider equity, fairness and redress in respect of affirmative action.⁶⁸⁸

In *Kimberley Girls High School and Another v Head of the Department of Education, Northern Cape Province and Others*, the HOD superseded the appointment of the preferred candidate of the SBG at Kimberley Girls High School. According to the HOD suitably qualified candidates from previously disadvantaged groups were excluded and that the governing body's recommendation 'did not have regard for the democratic values and principles referred to in section 7(1) of the Act (i.e., that the recommendation is declined in terms of sec. 6(3)(b)(v) of the Educators Act'.⁶⁸⁹ The evidence, in this case, showed that the interviewing committee, when shortlisting the candidates, completely overlooked or accorded little or no weight to the excellent academic (more specifically, English) qualifications of three disadvantaged black candidates. In contrast, nearly full marks were awarded in the scoring process to other candidates (including the three who were eventually shortlisted) who were not of a disadvantaged background and whose academic qualifications were comparable to or of a lower standard than the three disadvantaged candidates.⁶⁹⁰ The HOD had allowed the SGB to redo the process. However, they refused and opted for review by the courts

⁶⁸⁶ PAM 2016 para B.5.5.1.

⁶⁸⁷ Para B.5.4.7.

⁶⁸⁸ Para B.5.5.2.

⁶⁸⁹ *Kimberley Girls High School and Another v Head of the Department of Education, Northern Cape Province and Others* [2003] (32/2003) ZANCHC 35 para 2.

⁶⁹⁰ Para 7.

of the HOD's decision not to appoint their recommended candidate.⁶⁹¹ In this case, the SGB failed to follow internal procedures to deal with their grievances and opted to go to court first. The HC ruled that the action could have been avoided and dismissed the application by the SGB, with costs.⁶⁹²

In contrast, in *Hartswater High School and Another v Head of the Department of Education*, the SGB recommended the appointment of a white male, Steenkamp, who had scored the highest during the interview process.⁶⁹³ The HOD rejected the appointment because the SGB placed too much emphasis on the ability of Steenkamp and failed to redress the imbalance of the past.⁶⁹⁴ The HOD referred the matter back to the SGB to make another recommendation in terms of section 6(3) of the Educators Act. The SGB failed to make another recommendation but wrote to the HOD and submitted reasons for the appointment, including that there was only one white educator at the school. The HOD proceeded to make an appointment relying on 6(3)(d), in terms of which, if the SGB fails to make another recommendation, then the HOD may make the appointment.⁶⁹⁵ However, the HC held that the HOD must make decisions in accordance with s 195 of the Constitution. Further, the decision of the HOD was irregular because he needed to consider the submissions made by the SGB. In addition, throughout the processes, the SGB tried to get assistance and guidance on whether they acted in line with the required democratic principles. However, neither the two departmental officials nor the district manager would assist them.⁶⁹⁶ Further, the SGB had proceeded without guidance and relied on their judgements in making the appointment.⁶⁹⁷ The HC held that the SGB had done everything to observe the principles of democracy, but the employer had failed them by not giving them clear support and guidance. Also notably so, the HC mentioned that to arrive at any other

⁶⁹¹ *Kimberley Girls High School and Another v Head of the Department of Education, Northern Cape Province and Others* [2003] (32/2003) ZANCHC 35 para 26.

⁶⁹² Para 30.

⁶⁹³ *Hartswater High School and Another v Head of the Department of Education: Northern Cape* (765/2006) (2006) ZANCHC para 21.

⁶⁹⁴ Para 32.

⁶⁹⁵ Para 24.

⁶⁹⁶ Para 20.

⁶⁹⁷ Para 35.

conclusion would also be an injustice against the learners. The HC set aside the appointment made by the HOD.⁶⁹⁸

In terms of section 6(3)(b) of the Educators Act, the HOD may only decline the recommendation of the SGB if: procedures were not followed, the candidate does not meet the requirements for the post, the candidate is not registered with SACE, there is proof of undue influence, the SGB did not take democratic values and principles into account when making the recommendation.⁶⁹⁹ There have been numerous cases where the courts have curbed the HOD's discretion to appoint. In *Lawson Brown High School v The Member of the Executive Council, Department of Education, Eastern Cape Province and others*, the HC held that If the SGB has satisfied the requirement of section 6.3(b) of the Educators Act, then the HOD must appoint.⁷⁰⁰ Refusal by the HOD to ratify the recommendation by the SGB is ultra vires.⁷⁰¹ Similarly, in *Kimberley Junior School v The Head of the Northern Cape Education Department*, the SCA held that the HOD had no jurisdictional grounds to make an appointment without a recommendation. The SCA set aside the decision of the HOD to appoint.⁷⁰²

The shared responsibility between the SGB and the HOD in appointing a principal leads to frequent interference in the school's functioning and adversely affects learners.⁷⁰³ When disputes arise, there is a disruption to teaching and learning, and the learners also suffer.⁷⁰⁴ The breakdown in relations between a school's DOE and SGB often results in parent protests. It is common for parents to lock the school in such instances, refusing entry to educators and learners.⁷⁰⁵ Media reports indicate that this happens all over the country.⁷⁰⁶ For example, at Glenardle Junior Primary School, the SGB refused to allow the appointed principal entry to the school. The HOD had appointed Mrs Bedesi, ranked number five, as the preferred candidate by the SGB. In

⁶⁹⁸ (2006) (765/2006) ZANCHC para 37.

⁶⁹⁹ Educators Act section 6(3)(b).

⁷⁰⁰ *Lawson Brown High School v The Member of the Executive Council, Department of Education, Eastern Cape Province and others* (2007) 808/07 ZAECPC para 6.

⁷⁰¹ Para 9.

⁷⁰² *Kimberley Junior School v The Head of the Northern Cape Education Department* (2009) 278/08 ZASCA para 19.

⁷⁰³ Liwane (2017) 256.

⁷⁰⁴ (2006) (765/2006) ZANCHC 67 para 37.

⁷⁰⁵ Mboto S 'Parents criticised for locking gates of KZN school' *IOL* 10 August 2021.

⁷⁰⁶ Saal P 'Race issues plague appointment of school principals' *Sunday Times* 03 August 2017.

this matter, the SGB concluded the interview processes in November and heard nothing from the Department about who was appointed to the post until January of the following year. The SGB lodged a grievance. However, the grievance was ignored by the employer.⁷⁰⁷ The SGB alleged further that during the interview processes, they were constantly subjected to interference by the union official, who had insisted that they were not privy to the names or qualifications of the interviewees. Furthermore, both the department official and the union forced the appointment of Mrs Bedesi.⁷⁰⁸

Disputes often result in a school functioning without a principal for years. For example, in the *ELRC NAPTOSA obo Ogle and one other v Department of Education Kwazulu-Natal*, the arbitrator found that the school had to function for three years without a principal and that the dispute had led to the involvement of the community. Furthermore, the dispute adversely affected the learners.⁷⁰⁹

In *Head of Department, Department of Education, Free State Province v Welkom High School and Another*, the CC held that the state and the school governing body should have a relationship based on mutual respect, good faith, and mutual respect and trust.⁷¹⁰

In light of the above, this is not always the case. Three very important aspects of the dual relationship in making appointments to promotion posts emerge. First, the HOD does not possess an unfettered power to supersede the recommendation, but he must do so based on rational and fair reasoning.⁷¹¹ Regarding section 195 of the Constitution, a decision to promote must be made in terms of enabling legislation supported by justifiable reasons that are rational and not arbitrary.⁷¹² Secondly, there have been numerous other cases where the HOD has incorrectly exercised its power to appoint. Thirdly, the research indicates that SGBs and departmental officials fail to understand the democratic concepts of equality, fairness, and the need for redress without clear policy and training. This leads to disputes that adversely affect the learners of a school.

⁷⁰⁷ Magubane T 'Battle over Bluff principal hots up' *IOL* 10 February 2016.

⁷⁰⁸ Harper P 'School in legal bid to oust principal' *City Press* 01 March 2016.

⁷⁰⁹ PSES 790-15/16KZN para 43.

⁷¹⁰ *Head of Department, Department of Education, Free State Province v Welkom High School and Another* (2013) CCT 103/12 (ZACC) 124.

⁷¹¹ *Eikendal Primary School v WCED* 2008 (5) SA 18 (SCA) para 12.

⁷¹² Rycroft (2007) 28 *ILJ* 2192.

5.4 REMEDIAL MEASURES

The PAM 2016⁷¹³ when read together with the LRA and CA 3 of 2016, makes provision for grievance and dispute procedures. The following discussion will examine the grievance procedures, dispute procedures, and review procedures within the context of fair labour practice.

