

Educational law in democracy - *Who guards the guardians? Freedom of expression and whistle-blowers - A personal narrative*

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OPSOMMING

Wie Bewaak die Bewaarders? Vryheid van Uitdrukking en Verklidders – 'n Persoonlike Verhaal

Die bespreking van die opvoeder se reg op vryheid van uitdrukking in hierdie artikel spruit voort uit 'n departementele tugverhoor wat werklik plaasgevind het. Die opvoeder het, aldus die klagstaat, met die pers gepraat oor 'n voorval wat by die skool plaasgevind het. Die Departement beweer dat die opvoeder nie met die pers mag praat sonder die toestemming van die Departement nie. Hy sou dan ook nie sodanige toestemming gehad het nie. Tydens die verhoor het die skrywer as vakkondvertegenwoordiger namens die opvoeder gepoog om die voorsittende beampte te oortuig dat die geldigheid van die klagtes oorweeg moet word in die lig van die opvoeder se reg op vryheid van spraak, welke reg nie willekeurig deur amptenare van die Departement beperk kan word nie. Dit sou beteken dat dit geldige aanklagtes moet wees. Hierdie verweer was nie suksesvol nie. Die aandag van die voorsittende beampte is ook gevestig op nuwe kinderwetgewing wat die beskerming van kinders vereis en die aanmelding van bepaalde oortredings verpligtend maak vir opvoeders. Die voorsittende beampte kon dit aanvaar, maar alleen aanmelding aan die polisie maar nie aan die pers nie. 'n Laaste poging is aangewend deur die voorsittende beampte se aandag te vestig op die voorskrifte van die Wet op Beskermdes Bekendmakings 26 van 2000, wat die werkgewer gebied om, onder omstandighede waar aan die vereistes van die Wet voldoen is, 'n werknemer wat so 'n bekendmaking doen, te beskerm en verder die werkgewer verbied om die werknemer aan beroepsnadeel te onderwerp, wat in hierdie geval 'n skorsing en tugverhoor behels het. Ook hierdie poging was onsuksesvol. In die loop van die bespreking word ook melding gemaak van die basiese vereistes vir 'n billike verhoor wat verontagsaam is en wat buitendien daartoe behoort te lei dat die verrigtinge op appèl ter syde gestel behoort te word.

1 Introduction

In the following discussion, I deal with the powers and duties of employers of educators when dealing with misconduct and disciplining of educators. The discussion not only sets out to deal with the narrow technical parameters of the disciplinary process, but also seeks to show that departmental officials need to be aware of the broader set of Constitutional rights and duties of educators that also impacts on the conduct of both the employer and the employee. The narrative will deal

with the proceedings of an actual disciplinary hearing that took place. The article proposes to show what the legal requirements of a fair hearing are and to what extent these were not complied with during the hearing, resulting in a failure of justice. The narrative will follow and deal with the hearing and the procedural and legal issues, as well as many irregularities, as they unfold.

1 1 Charges of Misconduct Against an Educator Speaking to the Press

In the real life example that will be discussed below, the educator in question, a deputy principal of a public school (a public servant occupying a managerial position at the school), was charged with three counts of misconduct. It is alleged in the preamble to the charges that he is charged with misconduct for bringing the department into disrepute as set out in the three charges. Two of the charges allege that he contravened section 18(1)(f) of the Employment of Educators Act 76 of 1998, and the third charge alleges that he contravened section 18(1)(i) of the Employment of Educators Act¹ (the EEA).

Charges 1 and 2 allege that he unjustifiably prejudiced the administration, discipline or efficiency of the department of Education, an office of the state or a school, when he contacted the media and disclosed an incident involving a male learner at the School, which was published in two newspapers, without the consent or permission of the employer.

Charge 3 alleges that he failed to carry out a lawful order or routine instruction without just or reasonable cause when he contacted the local newspaper and disclosed an incident involving a male learner at the school without the consent or permission of the employer. The actual reason for using both terms “consent” and “permission” was never dealt with by the department during the hearing. This is the actual terminology used in the charge and appears to refer to some or other policy of the department which will be referred to and discussed in more detail later on.

When the educator received the charges, he requested his union to represent him at the hearing. This I undertook and that is how the particulars of the case came into my possession.

At the hearing, the educator testified that he had raised the issues that formed the basis of the charges against him at the school before, and that they were not dealt with. He testified that the principal was even present at the latest incident. He reported the incident to the Child Protection Unit (CPU) which referred him to the South African Police Service (SAPS). In view of his previous experiences of the lack of action, he went to the media. All of this was accepted by the departmental representative and

¹ 76 of 1998.

even by the presiding officer who, in his findings, ventured the opinion that the educator should have returned to the CPU to establish whether or not they were actually doing their work.

The evidence given by the educator on his own behalf, indicating why he acted in the manner he did, was not seriously challenged by the department, except for harping on the consent (or permission) issue end getting him to repeat that he knew about the policy. He was also once again admonished because he had spoken to the press and told that he should have heeded the warning given to him after the first incident not to do so again.

At the conclusion of the hearing, the educator was found guilty by the presiding officer on all three charges. The sanction that was imposed was that he be demoted from the rank of deputy principal to the rank of a post level 1 educator. He was also to be removed from the School Management Team (SMT) – a structure that normally comprises the senior staff of a school. The written notice containing the finding and the sanction informed him of his right to appeal against the finding and the sanction within five working days after receiving the notice. This was duly done within the stipulated time. The outcome of the appeal is still being awaited.

1 2 Misconduct

The EEA does not deal with the concept of misconduct under the definitions listed in section 1 of the Act. Sections 17 and 18 of the EEA, however, contain a list of acts and omissions which constitute “misconduct” for the purposes of the EEA. Also, section 18(1) refers to misconduct as “... a breakdown in the employment relationship and [that] an educator commits misconduct if he or she commits” any of a long list of possible acts of misconduct. It is interesting to note that section 17(1) which deals with *serious misconduct* leading to dismissal, does not contain the same wording as section 18(1) with regard to the breakdown of the employment relationship.

When an educator is charged with misconduct, the EEA requires the employer to give written notice of the proceedings and the notice must contain a description of the allegations of misconduct and the main evidence on which the employer will rely.² Item 3(1) of Schedule 2 to the EEA incorporates the Code of Good Practice of the Labour Relations Act³ (the LRA) into the EEA as far as it relates to discipline and it constitutes part of the Disciplinary Code and Procedures contained in Schedule 2 to the EEA. The conduct of an educator which may warrant disciplinary action is listed in sections 17 and 18 of the EEA.

The incorporation of the Code of Good Practice of the LRA into the EEA as far as it relates to discipline, has, amongst other things, important

2 It 5(2) Sc 2 EEA.

3 66 of 1995.

implications with regard to the charges of misconduct as well as the nature of the disciplinary proceedings.

