

Employer tolerance with educator misconduct versus learners' rights

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The disciplinary aspects in labour and education legislation have moved away from a punitive approach to one that can be called progressive discipline. A corrective approach has been adopted by employers, according to which efforts are made to correct employees' behaviour through a system of graduated disciplinary measures, such as counselling and warnings. Based on the Code of Good Practice in the Labour Relations Act 66 of 1995, the Employment of Educators Act 76 of 1998 includes detailed guidelines to principals and departmental officials who are required to conduct investigations in cases of alleged misconduct. To ensure fairness in the disciplinary procedure, labour legislation determines that dismissal should be reserved for cases of serious misconduct or repeated offences. The important question, however, is how much tolerance must the employer of an educator show? The constitutional principle, that the best interests of the child are always paramount, must certainly come into play in all matters regarding labour relations in education. How many warnings must the educator receive? How serious must an offence be before the educator can be barred from contact with learners? If continuing acts of misconduct by an educator hamper and even endanger the educational process, serious questions arise regarding whether the disciplinary procedure against an educator is "lawful, reasonable and ... fair". It may be fair towards the employer, but is it fair to the learner? In this article we attempt to weigh the fundamental rights of learners against certain labour rights of educators.

Introduction

The foundation for effective education, which guarantees the learners' best interests' being served at school, is in place because the rights and duties of employers and employees are embedded in common law and in the employment contract. In addition these rights and duties are also enshrined in the Constitution of South Africa (SA, 1996; hereafter Constitution) and general labour legislation. There is no uncertainty as to the labour rights of employers and employees (Pons & Deale, 2001:1 22), or of the employer's right to establish, maintain and enforce discipline in the workplace and the employee's duty to comply and to behave in an appropriate manner (Squelch, 1999:27).

At public schools, principals (fellow employees) act as the representatives of the employer (the HoD or MEC of the specific education department) when disciplinary matters occur. Principals are in fact "quasi employers". The fact that they have been allowed a certain amount of discretion since the Education Laws Amendment Act 53 of 2000 (SA, 2000b) is an indication of the decentralization of decision making in disciplinary matters (Rossouw, 2001:59).

The Labour Relations Act 66 of 1995 (LRA) (SA, 1995a), includes a Code of Good Practice (Schedule 8) regarding cases of alleged misconduct, specifically designed for those persons involved in conducting an investigation. Based on the provisions in the LRA, the Employment of Educators Act 76 of 1998, as amended (SA, 1998b), includes in Schedule 2 detailed guidelines to principals and departmental officials of the correct, fair procedure to be followed in cases of misconduct. This is laudable, as long as the guidelines set out in the Employment of Educators Act 76 of 1998 (SA, 1998b), namely, the Incapacity Code and Procedures for Poor Work Performance and Disciplinary Code and Procedures for Educators, do not restrict the principals' discretion to such a degree that these guidelines infringe on the fundamental rights of the learners. This is what happens when, for instance, the educator's right to strike (SA, 1996: section 23(2)(c)) infringes on the learner's right to education (SA, 1996: section 29(1)). So it is a vital and realistic issue which needs to receive constant attention.

Fortunately, the Employment of Educators Act 76 of 1998 (SA, 1998b) expressly provides for the right to take disciplinary action against educators when necessary. The amended section 18(2) formulates this provision as follows:

If it is alleged that an educator committed misconduct as contemplated

in subsection (1), the employer must institute disciplinary proceedings in accordance with the disciplinary code and procedures contained in Schedule 2.

However, the disciplinary processes in recent labour and education legislation in South Africa have moved away from a punitive approach to one that can be called "progressive discipline". In the LRA as well as the Employment of Educators Act 76 of 1998 (SA, 1998b), a corrective approach has been prescribed to employers, according to which a system of graduated disciplinary measures (art. 3(2) of schedule 8 in LRA) endeavours to correct employees' behaviour. This ensures fair treatment of the educator, who is working under considerable stress in the new dispensation.

