

UNIVERSITY OF KWAZULU NATAL

COLLEGE OF LAW AND MANAGEMENT

SCHOOL OF LAW

The Impact of Section 17 of the Employment of Educators Act 76 of 1998 on Fair and Rational Decision-making

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This research is submitted in pursuance of the requirements for the degree of Master of Laws.

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Date: August 2024

Declaration

I, Thirona Moodley, do hereby declare that this study on "The Impact of s17 of the Employment of Educators Act 76 of 1998 on Fair and Rational Decision-making." is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Thirona Moodley
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Acknowledgements

This has been a journey I could not have walked alone. First, I must acknowledge my Swami, who has always had my back and held my hand through life's journey.

Nicci, my supervisor, thank you for your valuable input and warm encouragement. Your insight and perspective of the law and your attention to detail are amazing. Every meeting brought a fresh perspective, and you also trusted, respected, and accepted my views.

Michelle Mopp, no words will suffice to acknowledge you. You had started me on this journey and held my hand. You gave me your precious time, allowing me to vent my frustrations and celebrate the small successes along the way. You provided personal and academic support, for which I am eternally grateful.

Thank you, Anne, for always offering administrative assistance and sorting out my “bad” typing.

Mum, you have always been supportive and encouraged me during my studies, which have been often. I know I can always depend on you to step in. Thank you.

Finally, my family. My husband Thesigan, who spent his evenings and weekends alone, life has been tough for you during this time. Thank you for keeping the torch burning.

My amazing daughters, Kahali and Sevti, you are my pride and joy, my inspiration in life and the reason I always strive to achieve more. Thank you for being my biggest fans; you both have no idea how much I learn from you every day; your sound and mature advice has always made me believe in myself even more. Although apart by distance, we were study partners late into the evenings and weekends. Thank you for the virtual coffee breaks, sharing of reels, and our girl's club chats.

KEYWORD / PHRASES

Breakdown in the employment relationship

Corrective as opposed to punitive discipline.

Discrimination

Dismissal

Educator

Mandatory Dismissal

Mitigation in disciplinary enquiries

Misconduct

Right to Dignity and Equality

Right to fair labour practices.

Progressive discipline

Sanction

Substantive fairness

Unfair labour practice

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Abbreviations and Acronyms

BCEA: Basic Conditions of Employment Act 75 of 1997

CCMA: Commission for the Conciliation, Mediation and Arbitration

DBE: Department of Basic Education

EEA: Employment of Educators Act 76 of 1998

EEQA: Employment Equity Act 55 of 1998

ELRC: Education Labour Relations Council

HOD: Head of Department

ILO: International Labour Organisation

LRA: Labour Relations Act 66 of 1995

MEC: Member of the Executive Council

PED: Provincial Education Department

PSA: Public Service Act 103 of 1994

SACE: South African Council of Educators

SACE Act: South African Council of Educators Act 31 of 2000

SASA: South African Schools Act 84 of 1996

ULP: Unfair Labour Practice

UN: United Nations

Abstract

This research aims to illustrate the complex nature of educator discipline in the public sector. This complexity impacts the outcome for educators found guilty of an offence listed in s17 of the Employment of Educators Act 76 of 1998 (EEA). Educators found guilty of an offence listed in this section of the EEA must be dismissed; no alternative sanction can follow. I use literature and case law to illustrate that the mandatory sanction of dismissal of these educators is unfair and not aligned with their Constitutional right to fair labour practice, nor is it aligned with the right not to be unfairly dismissed in terms of the Labour Relations Act 66 of 1995.

This study examines the legal basis for categorising educator misconduct into serious misconduct and misconduct. Furthermore, it considers whether such categorisation contributes to the unfair dismissal of the educator. Educator misconduct is not examined in isolation; it includes the impact of educator misconduct on the learners.

The offences listed in s17 of the EEA are compared with the offences and sanctions listed in the South African Council of Educators Code for Professional Ethics. This is to establish whether the objectives of s17 are met, as the SACE Code does not have a mandatory deregistration for any offence. S17 of the EEA aims to remove the guilty educator from the school.