5.4.1 Grievance Procedures

The right to fair labour relations includes the right to a fair remedy. In grievance procedures, an applicant must first attempt to settle the matter at the school where the grievance arose before lodging a formal grievance with the Department. Once the appointment has been made, the aggrieved party may lodge a grievance with the grievance committee.⁷¹⁴ The grievance committee will then decide whether the issue needs further investigation.⁷¹⁵ If there is a need for an investigation, the grievance committee will be allocated more time than the standard 30-day period to resolve the grievance.

The grievance committee comprises officials working for the Department who may need to gain labour skills. According to a study done by Beckmann & Prinsloo, provincial and national staff do not have an educational background and, further, are ignorant of the law and how it should be applied. Furthermore, these officials need more professionalism, and there is a refusal to learn.⁷¹⁶ Also, these officials ignore legal advice and make hasty decisions that may lead to disputes.⁷¹⁷ In addition, an area of great concern is the lack of knowledge of the law and dispute procedures by administrators, unions, SGB, and officials of the Department.⁷¹⁸ Officials lack respect for human rights, act outside the scope of powers, and are subject to undue influences from unions.⁷¹⁹

⁷¹³ PAM 2016 Chapter G.

⁷¹⁴ Para G.4.2.

⁷¹⁵ Chapter G.

⁷¹⁶ Beckmann J & Prinsloo J 'Some aspects of education litigation since 1994: Of hope, concern and despair' (2015) 35 (1) *SAJE* 3.

⁷¹⁷ Beckmann & Prinsloo (2015) 4.

⁷¹⁸ Beckmann & Prinsloo (2015) 8.

⁷¹⁹ Beckmann & Prinsloo (2015) 9.

The failure of officials to understand and apply the law correctly apply the law leads to many disputes between employers and employees.⁷²⁰ For example, according to the annual reports of the ELRC, the number of promotion disputes that were lodged per annum is as follows:

1. From 1 April 2016 to 31 March 2017, 475 disputes were lodged, 99 related to promotions.⁷²¹
2. From 1 April 2017 to 31 March 2018, 576 disputes were lodged, 139 related to promotions.⁷²²
3. From 1 April 2018 to 31 March 2019, 1026 disputes were lodged, and 252 were related to promotions.⁷²³
4. From 1 April 2019 to 31 March 2020. 1086 disputes were lodged, and 209 were related to promotions.⁷²⁴

According to Beckmann & Prinsloo, to limit the number of disputes, the grievance processes should be conducted by education law specialists.⁷²⁵

In light of the above, the internal grievance processes of the DOE are often dealt with by departmental officials who are ignorant of the law, disregard human rights, and need help understanding the education system. The appointment continues while waiting for a fair hearing before an impartial dispute forum. The delay has severe implications for the school and the individuals involved.

5.4.2 Disputes procedures

In the case of a claim based on unfair labour practice, or promotion, the aggrieved parties in education may lodge a dispute with the ELRC in terms of the LRA.⁷²⁶ The application for a dispute may only be made once the appointment has been made.⁷²⁷

The relief that an arbitrator may order is that the appointment of the incumbent is set

⁷²⁰ Beckmann & Prinsloo (2015) 4.

⁷²¹ ELRC Annual Report: 2016 – 2017 90.

⁷²² ELRC Annual Report: 2017 – 2018 100.

⁷²³ ELRC Annual Report: 2018 – 2019 104.

⁷²⁴ ELRC Annual Report: 2019 – 2020 113.

⁷²⁵ Beckmann & Prinsloo (2015) 9.

⁷²⁶ LRA schedule 7 section 2(1)(b).

⁷²⁷ PAM 2016 B.8.6.

aside, and the applicant is appointed instead,⁷²⁸ or that the appointment is set aside,⁷²⁹ and the processes begin de novo or compensation.⁷³⁰ The following includes a discussion of how the procedures involved vitiate the constitutional rights of the same beneficiaries that it aims to protect.

The parties to the dispute will include the applicant/s, unions or legal representatives acting on behalf of the applicant/s, and the DOE representative/s.⁷³¹ DOE, as the employer, defends the employer's appointment.⁷³² Also, in promotion disputes, an arbitration award could set aside the appointment of an incumbent to a post, and as such, the incumbent of the post must be joined in the dispute.⁷³³ The LRA defines the joinder as 'any person having an interest in the dispute'.⁷³⁴ The employer/DOE representative and the incumbent/joinder are respondents in the dispute.

First, many parties are involved in a dispute, which may lead to problematic delays. According to Benjamin, the processes at the CCMA are marked by a high level of absenteeism by parties, which results in delays.⁷³⁵ Furthermore, delays in proceedings contradict the very purpose of the CCMA to provide for the right to a speedy resolution to a dispute.⁷³⁶ The same applies to disputes at the ELRC. Applicants may only sometimes have a speedy resolution to the dispute. For example, in *Ogle and Another*, the arbitrator held that 'there was a lengthy delay of approximately two years in the proceedings between 25 August 2016 and 13 August 2018 due to several logistics. This included delays by the incumbent due to 'unrelated or irrelevant reasons'.⁷³⁷ Further, the above delays showed that the school functioned without a principal for three years. The community refused to grant the incumbent of the post access to the school.⁷³⁸ If an appointment has been made, that post is no longer vacant, and no other person may

⁷²⁸ CA 3 2016 para 60.

⁷²⁹ Para 65.

⁷³⁰ Para 63.

⁷³¹ Part C section 17.4.

⁷³² Rycroft A 'Rethinking joinder in appointment disputes: PSA v Department of Justice & Others; National Commissioner of the SA Police Service v SSBC & Others' (2005) 26 *ILJ* 1898.

⁷³³ ELRC Constitution Part C section 46.2.

⁷³⁴ LRA section 115(2A)(d).

⁷³⁵ Benjamin P 'Conciliation, Arbitration and Enforcement: The CCMA's Achievements and Challenges' (2009) 30 *ILJ* 36.

⁷³⁶ Benjamin P 'Friend or Foe? The impact of judicial decisions on the operation of the CCMA' (2007) 28 *ILJ* 2.

⁷³⁷ PSES 790-15/16KZN, para 2.

⁷³⁸ Broughton T 'Dispute over Durban school principal post comes to an end - for now' *News* 24 18 October 2018.

be appointed to that post. Therefore, when a dispute is prolonged, and an appointee does not report for duty, the school will have to function without a principal until the dispute is resolved.

In cases where an employer or the incumbent of the post/second respondent does not attend an arbitration, the applicant may apply for a default award. In this regard, the arbitrator issues an award without a respondent/s being present.⁷³⁹ However, issuing a default award may only sometimes guarantee the dispute's speedily resolved and may result in further delays. Regarding section 144 of the LRA, the respondents may apply to have the award rescinded, and if successful, the dispute will be referred back to arbitration.⁷⁴⁰ Alternatively, a party to a dispute may refer the award to the LC for review.⁷⁴¹ In some instances, the employer or the incumbent may provide security in an application for review in terms of section 145(7) of the LRA. The implications of s 145(7) of the LRA are that even if the award favours the applicant, an application for review and the furnishing of security suspends enforcement of the award, resulting in a further delay.⁷⁴²

According to Cameron, undue delays cause disruptions in the workplace because of 'anxieties, animosities, and uncertainties' due to the ongoing dispute.⁷⁴³ Therefore, delays may negatively impact the relationships between staff members, especially when the applicant and the respondent are at the same school.⁷⁴⁴ In *Cassimjee v Minister of Finance*, the SCA held that unreasonable delays might amount to an 'abuse of the processes'. In addition, in the school environment, undue delays are not in the best interests of the staff or the learners.⁷⁴⁵

Secondly, ELRC CA 3 of 2016 provides that the employer is liable for any unfair conduct during the recruitment processes and not the IC or the SGB because the latter merely make recommendations, and the HOD makes the appointment.⁷⁴⁶ The SGB is

⁷³⁹ LRA section 144 (d).

⁷⁴⁰ Benjamin (2009) 37.

⁷⁴¹ LRA section 145.

⁷⁴² Benjamin (2007) 39.

⁷⁴³ Cameron E 'The Right to a Hearing Before Dismissal Part 1' (1986) 7 *ILJ* 183 200.

⁷⁴⁴ Rycroft (2005) 1900.

⁷⁴⁵ *Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA) para 10.