In order to determine the desirability of an educator's continued service, when there has been some form of offensive behaviour, a clear distinction must be made between incapacity on the one hand and misconduct on the other. This distinction, however, is not always clear. In practice, certain forms of serious incapacity could be regarded as misconduct.

In this article a closer look is taken at the various disciplinary actions that may be taken so that the unlawful infringement of learners' rights, due to this more lenient approach to employee discipline, can be determined.

Problem statement

There can be no dispute concerning the fairness of labour legislation in determining that the dismissal of an employee should be considered only as a last resort (Squelch, 1999:43), as stipulated in Schedule 8, section 3(3) of the LRA:

Formal procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction is the best and most effective way for an employer to deal with minor violations of work discipline. Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning, or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct and repeated offences.

Although a clear distinction has therefore been made in the latest legislation between forms of serious misconduct and less serious offences, the important questions to be answered are: How much tolerance must an employer exercise in dealing with an educator's offen

ces? When do such offences infringe on the best interests of the child? Therefore,

- How serious must an offence be before the educator can be barred from contact with learners?
- How many warnings must the educator receive?
- Which kind of offence may be excused?
- Which forms of misconduct must lead to the educator's being transferred to a position where no personal contact with learners is possible?
- When is dismissal the only possible sanction?

If continued acts of misconduct by educators hamper or even endanger the educational process, serious questions must be asked regarding the fairness of the progressive disciplinary approach. This fairness would be not towards the educator, but towards the learner. An attempt is made to weigh some fundamental rights of the learners against certain labour rights of educators, and at considering the possibility of limiting those labour rights of educators, as provided for in law.

Focus

The main aspects of labour relations in education and the rights of learners, of importance for this research, are

- incapacity and misconduct;
- the approach to educator discipline; and
- fundamental rights of the child (learner).

The rights of educators regarding the prescribed due process which must be followed by investigators and the variety of possible sanctions will be weighed against the guaranteed fundamental rights of learners, as enshrined in the Constitution (SA, 1996), to :

- respect and protection of their human dignity and worth (section 10);
- bodily and psychological integrity (section 12(2));
- protection from maltreatment, neglect, abuse or degradation (section 28(1)(d));
- having their best interests regarded of paramount importance in every matter concerning them (section 28(3)); and
- education (section 29(1)).

This article will focus on the time scale of possible disciplinary actions to be taken against the educator as employee by the head of the provincial Department of Education (HoD) as the employer. It will, furthermore, endeavour to determine the compatibility of these actions with learners' best interests. The discussion will refer to labour relations in public schools, bearing in mind that educators in public further education and training institutions, public adult basic education centres, and departmental offices are bound by the same legislation.

Grounds for disciplinary action

Employers of educators have to consider the paramount importance of the learners' best interests whenever educators' offences need to be evaluated. In early 2003 the management of the South African Council of Educators (SACE) adopted the title Code of Professional Ethics in place of Code of Conduct (Kikine, 2003:1). In so doing the management stressed the element of professional as well as ethical conduct that is expected from all educators. According to De Villiers, Wethmar and Van der Bank (2000:13), this Code plays a vital role in encouraging educators to act professionally and show moral integrity. They state that:

- this Code for educators lays down common standards of professional and moral behaviour;
- encourages consistent behaviour;
- undertakes to discipline educators if they do not comply with its rules; and
- focuses on enabling educators to "... act in a proper and becoming way such that their behaviour does not bring the teaching profession into disrepute".

In this regard, Education Minister Asmal (as quoted by De Villiers *et al.*, 2000:48) accused educators of neglecting their professional duties, claiming that the public does not believe they are worthy of the money

the State is paying them.

It is therefore important to take a closer look at the prescribed disciplinary actions in some situations that may lead to dismissal. For the purposes of this article, these are restricted to incapacity due to poor work performance, incapacity due to illness, and misconduct.

