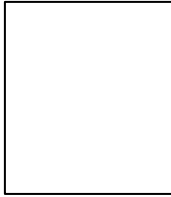
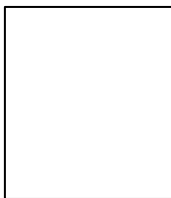


The employment relationship of the public-school educator: A constitutional and legislative overview ¹

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Abstract

The Constitution of the Republic of South Africa of 1996, underlines the importance of social transformation in South Africa and upholds the values of human dignity, equality and freedom. To this effect it provides that good human resource management must be cultivated in the public service and in this regard the government pointed out in its White Article on Human Resource Management in the Public Service (1997) the need for transforming human resource management practices. Since education is such an important vehicle for social transformation, the management and development of human resources in education are vital policy levers in bringing about the 'new South Africa' referred to in the Constitution and the White Article.

Similar to other public-service sectors, the field of education is managed and regulated by a vast and diversified legal framework. In this article the authors explore some of the legal aspects of human resources management and development in education, namely, the employment relationship of the educator teaching at a public school. In examining the relevant legal aspects the focus is on the constitutional and legislative framework, which governs this employment relationship.

¹ For a more comprehensive discussion of human resource management and development in the field of education, see the Canada-South Africa Education Management Program (CSAEMP) *The legislative framework for human resource management and development in the education and training sector* (2000). This research project was undertaken under the auspices of the CSAEMP, a co-operative undertaking of the Government of Canada, represented by the Canadian International Development Agency, the Government of South Africa, represented by the National Department of Education and McGill University, represented by the Faculty of Education. The final document was prepared by J Beckmann, E Bray, WF Foster, S Maile, WJ Smith and J Squelch.

Background

Section 195 of the Constitution of the Republic of South Africa² (Constitution) deals with basic values and principles governing public administration. It provides, among others, that:

Public Administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

...

(b) Efficient, economic and effective use of resources must be promoted.

...

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

The White Article on the Management of Human Resources in the Public Service (1997)³ (White Article) emphasises the need for transforming human resource management practices and achieving national goals in this regard:

A professional and impartial Public Service which is representative of all sections of society is essential for the efficient and effective government and the achievement of South Africa's democratic, economic and social goals. Transforming the Public Service into an instrument capable of fulfilling its role in bringing about the new South Africa depends on many things but, above all, it depends on the commitment and effectiveness of its employees, which in turn depend on the way in which those employees are managed... . Transforming the way human resources are managed is, therefore, the catalyst for the transformation of the Public Service itself.⁴

The above passages from the Constitution and the White Article reflect the importance of human resource management in the transformation of both the government and civil society in South Africa. Given the importance of education in the transformation of civil society, the management and development of education human resources are vital policy levers in bringing about the 'new South Africa' envisaged by the Constitution and the White Article.

Like any public policy endeavour, education is guided by the framework established by law. Understanding that framework is thus a critical first step in unpacking the various elements which make up the field of education human resources management and development. However, the legal framework of education human resource management comprises a vast field of labour law which cannot be explored in one article. Therefore, only some of the legal aspects of the employment relationship of the educator teaching at a public school will be discussed; the primary focus is on the constitutional and legislative provisions governing this employment relationship.

² The Constitution, preceded by the Republic of South Africa Constitution Act 200 of 1993 (also referred to as the interim Constitution).

³ Department of Public Service and Administration. 1997. *White Paper on Human Resource Management in the public service* (1997).

⁴ White Paper at 16.

Introduction

South Africa recently adopted a supreme Constitution, which introduced a system of constitutional democracy. This system replaced the former undemocratic and discriminatory one and also necessitated the transformation of the former education system into a new democratic system which upholds the democratic norms and values of the Constitution.

Education in South Africa takes place at four levels:

- 1 early childhood development – broadly referred to as pre-primary education;⁵
- 2 general education and training – commonly known as school education from Gr 1-9;⁶ further
- 3 education and training – commencing after nine years of compulsory general education and training and preceding higher education;⁷ and
- 4 higher education.⁸

As noted above, education is primarily a public service which the state provides to its people.⁹ The Constitution determines the structures, establishes institutions for education and sets out their functions, for example, it stipulates that 'education' is a functional area of which the legislative competence is shared (concurrently) by both the national and provincial spheres of government.¹⁰ The government is committed to:

... a South Africa in which all people have access to lifelong education and training opportunities, which will in turn contribute towards improving the quality of life and building a peaceful, prosperous and democratic society.¹¹

It is quite clear that education cannot function outside the socio-economic, cultural and political context of the society it serves and this implies that communities, learners, parents, educators and the government are regarded as 'equal' partners in the new democratic education system of South Africa.¹²

⁵ According to the national Department of Education *Policy for early childhood development (ECD)*, the ECD sector theoretically encompasses programmes for children from birth to the age of nine.