In the case of disciplinary proceedings, the civil onus for the discharging of the burden of proof applies, and that is proof on a balance of probabilities – that is to say that the educator has committed any of the acts of misconduct contained in the charge sheet. This is trite, as is the fact that the employer, in this case a provincial department of education, bears that onus. This is the conventional onus of proof. However, it also implies that whatever it is that the employer alleges the educator to have done, all the essentials of such charges should be set out in the charge and must then be proved on a balance of probabilities in the course of a proper and fair hearing. These essentials also lie at the heart of the right to fair labour practices which is a fundamental constitutional right.

1 3 The Bill of Rights: The Right to Fair Labour Practices

In terms of section 23(1) of the Constitution of the Republic of South Africa, 1996, everyone has the right to fair labour practices.

To give effect to these rights, the LRA was enacted, and one of the purposes of the LRA is to give effect to and to regulate the fundamental rights conferred by section 27 (the LRA still refers to section 27 as it was in the so-called interim Constitution of 1993) of the Constitution, and that is the right to fair labour practices.

When dealing with the concept of “fair labour practices”, or rather with the concept of “unfair labour practices”, we find this concept of “unfair labour practice” defined in section 186(2) of the LRA:

... meaning any unfair act or omission that arises between an employer and an employee involving –

- (a) ...
- (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee; ...

At the heart of a charge of misconduct lie the requirements set out in paragraph 7 of Schedule 8 to the LRA, the Code of Good Practice: Dismissal, referred to above, namely:

Any person who is determining whether a *dismissal* for misconduct is unfair should consider:

- (a) whether or not the *employee* contravened a rule or standard regulating conduct in, or of relevance to, the workplace
- (b) if a rule or standard was contravened, whether or not:
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the *employee* was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) the rule or standard has been consistently applied by the employer;
 - (iv) *dismissal* was an appropriate sanction for the contravention of the rule or standard.

As set out above, The Code of Good Practice: Dismissal, constitutes part of the Disciplinary Code and Procedures for Educators in the Schedule to the EEA. This latter Code and Procedures require written notice to be given of the hearing, which includes a description of the allegations of misconduct and the main evidence on which the employer will rely. Most of these requirements were not complied with by the employer before the hearing.

1 4 A Valid or a Reasonable Rule or Standard

It is implicit in these instructions in the Code and Procedures laid down in the EEA, that the allegations of misconduct must be based on a valid or a reasonable rule or standard as set out in paragraph 7 of Schedule 8 to the LRA. It is also implicit in these instructions that the legal basis underlying the power of the employer to issue instructions requiring the consent or permission of the employer to speak to the press (in the case under discussion) should be set out in these charges. The charges referred to above, do not contain any such information. The documents containing these powers and instructions, were at no stage disclosed or provided at the hearing. These are issues that can be dealt with *in limine* at the start of the disciplinary proceedings and should be dealt with by the presiding officer before allowing the hearing to continue. These issues were raised by the union representative at the start of the proceedings.

It was argued by the union on behalf of the educator, that:

- (a) the operative part of charges 1, 2 and 3, requiring the consent or permission of the employer to contact the media and to disclose an incident at the school, inasmuch (as far as it could be established at that time) as it is based on an alleged policy dealing with authority for officials to speak to the media, make comments or issue written statements, does not constitute a valid rule or standard which can form the basis of a charge of misconduct. In any event this document or policy was not produced and proven at the hearing.
- (b) The principal of the school testified at the hearing and said that the staff was told at a meeting about such policy but that she had not even seen such a policy or could not produce such a document at the hearing. She told her staff about the prohibition and repeated it after the first report appeared in the newspaper. The department, however, did not produce any such document at the hearing either. In his judgement the presiding officer dealt with this Policy as if he could take judicial notice thereof – which he in fact seemed to do. The evidence given by the educator on his own behalf indicating why he acted in the manner he did, was not seriously challenged by the departmental representative, except for getting him to repeat that he knew about the policy and being once again admonished that he should not have spoken to the press and that he should have heeded the warning given to him not to do so again.

1 5 The Bill of Rights, Education, Democracy and Values

This special edition of *De Jure* deals with Education Law in a Democracy. It will, therefore, be necessary to examine how the introduction of a new and democratic Constitution has enabled important fundamental constitutional protections to become part of the country's legal fabric.

Section 1 of the Constitution proclaims the Republic of South Africa as one sovereign democratic state, founded on certain values. As far as the Bill of Rights is concerned, section 7 of the Constitution provides that:

- (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
- (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
- (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

In terms of section 8(1) of the Constitution, the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. Without any doubt, therefore, these provisions cover the department of Education, its officials and employees as well as the laws introduced above.

How then, should the State and its officials go about their business in this democratic constitutional context?

Albertyn and Davis⁴ examine how the ascendancy of a liberal democratic constitution has enabled important democratic protections and transformative judgements. The authors point out that Dugard realised this in 1977 when he noted that a Bill of Rights would enable a post-apartheid government to restore respect for the law and legal institutions in circumstances where these had been used as instruments of oppression.⁵ This, we would argue and add, applies in equal measure to employers and employees in education.

Albertyn and Davis emphasise⁶ the central role of the Bill of Rights in a democracy and state that the establishment of a constitutional democracy placed the Bill of Rights at the centre of legal and political power in South Africa. According to s 7(1) of the Constitution, it is the "cornerstone of democracy" in South Africa, enshrines the rights of all people and affirms the democratic values of human dignity, equality and freedom. Section 39(1)(a) requires a court, tribunal or forum to promote the values that underlie an open and democratic society based on human dignity, equality and freedom when interpreting the Bill of Rights, and section 39(2) provides further that every court, tribunal or forum must

4 Albertyn & Davis "Legal realism, transformation and the legacy of Dugard" 2010 *SAJHR* 188.

5 2010 *SAJHR* 199.

6 2010 *SAJHR* 199, 200.

promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law or customary law.⁷

The law that we have in mind here for the purpose of this article, is labour and education legislation and the tribunal or forum that we would have in mind, would be the tribunal conducting the disciplinary hearing of an educator as an employee.