This study also determines whether state-employed educators are discriminated against compared to school governing body-employed educators and nurses in the public sector.

I conclude this research with recommendations for legislative amendments to align educator discipline with the principles established in the Courts, particularly the Constitutional Court and subsequent legislation.

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CHAPTER ONE
Introduction, Research Aims and Methodology

1.1 Introduction

This study aims to determine whether the implementation of s17 of the Employment of Educators Act 76 of 1998 (hereafter EEA) results in a fair and rational outcome for an educator who has been dismissed in accordance with this section. The EEA comprises of two sections that deal with educator misconduct, s17, serious misconduct and s18 misconduct. This study focuses only on s17 offences and s18 offences are referred to only to show the discrepancies in the categorisation of offences. Section 17(1) of the EEA lists six offences an educator could commit: theft, bribery, or an act of corruption in regard to examination or promotional reports;[1] committing an act of sexual assault on a learner, student, or other employee;[2] having a sexual relationship with a learner of the school where he or she is employed;[3] seriously assaulting, with the intent to cause grievous bodily harm , to a learner, student, or other employee;[4] illegal possession of an intoxicating, illegal or stupefying substance;[5] or causing a learner or a student to perform any of the acts contemplated in paragraphs (a) to (e).[6]Any educator found guilty of any of these offences must be dismissed and no other sanction will be considered. Examining the fairness of such a dismissal is central to this study. The rights of other role players are vitally important and are also considered. These rights also influence the fairness of the educator's dismissal. To summarise s17 of the EEA, the employer must dismiss an educator if the educator has committed theft, fraud, bribery or corruption in relation to examination or promotional reports.[7] The educator must also be dismissed if found guilty of sexual assault[8] or was in a sexual relationship with a learner in their school.[9] This section includes serious assault[10] and possessing an intoxicating, illegal or stupefying substance.[11] The chair of the enquiry or the arbitrator has no option of imposing any sanction other than dismissal if the educator is found guilty.

[1] EEA s17(1)(a).
[2] EEA s17(1)(b).
[3] EEA s17(1)(c).
[4] EEA s17(1)(d).
[5] EEA s17(1)(e).
[6] EEA s17(1)(f).
[7] EEA s17(1)(a).
[8] EEA s17(1)(b).
[9] EEA s17(1)(c).
[10] EEA s17(1)(d).
[11] EEA s17(1)(e).

This study examines established principles in our labour law, including but not limited to fairness and equality. With the guiding principles of the legal framework that regulates employment relations, this study examines whether the mandatory dismissal required by s17 of the EEA is fair and rational. The judiciary also shapes the South African legal system; the study examines the court's decisions in relation to dismissal and whether s17 of the EEA is aligned with judicial precedent. The persuasive value of the Education Labour Relations Council (ELRC) arbitration awards related to educator misconduct illustrates the challenges with the charges listed in s17 of the EEA.

Educators are integral role-players in achieving the overall objectives of the Department of Basic Education (DBE). The educator is in direct contact with children who are the focus in education.[12] The overall objective of the DBE is to guarantee that every South African has access to lifelong learning, education, and training opportunities, to enhance their standard of living and create a peaceful, wealthy, and prosperous nation.[13] The educators have the responsibility to realise the DBE's vision. According to De Villiers, the educator's role in education is the most important educational resource.[14] The overall conduct of the educator impacts the learner, the community, and the country.[15]This creates a unique employment relationship between the educator and the employer, as educators have the added burden of realising the learners unqualified right to basic education, which the Constitution emphasizes as a transformative tool.[16] The legislation that shapes this relationship is considered in Chapter 2. Despite the educators' role in contributing to South Africa's prosperity and education system, they are still employees and subject to the country's labour laws. The right not to be unfairly dismissed is considered sacrosanct to employees in South Africa and worldwide.