⁶ The General Education and Training (GET) level constitutes the first band on the National Qualifications Framework (NQF) in terms of the South African Qualifications Authority Act 58 of 1995 and leads to a General Education and Training Certificate (GETC). It represents nine years of compulsory schools attendance, usually from age seven to 15: see the South African Schools Act 84 of 1996.

⁷ The Further Education and Training (FET) level consists of various learning and training programmes and constitutes band 2 to 4 on the NQF. FET provides holders of a GETC, or equivalent, access to FET opportunities which allow them access to the workplace or higher education: see the Further Education and Training Act 98 of 1998. In terms of the schooling programme, FET consists of Gr 10-12

⁸ The Higher Education and Training (HET) level represents the third and last band (5 to 8) on the NQF and includes all learning programmes which lead to qualifications higher than Gr 12. HET is provided at higher education institution (e.g. universities, technikons and colleges): see the Higher Education Act 101 of 1997.

⁹ Other public services include, health, welfare and housing, usually administered by the various state departments. Private-sector education (e.g. as provided by independent schools, private colleges and some universities) constitutes a small percentage (approx 2-3%) of education in South Africa and is also subject to overall state control (ie through national norms, standards and qualifications laid down by the government).

¹⁰ Higher education, though, remains within the exclusive domain of the national government. See s 104(1) read with Sch 4 of the Constitution.

¹¹ Department of Education *Corporate plan* (Jan 2000 - Dec 2004) 3.

¹² Department of Education *White Paper on the Organisation, Governance and Funding of Schools* (1996) (White Paper 2) and preamble to the South African Schools Act of 1996.

In the following paragraphs the legal aspects of the employment relationship are examined with special emphasis on the employment relationship of an educator teaching at a public school.¹³ A public school is generally referred to as a primary or secondary school maintained largely through public funds and governed mainly by a particular provincial government.¹⁴

The employment relationship

The employment relationship is a legal relationship between two parties: the employer and the employee. In this case, the employee is an educator teaching at a public school in a post established by the responsible provincial education department;¹⁵ the employer of the educator is the relevant provincial education department, more specifically, the Head of Department (HoD) of provincial education.¹⁶ It must be noted that many educators (and non-educators) are appointed at public schools in additional (non-subsidised or 'institutional') posts and in such cases the individual public school (not the HoD) is the employer.¹⁷

Registration with the South African Council for Educators (SACE) is compulsory for all educators, including those teaching at independent schools.¹⁸ All educators are therefore subject to SACE's code of professional ethics and an educator's name may be removed from the register when he/she is found guilty of a breach of the code.¹⁹ Although the educator's

¹³ The employment relationship of educators teaching at independent schools is governed by labour legislation that applies generally in all employment relationships, as discussed in 4 below.

¹⁴ A 'school' is classified as a public school (e.g. ordinary and special) and an independent school (private school) which enrolls learners in one or more grades from grade zero to grade twelve; all public schools are juristic persons with a governing body as functionary: see South African Schools Act ss 1, 15 and 16. School legislation adopted by the national legislature (Parliament) provides national and uniform norms and standards for all schools (including independent schools); provincial school legislation governs the day-to-day administration of all schools in a particular province.

¹⁵ For this purpose, the term 'educator' has to be determined in the context of labour and education legislation. Eg, the Labour Relations Act 66 of 1995 (s 213), the Public Service Act 103 of 1994 (s 1 and 8), the Employment of Educators Act 76 of 1998 (s 1), the South African Schools Act 84 of 1996 (s 1) read with s 1 of the Education Laws Amendment Act 48 of 1999 which changed the description in the former Act. Broadly speaking, an 'educator' may be described as any person who teaches, educates or trains other persons or who provides professional educational services ... at any public school (or, e.g. a FET institution, adult basic education and training [ABET] centre or education department), and who is appointed in a post on any educator establishment (i.e. in a subsidised post).