De Vos⁸ uses the description of the Constitutional Court of South Africa's past to express the grand narrative of South Africa's history:

As the struggle of almost all disenfranchised and disadvantaged South Africans against the apartheid system intensified, the minority government, backed by powerful security apparatus, became more repressive and authoritarian. In the process, 'the legitimacy of law itself was deeply wounded' as the conflict 'traumatised the entire nation'. Our history is therefore one of repression not freedom, oligarchy not democracy, apartheid and prejudice, not equality, clandestine not open government.⁹

Sadly, in the workplace this repression continues. However, when the court is required to rule on legally protected actions or even fundamental rights, it has, in view of the history of our country, first of all to set out clearly what the case is not about. For example, in *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa*¹⁰ a case dealing with a "whistle-blower"¹¹ in the employ of the city council Wallis AJA explained that:

[i]t is perhaps as well at the outset to make it clear what this case is not about. It is not about the disciplinary proceedings and whether the sending of the letters in fact constituted misconduct or whether Mr Weyers received a fair hearing. Nor is the case about the application of the Employment Equity Act in the Tshwane Metropolitan Municipality. Nor does it require any view to be expressed on the wisdom of the approach adopted by either of the main protagonists, Mr Weyers and Mr Mahlangu, to the appointment of system operators and other staff in the PSC centre. Quite plainly they approached that issue from different perspectives and senses of priority. Whilst one might hope that these difficult issues in our society would always be resolved by mature discussion and mutual understanding, that did not occur in this instance and it is not for this court to determine the rights and wrongs of the situation that arose. Our only task is to determine whether the sending of the letter to the Engineering Council and the department of Labour was protected by statute. It is to that question that I now turn.¹²

7 *Ibid.*

8 De Vos "A bridge too far? History as context in the interpretation of the South African Constitution" 2001 *SAJHR* 1.

9 2001 *SAJHR* 13.

10 2010 2 SA 333 (SCA) 347.

11 We will return to "whistle-blowers" again later and discuss the issue in the context of the accused educator talking to the press – conduct which formed the core of the charges against him at the disciplinary hearing.

12 *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa* 2010 2 SA 333 (SCA) 347.

Along a different route, De Vos is also bearing down on this point:

The Court has used this grand narrative in the interpretation of the nature and scope of many of the rights contained in the Bill of Rights, including the right to equality and non-discrimination, the right to dignity, the right to privacy, the right of access to information, the right to freedom of religion and conscience, the right of access to court, the right of access to health care, and the right of access to housing ... and of course the right to freedom of expression and also for example, the protection of 'whistle-blowers'.¹³

The protection of whistle-blowers is covered by the provisions of the Protected Disclosures Act¹⁴ (the PDA).

2 Democracy and Freedom of Expression

Albertyn and Klaaren¹⁵ make the point that the implications of yoking together rights and regulation are by no means confined to the more material realm of traditional political economy. According to Albertyn and Klaaren, struggles to secure the civil and political rights of individuals who contest emerging global regulatory regimes reshape those regimes and infuse the traditional regulatory questions of systemic efficiency and equity with new perspectives. From another direction, they argue, the technocratic minutiae that loom large when fleshing out the concrete dimensions of rights, destroy the very significance of some of the rights – cultural and spiritual in particular – they aim to protect.

Simply put, in relation to the position of the deputy principal in the case under discussion in this article, he fell foul of bureaucratic regulations (that is, the prohibition of speaking to the press – a fact that was not proved in evidence), that took no cognisance of his right to freedom of expression and his right and duty to make a protected disclosure in terms of current legislation, namely the PDA.

As Albertyn and Klaaren continue their discussion of rights and regulation, the discussion eventually reaches the issue of access to information and they make the point that, in this regard, the culture attached to a regulatory practice can more easily fit with shifting and reigning political agendas (such as have been evident in South Africa over the past ten years) than can the cultures attached to rights. The initial purchase of the rights aspect of access to information, they say, therefore appears likely to fall behind, in part because the rights aspect (at least for this civil/political right) seems dependent on the political climate. This, they say, shows in sharp relief the constructed character of this right of access to information, even if South Africa over the past ten years has

13 2001 SAJHR 13.

14 26 of 2000.

15 Albertyn & Klaaren "Introduction: Special Focus on 'Rights and Regulation'" 2008 SAJHR 530.

provided a conducive and facilitative environment for the construction of rights.¹⁶

Within the context of our discussion of rights and regulation of rights we can now turn our attention to the regulation of political activity in the public sector and even the exercise of fundamental rights, or stated differently, the prohibitions on political activity. Within the context of this article, the following point is important with regard to the rights of public sector employees.

In this regard, we can turn to the case of *Osborne v Canada Treasury Board*,¹⁷ where the Canadian Supreme Court had to decide whether a statute prohibiting federal public servants from engaging in work for or against a candidate or political party infringed the guarantee of freedom of expression contained in section 2(b) of the Canadian Charter of Rights and Freedoms.

The respondents (on appeal) were public servants occupying a range of non-managerial positions.¹⁸ They had been refused permission by their employer to engage in various political activities after hours, including electioneering work in a local constituency office and attendance at a political convention. In applying the limitations test, the court found that the government objective underlying the limitation in question, the preservation of the neutrality of the civil service, was one of sufficient importance to warrant overriding a constitutionally protected right or freedom. The court also found that the measures restricting partisan political activity were rationally connected to the objective of maintaining the neutrality of the civil service. However, applying the “minimum impairment” test, the court found the measures were “over-inclusive”, both as to the range of activity prohibited and the level of public servant to whom the restrictions applied. The restrictions applied, the court said, to a great number of public servants who were employed in routine clerical, technical or industrial duties that were completely divorced from the exercise of any discretion that could be in any manner affected by political considerations. The restrictions also banned all partisan-related work by all public servants without distinction as to the type of work involved. Activities such as volunteer work in making telephone calls or stuffing envelopes for a candidate or partisan questioning of candidates at a political meeting were all included in the general language of the measure. Therefore the restrictions were over-inclusive and went beyond what was necessary to achieve the objective of an impartial and loyal civil service.¹⁹

The point to note at this stage is the approach of the Court, dealing with a protected right or freedom and how limitations thereof should be approached. We will return to the significance of this in the context of the

16 2008 SAJHR 534, 535.

17 1995 4 LCD 375 Can.

18 376.

19 1995 LCD 375 (CAN) 377-378.

article again below when we specifically deal with the educator's right to freedom of expression, the limitation of his rights and his duty to make certain disclosures and legislation dealing with protected disclosures. These are all defences against the charges. These issues are matters of law. The presiding officer at the departmental disciplinary hearing could not, however, be persuaded to take a better look at these defences that were raised before him.

3 The Bill of Rights: The Right to Freedom of Expression

Now to return to the hearing of the charges of misconduct against the educator. On behalf of the educator, the union representative presented an argument that was designed to show that the educator has a fundamental right to freedom of expression which could not be limited in an arbitrary manner by the department – most certainly not by any policy or instructions which were not even properly proved in evidence. The argument starts with the provisions of the Bill of Rights.

Section 16(1) of the Constitution provides that:

- (1) Everyone has the right to freedom of expression, which includes:
 - (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity;
 - (d) academic freedom and freedom of scientific research.

As far as possible limitations of the right to freedom of expression go, section 16(2) contains internal exclusions, namely:

- (2) The right in subsection (1) does not extend to:
 - (a) propaganda for war;
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

The charges against the educator do not allege any of these actions, but appended various other attributes²⁰ to the alleged acts of misconduct, including:

- ... bringing the department into disrepute in the manner as set out in the three charges.
- ... unjustifiably prejudicing the administration, discipline or efficiency of the department of Education, an office of the state or a school.
- ... contacting the media during February 2011 and
- Worst of all, doing all of this without the consent or permission of the employer.