1.2 Background to the Study

The EEA was assented to on 30 September 1998, and later amended by the Education Laws Amendment Act 53 of 2000. This Act introduced s17, serious misconduct, to the EEA. Before this amendment, the EEA did not distinguish between serious misconduct and misconduct. The introduction of s17(1) to the EEA has brought with it the automatic sanction of dismissal to educators found guilty of any offence listed in s17. As a result, mitigation for a lenient sanction, which has

[12] JP Rossouw '*Decentralisation in South African public schools: A labour law perspective on the role of the principal in managing staff misconduct*' (2001) 19 (4) *Perspectives in Education* 125.
[13] Department of Basic Education Website https://www.education.gov.za/AboutUs/AboutDBE.aspx accessed 27 June 2022.
[14] C De Villiers *Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education* (unpublished LLD Dissertation, University of Stellenbosch,2022).
[15] JP Rossouw 'Decentralisation in South African public schools: A labour law perspective on the role of the principal in managing staff misconduct' (2001) 19 (4) *Perspectives in Education* 125.
[16] C De Villiers *Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education*. (unpublished LLD Dissertation, University of Stellenbosch,2022) 15.

always been an integral part of the disciplinary process, is bypassed when educators are found guilty of a s17 offence.[17] This study considers whether the inability to provide evidence to mitigate a lenient sanction impacts the fairness of a s17 dismissal.

1.3 Legislative Framework

South Africa is part of the international community and, as a member of the United Nations, must promote universal respect for and observance of human rights and freedoms proclaimed in the Charter of the United Nations.[18] Therefore, the International Labour Organization's objectives must be reflected in South Africa's domestic legislation, particularly the ILO Conventions that South Africa has ratified. The Constitution of the Republic of South Africa (the Constitution) forms the framework for all legislation in the country, and the LRA is the over-arching labour legislation that other labour legislation must conform with. The provisions in the LRA relating to dismissal and The Code of Good Practice: Dismissal (hereafter Schedule 8) in the LRA is of particular significance to this study. The South African Council of Educators (hereafter SACE) is the professional body with which all educators must register. This body plays a significant role in this research, particularly the SACE Code of Professional Ethics.[19] The ELRC is the bargaining council established by the Public Sector Co-ordinating Bargaining Council (hereafter PSCBC) to regulate the conditions of service of educators in public schools employed by the State.[20] The Constitution of the ELRC also empowers the ELRC to perform dispute resolution functions for educators. Through collective bargaining, collective agreements regulate conditions of service and discipline matters. Collective Agreement 3 of 2018, "Providing for Compulsory Inquiries by Arbitrators in Cases of Disciplinary Action against Educators Charged with Sexual Misconduct in Respect of Learners," is significant to this study and is examined in Chapter 3.

The primary purpose of the Employment Equity Act 55 of 1998 (hereafter EEQA) is to prohibit direct or indirect unfair discrimination based on listed or unlisted grounds.[21] One of the objectives of this study is to determine whether s17 amounts to actionable, arbitrary, unfair discrimination. State–employed educators are compared to School Governing Body-employed educators. Apart from general

[17] LRA Schedule 8 item 3(5).
[18] United Charter available on *https://www.un.org/en/about-us/un-charter* accessed 10 April 2024.
[19] SACE Act s21(2).
[20] J Brand et al. *Labour Dispute Resolution* (1997) 71.
[21] EEQA s 6(1).

labour legislation, the education sector is also regulated by sector-specific legislation that this study examines in relation to the fairness and rationality of s17 of the EEA.[22]

1.4 Rationale and Purpose of this Study

The right to work allows individuals to realise their human rights, economically support themselves, and participate in society.[23] The termination of the employment contract is not to be taken lightly as it has dire consequences for the employee. It is for this reason dismissal of an employee is regulated through international law, ILO labour standards, the Constitution[24] and the Labour Relations Act.[25] In addition to this, the employment of educators is regulated through the EEA, which regulates the educator's conditions of service including educator discipline contained in ss17 and 18 of the Act. The Disciplinary Code and Procedures for Educators (hereinafter Schedule 2) is attached to the EEA.