⁷⁴⁶ CA 3 of 2016 para 29.

involved in most of the recruitment and selection processes, and the HOD, in most cases, satisfies the recommendations made by the SGB.⁷⁴⁷ However, the SGB is not liable for unfair labour practices or corrupt behaviour.⁷⁴⁸ According to Mokabane, Odeku & Nevondwe, the SGB must be held accountable for a decision to recommend a candidate who did not meet the criteria for a post.⁷⁴⁹ In other words, the SGB must be able to provide reasons for their decisions. In addition, when decision-makers are not held accountable for their decisions, they are more likely to act in their best interest rather than that of the school. In such instances, this decision may negatively impact education quality.⁷⁵⁰ Providing reasons for decisions is essential for procedural fairness because it provides clarity. In addition, when people understand the rationale behind the decision, the number of disputes may be limited.⁷⁵¹

Thirdly, proving that an employer has committed an unfair labour practice is, from the outset, difficult because the employer has a right to appoint an employee whom they deem fit,⁷⁵² subject to unfair labour practices/ discrimination. According to paragraph 4 of CA 3 of 2016, to succeed, the applicant 'must prove more than the fact that he/she has superior qualifications and experience or even scored the highest in the interview process'.⁷⁵³ The applicant must prove that s/he is 'the best candidate for the post out of all those who applied'.⁷⁵⁴

In summary, for an applicant to prove that s/he is the 'best candidate of all who applied for the post', the applicant must have access to the CV of every applicant for the post. In cases with many applicants, studying every CV would be time-consuming and negate the right to a speedy resolution. Furthermore, the information of all the applicants will be disseminated to third parties. Herein lies the possibility of infringing on the applicant's right to privacy.

⁷⁴⁷ Adams & Waghid (2005) 31.

⁷⁴⁸ Volmink (2016) 17.

⁷⁴⁹ Mokabane M, Odeku K & Nevondwe T 'Employer's failure to adhere to its promotional policy and procedure: Implications for fair labour practices.' (2012) 6 (46) *African Journal of Business Management* 11445.

⁷⁵⁰ Wossmann L 'Accountability through External Exams and the Management of Educational Institutions' (2005) *International Journal for Education Law and Policy* 72.

⁷⁵¹ Goldring J 'Does Nanny Know Best.' (1986) 11 (4) *Legal Service Bulletin* 168.

⁷⁵² Grogan J *Dismissal, Discrimination, and Unfair Labour Practices* 2ed (2007) 52.

⁷⁵³ CA 3 of 2016 para 42.

⁷⁵⁴ Para 33.

The Constitution, section 14 (d), protects the rights of every person not to have the privacy of their communications infringed. To this end, the Protection of Personal Information Act 4 of 2013 (POPIA) was enacted to give effect to the right to privacy as envisaged by Constitution.⁷⁵⁵ POPIA aims to regulate how personal information is dealt with and ensure that personal information is protected.⁷⁵⁶ Personal information protected under POPIA includes a person's contact information, identity numbers, race, sex, marital status, education, and employment history.⁷⁵⁷ Regarding recruitment and selection, such information cannot be disseminated to a third party without the applicant's consent.⁷⁵⁸ The CVs of the applicants contain personal information. Failure to comply with the POPIA could result in a fine of up to 10 million rands,⁷⁵⁹ or imprisonment of up to 10 years.⁷⁶⁰ According to Buys, personal information can be abused either negligently or intentionally.⁷⁶¹

POPIA makes provision for a limitation of the right to privacy.⁷⁶² In this regard, POPIA provides the right to privacy must be balanced against the right to access information.⁷⁶³

The Promotion of Access to Information Act 2 of 2000 (PAIA) was enacted to give content to the right to access information as provided in section 32(2) of the Constitution. Furthermore, PAIA provides for the right of access to information held by the state or another person required to exercise or protect a right.⁷⁶⁴ However, according to section 45, a public official may refuse to furnish information where the request for information is 'manifestly frivolous or vexatious or satisfying the request would amount to a waste of public resources'.⁷⁶⁵

Also, section 44 of PAIA provides that the public body may refuse access to the records of a third party if these records contain evaluative material.⁷⁶⁶ Furthermore, the third

⁷⁵⁵ Protection of Personal Information Act 4 of 2013 section 2.

⁷⁵⁶ Section 2.

⁷⁵⁷ Section 1.

⁷⁵⁸ Section 26.

⁷⁵⁹ Section 109(2)(c).

⁷⁶⁰ Section 107(b).

⁷⁶¹ Buys M 'Protecting personal information: Implications of the Protection of Personal Information (POPI) Act for healthcare professionals' (2017) 107 (11) *SAMJ* 954.

⁷⁶² POPIA section 2.

⁷⁶³ Section 2(a)(i).

⁷⁶⁴ The Promotion of Access to Information Act 2 of 2000(PAIA) Aim.

⁷⁶⁵ PAIA section 45.

⁷⁶⁶ Section 44(2)(b).

party must consent to the disclosure of the information.⁷⁶⁷ Evaluative material, according to PAIA section 1, includes: 'an evaluation or opinion prepared for determining the suitability, eligibility or qualifications of the person to whom or which the evaluation or opinion relates: for employment or appointment to office; for promotion in employment or office or continuance in employment or office; for removal from appointment or office; or the awarding of a scholarship, award, bursary, honour or similar benefit'.⁷⁶⁸

For example, in *Belwana and Another v Eastern Cape MEC for Education and Another*, two applicants approached the HC to order the DOE to provide them with the scoresheets and minutes of the interviews. Applicant one was not shortlisted or interviewed for a post.⁷⁶⁹ The HC held that the applicant was one of 35 unsuccessful candidates. Providing her with such information would open the doors of litigation for all other applicants yet to make it to the interview stage.⁷⁷⁰ In addition, the HC held that such an application was 'frivolous or vexatious'.⁷⁷¹ Regarding the second applicant who was interviewed and, therefore, part of the process, the HC held that the panellists had signed a confidentiality clause. Therefore, the Department of Education is entitled to refuse to provide the applicant with evaluative material of other applicants.⁷⁷² The HC ordered the DOE to provide the second applicant with: the list of candidates who applied for the vacant head of department post; the minutes of the recruitment proceeding; only the applicant's scores; and other documentation that did not fall within the ambit of evaluative material listed in section 1 of PAIA.⁷⁷³

The implications of not having access to the CVs of all the applicants for the posts also impact the relief available to an unsuccessful applicant. Where an unsuccessful applicant does not prove that s/he is the better candidate out of all the applicants for the post, an arbitrator is prohibited from making an order to appoint the candidate.⁷⁷⁴

⁷⁶⁷ PAIA section 48.

⁷⁶⁸ PAIA section 1.

⁷⁶⁹ *Belwana and Another v Eastern Cape MEC for Education and Another* (2017) 3 All SA 32 (ECB) para 32.

⁷⁷⁰ Para 36.

⁷⁷¹ Para 37.

⁷⁷² Para 68.

⁷⁷³ (2017) 3 All SA 32 (ECB) para 70.

⁷⁷⁴ CA 3 of 2016 para 59.

In light of the above, without the consent of every applicant for the post, the applicant will not have access to the CVs or the scoresheets of the interviewees. In such an instance, the applicant will not satisfy the requirement of proving that s/he is the best candidate for the post. The most an applicant can expect is that the arbitrator set aside the appointment of the incumbent or award the compensation.

Fourth, if the applicant is successful in proving an unfair labour practice,⁷⁷⁵ an award would be issued in favour of the applicant. Section 143(1) of the LRA provides that 'an award is final and binding as if it was a court order'. In practice, however, employers only sometimes comply with the award.⁷⁷⁶ In cases where an employer fails to comply with an award, the LRA section 143(3) provides for an award to be certified by the commissioner of the CCMA before an applicant can approach the LC for relief. In unfair promotion disputes, the application for certification must be made to the General Secretary of the ELRC.⁷⁷⁷ In promotion disputes, an arbitrator may also award compensation. Where the applicant is awarded is for compensation, then after certification, the applicant may approach the sheriff of the court.⁷⁷⁸ The sheriff may then attach the employer's property to be sold in execution to satisfy the debt.⁷⁷⁹ The employer may then approach the court to stay the execution to frustrate the applicant's claim, which may be unfair to an applicant's right to a speedy resolution.⁷⁸⁰

In cases where the award is for performance, for example, setting aside the appointment and starting the process de novo, the applicant must, after certification, institute a contempt proceeding in the LC.⁷⁸¹ According to Vettori, these proceedings not only add to the delay but also incur additional costs for the applicant. In addition, there are no time limits attached to when the procedures must be finalised.⁷⁸² Furthermore, once

⁷⁷⁵ CA 3 of 2016 para 65.