¹⁶ The definition of 'employer' must be determined in the context of labour and education legislation. Although no definition of 'employer' is found in the Labour Relations Act of 1995 and the Public Service Act of 1994, the latter refers to two employers for public service employees: in the case of employees in the national departments, the Minister responsible for that department; in the case of employees in the provincial departments, the Member of the Executive Committee (MEC) of that province. The Employment of Educators Act of 1998 (s 1 and 3) distinguishes between educators in the service of the national education department (Director-General the employer), and educators in the service of provincial departments of education (HoD the employer); it also makes a further distinction with regard to employment issues generally and salaries and conditions of service. Broadly speaking, the HoD of a relevant provincial education department is regarded as the employer of educators appointed in establishment posts of that department: see CSAEMP Project *op. cit.* 47-48.

¹⁷ E.g. the South African Schools Act of 1996 (s 20(4) and (7)) and the Employment of Educators Act of 1998 (s 3(4)) refer to educators in additional (non-subsidised) posts, their employer (the public school) and the registration of these educators with the South African Council for Educators (SACE). The Further Education and Training Act of 1998 has a similar provision for educators in the employ of further education and training institutions: (s 14(6)).

¹⁸ The South African Council for Educators, Act 31 of 2000, makes provision for the continued existence of SACE, the professional body for educators, its composition and functions. The Act determines that registration with the SACE is compulsory for all educators in the employment of any employer and that no person may employ an educator unless such a person is registered with the SACE: s 21.

¹⁹ The disciplinary committee of SACE must, among other things, ensure that an alleged breach of the code of professional ethics is investigated, ensure a fair hearing in terms of the Act, and recommend a finding and appropriate action to SACE, where necessary: ss 14(2) and 23(1)(c).

professional relationship with SACE must be distinguished from his/her employment relationship with the HoD, these relationships mutually influence each other, for example, an educator who is removed from the SACE register may not be employed as an educator by any employer.²⁰

The employment relationship is a public-law relationship of authority (a vertical relationship) in which the employer exercises authority over the employee (i.e. the employee works under the authority of the employer). Different rights and obligations (duties) flow from this relationship, for example: the employee has rights in terms of the services he/she renders (e.g. a right to remuneration and leave benefits); the employer has rights in terms of the services he/she/it receives (e.g. a right to have work performed as agreed upon); the employee has a right to strike and the employer the right to lock out.

Although the employment relationship is governed mainly by public law, in this case labour law, the individual employment contract between an employer and employee is still based on private law (contractual) principles. However, educator employment relations in South Africa have become increasingly unionised and one may deduce that this employment relationship comprises both individual and collective labour law. An individual relationship deals with the employment contract between the individual employee and employer (based on contractual obligations), without the involvement of union/collective relations. Collective labour relations (based in public law) concern the relationship between one or more employers and a group of employees (e.g. a provincial department of education and public-school educators of the province).²¹ In such a case employer and employee organisations negotiate on behalf of the parties they represent, for example, teachers' unions negotiate with employers on educator terms and conditions of service in the Education Labour Relations Council (ELRC); issues of common interest in the public sector (e.g. remuneration of educators in the broader public service) are negotiated in the general public service bargaining council, the Public Service Coordinating Bargaining Council (PSCBC).²² The individual employment relationship between the educator and the provincial HoD does not entail individual bargaining and its content is determined through the process of collective bargaining. This means that collective bargaining agreements/resolutions are important sources of labour law. In conjunction with the Constitution and labour legislation they form an important source of the educator employment relationship.

To conclude, although educators in the service of the provincial education departments do not have the power to individually negotiate the terms and conditions of their service contracts, their individual employee-employer relationships continue to exist but are influenced and modified by these collective relationships.²³ The content of these individual employee-employer relationships is, with the exception of employees employed at the top of the employee echelon (director and higher), determined by collective bargaining.

²⁰ S 21 of the Act. Similarly, an investigation into alleged misconduct in terms of the employment disciplinary code may lead to an investigation into an alleged breach of the SACE professional code, and vice versa: see Employment of Educators Act of 1998 s 17 (also Education Laws Amendment Bill 48 of 2000 clause 11 and 12) and SACE document Disciplinary powers and procedures (item 6).

²¹ Van Jaarsveld and Van Eck *Kompendium van arbeidsreg* (1998) 25.

²² The Labour Relations Act of 1995 makes provision for collective bargaining, the establishment of appropriate structures and institutions in this regard; it also determines the rules, procedures and mechanisms for collective bargaining and dispute resolution.

²³ See generally CSAEMP Project *op. cit.* 41-48.

Demarcation of the labour law context of educators

South African employment (or labour) law has been drastically changed by the Constitution. It contains an explicit labour relations provision (s 23), which stipulates for example:

- (1) Everyone has the right to fair labour practices.
....
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with s 36(1).