This study endeavours to determine the rationale for the offences being categorised into serious misconduct, s17 and misconduct, s18. The resultant categorisation of offences means that educators found guilty of a s17 offence must be dismissed and an educator guilty of a s18 offence may be dismissed or subjected to any of the other sanctions stipulated in the Act.[26]

Furthermore, this study will consider whether the mandatory dismissal of the educator guilty of a s17 offence meets the standards for dismissal set by legislation and the courts. It cannot be accepted that because the EEA dictates that dismissal for a s17 offence is mandatory, it is fair. This study determines whether the mandatory dismissal of s17 of the EEA is fair after considering the law and judicial precedent.

1.5 Research Questions.

This thesis seeks to address the following:

1.5.1 Is the mandatory dismissal of an educator found guilty of a s17 offence fair, considering one's Constitutional right to fair labour practice,[27] the right not to be unfairly dismissed?[28]

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[22] Employment of Educators Act 76 of 1998; South African Schools Act 84 of 1996; South African Council of Educators Act 31 of 2000.

[23] C De Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education* (unpublished LLD Dissertation, Stellenbosch,2022) 116.

[24] S23.

[25] 66 of 1995 s185.

[26] EEA s18(3).

[27] The Constitution s23(1).

[28] LRA s185.

1.5.2 Are educators employed by the Department of Education in public schools discriminated against based on them having different employers when compared to SGB-employed educators in public schools?

1.5.3 Is policy reform necessary to ensure that legislation and procedures governing dismissal in terms of s17 promote fair and rational decision-making?

1.6 Literature Review

The literature reviewed includes studies and articles related to misconduct and educator misconduct.

1.6.1 Sexual Misconduct and the *in loco parentis* Principle are Inextricably Linked, and Several Writers Connect the Above

Sexual misconduct is contained in s17(1)(b), this is when an educator sexually assaults a learner, student, or another employee and s17(1) (c) refers to an educator who has a sexual relationship with a learner in the school they are employed in. There is extensive focus on sexual misconduct and its impact on learners in the literature reviewed. The literature reviewed in relation to sexual misconduct does not focus on the rights of educators and their right to a fair hearing and outcome, it focuses on the child's rights only and the impact of the educator's conduct on the child, this study focuses on the rights of the educator in the context of s17 of the EEA.

Sexual grooming of a learner is not listed as an offence in s17 of the EEA. Coetzee addresses this in "Educator Sexual Misconduct: Exposing or Causing Learners to be Exposed to Child Pornography or Pornography."[29] These acts are criminalised in ss18(2) and 19 of the Sexual Offences and Related Matters Amendment Act 32 of 2007. It's noteworthy that the EEA does not define sexual assault; this is problematic as the alleged misconduct by the educator is defined and interpreted by the department official drawing up the charges. Coetzee affirms that educators are in a *loco parentis* relationship with the learners.[30] It is when an educator cares for and supervises a learner, like a reasonable parent.[31] This can attest to the fact that the educator's employment relationship is unique, this is examined further in Chapter 2.

[29] SA Coetzee 'Educator misconduct: Exposing or causing learners to be exposed to child pornography or pornography' (2015) 18 (6) *Potchefstroom Electronic Journal* 1-12.
[30] SA Coetzee 'Educator misconduct: Exposing or causing learners to be exposed to child pornography or pornography' (2015) 18 (6) *Potchefstroom Electronic Journal* 7.
[31] ST Mampane 'Exploring the Practice of *In Loco Parentis* in Public Schools' (2018) 16 (5) *BCES Conference Books* 183-188