⁷⁷⁶ Benjamin (2009) 48.

⁷⁷⁷ ELRC Constitution Part C section 59(1).

⁷⁷⁸ Para 63.

⁷⁷⁹ Magistrates' Courts Act 32 of 1944 section 65.

⁷⁸⁰ Vettori S 'Enforcement of labour arbitration awards in South Africa' (2013) 25(2) *South African Mercantile Law Journal* 249.

⁷⁸¹ ELRC Constitution Part C section 59 (3)(2).

⁷⁸² Vettori (2013) 248.

the employer finds that the applicant is taking the matter to the LC, the employer may apply for review to frustrate the implementation process.⁷⁸³

Lastly, regarding CA 3 of 2016, an employer can follow flexible procedures when making an appointment.⁷⁸⁴ In *Observatory Girls Primary School v Head of Department of Education, Gauteng*, the HC held that when an SGB is filling a vacancy, there is no need for strict compliance with the interview procedures. 'Substantial compliance is sufficient'.⁷⁸⁵ In this regard, Mokabane, Odeku & Nevondwe submits that the employer must follow policy strictly to prevent 'corruption and nepotism'.⁷⁸⁶

In summary, employers may only sometimes comply timeously with awards made by the ELRC. In addition, the employer is not obligated to follow strict procedures when making an appointment, which may result in corruption. Furthermore, the employer may use review procedures under the LRA to delay implementing an award in favour of applicant awards timeously. Challenging the employer's decision not to promote may be lengthy and costly. All of these factors vitiate an applicant's right to fair decision-making procedures and the right to a fair remedy.

5.4.3 Review Procedures

Once an award has been issued, any party to the dispute who alleges that the award is defective may institute review proceedings in the LC.⁷⁸⁷ The grounds for review are limited to acts or omissions by an arbitrator/commissioner. A party may allege that: the commissioner committed misconduct concerning the commissioner's duties as an arbitrator or committed a gross irregularity in the arbitration proceedings, exceeded the commissioner's powers, or an award has been improperly obtained.⁷⁸⁸ According to Vettori, review procedures may be lengthy, complicated, costly, and intimidating because it involves approaching the LC.⁷⁸⁹

⁷⁸³ Vettori (2013) 249.

⁷⁸⁴ CA 3 of 2016 para 51.

⁷⁸⁵ *Observatory Girls Primary School v Head of Department of Education, Gauteng* 2003(4) SA 246 (W) para 255.

⁷⁸⁶ Mokabane, Odeku & Nevondwe (2012) 11437

⁷⁸⁷ LRA section 145(1).

⁷⁸⁸ LRA section 145(2).

⁷⁸⁹ Vettori (2013) 253.

Benjamin submits that providing a process of review instead of appeals is to avoid financial implications, undue delays and the legal processes associated with appeals.⁷⁹⁰ Furthermore, at the time the CCMA came into being, it was not a foregone conclusion that there would be so many matters referred to the LC in seeking a review of awards.⁷⁹¹ The result is that the outcome of a dispute may be delayed for two years or more.⁷⁹² Vettori argues that disputes involving a claim for performance are often complicated and require legal representation, which is costly.⁷⁹³ In addition, according to Benjamin, applicants are not keen to oppose it due to the fear of an order for costs being made against them, resulting in a review based on a one-sided argument.⁷⁹⁴

Another issue with the review, according to Benjamin, is that it was envisaged that the LC would play a supervisory role in the functioning of the CCMA. Furthermore, the processes of review by the LC would ‘promote consistency in the interpretation and application of labour legislation’.⁷⁹⁵ However, arbitrators preside over matters and issue the awards, yet review procedures require very little input from them. As such, the LC is not always au fait with how the CCMA operates, yet their decisions affect how the arbitrator functions in matters before them.⁷⁹⁶

According to Benjamin, recalcitrant employers depend on the fact that this process is costly and time-consuming for applicants seeking enforcement to delay the implementation of awards.⁷⁹⁷ In addition, delays often lead to awards never being implemented because of the non-finalisation of the review processes and, therefore, the non-implementation of awards.⁷⁹⁸

In summary, the vision of the LRA is to provide speedy, simplified dispute resolution procedures. This vision still needs to be fully realised for applicants wanting to challenge a decision to appoint in education.⁷⁹⁹ The applicants in promotion disputes

⁷⁹⁰ Benjamin (2007) 35.

⁷⁹¹ Benjamin (2007) 36.

⁷⁹² Benjamin (2007) 41.

⁷⁹³ Vettori (2013) 254.

⁷⁹⁴ Benjamin (2007) 36.

⁷⁹⁵ Benjamin (2007) 6.

⁷⁹⁶ Benjamin (2007) 36.

⁷⁹⁷ Benjamin (2009) 41.

⁷⁹⁸ Benjamin (2007) 42.

⁷⁹⁹ LRA section 1.

may have difficulties pursuing the implementation of an award and further review processes because of the costs and delays. In addition, the LC's aim to monitor the functioning of the CCMA has created further challenges for how an arbitrator deals with disputes. The LC and arbitrators have taken many decisions, and all other parties are expected to keep abreast of all of these decisions. In the absence of clear guidelines, this may be a challenge. The procedures involved are lengthy, costly, complex and limited and may further delay achieving justice and stability in a school. The remedies available to applicants vitiate the applicant's right to a speedy and fair resolution.

5.5 STAKEHOLDERS INVOLVED IN RECRUITMENT AND SELECTION

According to Beckmann, to determine whether the empowering legislation makes provision for the recruitment of suitably qualified educators, one has to look at how educators are recruited and selected, and the role played by different stakeholders involved in the recruitment process.⁸⁰⁰ In this regard, Beckmann explicitly mentions the role of SACE, the SGB and teacher unions.⁸⁰¹ The discussion below will first deal with the role played by SACE, secondly, the involvement of the SGB in the recruitment and selection processes, and thirdly, the role played by the teacher union and the departmental officials to determine whether these promote the concepts of fairness, equality, and rational decisions in the appointment procedures.

5.5.1 SACE

The SACE Act aims to bring professionalism and dignity to the profession through SACE as the regulatory body of educators. This has yet to be attained, and SACE is believed to be far from achieving that goal.⁸⁰² Liwane confirmed this view and further submitted that SACE needs to put more effort into fulfilling its mandate.⁸⁰³

A factor of great concern reported by the Volmink Report is that SADTU wholly dominates SACE and that the body is politically controlled.⁸⁰⁴ The body itself

⁸⁰⁰ Beckmann (2018) 4.

⁸⁰¹ Beckmann (2018) 5.

⁸⁰² De Wet C 'The Status of Teaching as a Profession in South Africa' (2016) 14 (1) *Education Policy, Reforms & School Leadership* 147.

⁸⁰³ Liwane (2017) 256.

⁸⁰⁴ Volmink (2016) 108.

highlighted the shortcomings of SACE in the execution of its mandate after meeting with stakeholders in the sector. To this end, non-visibility, lack of communication with the profession, and the inadequate provisioning of professional development programmes are among the most concerning issues regarding the council's operation.⁸⁰⁵ The council further acknowledged that they needed to take the lead in ensuring that the 'dignity' and 'status' within the teaching profession are restored.⁸⁰⁶

Another issue that comes to the fore is SACE's inability to handle the registration of educators. In 2016 SACE reported that 40 000 educators working in South Africa were not registered with the body and that there was nothing they could do for these employees or employers.⁸⁰⁷ Under the issue of registration is access to educators' information on Persal, the DBE's personnel and salaries management system database. The SACE manager for legal and ethical affairs testified at the South African Human Rights Commission (SAHRC) hearing held in Limpopo in May 2019 that the scope of the Act does not allow SACE to access educators' information on the DBE database. As a result, unregistered educators continue to exist in contravention of the Act. Educators move from one province to another or private schools and continue teaching.⁸⁰⁸ The disjuncture between the DBE and SACE must be remedied. For example, the Limpopo Department of Education attempted to have an educator strike off the roll for ten years before SACE processed the documentation.⁸⁰⁹

Beckmann submits that SACE has little or no effect on the selection processes in terms of recruitment and selection processes.⁸¹⁰ The issue of SACE's failure to conduct proper registration has further implications for fraudulent qualifications. SACE maintains that it is the role of the Department of Education, as the employer, to verify the credibility of an educator's qualifications,⁸¹¹ and according to SASA, this is a

⁸⁰⁵ SACE 'Redefining the Role and Functions of the South African Council for Educators (SACE)' (2011) 2.