20 As set out in the charges against the educator.

Section 36(1) of the Constitution contains the following general limitation of rights:

- (1) The rights in the Bill of Rights may be limited only in terms of 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:
 - (a) the nature and purpose of the limitation;
 - (b) the nature and extent of the limitation;
 - (c) the relation between the limitation and its purpose;
 - (d) less restrictive means to achieve the purpose.

In view of the charges against the educator, the department would be expected to make specific mention in the charges of misconduct of the source of the prohibition on contact with the media, disclose its legal foundation, and then to lead evidence to prove that it existed and was transgressed. Prior to the disciplinary hearing, a page from a document was made available to the union off the record by another departmental official who had no part in the disciplinary proceedings. Furthermore, neither this page nor the original document containing the alleged policy was ever introduced and proved during the hearing. The page in question is headed "Communication policy and services", and apparently purports to deal with the policy in question. This piece of paper, even if it had been properly introduced and proved in evidence, does not apply to the issues in question. It refers to the right of access to information held by the State or any other person and cannot have, and in fact does not have, any bearing on the charges in question. Nevertheless, it bears repeating that no such document, nor any other similar document, was in any event ever introduced in evidence.

It will be argued below that even if the department had provided this information and had properly proved this alleged policy during the hearing, it would still have been to no avail since, as we have indicated above, it does not apply to the facts of the case and, as will also be shown below, in law, policy cannot trump a constitutional right, such as a right to freedom of expression.

The alleged policy was not dealt with in evidence apart from the *viva voce* mention by the principal of having been told at a meeting at some or other time that they were not to speak to the press. Whether this constitutes the "policy" in question, was not clarified by any evidence during the hearing and cannot be relied on to make any finding regarding any of the transgressions with which the educator was charged – even if it were valid policy.

The proof of the policy would in any event have missed the point of the charges and the defence completely. The educator was not claiming any right of access to information in terms of this section. He is in possession of the information. He is claiming his right to freedom of expression, and as will be shown below, also his right (and to a certain

extent his duty) to have made a “protected disclosure” in terms of the PDA.

The information with which this case is concerned is in the possession of the educator, so that the alleged policy to which the page in question refers, relying on section 32 (dealing with the right of access to information – even had it been properly proved and introduced into evidence) cannot and in my view, does not apply to the case. Furthermore, section 32(2) of the Constitution requires legislation to be enacted to give effect to this right. No reference is made to any such legislation in the department’s charges or in evidence during the hearing. Within very narrowly defined limits a statute can limit this right to freedom of expression. This was not argued by the department and neither was any statute disclosed as a basis for the prohibition on speaking to the press.

It should be abundantly clear by now, although it was not to the presiding officer at the hearing, and, therefore, it bears repeating, that even if all of this had been properly proved, which did not happen, “policy” is not law and certainly not law or a law of general application which can limit an entrenched fundamental right as required by section 36(1) of the Bill of Rights. It must be emphasised that the charges do not even refer the educator to any law or policy dealing with the dissemination of information. The charges merely refer to the “consent or permission” of the employer. The “policy” and the legal basis thereof was never referred to in the charges, nor disclosed at the hearing.

In addition to section 36(1) of the Constitution, dealing with the limitation of rights generally, section 36(2) continues and provides in particular as follows:

- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

There is no evidence of any such law on record. Neither does any of the charges refer to any such law or limitation. It bears repeating, that even if the so-called policy had been properly introduced and proved, “policy” is not covered by section 32(1) regarding the right of access to information and neither is such “policy”, for the purposes of section 32(2), nor for the purposes of section 36(2), a law. As far as foreign law is concerned, it is useful to bear in mind the Canadian case of *Osborne v Canada Treasury Board*,²¹ referred to above and, as far as the South African Constitution is concerned, we should bear in mind the provisions for the limitation of fundamental rights provided for in section 36, if it were appropriate and applicable.²²

21 [1991] 2 S.C.R. 69.

22 “The restrictions applied, the court said, to a great number of public servants who were employed in routine clerical, technical or industrial duties that were completely divorced from the exercise of any discretion that could be in any manner affected by political considerations.” See above.

In the South African case of the *Islamic Unity Convention v Independent Broadcasting Authority*²³ the Constitutional Court, *inter alia*, considered the influence of a widely phrased limitation of the right to freedom of expression in the Code of Conduct for Broadcasting Services made pursuant to the empowering statute, being the Independent Broadcasting Authority Act²⁴ and which is contained in Schedule I to the Act.

In this case, the Code of Conduct for Broadcasting Services came under attack. It had been promulgated pursuant to legislation. The Court had to consider the right to freedom of expression in the light of the limitation contained in the Code of Conduct. Clause 2(a) of the Code of Conduct for Broadcasting Services prohibited, *inter alia*, the broadcasting of material likely to prejudice relations between sections of the population. The Court concluded that such a prohibition extended beyond constitutionally unprotected expression enumerated in section 16(2) of the Constitution. The prohibition was so widely phrased and so far-reaching as to deny broadcasters and audiences the right to hear, to form, to freely express and to disseminate their views and opinions on a wide range of subjects. Notwithstanding the fact that where appropriate, the regulation of broadcasting served an important and legitimate purpose, in this case the limitation on the right was not justifiable. The Court, accordingly, found the prohibition in clause 2(a) prohibiting broadcasting of material “likely to prejudice relations between sections of the population”, unconstitutional.

In the misconduct case against the educator under discussion, we are not dealing with the limitation of an entrenched right contained in any law of general application or any other constitutionally empowered limitation. No such law came to light. From the point of view of the case for the department, we are dealing with so-called policy. Policy is not law. Even if it were law, there are powerful restrictions placed on a limitation of the right to freedom of expression as expressed in section 36(2) of the Constitution and the conduct set out in section 16(2) of the Constitution, and, as pointed out before, this aspect is not even mentioned in the charges. It is not applicable in this case and in any event it was not even dealt with in the evidence presented at the hearing. Although it would have been to no avail, it was nevertheless not even brought up in argument on behalf of the department.

In the *Islamic Unity* case the court held, *inter alia*, as follows:

... where the scope of regulation extended beyond the categories of expression enumerated in s 16(2), such regulation would encroach upon the terrain of protected expression and would have to meet the justification criteria in s 36(1).²⁵

23 2002 4 SA 294 (CC).

24 153 of 1995.

25 *Islamic Unity* case 309E par 34.