The principle of *in loco parentis* must be understood in the context of s17 of the EEA, specifically s17(1)(b), (c) and (d), which includes committing sexual assault on a learner, having a sexual relationship with a learner, or seriously assaulting a learner with the intention to cause grievous body harm. These offences do not comply with or respect the principle of *in loco parentis*. Mampane[32] examines the principle of *in loco parentis* in public schools. It is when an educator cares for and supervises a learner, like a reasonable parent. This includes caring for the child's emotional, physical, and psychological well-being.[33] Not only does this writer link violence and assault against learners with the principle of *in loco parentis* but also connects it to the child's constitutional rights, to equality, human dignity, freedom and security of the person, the right to be protected from maltreatment, neglect, abuse and degradation and the right to basic education.[34] It is important to note that s10 of the South African Schools Act (hereafter SASA)[35] also prohibits corporal punishment in schools, and one administering corporal punishment may be charged criminally and in terms of s17(1) (d). It is noteworthy that s17(1)(d) refers to serious assault with the intention to do grievous body harm, and s18 (1) (r) refers to assault. This study addresses the rationale for categorising the charges and the challenges with the varying interpretations.

Another article about sexual misconduct in education is "Sexual Harassment in the Education Sector.*"*[36] It also examined the in *loco parentis* principle and policy formulation that must protect learners and educators from sexual harassment.[37] The educator's authority over the learners creates the opportunity for abuse. This article considered the Sexual Offences and Related Matters Amendment Act 32 of 2007[38] and The Children's Act 38 of 2005[39] in the context of education. The article looks at ss17(1)(b), (c), and (d) of the EEA. One of the challenges identified in this article is that s17(1)(c) refers to the offence of "having a sexual relationship with a learner of the school where he or she is employed." The paper presents the challenge with this section, as a sexual relationship with a learner is only misconduct if the learner is from the school where one is employed; it is not a

[32] ST Mampane 'Exploring the Practice of *In Loco Parentis* in Public Schools' (2018) 16 (5) *BCES Conference Books* 183- 188.
[33] ST Mampane 'Exploring the Practice of *In Loco Parentis* in Public Schools' (2018) 16 (5) *BCES Conference Books* 183.
[34] ST Mampane 'Exploring the Practice of *In Loco Parentis* in Public Schools' (2018) 16 (5) *BCES Conference Books* 184
[35] 84 of 1996.
[36] D Smit and V du Plessis 'Sexual harassment in the Education Sector' (2011) 14 (6) *Potchefstroom Electronic Law Journal* 173.
[37] D Smit and V du Plessis 'Sexual harassment in the Education Sector' (2011) 14 (6) Potchefstroom *Electronic Law Journal* 173.
[38] D Smit and V du Plessis 'Sexual harassment in the Education Sector' (2011) 14 (6) *Potchefstroom Electronic Law Journal* 181.
[39] D Smit and V du Plessis 'Sexual harassment in the Education Sector' (2011) 14 (6) *Potchefstroom Electronic Law Journal* 184.

s17 misconduct if the learner is from another school.[40] De Villiers also raises this concern with the learner being from the same school as the educator.[41] This study examines how it can be fair for one educator to be charged and dismissed for having a sexual relationship with a learner from the school they are employed at however, an educator who has a sexual relationship with a learner from another school escapes liability. An educator may be disciplined for having a sexual relationship with a learner not in the school where they are employed in terms of s18(5), but only if it's alleged that they committed common law or statutory rape.[42]

One of the questions raised by the study is whether s17 of the EEA fulfils its intended purpose, which is to remove such educators from the schooling system permanently and to serve as a deterrent, particularly regarding sexual misconduct relating to learners. Calitz and De Villiers[43] argue that based on statistics and reports received from the Department of Basic Education (hereafter DBE) and SACE, teachers are not being dismissed for serious misconduct.[44] This article criticises the provincial departments of education as they do not elaborate on the steps taken against teachers accused of sexual misconduct, this makes it difficult to assess sexual misconduct in schools.[45] Calitz and De Villiers also focus on the *in loco parentis* principle and links it to s3(1) of SASA, which legally obligates parents to send their children to school.[46] Hence, parents delegate their duty of care to the teachers, who must ensure a safe learning environment.