Incapacity

Van Kerken (2003:155), mentions that "incompetence and incapacity are not disciplinary issues". Incapacity is, nevertheless, an internationally recognised ground for dismissal, provided that a fair reason exists for the dismissal and a fair procedure has been followed (Christianson, 1998:161). It should, however, be distinguished from misconduct; incapacity is based on grounds where there is normally "no fault" on the side of the employee, which means that the educator is not intentionally or negligently incapable (Squelch, 1999:54). It is especially in cases of incapacity that the principles of progressive discipline should be applied judiciously before dismissal is at all considered. Grogan (2000:165) sounds a warning:

Dismissals for incapacity and the employer's operational requirements arise from circumstances for which the employee is not to blame. It is to be noted, however, that the dividing line between dismissals relating to conduct and dismissals relating to capacity and operational requirements ... may not always be clear.

Whatever the case, the learners' right to education does not allow for incapacity to be prolonged if this does not promote their best interests, as it impacts negatively on the education process. It is therefore important to take cognisance of the fact that there are three types of situation, of which incapacity due to poor work performance is discussed first.

Incapacity due to poor work performance

It should be noted that Van Kerken (2003:155), unlike the LRA, uses two different terms: incompetence: referring to poor work performance, and incapacity, referring to ill health or injury. This could help the principal or employer to differentiate correctly and to follow the correct procedure.

Section 16 of the Employment of Educators Act 76 of 1998 (SA, 1998b) refers as follows to incapable educators:

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

Section 1(2) of Schedule 1 provides the key to the matter. The employer (or the representative who is investigating the case) must assess the degree of incapacity of the educator. He/she must consider

- the impact that the incapacity has on the work to be done at the school;
- the extent to which the educator fails to meet the required performance standards;
- the extent to which the educator lacks the skills to perform according to the job description;
- the nature of the educator's work and responsibilities; and
- the circumstances of the educator.

The interest of all stakeholders should be taken into consideration when considering these aspects. The first four factors refer to the school and the educator's responsibilities, and fairness and balance are built into the system by also considering the circumstances of the educator. It can be assumed here that the best interests of the learners are synonymous with the best interest of the school.

A number of reasons for poor work performance can be identified, which must all also have an influence on the decision taken by the employer, as indicated by Grogan (2000:167). In the first place "it is important to distinguish between incapacity that arises from misconduct or wilful negligence, and incapacity caused by circumstances beyond the employee's control".

There is normally a direct link between the amount of experience of the employee and the capacity demonstrated. Inexperienced educators should therefore normally be judged with more tolerance.

An example of incapacity, which is largely applicable to the education sphere, is technological change. Some educators may be quite experienced in years, but may find themselves incapable of performing as effectively as a number of years ago. This can be the result of not keeping up with the rapid technological changes either in their subject field or in the school setting. In a certain sense, their younger, "less experienced" colleagues may have an advantage over them, which must be kept in mind when assessing poor work performance.

The incompatibility factor, resulting in inability of educators to perform their duties satisfactorily, may also be the result of redeployment, affirmative action or being under qualified. An educator may be quite effective in one school, just to be found "unsuitable" for a similar post at another. He/she may simply not adjust to a new staff or learners from another cultural group. Certain governing bodies have been put under pressure by the Education Minister to appoint staff members from other cultural groups (Rademeyer, 2001:1). If not managed properly, such a process of redeployment, affirmative action or being under qualified may result in poor work performance. This will definitely not be in the best interest of the learners, the individual new staff members, or the school. Moreover, education at regional and national level may be affected adversely.

During the investigation into the educator's incapacity, all relevant factors should be considered and the educator must be given ample opportunity to be heard. These factors are protected by the Constitution, as well as common law principles and national legislation (Joubert & Prinsloo, 2000:164-166). After this evaluation, considering all relevant factors and giving the educator ample opportunity to be heard, realistic time frames must be determined for the educator to meet the required standards of performance after appropriate training or counselling (section 2(4)). It is important to note that, if the educator fails or refuses to follow a programme of counselling and training, the employer may consider taking disciplinary action against the educator because what started off as an instance of incapacity has become a form of misconduct (section 2(5)(a)).