⁸⁰⁶ Annual Report 2018/19.

⁸⁰⁷ SACE 'The Role of the South African Council for Educators' (2016) 6.

⁸⁰⁸ Macupe B 'Abusive teachers still slip through the system, council for educators admits' *Mail & Guardian* 24 May 2021.

⁸⁰⁹ Kgosana R 'Educator caught with fake qualifications after 20 years of teaching' *The Citizen* 14 November 2016.

⁸¹⁰ Beckmann (2018) 17.

⁸¹¹ Kgosana *The Citizen* 14 November 2016.

function of the SGB.⁸¹² The discussion will now deal with the functions of the SGB as a stakeholder in the recruitment and selection processes.

5.5.2 The SGB as a stakeholder in the recruitment and selection processes.

SASA Section 20(1)(i) provides for parental involvement in the decision to appoint. This includes the appointment of school principals. According to Beckmann, the power to recommend an appointment by an SGB is regarded as a significant indication of self-governance in a school. It is a further step forward for democracy. Parents serving on the SGB come from different communities.⁸¹³ The discussion that follows will examine whether the decision regarding whom to recommend for appointment to a post will be fair, equitable and rational, irrespective of the differences between communities.

5.5.2.1 SGBs in less affluent communities

According to Beckmann, South Africa's cooperative governance system is new.⁸¹⁴ Adams & Waghid argue that participants in the SGB need to be efficiently trained to understand their functions and roles within the context of democracy. According to their study, such training needed to be improved, especially in poorer communities.⁸¹⁵ In addition, due to the lack of education, poverty, and language barriers, poorer parents are less likely to participate fully in the decision-making processes, resulting in decisions being made according to majority rule.⁸¹⁶ Furthermore, promotion processes within the poorer communities are more likely to be less transparent, and there is a tendency to appoint a pre-approved candidate.⁸¹⁷

According to Wills, schools in poverty-stricken areas are more likely to have less qualified principals in terms of education and experience than those in affluent communities.⁸¹⁸ It is argued that poor socio-economic conditions, the lack of training, lower levels of education, politicisation, and malfeasant officials in both the unions and

⁸¹² SASA section 20.

⁸¹³ Beckmann J 'Legislation on school governors' (2009) 29 *SAJE* 1.

⁸¹⁴ Beckmann (2009) 1.

⁸¹⁵ Adams & Waghid (2005) 30.

⁸¹⁶ Adams & Waghid (2005) 30.

⁸¹⁷ Adams & Waghid (2005) 31.

⁸¹⁸ Wills (2015) 16.

the employer's offices make SGBs in poorer communities more open to corruption and undue influence.⁸¹⁹ Further investigations have shown that the power to appoint educators to promotion posts is met with anger and frustration by many educators.⁸²⁰ Especially those who believe that 'the SGB lacks the expertise and qualifications of the profession and should not be allowed to make decisions that affect their career path when sometimes the parents themselves have not even completed Grade 8'.⁸²¹

The Volmink Report suggests that where the SGB parent component needed to understand the roles of deputy principals or subject heads of departments, they relied heavily on the principal and unions for guidance. In addition, in many cases, principals act as resources in the interview process, leaving the recruitment process vulnerable to manipulation.⁸²² Adams & Waghid suggest a need for impactful capacity building in less affluent areas to ensure that the SGBs function according to democratic precepts.⁸²³

In 2008 the OECD reported on reviewing National Policies for Education in South Africa.⁸²⁴ The Report stated that less privileged areas' SGBs performed poorly due to several issues such as the lack of expertise, experience, time, sustained parental involvement, lack of participation, lower literacy, indirect costs, expertise 'drain' from townships and localised interests leading to undue influence on the appointment.⁸²⁵

According to Beckmann, the education system is failing in South Africa because of the lack of suitably qualified educators.⁸²⁶

In summary, applicants applying for promotion posts at schools in communities lacking education, issues such as poverty and a lack of expertise may not be met with fair decision-making processes. This may result in appointing an underqualified principal in terms of skills, education, and experience instead of the best candidate for the

⁸¹⁹ Volmink (2016) 95.

⁸²⁰ Van Wyk N 'School governing bodies: the experiences of South African educators' (2004) 24(1) *SAJE* 52.

⁸²¹ Van Wyk (2004) 52.

⁸²² Volmink (2016) 82.

⁸²³ Adams & Waghid (2005) 32.

⁸²⁴ OECD 'Reviews of National Policies for Education: South Africa 2008' (2008).

⁸²⁵ OECD (2008) 25.

⁸²⁶ Beckmann (2018) 1.

position. Also, the lack of suitably qualified educators negatively impacts the delivery of quality education.

5.5.2.2 SGBs in affluent communities

Before 1994, unlike township schools, white-dominated schools were involved in appointing educators through school boards, who made the appointment, which was then approved by the state.⁸²⁷ The OECD report in 2008 also noted that in middle-class schools where the SGBs were composed of predominantly white members, they tended to dominate the schools.⁸²⁸ Van Wyk submitted that principals with experience in poorer and more affluent communities indicated that in poorer communities, they could do as they pleased as opposed to more affluent communities, where the SGB members were more knowledgeable of their rights and duties.⁸²⁹ According to Wills, more affluent schools would benefit from the best educators due to the existing inequalities as they have more to offer. This in itself may contribute to the debilitation of schools in other communities.⁸³⁰ In addition, applicants to posts in affluent communities are subjected to stricter criteria and will be treated more fairly. These schools appoint applicants with the best experience and qualifications to ensure that quality principals are appointed, and as such, these schools may perform better than those in poorer communities.⁸³¹

SGBs in more affluent schools consist of parents who are more knowledgeable of legislation and fair procedures. Further, there is more inclination to attract the most suitable person for the position. To this end, applicants for promotion posts in affluent schools may be subjected to stricter criteria to ensure that the school appoints the best person for the principal position. This, in turn, positively impacts the quality of education.

In summation, serious disparities exist in how the different SGBs function. The socio-economic issues mentioned above and the absence of fully functioning governing

⁸²⁷ Beckmann J 'Legislation on school governors' (2009) 29 *SAJE* 6.

⁸²⁸ OECD 'Reviews of National Policies for Education: South Africa 2008' (2008) 25.

⁸²⁹ Van Wyk (2004) 10.

⁸³⁰ Wills (2015) 19.

⁸³¹ Wills (2015) 19.

bodies collectively vitiate the decision-making processes, especially in less affluent areas, threatening the individual's right to fair labour practice and equal treatment. Most authors mentioned above believe there is a recognisable need for capacity building. The state attempted to address the issues of the different levels of skills and capacities in the different communities and the parents that serve on the governing bodies within their respective areas by enacting SASA, section 19.⁸³²

All authorities studied above support the view that there should be some parental engagement regarding appointments. However, SGBs must be effectively capacitated through proper training. This thesis has established that the involvement of the SGB in some poorer, less educated communities may pose a risk to an applicant's right to be treated equally and fairly during the recruitment and selection processes.

5.5.3 The involvement of teacher unions in the recruitment and selection processes

Educators join unions for various reasons. Among those reasons are protection against arbitrary treatment and violation of the rights afforded to the educator by the state as the employer and for better conditions of service and including benefits.⁸³³ Regarding recruitment and selection, the role of union representatives is to act as observers.⁸³⁴ This is only sometimes the case. The discussion below will examine some reasons why union involvement in the recruitment processes does not always provide for the right to equality and fair labour practices when applying for promotions.

According to Beckmann, union involvement is one of the major causes for appointing unsuitably qualified educators.⁸³⁵ First, union representatives on interview committees actively interfere with recruitment.⁸³⁶ According to Zengele, observers act outside the scope of their duties because DOE fails to train SGBs adequately, and as a result, they depend on the union to guide the recruitment processes.⁸³⁷ Furthermore, the takeover

⁸³² Van Wyk (2004) 2.

⁸³³ Mafisa L 'The role of teacher unions in education with specific reference to South Africa.' (2017) 7 (4) *The Online Journal of New Horizons in Education* 78.

⁸³⁴ PAM 2016 section B.5.4.3.4.

⁸³⁵ Beckmann JL 'Competent educators in every class: The law and the provision of educators' (2018) 43(2) *Journal for Juridical Science* 4.

⁸³⁶ Volmink (2016) 25.