Importantly Calitz and De Villiers point out that in s17, serious misconduct in the EEA includes sexual assault and sexual relationships at one's place of employment, but it includes rape in s18, where dismissal is not compulsory.[47] One of the questions in this study is the logic and rationality behind categorising offences. The unique aspect of this article was the recommendation of vicarious liability on the employer's part for the teacher's conduct. Vicarious liability is when one is held liable

[40] D Smit and V du Plessis 'Sexual harassment in the Education Sector' (2011) 14 (6) Potchefstroom *Electronic Law Journal* 186.
[41] C De Villiers *Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education*. (unpublished LLD Dissertation, University of Stellenbosch,2022) 341.
[42] EEA s18(1) (dd)
[43] K Calitz and C de Villiers 'Sexual Abuse of Pupils by teachers in South African Schools: The vicarious Liability of Education Authorities' (2020) 137 (1) *South African Law Journal* 72-107.
[44] K Calitz and C de Villiers 'Sexual Abuse of Pupils by teachers in South African Schools: The vicarious Liability of Education Authorities' (2020) 137 (1) *South African Law Journal* 79.
[45] K Calitz and C de Villiers 'Sexual Abuse of Pupils by teachers in South African Schools: The vicarious Liability of Education Authorities' (2020) 137 (1) *South African Law Journal* 79.
[46] K Calitz and C de Villiers 'Sexual Abuse of Pupils by teachers in South African Schools: The vicarious Liability of Education Authorities' (2020) 137 (1) *South African Law Journal* 81.
[47] K Calitz and C de Villiers 'Sexual Abuse of Pupils by teachers in South African Schools: The vicarious Liability of Education Authorities' (2020) 137 (1) *South African Law Journal* 80.

for the actions or omissions of another person.[48] According to these writers, due to the various concepts such as sexual misconduct, sexual harassment, sexual assault and sexual violence and the multiple definitions attached to these concepts in legislation and policy, they have been inconsistently applied in the education sector.[49] The challenges regarding terminology are addressed extensively in this study.

1.6.2 Dismissal and Discipline in the Education Sector

Mnguni's critique of s17 includes the fact that there was no definition of sexual assault and that there are other sexual offences that impact children that are not included in s17.[50] The writer agrees with this as it was also raised by Coetzee,[51] common law rape and statutory rape are not considered serious misconduct in the EEA, furthermore, sexual grooming is not a s17 offence. Calitz and De Villiers[52] also question what definitions were used in s17 regarding sexual misconduct. Mnguni questioned why theft, bribery and corruption only related to promotion reports in s17(1)(a), as in criminal law, theft, bribery, and corruption might carry lengthy jail sentences.[53] Notably, Mnguni cites Coetzee,[54] the offence of rape is included in s18(5)(d) of the EEA. Section 18 does not require a compulsory dismissal if an educator is found guilty of an offence in this section. The Sexual Offences Amendment Act 32 of 2007 prohibits any person convicted of attempted murder, rape, indecent assault, or assault to work with children.[55] Indeed, the offence should result in mandatory dismissal. Mnguni recommended that the phrase "must be dismissed" in s17 be replaced with "may be dismissed", this will be in line with item 3(5) of Schedule 8 and item 7 of Schedule 2 of the EEA. Another critical recommendation by Mnguni is that s17(1)(c) of the EEA be aligned to clause 3.9 of the SACE Act, which condemns any form of sexual relationship with a learner at any school. Mnguni did not address whether s17 of the EEA unfairly discriminates against educators employed in terms of the EEA.

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[48] Vicarious liability and what it means for employers. Available on https://www.abgross.co.za/vicarious-liability-and-employers/ accessed 6 October 2022.

[49] K Calitz and C de Villiers 'Sexual Abuse of Pupils by teachers in South African Schools: The vicarious Liability of Education Authorities' (2020) 137 (1) *South African Law Journal* 80.

[50] S Mnguni *Application of Section 17 of the Employment of Educators Act (*unpublished LLM thesis Nelson Mandela Metropolitan University, 2016) 66.
[51] SA Coetzee 'Educator misconduct: Exposing or causing learners to be exposed to child pornography or pornography' (2015) 18 (6) *Potchefstroom Electronic Journal* 7.
[52] K Calitz and C de Villiers 'Sexual Abuse of Pupils by Teachers in South African Schools: The vicarious Liability of Education Authorities' (2020) 137 (1) *South African Law Journal* 73.
[53] S Mnguni *Application of Section 17 of the Employment of Educators Act (*unpublished LLM thesis Nelson Mandela Metropolitan University, 2016) 66.
[54] SA Coetzee 'Law and Policy Regulating Educator-On-Learner Sexual Misconduct' (2012) 23(1) *Stellenbosch Law Review* 82.
[55] s41(1)(a).