As to whether clause 2(a) was a constitutionally permissible limitation on expression not excluded from the protection of section 16(1), the Court held that it was in the public interest that people be free to speak their minds openly and robustly and that they be free, in turn, to receive information, views and ideas. It was also in the public interest that reasonable limitations be applied, provided that those limitations were consistent with the Constitution.²⁶

The Court also that there was no doubt that the inroads on the right to freedom of expression made by the prohibition on which the complaint had been based were far too extensive and outweighed the factors considered by the fourth respondent as ameliorating their impact. Although it was true that the appropriate regulation of broadcasting served an important and legitimate purpose because of the critical need in South Africa to protect and promote human dignity, equality, freedom, the healing of past divisions and the building of a united society, it had not been shown that that need could not adequately be met by the enactment of a provision which was appropriately tailored and more adequately focused. The relevant portion of clause 2(a) accordingly impermissibly limited the right to freedom of expression and was unconstitutional.²⁷

These rulings in the *Islamic Unity* case will also apply in the present case against the educator except for the fact that the *Islamic Unity* judgment dealt with a statutory limitation – legislation which at least falls within the ambit of sections 32(2) and 36(2) of the Constitution. The limitation was, however, not upheld. In the case of the educator under discussion, the “consent or permission” requirement does not stem from any statutory empowerment. It apparently emanates from a departmental policy directive. This suggests that it was policy rather than law which required the educator to obtain the consent or permission of his employer to speak to the press. In other words it was policy rather than law which limited his right to freedom of expression. Had that policy been put before the hearing properly, the question could then arise: what would have been the legal effect of policy purporting to limit a fundamental right? This was never debated. As to the legal effect of policy, we need to examine the view of the Constitutional Court in the *Harris* case below.

The Constitutional Court dealt with this question in the case of *Minister of Education v Harris*.²⁸ In this case the issue was the effect of policy determined by the Minister of National Education pursuant to the National Education Policy Act²⁹ (NEPA).

On 18 February 2000 the Minister of Education published a notice under section 3(4) of NEPA stating that a learner may not be enrolled in

26 *Islamic Unity* case 310C-D par 37.

27 *Islamic Unity* case 314F-315B and 312F-313A par 51 read with par 45.

28 2001 4 1297 (CC).

29 27 of 1996.

grade one in an independent school if he or she does not reach the age of seven in the same calendar year. Talya Harris was part of a group of children who had enrolled at the age of three in the King David Pre-Primary School, and had spent three years being prepared for entry to the primary school in the year 2001. Her sixth birthday was due to fall on 11 January 2001, a short while before the school year was due to begin. Challenging the validity of the notice, her parents sought an order of Court permitting her to be enrolled in grade one in the year in which she turned six.

The Court held, *inter alia*, that in the light of the division of powers contemplated by the Constitution and the relationship between SASA and NEPA, the Minister's powers under s 3(4) of the latter Act were limited to making policy determinations. He had no power to issue an edict enforceable against schools and learners. Since the notice purported to impose legally binding obligations on independent schools and MECs it was *ultra vires* the Minister's powers under s 3 of the National Education Policy Act.³⁰

In the present case of the disciplinary proceedings against the educator, although the question of the "policy" was contested from the outset and already *in limine*, the department never attempted to put evidence before the hearing pursuant to which powers the policy was formulated, especially since it purported to limit a fundamental right to express himself, which right was also asserted at the outset of the hearing. In the context of the submissions by the union on behalf of the educator in this regard, it is clear that the Minister does not have the power to make policy that has the force of law – and law at that which could limit a constitutional right to freedom of expression. In any event, no mention thereof is made in the charges and no argument supporting such position was presented by the department.

To the extent that the presiding officer found the educator guilty on all three charges, to that extent at least he must be presumed to find that the necessary legal power existed which required the consent or permission of the employer to speak to the press, and consequently he must be presumed to have found that such policy existed and furthermore, by parity of reasoning, that it could have the force of law which could limit a fundamental right. If this is so, the presiding officer has made a fatal error of law and accordingly his findings and the sanction imposed should not be allowed to stand and should be set aside on appeal. It must be abundantly clear at this stage of the argument, that:

- (a) there was no law, no policy and no transgression of any valid rule or standard by the educator;
- (b) the policy in question (apart from the other fatal defects already highlighted above regarding who speaks to the press, with or without the permission of the department) is not law and cannot limit the right to freedom of expression as asserted by the Constitution;

30 1305H-1306B, 1306E-G Par 11, 13.

(c) The educator's communication with the press, even if it had been properly proved (which is not the case), would fall within his right to freedom of expression and would be protected expression. Hence, once more no transgression of a valid rule or standard as required by the LRA is at stake.

Further provision for protected disclosures in terms of the Children's Act and the PDA, will be dealt with below.

4 School Safety, the Children's Act and the Protected Disclosures Act

During the course of the hearing of the disciplinary inquiry into the educator's alleged misconduct, the nature of the charges were such that the department as employer was also required to prove that there was a communication with the press, that it was the educator who had done so and also what had been communicated. Without calling any witnesses in this regard, the presiding officer, despite persistent objections from the union representative, allowed the departmental representative to "testify" from the "bar" regarding the official's communications with the press about the statements made by the educator, without complying with any of the proper requirements to present such evidence. The request by the union representative to be allowed to "cross-examine" the "witness" was met with vehement opposition from both departmental officials. This conduct of the presiding officer constituted a gross irregularity and on this basis alone, apart from all the other defects, constitutes sufficient reason to set aside the findings and the sanction. Clearly the educator's right to a fair hearing was severely compromised.

Although the newspapers and the reporters are local residents, and were available to testify, the departmental representative did not call any of them to testify. Neither did he hand in any affidavits with regard to the communications with the local media. Despite strenuous and continuous objections from the union, the presiding officer allowed the departmental representative, to "testify" from the "bar" to the effect that the educator had phoned the newspapers and that the official had obtained from the newspapers the information that the educator had communicated with both newspapers and the official also "testified" to what the information was that he had received over the telephone from the newspapers. No independent witness was called to testify. There was no opportunity to cross-examine any witness on this.

The conduct of the presiding officer in allowing this information to be put on record in this manner by the departmental prosecutor was totally irregular. The union nevertheless then requested an opportunity to cross-examine this "witness". The "witness" himself replied that this could not be done and that he could not be subjected to cross-examination. The presiding officer did not rule in favour of the union.

The departmental prosecutor then disingenuously, after further objections from the union, purported to withdraw his "evidence" and

proceeded to produce and to rely on statements received from the educator to prove what he (the official) had just “testified” to. Once again and continuing on the same path of irregular proceedings, he simply handed in those statements from the “bar” himself. No witness was called. No evidence of any witness was led to indicate how these statements were obtained, whether they had been made freely and voluntarily after the educator had been informed of his rights and properly warned about the import of the statements, should he make any. The defence was not provided with copies of these statements. The hearing simply continued.

The union could not put any of these questions to any witness, since no witness was called to identify and hand in these documents. The right to cross-examination is fundamental to these proceedings and as such is also re-stated in Schedule 2 to the EEA. This right was simply ignored. There was no witness to cross-examine.

The duty to prove documents and statements properly at a disciplinary hearing is equally important and the right to cross-examine those witnesses equally is expressly stated in Schedule 2 to the EEA. Nothing came of this. No fair hearing as required by the LRA and the EEA could come from such proceedings.