To give effect to this provision, new labour legislation had to be promulgated and this led to the adoption of a consolidated, democratic labour regime for South Africa. Employment relations of educators (including educators in private education) have been incorporated into this broad national labour dispensation, which now prescribes uniform legal norms and standards for labour in South Africa.

The most important legal document for labour relations in South Africa, the supreme Constitution,²⁴ has paved the way for national labour legislation, which normally applies to all (or most) labour relations in South Africa. These statutes are:

- the Labour Relations Act 66 of 1995²⁵
- the Basic Conditions of Employment Act 75 of 1997²⁶
- the Employment Equity Act 55 of 1998²⁷
- the Skills Development Act 97 of 1998²⁸
- the Skills Development Levies Act 9 of 1999²⁹

²⁴ See 4.1 below.

²⁵ This Act provides the basics for a new consolidated and democratic labour regime in South Africa and applies to both the public and private sectors. It aims at advancing economic development, social justice, labour peace and the democratisation of the workplace (s 1). It gives effect to the provisions of the Constitution (mainly labour rights in ch 2) and deals with major topics such as: freedom of association and other protections; collective bargaining; strikes and lock-outs; workplace forums; trade unions and employer organisations; dispute resolutions and unfair dismissal. However, the Act does not apply to the National Defence Force, the National Intelligence Agency, the South African Secret Service and independent contractors (as employees); s 2 and 213.

²⁶ This Act applies generally to all employees and provides for minimum employment standards for both unionised and non-unionised employees. The Act takes precedence over any individual or collective agreement but its provisions do not affect any contractual benefit which is more favourable to the employee than the standards provided for in the Act (s 4 and 5).

²⁷ This Act has primacy over other related legislation and gives effect to the right to equality (s 9 of the Constitution) in the labour field. It applies to both the public and private sectors with the purpose of achieving equity in the workplace by promoting equal opportunity and fair treatment, eliminating unfair discrimination and by implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups (blacks, women, the disabled) in order to ensure their equitable representation in all occupational categories and levels of the workforce (s 2).

²⁸ This Act applies to the public sector and only partly to the private sector. Its purpose is to "... improve the employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education" (s 2(1)(e)). In its preamble the Act provides for an institutional framework "... to devise and implement national, sector and workplace strategies to develop and improve skills of the ... workforce" and for "... learnerships that lead to recognised occupational qualifications ...".

²⁹ This Act is administered by the Department of Labour and provides for the imposition of a skills development levy to be paid by employers; the payment of the levy to the Commissioner for the South African Revenue Service (SARS) and the Sector Education and Training Authority (SETA) and the distribution of these levies; procedures and mechanisms for the recovery of the levy by SETA.

These five labour statutes govern, with a few exceptions, most public- and private-sector employment relations in South Africa. Of particular importance to this discussion is the fact that another statute deals specifically with public-service employment matters, namely, the Public Service Act 103 of 1994.³⁰

The public service consists of three main sectors: general education and training, general public service and protection services.³¹ Although educators are public servants, the provisions of the Public Service Act distinguish between educators and other employees. In s 1 an educator is referred to as "... a teacher or other person performing education functions at a state educational institution" (excluding universities and technikons). The status of the educator in the public service is therefore recognised and legislation has been adopted to specifically govern the employment relations of these educators in the general education and training sector of the public service, for example:

- the South African Schools Act 84 of 1996³²
- the Employment of Educators Act 76 of 1998³³
- the Further Education and Training Act 98 of 1998³⁴

Provisions of the latter three statutes referring to the employment relationship of educators, may even take precedence over labour legislation that generally applies to all employment relationships. To determine whether general labour legislation applies in a specific educator employment relationship and/or whether specific legislation has replaced or supplemented it, is not an easy task.³⁵ Although one should guard against oversimplification and emphasise that each case has to be assessed in terms of its own facts and circumstances, it may be concluded that education legislation dealing specifically with educator employment (e.g. the educator's conditions of service in the Employment of Educators Act of 1998) usually overrides labour legislation that applies generally (e.g. the basic conditions of service in the Basic Conditions of Employment Act of 1997, or conditions of service in the public service in the Public Service Act of 1994).³⁶

³⁰ E.g. this Act provides for the organisation and administration of the public service of the Republic, the regulation of the conditions of employment, terms of office, discipline, retirement and discharge of members of the public service. Regulations have been issued in terms of this Act to set out in detail the conditions of service of public service employees, personnel administration standards (PAS) and the code of conduct for the public service.

³¹ E.g., the general education and training sector deals with employees of that sector (e.g. educators, non-educators, officials in national and provincial education departments) and services rendered at all four levels of formal education (see 2 above); the general public service sector includes services such as health, welfare and housing; protection services include defence, police and security.