The distinction between misconduct (s18, EEA) and serious misconduct (s17, EEA) was introduced to the EEA by the Education Laws Amendment Act 53 of 2000. Martin[56] undertook a study 5 years later to determine the extent to which educators were aware of s17 and the consequences thereof. One of the focus areas of the research was whether the Provincial Education Department (PED) in Gauteng did enough advocacy to capacitate educators regarding s17 offences. In this study, educators felt that the department needed to have more workshops so that the amendments could be better understood,[57] others believed that despite educators being aware of s17, it did not bring about a shift in behaviour.[58] Martin's research is significant to this study, as it elucidates the significance and the impact of distinguishing between misconduct and serious misconduct in terms of the EEA.

The findings of De Villiers are quoted extensively in this study. The aim of de Villiers's study was to determine the impact of legislation on educator performance in the delivery of basic education.[59] This writer extensively considers educator misconduct and includes in her analysis the "curious distinction" between s18 and s17 of the EEA. De Villiers also considers the possible sanctions that the EEA allows for, and this is relevant to this study. She identified the areas for improvement in the legislation regarding who is responsible for educator discipline and recommended legislative amendments to improve the management of educator discipline. The study dealt in detail with s17 and s18 offences and the challenges associated with categorising and interpreting the offences. She found that due to the misinterpretation of the offences and charges, there was inconsistent application of the disciplinary code. This study also examined the impact of international law, the Constitution and the LRA on the EEA and educator discipline.[60] An extensive examination of ELRC awards and case law was presented to substantiate the writer's findings.[61] The writer examined the discipline of state-employed educators vis-a-vis SGB-employed educators.

[56] R Martin *The perceptions of educators with regard to section 17 acts of misconduct in the employment of educators* (unpublished M. ED thesis University of Johannesburg 2005) 73.
[57] R Martin *The perceptions of educators about section 17 acts of misconduct in the employment of educators* (unpublished M. ED thesis University of Johannesburg, 2005) 73.
[58] R Martin *The perceptions of educators with regard to section 17 acts of misconduct in the employment of educators.* (unpublished M. ED thesis, University of Johannesburg, 2005) 75.
[59] C De Villiers *Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education* (unpublished LLD Dissertation, University of Stellenbosch,2022) 120.
[60] C De Villiers *Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education* (unpublished LLD Dissertation, University of Stellenbosch,2022) 121-185.
[61] C De Villiers *Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education* (unpublished LLD Dissertation, University of Stellenbosch,2022) 279-347.

1.6.3 Impact of the Bill of Rights on s17 of the EEA

De Waal and Mawdsley focus on the educator's constitutional right to privacy.[62] The authors looked at the extent to which the members of the public are entitled to know the identity of the educators who have been charged with sexual misconduct, who should investigate sexual misconduct and what expectations of privacy the educator could reasonably have during the investigation. This article is relevant to this study, as this study considers the impact of s17 charges on the educator's constitutional right to dignity and equality. Finally, this article considered the impact of charges on educators.

Coetzee[63] looks at the ELRC Collective Agreement 3 of 2018, *"*Providing for Compulsory Inquiries by Arbitrators in Cases of Disciplinary Action against Educators Charged with Sexual Misconduct in Respect of Learners." This is a pre-dismissal arbitration in terms of s188A of the LRA. Educators charged with sexual misconduct against learners will not be subjected to an internal hearing but an arbitration. This bypasses the internal disciplinary process, conciliation, and appeal.[64] The educator charged with s17(1) (a) and (b), as well as s18 charges of sexual misconduct against learners,[65] will not have an internal disciplinary process. Instead, the matter will be heard in the ELRC, a bargaining council established in terms of s27 of the LRA, and the outcome will be an arbitration award subject to s145 of the LRA, which provides for the review of arbitration awards.