If, after having completed the programme of counselling and training, the educator still does not meet the required performance standards, the employer may:

- confer with the educator and provide further training or counselling, or
- transfer, demote or dismiss the educator.

Since all of these sanctions will have an effect on the learners who are in close contact with the educator, it stands to reason that the best interests of the learners should be of paramount importance throughout.

It is therefore disconcerting to hear how "extremely difficult" it is "to achieve the dismissal of any educator" (as the Labour Relations Officer informed school representatives at a workshop on The Process for the Filling of Vacancies in Vereeniging, Gauteng, 15 March 2003). The information was based on Resolution 13 of 1995 of the Education Labour Relations Council (SA, 1995b). If this is really so, progressive discipline will have been extended too far and will infringe on the learners' right to education.

Incapacity due to ill health or injury

Section 12 of the Employment of Educators Act 76 of 1998 (SA, 1998b) refers to Schedule 1 (s 3(1)), where two possibilities regarding ill health/injury are mentioned: the employer may initiate an investigation, or the employee may apply for a discharge. Important aspects of the subsequent process are the following:

- A registered medical practitioner must examine the educator and file a confidential report.
- This report must give an indication of the nature, extent and permanency of the educator's incapacity.
- Alternative employment may be considered, or the possible adap-

tation of the duties or work circumstances of the educator. Dismissal must be seen as a last resort.

- The abuse of alcohol or drugs is specifically mentioned in section 10 of Schedule 1, and a formal rehabilitation programme is to be followed at the expense of the educator.

This last aspect regarding alcohol or drugs closely relates to one of the serious forms of misconduct as specified in section 18, and might be seen as a crucial point in the application of progressive discipline. The best interest of the learner must be weighed seriously against the interest of the educator involved. According to Van Heerden (1999:526), the interests of the minor (in this case the learner) means the welfare of the learner and the term welfare must be taken in its widest sense. In the case of older children, their wishes in the matter cannot be ignored.

The specified procedure can be seen as contradictory: on the one hand, counselling and rehabilitation must be considered first before disciplinary proceedings may be initiated (Schedule 1(11)). The suggested counselling and rehabilitation (Schedule 1) may be regarded as the continued employment of the educator in his or her post, although the last possible sanction mentioned specifies: "terminate the employment of the educator, if the behaviour is repetitive" (Schedule 1, section 9(d)). This approach is, on the other hand, contradictory to the fact that alcohol and drug abuse are stipulated as being serious offences. Not only causing a learner to possess or abuse drugs or alcohol (section 17(f)), but even the illegal possession of an intoxicating, illegal or stupefying substance by an educator is regarded as serious misconduct for which an educator must be dismissed, if found guilty (section 17(e)).

The seriousness of this aspect may definitely warrant the limitation of the right of an educator to undergo a progressive disciplinary process. The best interests of the learners should be of paramount importance, and the employer should not wait until the abuse is repeated before suspending the educator. The suggested more tolerant approach towards the time scale of the procedure in Schedule 1 should therefore not be followed in drug or alcohol cases. The employer should be encouraged to implement the approach of Schedule 2(6)(1), as it would be in all other cases of misconduct.

Misconduct

Proper behaviour, based on certain moral, ethical and religious norms, forms the basis of all education (De Villiers *et al.*, 2000:4-14), and when this is not upheld by an educator, he/she will have little more to offer the learner than mere instruction of the subject content. It was Education Minister Kader Asmal who emphasized the need for morality to be reinstated as the "bedrock" of school life (*ibid*:1). Some forms of misconduct not only "set a bad example", but may have direct impact on one or more learners when they become actively involved in the offence. When educators are found guilty of some form of misconduct, learners' fundamental rights are often infringed. These include their rights to inherent dignity, bodily and psychological integrity, protection from maltreatment / neglect / abuse or degradation, having their best interests regarded as of paramount importance, and their right to education.