³² This Act provides for the organisation, governance and funding of schools in South Africa. However, it also contains important provisions regarding the employment relations of educators appointed at a public school in additional (nonsubsidised or 'institutional') posts.

³³ This Act deals specifically with the employment conditions of educators in public education (e.g. educators in the employ of the provincial HoD). Regulations have been issued in terms of the Act to create and distribute educator posts in the various provinces and to set out the terms and conditions of service of educators (e.g. the Personnel Administration Measures [PAM]).

³⁴ This Act, similarly to the South African Schools Act, provides for the establishment and governance of public further education and training institutions. It also refers to the employment position of educators who are in the employ of these institutions in additional posts.

³⁵ See 4.2 below.

³⁶ E.g. see s 2 of the Public Service Act.

Many other statutes may have an impact on labour law and educator employment relations in particular, but the focus of this discussion is on the relevant provisions of the Constitution and the different statutes listed above.³⁷

As mentioned earlier, educator employment relations have been modified substantially by collective agreements/resolutions negotiated in the educator and training sector and broader public service. These documents are important instruments in the governance of the educator employment relationship and their rules form part of and fit within the framework and sources of collective labour law. In solving employment issues, one would normally have to scrutinise the individual contract of employment, relevant labour legislation and collective agreements simultaneously. In the case of inconsistencies between the various sources, the provisions of relevant collective agreements may prevail especially where such provisions are more favourable to the individual employee.³⁸ For example, the agreement by the PSCBC on allowances and benefits in the public service will be of particular importance to educators involved in the public education and training sector of the public service; the ELRC resolutions on the transfer of educators in terms of operational requirements and the workload of school educators, apply specifically to educators in public schools.³⁹

A policy document (and other public documents) does not, in itself, constitute law (e.g. legislation) but must be seen as an executive document prepared by the government to set out its policy plans and a plan of action for implementation.⁴⁰ Although not legally enforceable by the courts, it reflects the undertaking and commitment by government (and all stakeholders) in this regard.⁴¹ When policy is enacted in law (e.g. in the National Education Policy Act 27 of 1996), it becomes part of the law and thus enforceable by the courts. Policy usually paves the way for legislation⁴² or follows after legislation.

To understand the role and impact of the Constitution, labour legislation and education legislation governing the educator employment relationship, the most important and relevant provisions have to be examined briefly.

³⁷ Other legislation which may impact on labour law include, the National Education Policy Act 27 of 1996, South African Qualifications Authority Act 58 of 1995, Promotion of Administrative Justice Act 3 of 2000 and the Promotion of Access to Information Act 2 of 2000.

³⁸ E.g. the Labour Relations Act of 1995 (s 23(3) and 199) and the Basic Conditions of Employment Act of 1997 (s 49) provide that collective agreements and legislation take precedence over individual contracts of employment; and collective agreements may take precedence over the provisions of the latter Act. See also Basson, Christianson, et al op cit 54-55; Basson, Christianson et al *Essential labour law. Vol 2: Collective labour law* (1998) 18-20.

³⁹ E.g. the Public Service Co-ordinating Bargaining Council, Resolution 3 of 1999 *Agreement on remunerative allowances and benefits*; Education Labour Relations Council, Resolution 5 of 1998 *Transfer of serving educators in terms of operational requirements (1) and The advertising and filling of educator posts (2)*; Education Labour Relations Council, Resolution 7 of 1998 *Workload of educators*.

⁴⁰ E.g. the *White paper on Education and training in a democratic South Africa* (1995) issued by the Department of Education paved the way for a new democratic education system in South Africa; public discussion documents (also referred to as consultative papers or green papers) usually precede white papers.

⁴¹ E.g. the *White Paper on The organisation, governance and funding of schools* (1996) by the Department of Education involved a long consultative public process in which all stakeholders participated. It sets out the proposed policy for a new democratic school system and determines how public schools should be governed.

⁴² E.g. the White Paper dealing with the organisation and funding of schools preceded the South African Schools Bill of 1996, which was published for public comment and later became the South African Schools Act of 1996.