It must be said that the institutional bias of the presiding officer appears to have exceeded all rational limits and that the right of the educator to a fair hearing had been further compromised. The union and the educator had already sought a brief adjournment to consider withdrawing from the hearing proceedings in view of the irregularities and the bias of the presiding officer. This was, however, not done.

5 Protected Disclosures

The hearing proceeded and a further attempt was made by the union representative to convince the presiding officer that the proceedings against the educator could not be allowed to continue in that manner. The union tried to convince the presiding officer that in a case such as this, where the educator is charged with contravening subsections 18(1)(f) (charges 1 and 2) and 18(1)(i) (charge 3) of the EEA, contacting the media without the consent or the permission of the employer, the rule the department seeks to invoke amounts to an unconstitutional limitation of the educator’s right of freedom of expression, and can therefore, not be a valid rule or standard as required by paragraph 7 of Schedule 8 to the LRA. No policy or any law limiting this right was proved by the department. Nor, as pointed out above, any power of the Minister to formulate such rule and consequently such limitation.

On this basis the educator should never have been suspended in the first place, nor should charges have been sustained after the start of the hearing.

Although these arguments were put before the presiding officer *in limine*, they were not dealt with apart from being “noted” and the hearing continued. These objections and arguments were repeated at the end of the case for the department when the union applied for the discharge of the educator, and also at the conclusion of the hearing.

All three charges should have been dismissed *in limine*. Once the hearing continued, there were serious lapses in the manner in which the evidence was presented as has been pointed out above. The case for the department in any event did not constitute a *prima facie* case. An application for the educator’s discharge was made at the end of the case for the department. Apart from the irregular admission of evidence, most of the elements of the charges the department was required to prove to support the charges against the educator were not presented. The application for the educator’s discharge at the end of the case for the department was nevertheless not sustained.

As already indicated above, the evidence given by the educator on his own behalf indicating why he acted in the manner he did, was not seriously challenged by the department. It was in the view of the department a simple matter, namely the existence of a policy, the fact that the educator knew about the policy and, therefore he was once again admonished that he should not have spoken to the press and that he should have heeded the warning given to him not to do so again.

The fact that the heart of his evidence still stands on record,³¹ has a huge bearing on the matter that will be raised below, namely that of having made a protected disclosure to the press for the purposes of the PDA. On behalf of the educator it was also argued that the conduct of other educators at the school which the accused educator had brought to the attention of the press, could also fall under the provisions of SASA, relating to “initiation practices”, or at least, under the heading of conduct which could endanger the health and safety of learners. Such conduct had to be dealt with officially.

SASA deals with many aspects of the health and safety of learners at schools. This includes safety measures and the prohibition of initiation practices at schools. Initiation practices are prohibited at public schools. For the purposes of section 10A of SASA, “initiation practices” are, *inter alia*, defined as:

... any act which in the process of initiation, admission into, or affiliation with, or as condition for continued membership of a school, a group, intramural or extramural activities, inter-schools sports team, or organisation:

(a) endangers the mental or physical health or safety of a person;

...

(4) In considering whether the conduct or participation of a person in any initiation practices falls within the definition of subsection (3), the relevant

³¹ It should be noted that a copy of the record of the proceedings has not been made available. It was also not available for the preparation of the appeal.

disciplinary authority referred to in subsection (2)(a) must take into account the right of the learner not to be subjected to such practices.

The obligations and duties assumed by the educator and to which he testified at the hearing, and which was not rejected or attacked by the department, can be amplified by reference to the provisions of the Children's Act³² (CA):

- The objects of the CA, which are relevant to this case, are, *inter alia*:
- (b) to give effect to the following constitutional rights of children, namely:
 - ...
 - (iii) protection from maltreatment, neglect, abuse or degradation;
 - (iv) that the best interests of a child are of paramount importance in every matter concerning the child;
 - ...
 - (f) to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards;
 - (g) to provide care and protection to children who are in need of care and protection;
 - (h) to recognise the special needs that children with disabilities may have;
 - ...
 - (i) generally, to promote the protection, development and well-being of children.

With regard to the reporting of abused or neglected children and children in need of care and protection, section 110(1) of the CA provides that:

Any correctional official, dentist, homoeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care centre who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, must report that conclusion in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official.

Bearing this in mind, the educator testified that he had raised these issues at the school before, and they were not dealt with. He testified that the principal was even present at the latest incident. He reported the incident to the Child Protection Unit which referred him to the SAPS. In view of previous experiences of the lack of action, he went to the media. All of this was accepted by the department and even by the presiding officer, who in his findings ventured the opinion that he should have returned to the CPU to establish whether they were actually doing their work and, also to repeat once more that the educator is not allowed to talk to the media – that's policy!

32 38 of 2005.

The attention of the presiding officer was drawn to the relevant legal provisions which justified the conduct of the educator. Apart from pointing out that this is a legal duty imposed on the persons listed in section 110(1) of the CA, it was also argued on behalf of the educator that his conduct could also be described as a protected disclosure, since section 110(3) clearly provides for the nature and the extent of the protection, namely:

- A person referred to in subsection (1) or (2) –
- (a) must substantiate that conclusion or belief to the provincial department of social development, a designated child protection organisation or police official;
 - (b) who makes a report in good faith is not liable to civil action on the basis of the report.

In contrast to the view of the presiding officer that the educator should have followed up his report to the CPU with a further visit to establish whether the matter had been dealt with, section 110 continues and describes the duties of the various officials, including a designated child protection organisation or police official, after such a report had been made. The presiding officer's take on this matter is completely erroneous. A simple reading of the legislation to which he was referred (and of which hard copies were handed to him by the union) would have cleared up this matter for him. He failed to do so. It is a serious error of law.

Finally, in argument it was brought to the attention of the presiding officer, taking the educator's undisputed testimony in that regard into account, that the educator's conduct falls squarely within the ambit of the provisions of the PDA.

What does this entail as far as the educator and this case is concerned?

The Preamble to the PDA indicates that Government recognised that:³³

- (a) every employer and employee has a responsibility to disclose criminal and any other irregular conduct in the workplace;
- (b) every employer has a responsibility to take all necessary steps to ensure that employees who disclose such information are protected from any reprisals as a result of such disclosure.

For the purposes of the PDA”

‘disclosure’ means any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following:

- (a) that a criminal offence has been committed, is being committed or is likely to be committed;

33 See the Preamble Protected Disclosures Act 26 of 2000 (PDA).

- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
- (d) that the health or safety of an individual has been, is being or is likely to be endangered;
- (e) that the environment has been, is being or is likely to be damaged;
- (f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000;
- (g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.