Nyberg (1990:595) points out that educators cannot avoid inculcating values through their personal words and actions. Every educator must therefore be a role model for young, developing learners, since children learn first and foremost through the example of, *inter alia*, those who have authority over them (De Villiers *et al.*, 2000:13). This becomes evident especially when educators abuse their positions for either financial or personal gain. Numerous allegations of sex related acts of misconduct by educators are also currently being published on a regular basis. The public actions of a teacher, Janine Orderson, for example, made headlines. This was because of her as the editor of the education newspaper *The Teacher* put it "obscene behaviour and cucumber sucking antics" as a contestant on the reality television programme *Big Brother (The Teacher, 2001:1)*.

The LRA describes misconduct in general terms in Schedule 8(4):

Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination.

In contrast to this description, the Employment of Educators Act 76 of 1998 (SA, 1998b) goes much further by stipulating a list of 38 possible offences, ranging from less serious misconduct to those types of serious misconduct, which will inevitably lead to dismissal of the educator, should the person be found guilty.

Less serious misconduct

The types of less serious misconduct listed can be categorised as follows: property and finances, criticism of employer or institution, mis use of position to promote certain interests, poor work performance, improper behaviour, disregarding safety regulations, dishonesty, and refusal of counselling or rehabilitation. For the purpose of this article, only a selection of those that may have the biggest impact on learners' rights is mentioned below. Original numbering in the Act is retained.

Improper behaviour

- (i) fails to carry out a lawful order or routine instruction without just or reasonable cause;
- (q) while on duty, conducts himself or herself in an improper, disgraceful or unacceptable manner;
- (s) incites other personnel to unprocedural and unlawful conduct;
- (t) displays disrespect towards others in the workplace or demonstrates abusive or insolent behaviour;
- (u) intimidates or victimises fellow employees, learners or students;
- (bb) participates in unprocedural, unprotected or unlawful industrial action

Dishonesty

- (z) gives false statements or evidence in the execution of his or her duties;
- (aa) falsifies records or any other documentation;
- (dd) commits a common law or statutory offence;
- (ee) commits an act of dishonesty; or

Poor work

- (j) absents himself or herself from work without a valid reason or permission;

Performance

- (l) performs poorly or inadequately for reasons other than incapacity;
- (o) without authorisation, sleeps on duty;

Safety regulations

- (e) in the course of duty endangers the lives of himself or herself or others by disregarding set safety rules or regulations;
- (y) refuses to obey security regulations;

The moral example set by educators as partners in education is pivotal (De Villiers *et al.*, 2000:12-13):

- Learners cannot be expected to be diligent in their work if the educators are extremely slothful in doing their own work.
- If, for example, educators steal time at work and steal school stationery, learners will be tempted to do the same.
- On the other hand, if the learners observe their educators as being diligent, respectful and fair towards others, and scrupulously honest, their own attitudes and conduct are bound to be influenced by the moral integrity of their educators.

When an educator humiliates or abuses the learner physically or psychologically, he/she can no longer project the image of counsellor and will not be fulfilling his/her "community, citizenship and pastoral role" (Department of Education, 1998a:69). De Villiers *et al.* (2000:35) agree with this line of argument in stating that the learner's attitude towards school can be affected adversely by humiliation and psychological abuse by the educator.

Serious misconduct

Eben Boshoff, Director of Legal Services and Legislation, National Department of Education, stated during a colloquium in 2001 that the forms of serious misconduct as stipulated in the Employment of Edu-

cators Act 76 of 1998 (SA, 1998b) are regarded as more serious than those listed earlier, because they are offences that could seriously harm learners and could cause the educator to abuse his/her position of trust. According to a document with further guidelines to the MEC of each provincial Department, "mitigating circumstances will become irrelevant in such a case". All of these will have a big impact on learners' rights:

Serious Misconduct

- 17.(1) An educator must be dismissed if he or she is found guilty of
- (a) theft, bribery, fraud or an act of corruption in regard to examinations or promotional reports;
 - (b) committing an act of sexual assault on a learner, student or other employee;
 - (c) having a sexual relationship with a learner of the school where he or she is employed;
 - (d) seriously assaulting, with the intention to cause grievous bodily harm to, a learner, student or other employee;
 - (e) illegal possession of an intoxicating, illegal or stupefying substance; or
 - (f) causing a learner or a student to perform any of the acts contemplated in paragraphs (a) to (e).