The constitutional context of educator employment

Constitutional supremacy

In the Preamble to the Constitution, the people of South Africa acknowledge the supremacy of the Constitution to -

- establish a society based on democratic values, social justice and fundamental human rights
- lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law
- improve the quality of life of all citizens and free the potential of each person

In s 1 of its Founding Provisions it is stated that the RSA is a democratic state founded on values such as: human dignity, the achievement of equality and advancement of human rights and freedoms, non-racialism and non-sexism, the supremacy of the Constitution and the rule of law. Section 2 states that the "... Constitution is the supreme law of the Republic;" and that "... law or conduct inconsistent with it is invalid." Furthermore, "... obligations imposed by it must be fulfilled." This implies that all labour legislation must be in line with the Constitution and that the conduct and activities of all state governments (e.g. education and labour departments) and other organs of state (e.g. public schools) must comply with its provisions.

The Bill of Rights (ch 2)

Section 7 recognises that the Bill of Rights is "... a cornerstone of democracy in South Africa." It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. Needless to say, these values must also be respected and upheld in the employment field. Section 7 further stipulates that "... the state must respect, protect, promote and fulfil the rights in the Bill of Rights." This provision is very important and has far-reaching consequences for the state (here, the provincial HoD) and the public school (an "organ of state") as employers of public-school educators. But as indicated in s 8(1) and (2), the Bill of Rights does not only bind the state in its relationships with the individual (i.e. the vertical relationship), it also applies to private persons in their private-law (i.e. horizontal) relationships. For labour relations this implies that both parties in the public-sector and private-sector employment relationship are compelled to comply with the provisions of the Bill of Rights.⁴³ Although many of the individual rights embodied in the Bill of Rights have an impact on the employment relationship,⁴⁴ only s 9 (equality), s 23 (labour relations) and s 33 (administrative justice) are discussed briefly.

Section 9 stipulates that every person is equal before the law and has the right to equal protection and benefit of the law. The equality right also protects persons against unfair discrimination by the state on grounds listed in subs (3) and on certain unlisted grounds.⁴⁵ Subsection (2) relates to affirmative action (also called 'positive' discrimination) and is aimed at persons or categories of persons disadvantaged by unfair discrimination. The objective of this

⁴³ This means that the owner of an independent school – the employer of educators – is obliged to uphold the provisions of the Bill of Rights.

⁴⁴ E.g. the right to human dignity (s 10), privacy (s 14) and freedom of expression (s 16) may also be affected in the employment relationship.

⁴⁵ E.g. the state (e.g. the HoD or public school as employer) may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex pregnancy, marital status, age, disability, religion, culture, language. Unfair discrimination on analogous grounds which affect human dignity is also prohibited.

provision is to enable disadvantaged people to achieve the full and equal enjoyment of all their rights and freedoms – including labour rights. Legislation and other measures should be adopted to advance persons or groups previously disadvantaged by unfair discrimination – a good example in the labour field is the adoption of the Employment Equity Act of 1998 and affirmative action employment policies and equity plans which illustrate how affirmative action should be addressed in the labour field. Subsection (4) stipulates that no person (e.g. a private person) may unfairly discriminate against anyone on the grounds listed in subsection (3) and therefore confirms the horizontal application of the equality right, implying that private employers (e.g. owners of independent schools) are prohibited by the Bill of Rights from discriminating unfairly against educators on the grounds listed in subsection (3). Finally, national legislation must be enacted to prevent and prohibit unfair discrimination.⁴⁶

Section 23 of the Bill of Rights provides everyone with a right to fair labour practices (e.g. no person may be dismissed unfairly). It also protects employees and employers in their respective individual and collective labour relationships and provides for the adoption of national legislation to recognise and secure collective labour agreements – the Labour Relations Act of 1995 illustrates this point. Section 33 stipulates that every person is entitled to administrative action that is lawful, reasonable and fair in procedure. For employment relations this implies that the employer (e.g. the HoD, public school and any other employer) in an authoritative position, must act in a lawful, reasonable and procedurally fair manner in the employment relationship (e.g. in disciplining, suspending or dismissing the educator). The educator is also entitled to written reasons when his/her rights have been affected (e.g. when suspended or dismissed). National legislation must be adopted to give effect to this right in all spheres where administrative (employment) action is being exercised.⁴⁷

Rights (including fundamental rights) may be limited by the rights and interests of the other party in a particular relationship, or when the public interest demands it. This usually happens in a situation where competing or conflicting rights have to be weighed up and balanced: for example, the equality right or employment rights of educators could be limited in circumstances where such a limitation would be reasonable and justifiable. Section 36 of the Constitution contains the limitation clause and prescribes the nature of a limitation and factors to be taken into account to effect a 'lawful' limitation of the right. For example, a dismissal certainly affects the educator's right to practise a profession and earn remuneration for his/her work. The act of dismissal (the limitation) must therefore be reasonable and justifiable under the circumstances. In interpreting the employment relationship, s 39 places an obligation on the courts to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

Finally, the Constitution reiterates the importance of international law (in this case, international human rights law and international labour law) as a source of law in the development of our South African law.⁴⁸ South Africa has acceded to a number of international treaties and recognises international labour rights adopted by the International Labour

⁴⁶ E.g. the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 has been promulgated to address unfair discrimination in both the public and private sector generally.