Such a disclosure amounts to a *protected disclosure* which is defined in the PDA as:

a *disclosure* made to –

- (a) a *legal adviser* in accordance with section 5;
 - (b) an *employer* in accordance with section 6;
 - (c) a member of Cabinet or of the Executive Council of a province in accordance with section 7;
 - (d) a person or body in accordance with section 8; or
 - (e) any other person or body in accordance with section 9,
- but does not include a *disclosure* –
- (i) in respect of which the *employee* concerned commits an offence by making that *disclosure*;
 - (ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5.

In terms of section 2(1) of the PDA the objects of the act are:

- (a) to protect an employee, whether in the private or the public sector, from being subjected to an occupational detriment on account of having made a protected disclosure;
- (b) to provide for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure; and
- (c) to provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her employer.

As the provisions of the PDA are perused further, section 3 provides that an employee making a protected disclosure should not be subjected to an occupational detriment:

No employee may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure.

The occupational detriment which is prohibited by the PDA is defined as follows:

‘occupational detriment’, in relation to the working environment of an *employee*, means *inter alia*:

- (a) being subjected to any disciplinary action;
- (b) being dismissed, suspended, demoted, harassed or intimidated.

The occupational detriment(s), in relation to the working environment of the accused educator to which he had already been subjected in this instance under discussion, is his suspension and being subjected to disciplinary action. Both are prohibited by the Act.

It is worth remembering that the educator's testimony in this regard was not attacked on the aspect of disclosure and the reasons therefor. The criticism by the departmental officials (and the basis for the charges against him) remained to the allegation that he required the consent or permission of the department to talk to the press. In other words, the policy prevents him from talking to the press. As indicated by the presiding officer in his finding, there are many persons or bodies to whom he could have spoken, but (according to the presiding officer and despite the provisions of the PDA) this does not extend to the press. This is of course, in view of the provisions of the PDA, patently wrong and a total misdirection as will be shown further below.

The question, therefore, arises, can the educator talk (disclose) to the press? The PDA provides for various routes of protected disclosures, *inter alia*, in section 9 for General Protected Disclosure.

The practical Guidelines for employees in terms of section 10(4)(a) of the PDA, were published on 31 August 2011.³⁴ A copy of this notice was handed to the presiding officer by the union at the hearing. The Guidelines emphasise that the PDA was implemented on 16 February 2001 and applies to disclosures made after 16 February 2001. The charges against the educator under discussion relate to events during February 2011.

The Guidelines refer to the various categories (or "routes") of disclosure listed in the PDA and under route 5 is listed:

... any person, for example a member of the press (people working for radio and television stations or newspapers), a police official of the SAPS or a person working for an organisation which keeps watch over the public or private sector.

This is exactly what the educator under discussion had done and for which he should have been protected by his employer and not disciplined.

6 Whistle-blowers and Protected Disclosures

I have already referred to the provisions of section 186(2) of the LRA dealing with unfair labour practices. Section 186(2) (d) of the definition of "unfair labour practice" renders unfair any "occupational detriment" in contravention of the PDA, which is designed to protect "whistle-blowers". Grogan³⁵ sets out this protection and explains that the PDA

³⁴ See the Preamble PDA.

³⁵ Grogan *Workplace Law* (2009) 84-85.

and the LRA together protect employees against dismissal or any prejudice if they disclose information to specified persons concerning, among other things, the commission of criminal offences, “miscarriages of justice”, unfair discrimination and conduct detrimental to health and safety or the environment. Section 186(2)(d) affords employees who suffer prejudicial treatment other than dismissal, relief in the Commission for Conciliation, Mediation and Arbitration, established in terms of section 112 of the LRA. In the case of educators employed by the State, the statutory bargaining council where this relief would be sought, would be the Educators Labour Relations Council (ELRC), also established in terms of the LRA.

To succeed in an unfair labour practice action under section 186(2)(d), Grogan³⁶ points out further that employees must prove, firstly, that the disclosure to which the employer took exception was protected and, secondly, that they were subjected to an occupational detriment. A protected disclosure, Grogan continues, is defined in terms of its content, the manner in which and the person to whom it is made, and the state of mind of the person making it. The disclosure must relate to the forms of wrongdoing mentioned in the PDA, and must constitute statements of fact, not unsubstantiated opinion. The disclosure is protected only if the employee had “reason to believe” that the information would disclose one of the specified wrongs, and if made to a legal advisor, an employer, a member of the Cabinet or the Executive Council of a province. Employees must also utilise the procedures provided by the employer when making such disclosures.

An “occupational detriment”³⁷ includes prejudice going beyond the forms of unfair labour practice identified in the LRA. Occupational detriments include, apart from being dismissed, being subjected to disciplinary action, harassed, intimidated, transferred or refused transfer, being subjected to adverse alteration of terms and conditions of employment, or being “otherwise adversely affected” in employment, profession or office, including employment opportunities or work security. In the case under discussion, the educator was suspended from work and then charged with misconduct for having spoken to the press – clearly conduct on the part of the employer which is prohibited by the PDA.

Inasmuch as this disclosure was made to the newspapers, it falls under the fifth category (route 5) and the educator should have been protected by his employer, not suspended and prosecuted.

A useful illustration of the application of this Act in the workplace is to be found in *City of Tshwane Metropolitan Municipality v Engineering Council of SA*.³⁸ In this case, Wallis AJA stated clearly that:

36 85.

37 85.

38 2010 31 ILJ 321 (SCA).

... the Act, ... seeks to encourage whistle-blowers in the interests of accountable and transparent governance in both the public and the private sector ...

... the threat of disciplinary action can be held as a sword of Damocles over the heads of employees to prevent them from expressing honestly held opinions to those entitled to know of those opinions. A culture of silence rather than one of openness would prevail. The purpose of the PDA is precisely the opposite.

It is worth noting that the Guidelines and the Court refer to “whistle-blowing”. This totally escaped the attention of the department and the presiding officer and, in retrospect, it appears to have been totally ignored.

In conclusion it must be said that even apart from all the failures in the case for the department, and the gross irregularities leading to a miscarriage of justice and an unfair hearing, the educator’s conduct amounts to a protected disclosure and he should have been protected by his employer. The employer, especially, judged in retrospect on the basis of the bias against the educator (his suspension) before the hearing and during the hearing (disciplinary proceedings) and its basic ignorance of the provisions of the PDA, lead to the inevitable conclusion that the educator was not afforded a fair hearing. This despite the fact that his disclosures to various persons or bodies are all protected disclosures in the broadest sense of the word, namely:

- (1) his right to freedom of expression which cannot be curtailed by an unknown and unproven policy,
- (2) his duty to report the conduct of the staff in terms of the Children’s Act; and last but not least
- (3) his protected disclosure in terms of the Protected Disclosures Act – an Act which:
 - (i) obliges his employer to protect him;
 - (ii) prohibits the employer from suspending him;
 - (iii) prohibits the employer from subjecting him to a disciplinary hearing.

From these provisions of the PDA it must be clear that the educator should never have been suspended or charged with misconduct. However, having been charged, it became manifestly clear during the hearing that he had presented an absolute defence against the charges, that he was not proved to be guilty on a balance of probabilities and consequently that he should not have been found guilty.