Not only does the learner's right against maltreatment, neglect, abuse, and degradation impose a duty on private persons as well as on the State to refrain from these forms of treatment, it also requires the State to act positively to prevent abuse, maltreatment, neglect, or degradation. According to Bekink and Brand (2000:188-189) this second obligation requires the State to

- intervene in situations of ongoing maltreatment, abuse, neglect and degradation;
- create legislation and other measures to protect learners from these abusive forms of treatment; and
- ensure the effective enforcement of these measures to protect against abuse, without interfering with the interests of learners in an unwarranted fashion.

Education Minister Asmal launched a scathing attack in September 1999 on educators "who are involved in child abuse" (De Villiers *et al.*, 2000:41). It was pointed out that educators should become part of the effort to provide solutions to sexual offences, instead of being part of the problem.

In terms of s.18 of the Employment of Educators Act 76 of 1998, the following possible disciplinary actions (short of dismissal) may be imposed by the employer:

- (b) a verbal warning;
- (c) a written warning;
- (d) a final written warning;
- (e) a fine not exceeding one month's salary;
- (f) suspension without pay for a period not exceeding three months;
- (g) demotion;
- (h) a combination of the sanctions referred to in paragraphs (a) to (f).

Dismissal, if the nature or extent of the misconduct warrants it, is therefore stipulated as only the last resort.

Conclusion

Since the Constitution came into practice, society has formed the perception that the rights of those suspected (or even found guilty) of misconduct actually outweigh those of the law-abiding or innocent citizens. Numerous rights in the Constitution equally protect the rights of wrongdoers and other citizens. The wheel has however turned, according to the editor of the newspaper *Beeld* (2002:8). In his column, he refers to the decision of the High Court in Cape Town where the rights of a man suspected of two murders were limited when he refused permission for an operation to remove a bullet from his leg. To gather all relevant information and evidence for the court decision, the interest of society outweighed the right of an individual to bodily integrity, as enshrined in section 12 regarding freedom and security of the person,

and the order was given to remove the bullet.

If continuing acts of misconduct, as well as prolonged incapacity or incompetence by educators hamper or even endanger the educational process, serious questions must be asked regarding the progressive approach towards disciplinary procedures against them. If the fundamental rights of learners are weighed against those of the educators as employees, the only conclusion can be that the rights of the learner, being in the most vulnerable position, must be protected. The best interests of learners must indeed be paramount in every matter concerning them, as stipulated in s.28(2) of the Constitution.

Section 36 of the Constitution provides for the limitation of rights, provided that "the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". Many (if not most) forms of misconduct that some educators are accused of, oppose and challenge the ideal of an open and democratic society. In most cases the dignity of the learners, among other rights, is at stake. If the principle of progressive discipline in labour relations is taken too far, children may be left unprotected and irreparable harm done to their lives. The common law principle of the duty of care vested in the educator must be applied by all authorities whose actions have a bearing upon the well being of learners. Once again, the best interests of the learner should be ample justification for the limitation of the rights of some educators.

In terms of labour legislation, if the alleged misconduct is serious, it makes continued employment intolerable. Serious sanctions must then be imposed with immediate effect. Through suspension, educators must be barred from contact with learners, and the disciplinary process must proceed and be concluded in the shortest possible time frame. If warranted, the employer must not hesitate to dismiss an employee who has been found guilty, provided lawful and reasonable procedures were followed.

Without a doubt, WH Auden's wise words should weigh heavily in the evaluation of each instance:

Unless an individual is free to obtain the fullest education with which his society can provide him, he is being injured by society.

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