⁴⁷ E.g. the Promotion of Administrative Justice Act 3 of 2000 has been promulgated to give effect to section 33; it also makes provision for judicial review of administrative action. Other legislation has also incorporated the right to administrative justice: e.g. the Employment of Educators Act of 1998 places a duty on the state to give effect to administrative justice and to furnish written reasons where the educator's rights have been adversely affected in the employment relationship.

⁴⁸ See e.g. s 39(1) and 233.

Organisation (ILO). These international labour rights must be considered in employment relationships.⁴⁹

Other relevant provisions of the Constitution

Section 195 of the Constitution (parts of which are quoted above) is of particular importance in public-education employment. This provision binds the government (e.g. its departments and other organs of state) in terms of the public services (e.g. the administration of education and labour) it renders to the public, and with regard to its internal relationships in the administration. The employment services the state (e.g. the HoD) provides for employees (e.g. public-school educators), fall squarely within the ambit of this section and have to be tested accordingly. In addition, this section also stipulates that the public administration and other persons/institutions recognised as 'organs of state' (e.g. public schools, universities and employer/employee organisations) must comply with the basic values and principles of the Constitution such as:

- (a) Services must be provided impartially, fairly, equitably and without bias.
- (b) Public administration must be accountable.
- ...
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

It is apparent that educators teaching at public schools must be ensured that these democratic principles and values are adhered to and implemented by the employer in the employment relationship. S 195 also requires that national legislation must be adopted to promote the implementation of these values and principles in the administration of educator employment issues, for example, as illustrated by the different statutes referred to above.

Finally, chapter 3 of the Constitution provides that the different spheres of government (i.e. national, provincial and local) must co-operate in their business of governing the country. This co-operative relationship is of crucial importance in the employment field because labour legislation is adopted in the national sphere of government while the nine provincial spheres have to co-operate with the application and implementation of these laws in the provinces' public schools, for example. Smooth and 'balanced' intergovernmental relations will enhance government work (e.g. through sharing of scarce resources) and ensure better employment relations between the state and its employees.

Legislation governing the employment of educators

As noted earlier, s 2 of the Constitution emphasises that all law and conduct must be consistent with the supreme Constitution and obligations imposed by it must be fulfilled. This section has important implications for labour law. It means that all labour legislation must be consistent with the Constitution and employment actions and obligations exercised by the government and its officials, must also be in line with the provisions of the Constitution and relevant labour legislation. If legislation or conduct is found to be inconsistent with the provisions of the Constitution, the courts may invalidate such legislation or conduct. Legislation is regarded as the primary source of educator employment relations and government departments, their

⁴⁹ See e.g. s 231-233. South Africa has signed and ratified a number of labour conventions, for example, the Convention Concerning Forced or Compulsory Labour (1930) and the Convention Concerning Discrimination in respect of Employment and Occupation (1958).

officials, educators, teachers' unions, bargaining councils and other organs of state (e.g. public schools) are bound by relevant labour legislation and must perform their activities and functions within the framework of such legislation and the Constitution generally.

As noted above, educator employment is governed predominantly by national legislation passed by Parliament. These labour laws deal with employment matters generally (e.g. the Labour Relations Act of 1995 and Employment Equity Act of 1998) or with specific issues of employment in a general manner (e.g. terms and conditions of service in the Basic Conditions of Employment Act of 1997; public-service employment in the Public Service Act of 1994; educator employment in the Employment of Educators Act of 1998) and must be consulted, depending on the employment issue or problem that is being investigated. For example, the uniform national norms and standards in the Labour Relations Act of 1995 regarding industrial action (strikes and lock-outs ss 64-88) apply generally and will be applicable when a question regarding the nature and requirements of strikes and lock-outs by educators are investigated (e.g. whether a protected or unprotected strike). Likewise the provisions on the nature, scope and requirements of unfair labour practices (ss 185-197 – e.g. unfair dismissals) will be applicable when an educator has allegedly been dismissed unfairly by the employer. The Employment Equity Act of 1998 is another overarching statute that governs aspects of employment equity and affirmative action in public education, for example.