⁸³⁷ Zengele T 'Have Teacher Unions taken over the South African education system? Redeployment in Progress' (2013) West East International Academic Conference Proceedings Istanbul, Turkey 90.

by the unions often results in the appointment of unsuitable qualified educators and discriminates against those suitably qualified unsuccessful applicants.⁸³⁸

Secondly, the undue influence of unions on decision-makers and the 'buying and selling of posts',⁸³⁹ has contributed to corruption in education.⁸⁴⁰ Examples are in the Volmink Report, where the committee outlines how posts are sold.⁸⁴¹ The educator wanting a particular position approaches the union official concerned and pays R30 000 rand to the official. The union official then unduly influences the SGB and the department officials to ensure the candidate gets the position.⁸⁴² Once the interviews are concluded, the candidate that has paid for the post gets the position. The practice is more common in areas where unions are dominant and are feared by the SGB and departmental officials.⁸⁴³ Especially in areas where officials and SGBs need help implementing legislation and policies.⁸⁴⁴ The study by Zengele found that there are many members of the SGBs who need to be more knowledgeable of the processes hand over the power to lead the recruitment processes to the unions.⁸⁴⁵

Thirdly, unions like SADTU are politically aligned with the African National Congress (ANC), a national political party, as opposed to other unions, such as NAPTOSA, which has the second-highest number of members in the education sector.⁸⁴⁶ This alignment between SADTU and the ANC limits the union's political will to effect policy changes or act in its members' best interest.⁸⁴⁷ According to Zengele, the political relationship between SADTU and the ANC has been one of the main contributors to nepotism in appointments.⁸⁴⁸ Furthermore, educators join SADTU because they believe they are more likely to be promoted.⁸⁴⁹

⁸³⁸ Zengele (2013) 90.

⁸³⁹ Beckmann (2018) 5.

⁸⁴⁰ Mafisa (2017) 75.

⁸⁴¹ Volmink (2016) 9.

⁸⁴² Volmink (2016) 9.

⁸⁴³ Volmink (2016) 18.

⁸⁴⁴ Volmink (2016) 17.

⁸⁴⁵ Zengele (2013) 91.

⁸⁴⁶ Govender L 'Teacher unions' participation in policy-making: a South African case study' (2015) 45 (2) *Compare: A Journal of Comparative and International Education* 199.

⁸⁴⁷ Govender (2015) 199.

⁸⁴⁸ Volmink (2016) 18.

⁸⁴⁹ Zengele (2013) 88.

Fourthly, whereas collective bargaining could be a helpful tool to develop the procedures involved in recruitment and selection, the PAM 2016 contains the same recruitment and selection procedures as those agreed to in Resolution 11 in 1998.⁸⁵⁰ However, in terms of improving and developing policies that will ultimately provide educators with the right to fair labour practice in terms of recruitment and selection, a union's strength to agree and change policy depends on the vote weight of that union. In education, SADTU has the most membership and currently has 68% of the vote weights in the ELRC.⁸⁵¹ According to Liwane, policies should be created at the bargaining council to limit personal gain and ensure that quality educators are employed.⁸⁵² Therefore, it stands to reason that SADTU, the union with the most seats in the bargaining council, has been most implicated in promoting corruption. Further, it is politically aligned with the ANC. SADTU has failed to act in the members' best interest by ensuring that Resolution 5 of 1998 is updated to curb the widespread irregular appointments. The Volmink Report, in 2016, provided sufficient evidence of irregular appointments in education and recommended policy reforms.

However, there has yet to be any reform to the current legislation and policy governing education recruitment and selection processes. In addition, according to media reports, the current leadership of SADTU has admitted that there are officials in the union who sell posts together with officials in the DOE.⁸⁵³

Lastly is the threat of collusion between union officials and the officials at SACE and the Department of education. The Volmink Report found that SADTU has captured the Department of Education in Northwest, Eastern Cape, Kwa-Zulu Natal, and Limpopo province, as opposed to Western Cape, where there is a balance between the different teacher unions and therefore less undue influence by SADTU.⁸⁵⁴ According to Zengele, many SADTU members occupy management positions in the DOE. These positions include those overseeing recruitment and selection.⁸⁵⁵

⁸⁵⁰ PAM 2016 B.5.

⁸⁵¹ ELRC Collective Agreement 1 of 2022 Annexure A 3.

⁸⁵² Liwane (2017) 274

⁸⁵³ Bhengu S 'SADTU clamps down on KZN 'principal posts-for-cash' syndicate' *East Coast Radio News* 24 August 2022.

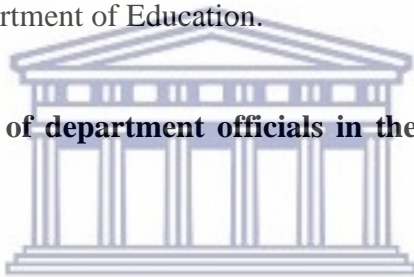
⁸⁵⁴ Volmink (2016) 18.

⁸⁵⁵ Zengele (2013) 89.

The study by Zengele found that some principals have been appointed without proper qualifications because of nepotism, and those educators with master's and doctoral degrees are left in the classroom to teach.⁸⁵⁶ This has resulted in many suitably qualified educators with the best interest of the learners at heart resigning from the profession.⁸⁵⁷ In addition, there are instances where a suitably qualified person is not appointed because the union still needs to ratify the appointment.⁸⁵⁸

SADTU is one of the leading causes of corruption and undue influence in filling promotion posts. Underqualified educators aligned to SADTU or willing to pay for a post are appointed, preventing suitably qualified educators from filling a managerial position. Furthermore, corrupt union officials have captured DOE. To this end, corrupt union officials unduly influence the decision-making powers of the SGBs, and the DOE officials involved in the recruitment. The discussion will now examine the implications for an applicant for promotion posts and the problems associated with the official's involvement in the Department of Education.

5.5.4 The involvement of department officials in the recruitment and selection processes



The Volmink Report found that undue influence was prevalent among union officials, applicants and officials within the circuit and district offices of the DOE itself.⁸⁵⁹ In 2022 a media report confirmed that this practice is ongoing.⁸⁶⁰

A significant concern is that senior managers are allowed to join trade unions. As such, objectivity and loyalty to the union involved come into question when it comes to making appointments, threatening the right to equality and fair labour practice.⁸⁶¹ This may result in a conflict of interest. The Volmink Report submits that the Deputy Directors-Generals in the DBE are SADTU members who attend SADTU meetings.⁸⁶²

⁸⁵⁶ Zengele (2013) 90.

⁸⁵⁷ Zengele (2013) 90.

⁸⁵⁸ Zengele (2013) 92.

⁸⁵⁹ Volmink (2016) 23.

⁸⁶⁰ Bhengu S 'SADTU clamps down on KZN 'principal posts-for-cash' syndicate' *East Coast Radio News* 24 August 2022.

⁸⁶¹ Volmink (2016) 25.

⁸⁶² Liwane (2017) 274.

The Report cited cadre deployment,⁸⁶³ as one of the reasons that fuel corruption and educators' lack of respect for managers, who are appointed because of being affiliated with SADTU⁸⁶⁴ further negatively impacting the right to equality and fair labour practices.

Liwane's study confirmed that many leadership positions in the DOE are held by SADTU members, resulting in educators becoming disillusioned because, often, promotion positions are given by SADTU officials, who are primarily absent from class.⁸⁶⁵ For example, the Volmink Report alleges that SADTU determines who the HOD of education will be and how long the incumbent will remain in the position.⁸⁶⁶ Further, the District Directors admitted that fear, intimidation, and threats by SADTU were some of the reasons why there was undue influence in the recruitment and selection processes.⁸⁶⁷

5.5.5 The impact of the involvement of so many stakeholders in the promotion processes

The role of the principal is an important one. By the employer's summation, the role requires a reputable and professional individual who exhibits strong strategic and operational administration qualities.⁸⁶⁸ Further, the principal must understand the broader education landscape and thoroughly understand the laws and policies governing the country and the sector, accompanied by an impetus that will drive, implement, and monitor those laws and policies. This expertise requires a highly functional individual operating within the boundaries of fairness, equity, transparency, and accountability.⁸⁶⁹

⁸⁶³ Volmink (2016) 26.

⁸⁶⁴ Liwane (2017) 274.

⁸⁶⁵ Liwane (2017) 125.

⁸⁶⁶ Volmink (2016) 23.

⁸⁶⁷ Volmink (2016) 93.

⁸⁶⁸ Department of Basic Education 'The Importance of Principals'
<https://www.education.gov.za/Informationfor/Principals.aspx> (accessed 13 August 2021).