7 The Possibility of Civil Claims Against the department and its Officials

In general it must also be said, all things considered, since the department in question had not acted upon previous reports, the officials appear to be blissfully unaware of the implications for them, the department and the school, of a failure to deal with this problem. The

extent of the implications appears from the judgement of Moosa J, in the case of *Jacobs v Chairman Governing Body Rhodes High School*.³⁹

Moosa J, summed it up as follows:

The incident which formed the basis of the cause of action in this matter had tragic, devastating and unfortunate consequences for the learner, the educator, the school principal and the school as a whole. On the fateful day of the incident, the learner bludgeoned the educator with a hammer in the class in the presence of other learners. Pandemonium and panic broke out amongst the shocked learners. Some of the learners rushed to the assistance of the educator and prevented the learner from attacking the educator further.

On the basis of the pleadings, the following issues had to be determined by the Court:

- (a) Whether there was a legal duty to take reasonable steps to ensure that Jacobs (the educator) was not harmed by the learner and if so, whether the Defendants and/or their servants breached that duty;
- (b) Whether the conduct of the Defendants or their servants was culpable, that is, whether they were negligent and whether there was a causal connection between such negligent breach of duty and the loss or damage suffered by the Plaintiff;
- (c) Whether the Plaintiff (Jacobs) suffered any loss or damage in consequence of any wrongful and negligent breach of duty and if so, what the quantum of such damages is.⁴⁰

The Court found in favour of the plaintiff and awarded damages and costs against the principal and the department for having neglected their legal duties.

In the case under discussion in this article, it is highly likely that sooner or later something similar could happen at this school – whether it be injuries to learners or educators, or even damage to school property.

8 Conclusion

In terms of Item 7 of Schedule 8 to the LRA, fair disciplinary action requires a valid rule or standard. The PDA, in dealing with protected disclosures, specifically requires this kind of conduct to be reported and the Guidelines lay down the procedures – including the General section dealing with disclosure to the press. The PDA prohibits the employer from acting against the employee by way of suspension or disciplinary action and explicitly requires the employer to protect the employee from “occupational detriment”.

The department argues that the employee knew about the communication policy and deliberately acted contrary to that. This

³⁹ 2011 1 SA 160 (WCC) 161, 162.

⁴⁰ *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 1 SA 160 (WCC) 165.

argument ignores the provisions of the PDA and the Guidelines in terms of the PDA. The presiding officer in his findings appears to endorse the view of the officials of the department, and, in short, by parity of reasoning, finds that the “policy” trumps:

- (i) the right to freedom of expression in the Bill of Rights (which can actually only be limited by a law of general application);
- (ii) the provisions of the Children’s Act which obliges certain groups of persons, such as teachers, to report certain conduct; and further by parity of reasoning,
- (iii) the provisions of the Protected Disclosures Act, despite the fact that this Act (like the Children’s Act) obliges persons to report certain conduct, prohibits the employers from causing an employee occupational detriment (which includes suspension and disciplinary action) and compels the employer, under circumstances of protected disclosures, to protect the employee.

The Guidelines specifically authorise disclosure to the press.

The conclusion is inevitable that the rule or standard in the policy, sought to be enforced by the employer, is not a valid rule or standard which can form the basis of a valid charge of misconduct, and the educator can therefore not be found guilty on any of the three charges and he should accordingly have been found not guilty. The finding should be set aside on appeal.

Even if it is found to be a valid rule or standard, it must be emphasised that the proceedings were so grossly irregular and prejudicial that the educator was not afforded a fair hearing as guaranteed by the Constitution and the LRA and also the EEA. Most of these prescripts were violated.

There should be no doubt as to the implications for a school and the staff, the learners and their parents, the school governing body and the Department of Education, should the duty to watch over the safety of learners not be properly performed. In the *Rhodes* case, Moosa J made it quite clear that:

[i]n terms of s 60(1) of the South African Schools Act, Act 76 of 1996 (SASA), the State is liable for any damage or loss caused as a result of any act or omission in connection with any school activity conducted by a public school and for which such school would otherwise have been liable. In terms of s 60(3), such a claim must be instituted against the third defendant (the MEC for Education, Western Cape). Similar provisions exist in WCPSEA (the Western Cape School Education Act), namely ss 19(1) and (2). There are a number of provisions in SASA and in the regulations promulgated in terms thereof which speak to the issue of safety and security at public schools. There are also a number of policy documents of the defendants that speak to the issue of safety and security at public schools, for example, the Procedural Manual for Managing Safety and Security within WCED (the Western Cape Education Department) Institutions. The Constitution and Code of Conduct of Rhodes High also provide for the safety and security of educators and learners alike. It must be noted that the principal is specifically given various

powers of enforcement and various responsibilities by the Act and regulations, to ensure the safety of a school's teachers and students. It is therefore clear, given the range of powers and duties that fall into the hands of the principal, and the fact that management is vested in the principal, that it is he or she who carries the primary responsibility in ensuring the safety of the members of the school community.⁴¹

In the disciplinary hearing under discussion, the department of Education in question failed to perform some of its basic duties in terms of the statutory provisions referred to by Moosa J, above. Not only that, but when confronted with a situation at the school where the learners were improperly treated and the educator had repeatedly reported the conduct of his colleagues, when confronted by the newspaper reports, instead of recognising the situation for what it was and protecting the "whistle-blower", the employer did exactly what the PDA expressly prohibits the employer to do, and that is, to suspend the employee and to institute disciplinary proceedings. This Act requires exactly the opposite, and that is, to protect the employee. The employer failed to do that.

9 Who Guards the Guardians?

Going back in history, we find the Latin phrase *Quis custodiet ipsos custodes?* a phrase traditionally attributed to the Roman poet Juvenal from his Satires,⁴² which is translated literally as "Who will guard the guards themselves?" It is sometimes rendered as "Who watches the watchmen?"⁴³

If departments of State and their employees cannot be relied on to understand the fundamental rights of citizens and to be fully informed of all the ramifications of a true democracy, and to act within that framework, including the protection of "whistle-blowers", then the time has come to alert the other constitutional guardians of citizens, that is, the various State institutions supporting constitutional democracy as provided for in chapter 9 of the Constitution. The educator in question sought out the Fourth Estate – the press that likes to cast itself as society's guardian:

The concept of the Fourth Estate (or fourth estate) is a societal or political force or institution whose influence is not consistently or officially recognised. The Fourth Estate now most commonly refers to the news media, especially print journalism ...⁴⁴

We have now come full circle. The educator disclosed the misconduct to the press. This is exactly what the PDA empowers the educator to do. The

41 *Idem* 168.

42 Satire VI, lines 347-348.

43 From *Wikipedia*.

44 From *Wikipedia*.

act prohibits the employer from suspending or disciplining the educator. However, this is exactly what the employer did and he was punished.