Since the focus of this article is on educators in the general education and training sector of the public service, the Public Service Act of 1994 (governing the public service generally) should also be consulted. The regulations (subordinate legislation) issued in terms of the Act on the conditions of service of public-service employees and the code of conduct of the public service, and collective agreements of the public service, should be scrutinised to understand the educator's employment relationship in its broader public-service context. This may be necessary in a case where questions regarding the remuneration and benefit structures/scales of educators in public education and training are compared with those of employees in the other public service sectors or the public service generally.

Most questions regarding the conditions of service and remuneration of educators teaching at a public school fall squarely within the ambit of the Employment of Educators Act of 1998,⁵⁰ a statute dealing exclusively with employment of educators in public education. Of importance here is that the relevant sections of the Act, its regulations on the conditions of service for educators, Personnel Administration Measures (PAM) and collective agreements of the public education and training sector, have to be examined. The provisions of this Act (e.g. on particular issues regarding educator conditions of service – leave, benefits and allowances) usually prevail over more general public-service employment issues provided for in the Public Service Act of 1993,⁵¹ although each question has to be examined individually.

Employment relations of educators in additional (non-subsidised) posts created by a public school require special attention. First of all, general labour legislation that provides for overall national norms and standards would apply to the educator employment relationship, as discussed above. However, these educators are not regarded as 'educators' in terms of the Employment of Educators Act of 1998, which means that, apart from exceptions discussed below, their employment relations (e.g. terms and conditions of service, remuneration and benefits) are not governed by this educator-specific law but by their individual (private law)

⁵⁰ E.g. this Act provides for the employment of educators by the state, the regulation of conditions of service, discipline, retirement and discharge of educators, and related matters.

⁵¹ See e.g. s 2 of the Public Service Act.

employment contracts and the Basic Conditions of Employment Act of 1997.⁵² The conditions of employment and remuneration of these educators (i.e. stated in their individual contracts) would be weighed up against the provisions of the Basic Conditions of Employment Act of 1997 to determine which is more favourable to the educator. Secondly, these educators must be registered with SACE and are subject to the professional code and discipline exercised by SACE – as in the case of all practising educators. Finally, the public school is the employer of these educators but also an 'organ of state' in the administration of public-education services. In this capacity it is bound by the democratic values and principles enumerated in s 195(1) and (2) of the Constitution; it must practise these values and principles in its employment relationship with the educator (e.g. transparent, open, participative and accountable conduct is expected of employer).⁵³ Section 20(8) of the South African Schools Act of 1996 further states that certain factors must be taken into account when appointments to additional posts are made, including the ability of the candidate, the principle of equity, the need to redress past injustices and the need for representivity. This implies that the principles of equity and representivity in the workplace (as stipulated in the Employment Equity Act of 1998) and specific measures tailored for rationalisation and redeployment in public-education employment (e.g. in the PAM and in the ELRC Resolution 6 of 1998 on procedures for rationalisation and redeployment of educators in the provisioning of educator posts), would apply equally to educators appointed in these additional 'private contract' posts.

Conclusion: objectives of the new labour dispensation in education

The aim of this article was to explore the constitutional and legislative framework that governs educator employment. It is not an easy task and one should never lose sight of the overall labour context and the integrated nature of its legal sources. Although it is apparent that a hierarchy of sources exists (with the Constitution as the supreme and most authoritative source), various general but diverse statutes apply to general and specific issues of an employment relationship. Each case must be interpreted and assessed in terms of its own set of facts and circumstances and within the constitutional and legislative framework illustrated in this article.

From this discussion one may summarise the objectives of labour relations, particularly educator employment relations, as follows:

- To acknowledge the supremacy of the Constitution: all legislation and policies, the activities and conduct of government departments, officials and other organs of state are subject to the Constitution
- To acknowledge, respect and promote the fundamental rights enshrined in the Bill of Rights
- To provide and promote a democratic labour dispensation based on equality, employment equity and sound human resource management and development

⁵² E.g. s 20(1) of the Schools Act provides that, despite s 60 of the Act, the State is not liable for any act or omission by the public school relating to its contractual responsibility as the employer in respect of staff employed in terms of subs (4) and (5).

⁵³ The requirements of section 195(1) similarly apply to the HoD in his/her employment relationship with other public-school educators.

- To promote the full and equal enjoyment of all rights and freedoms by persons or categories of persons previously disadvantaged by unfair discrimination
- To ensure a public-service education employment sector that is bound by the provisions of the Constitution, promotes fundamental rights and freedoms, complies with democratic values of representivity, transparency and participation in decision-making, and acts in a responsible and accountable manner in the administration of educator employment affairs.