⁸⁶⁹ Department of Basic Education 'The Importance of Principals'
<https://www.education.gov.za/Informationfor/Principals.aspx> (accessed 13 August 2021).

According to Rossouw & Liwane, educators cannot practice their profession freely because the stakeholders involved do not follow the prescripts of the law.⁸⁷⁰ The importance of a principal's position and the cooperative system of governance as prescribed by SASA means that there must be an understanding between all the decision-makers of the attributes required for the position before an appointment is made. The study by Adams & Waghid revealed that this is often not the case and that principals themselves need to gain the required knowledge of laws and policies.⁸⁷¹

Further, Stodd J argues that there are disparities in society; therefore, culture, environment and other socio-economic factors or the lack of knowledge or information will influence the individual's notions of fairness.⁸⁷² Research has shown that although the HOD makes the appointment, most of the processes are controlled by the SGB, which may not be au fait with the education environment.⁸⁷³ The problem is further exacerbated by the involvement of unions, who have captured most of the officials at the DOE and unduly influence decision-makers such as the SGB.⁸⁷⁴

In addition, according to a report released by Corruption Watch in August 2022, corruption within the context of recruitment and selection in schools accounts for twelve per cent of the corruption found in public education. These acts include bribery, favouritism, nepotism and sex for jobs.⁸⁷⁵ Therefore indicating that currently, the education sector still needs to manage to circumvent the scourge of corruption surrounding recruitment and selection in education.

In the *Minister of Finance and Other v Van Heerden* Moseneke J held that ‘the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance’.⁸⁷⁶ Therefore,

⁸⁷⁰ Rossouw & Liwane ‘Structure and agency: Clash or complement towards quality public education within the South African legislative framework?’ (2019) 39 (4) *SAJE* 6.

⁸⁷¹ Adams & Waghid (2005) 29.

⁸⁷² Stodd J ‘Framework for Fairness: A model for fair decision making in business’ <https://julianstodd.wordpress.com/2014/10/22/framework-for-fairness-a-model-for-fair-decision-making-in-business/> (accessed 19 June 2021).

⁸⁷³ See 5.2 above.

⁸⁷⁴ See 5.3 above.

⁸⁷⁵ Corruption Watch ‘Sound-the-Alarm-Sectoral-Report-Education’ corruption in the education sector’ https://www.corruptionwatch.org.za/wp-content/uploads/2022/08/Sound-the-Alarm-Sectoral-Report-Education_Aug2022.pdf (accessed 27 August 2022).

⁸⁷⁶ *Minister of Finance and Other v Van Heerden* (CCT 63/03) [2004] ZACC 3 para 22.

the legislation governing the promotion process must ensure that all stakeholders observe and practise the right to equality, fair labour practice, and the right to a fair remedy. This thesis argues that this is not always the case in public education.

5.6 CONCLUSION

Chapter 5 examined the implementation of the primary and quasi-legislation by the various stakeholders involved in the recruitment and selection processes to determine whether these processes promote fair decision-making in appointment to promotion posts and, if so, to what extent.

The research confirmed that the PAM 2016 and the applicable collective agreements allow for many inconsistencies and uncertainties. Corrupt practices, such as nepotism, favouritism and sex for jobs, are among the most prevalent reasons why the current legislation surrounding appointments in education does not promote fair decision-making. There are no clear guidelines regarding the roles of the stakeholders involved in the recruitment processes, the composition of the interview committee, how the posts should be advertised, the establishment of criteria, the scoring, and the rating of a candidate. The problem is exacerbated by the failure of stakeholders to respect and uphold these rights, compromising the right to substantive and procedural fairness and negatively impacting the decision-making processes. The impact of so many stakeholders involved in promotion processes suggests that educators wanting to apply for promotion will not be treated the same or even similar to applicants in other sectors of the state because of the disjuncture between those involved in the appointment processes in other sectors and those involved in the education sector.

The Chapter also examined the remedies available to an aggrieved party. One of the areas of concern is that clerks within DBE deal with grievance procedures. They are not only affiliated with unions but also may need more skills and knowledge to make determinations based on substantive and procedural fairness. Although the aggrieved party may have the right to lodge a dispute after the grievance process, several issues arise in this regard. The burden on the unsuccessful applicant to prove that he/she is the best candidate of all the applicants without having the CVs or knowledge of who

applied is almost impossible and unfair. In addition, review procedures are costly, add further delays, vitiate the applicant's right to a speedy resolution and are often abused by recalcitrant employers.

In light of the above, the thesis has established that the primary and subordinate legislation involved in public education's recruitment and selection processes do consistently not promote fair decision-making.



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CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 INTRODUCTION

This chapter aims to highlight the research findings, summarise the issues identified in examining the legislation and procedures in the recruitment processes governing promotions in public education, and provide recommendations.

6.2 SUMMARY AND FINDINGS

Chapter Two attempted to answer the question about the international values shaping the right to fair labour practices. The chapter focussed on human rights and labour standards governing the promotion of fair decision-making when making appointments as envisaged by the ILO and UNESCO. This thesis established that the right to fair labour practices, equality, an appropriate remedy and collective bargaining are fundamental principles of international law and further provide the framework for domestic legislation in South Africa as a member of the UN and the ILO.⁸⁷⁷

Chapter three attempted to answer whether the national legislative framework provides the right to equality, fair labour practice and a fair remedy. It was established that the Constitution affords all persons the right to equality and prohibits discrimination.⁸⁷⁸

The Constitution also provides for fair labour relations and the right to a fair remedy. The Constitution directs the legislator to flesh out these rights by enacting legislation. To this end, the LRA, the EEA, and the BCEA were enacted. Further to this, the LRA provides the framework for collective bargaining. This part of the thesis established that the national legislation does make provisions for the right to equality, the right to fair labour practice and the right to a remedy.

⁸⁷⁷ See 2.6. above.

⁸⁷⁸ See 3.2.1.1. above.

Chapter Four attempted to examine whether the primary legislation promotes fairness and equality in decision-making and to what extent it does so. Chapter four focussed on the sections dealing with appointments under the SACE Act, SASSA, the Educators Act, and the EEA. These acts confer the power to appoint the HOD of education in the province, subject to the recommendations made by the SGB. The unions act as observers to ensure that all interviewees are treated fairly. Regarding the Educators Act, section 6, appointments are made subject to the LRA or any collective agreements concluded by the ELRC, the bargaining council for educators.⁸⁷⁹ This thesis established that there is no requirement for an SGB, responsible for the more significant part of the recruitment processes, to have any skills and knowledge of the education sector or important positions such as school principals. The legislation must consider the disparities within the different communities, or the levels of education and integrity required to ensure that applicants for promotions are met with fair and rational decisions.

Chapter Five attempted to examine whether implementing the primary legislation when read together with the quasi-legislation, promotes fairness and equality in decision-making. In addition, if so, the extent to which it does so. To this end, the chapter assessed the provisions of the primary and quasi-legislation and assessed the implementation thereof. The enabling legislation and the PAM 2016 must provide proper guidance and directions. This issue is further expounded by the stakeholders involved. The shortcomings of the stakeholders involved in the selection and recruitment processes. These shortcomings included the need for more skills and knowledge of SGBs in school functionality, corruption among DOE officials, and the inability of SACE to monitor and regulate the profession. As a result, stakeholders are at the mercy of union representatives. These factors do not guarantee an applicant's promotion right to equality, fair labour practice and fair decisions.

6.3 RECOMMENDATIONS

RECOMMENDATION ONE: THE SACE ACT

⁸⁷⁹ See 4.3. above.

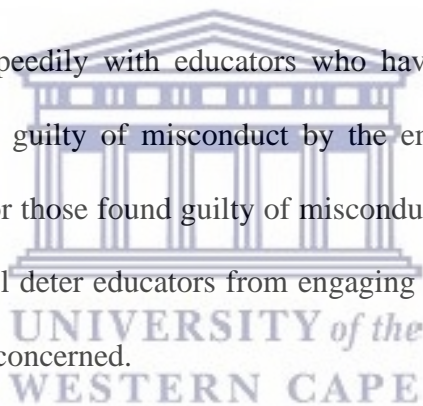
This thesis submits that SACE remains plagued by many factors that prevent the body from fulfilling proper control over the professionalism of educators. This problem is exacerbated by the disjuncture between the professional body and the DOE as the employer.

Recommendation one proposes that:

First, the SACE Act and SASA be amended to remedy the disjuncture between the SACE, the ELRC and DOE. To this end, creating a joint database will ensure that the records of the DOE, the ELRC and SACE are updated and aligned. In addition, the database may then be used to verify the CV of the applicants. Furthermore, the verification of the CVs of the applicants can be taken away from the SGB and be done by the SACE and the DOE.

Secondly, SACE officials should be discouraged from joining teacher unions to prevent a conflict of interest.

Thirdly, SACE deals speedily with educators who have transgressed the Code of Conduct or been found guilty of misconduct by the employer. The impact is that unregistered educators or those found guilty of misconduct can be dealt with speedily and efficiently. This will deter educators from engaging in fraudulent activities in so far as appointments are concerned.



RECOMMENDATION TWO: THE SASA AND THE EDUCATORS ACT

SASA section 20(1)(h) and the Educators Act section 6(3) make provision for the inclusion of the SGB in the recruitment and selection processes of educators. These sections must be amended to provide for independent panels to conduct interviews in so far as the school principal is concerned.

Recommendation two proposes that SASA and the Educators Act must be amended as follows:

SASA section 20(1)(h) and the Educators Act section 6(3) must remove the powers of the SGB to conduct the interview processes for the principal posts.

a) Beckmann suggests that the SGB and the principal are in the best position to determine the criteria for a post.⁸⁸⁰ This research recommends that the power of the SGB to determine the criteria for the vacancy of the principals' post be removed and that such power is conferred on the school management team instead.

b) Volmink proposes that the SGB act in an advisory capacity.⁸⁸¹ This thesis proposes that the powers of the SGB to control the recruitment and selection of principals to promotion posts must be removed. This research proposes that one member of the SGB be elected as an observer on the interview committee to represent the interests of the learners, parents, and communities.

c) Zengele proposes that recruitment companies do recruitment and selection processes.⁸⁸² However, according to Rush & Zingale, when the state transfer authority to non-public organisations, the citizens risk losing their constitutional rights and the right to hold those organisations liable for prejudices suffered.⁸⁸³ It is submitted that leaving the recruitment and selection processes in recruitment companies has the potential for corruption. This research established that an interview committee must know about school functionality and the curriculum when appointing a principal. Therefore, proposes that SASA and the Educators Act make provision for recruitment and selection by an independent panel of experts in the field of education. Panels may consist of principals who have been in the position for a reasonable period and have successfully run a school, preferably from districts outside the district where a post is advertised. In addition, the panel must include a district official, one SGB member and one representative from each union.

RECOMMENDATION THREE: PROCEDURES AND PROCESSES

Recommendation three proposes that unions and employers formulate new, more comprehensive collective agreements through collective bargaining, deal with the

⁸⁸⁰ Beckmann (2009) 181.

⁸⁸¹ Volmink (2016) 23.

⁸⁸² Zengele (2013) 93.

⁸⁸³ Rush L & Zingale N 'Retaining public value and public law value in outsourcing' (2015) 18 (1) *International Journal of organisation theory and behaviour* 105.

current shortcomings of selection processes, and ensure fair and rational decision-making. In so doing, update the PAM 2016. In this regard, the following recommendations are submitted:

- a) Develop a standard set of guidelines, eradicate the need for stakeholders involved in the recruitment processes, and rely on unions or educators for guidance.⁸⁸⁴
- b) To limit corruption or nepotism, it is submitted that policies must be strictly adhered to, and deviations must not be allowed.⁸⁸⁵
- c) Develop different, more secure modes of receiving applications. In some provinces, the current mode of placing applications in a box at the DOE makes those applications vulnerable to theft or removal by third parties. It is submitted that online applications are more secure, and candidates can receive immediate feedback as to whether the application has been successfully submitted. Applications should be made online to reduce interference and loss of CVs.⁸⁸⁶
- d) There are no rules regarding using cell phones and laptops during the interview process. Using these devices during the interview poses the risk that questions could easily be leaked.⁸⁸⁷ To protect the confidentiality of the questions being asked in the interview process, the guidelines must include banning the use of technology such as cell phones and laptops or any electronic device that allows for contact with parties outside during the interview process.
- e) In keeping with international labour standards, advancement and promotion should be based on an objective assessment of an educator's qualifications⁸⁸⁸ and senior positions should, as far as possible, be given to experienced applicants.⁸⁸⁹ This thesis argues that level one educators should not be eligible to apply for the principal's post.
- f) Principals must be trained to be managers. This training could take the form of a compulsory specialised training program designed especially for school

⁸⁸⁴ See 5.5.2.1 above.

⁸⁸⁵ See 5.4.2 above.

⁸⁸⁶ See 5.3.2.5 above.

⁸⁸⁷ See 5.3.3.2 above.

⁸⁸⁸ Principle 44.

⁸⁸⁹ Principle 43.

managers and further receive psychometric testing before the appointment is made.⁸⁹⁰

- g) Where there are allegations of unfair labour practices in recruitment, complainants must have access to effective grievances to address alleged abuses and fraudulent practices in recruitment.⁸⁹¹ In education, grievances are done by officials at DOE who sometimes need to gain the necessary knowledge of the applicable legislation, are unprofessional, or are subject to undue influence by unions and tend to make hasty decisions that may lead to disputes.⁸⁹² This thesis submits that grievances must be dealt with by an independent panel with an educational background and knowledge of international law, national legislation and primary legislation governing the appointments.

RECOMMENDATION FOUR: TEACHER UNIONS

SACE and DOE officials involved in recruitment and selection can join the teacher union. The involvement of these officials may amount to a conflict of interest.

Recommendation four proposes:

- a) DOE and SACE officials are not employed in terms of the Educators Act and should not be allowed to join educator unions. To this end, public officials may join other unions in the PSCBC.
- b) All stakeholders participating in the recruitment and selection processes must be appropriately trained concerning the powers and functions of all participants.

RECOMMENDATION FIVE: REMEDIES

The research established that the current rules surrounding disputes at the ELRC do not always provide a speedy and fair resolution for aggrieved applicants. Review procedures are costly and lengthy and add to the delay of a speedy resolution.

Recommendation five proposes the following changes to the current procedure to be considered:

⁸⁹⁰ See 5.2. above.

⁸⁹¹ Guideline 8.

⁸⁹² Beckmann & Prinsloo (2015) 4.

a) Where an unsuccessful applicant has been selected as part of the top five candidates to be interviewed, that applicant should not have to prove that s/he is better than all those candidates that have applied for the post. The unsuccessful applicant has been sifted and shortlisted is already sufficient evidence that the applicant is better than the applicants who did not make the top five list. The unsuccessful applicant should only have to prove that s/he is the better candidate than the appointed applicant.

b) All parties who participated in the recruitment and selection processes must be held accountable for decisions that were taken.

c) In terms of review, research by Benjamin has proven that review is costly and causes delays. To this end, this study agrees with the recommendations made by Benjamin that the LRA be amended to make provision for: the CCMA to enforce its awards, that a committee must be established to oversee awards, that strict sanctions be imposed on employers who use a review as a delay tactic, and that employee is granted assistance with enforcing awards.⁸⁹³ Recommendation five proposes that the same powers be granted to ELRC.

6.4. CONCLUSION

South Africa is constitutionally bound to apply international labour standards. The right of an applicant or an employee to be treated fairly during the promotion process is a constitutional guarantee. Further, all recruitment procedures must respect and apply the right to equality, freedom and human dignity. Research has shown that this is not always the case when applying for promotions in posts in public education.

In light of the above, this thesis has established that the legislation and procedures governing the promotion processes in public education do not consistently promote fair and rational decision-making and deprive an applicant of the right to equality, fair labour practice and a right to a fair remedy. In doing so, the main research question has been answered.

⁸⁹³ Benjamin (2009) 48.

Promoting educators to principal posts needs effective implementation, interpretation and application of the recruitment, selection, and appointment processes. There is a need for clear policy, training, and education to guide the processes involved in eradicating the widespread number of irregular appointments and unfair labour practices concerning appointments in education.



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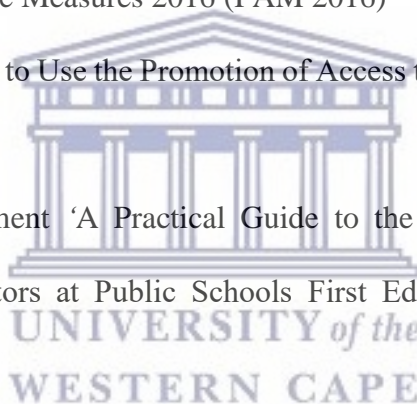
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