The study did not look at the role of mitigation in s17(1)(b)(c), which is an important component of the study at hand. Furthermore, this study failed to contemplate that offences that are wrongly categorised as a s17 offence will result in dismissal if the educator is found guilty, whereas if the offence was correctly categorised as a s18 offence the educator will have the opportunity of an internal appeal or even possibly a lesser sanction than dismissal. This study addresses this concern.

Other literature reviewed looked at the general principles in determining a sanction. Dismissal is the ultimate sanction an employee can receive, Schedule 8 of the LRA, item 2, indicates that the facts of the case determine whether dismissal is an appropriate sanction. In the article "Fairness of Dismissal

[62] E De Waal and R Mawdsley 'Student/ learner allegations of teacher sexual misconduct: A teacher's right to privacy and due process' (2011) *De Jure* 44 (1) 74 -100.
[63] SA Coetzee 'Promoting fair individual labour dispute resolution for South African educators accused of sexual misconduct. Part 1" (2021) 2021 (1) *Journal of South African Law* 40.
[64]SA Coetzee 'Promoting fair individual labour dispute resolution for South African educators accused of sexual misconduct. Part 1" (2021) 2021 (1) *Journal of South African Law* 40.
[65] EEA s18(1) (q) s18(5)(d).

as a Sanction for Misconduct in South African Labour Law,*"*[66] the writer looked at the fairness of dismissal as per principles laid down by *Sidumo*.[67]

Another article that examined the principles established in *Sidumo* is *"*Sidumo test explained: Fairness of Employers Decision."[68] The writer studied case law that expands on the role of the decision-maker. The article looks at *Dorrainn Bailiff Investments (Pty) Ltd v CCMA,*[69] where it was held that the commissioner must objectively, impartially, and fairly determine whether the employer's decision is fair.[70] They have no power to decide what they would have done but to determine whether what the employer did was fair, given all the facts and circumstances. This study examines whether dismissal in s17 (1) is appropriate if all the circumstances around the misconduct are not considered. In the context of s17 of the EEA, what would the presiding officer do if they find the employee guilty but do not believe that dismissal is the appropriate sanction? How would they comply with the principle laid down in *Sidumo*, that of a reasonable decision-maker?

As indicated, s17 does not allow the educator to mitigate for a lenient sanction. Mitigation has always played a role when determining an appropriate sanction, as noted in the article, "How do you Determine a Fair Sanction? Dismissal as an Appropriate Sanction in Dismissal Cases for (Mis)conduct."[71] This article looked at *Edcon Ltd v Pillemer*[72] (hereafter *Edcon*) and the role of mitigation. In this case, the SCA looked at surrounding circumstances, including length of service and disciplinary record. More importantly, this article looked at serious misconduct, albeit not by educators specifically, and its impact on the employment relationship.[73]

There are numerous studies and articles that focus on the sexual misconduct of educators and its impact on learners. This study considers s17's implications for fair labour practices and fair decision-making from the educator's perspective, not the learners. Existing literature examining serious

[66] CM van der Bank 'Fairness of Dismissal as a Sanction for Misconduct in South African Labour Law' (2014) 3 (1) Academic *Journal of Interdisciplinary Studies 139*-146.
[67] CM van der Bank 'Fairness of Dismissal as a Sanction for Misconduct in South African Labour Law' (2014) 3 (1) *Academic Journal of Interdisciplinary Studies 140-141.*
[68] '*Sidumo* Test explained: Fairness of employer's decision' available at https://www.gilesfiles.co.za/sidumo-test-explained/ accessed 24 March 2022.
[69] (2016) ZALAC 20.
[70] '*Sidumo* Test explained: Fairness of employer's decision' available at https://www.gilesfiles.co.za/sidumo-test-explained/ accessed 24 March 2022.
[71] N Smit 'How do you determine a fair sanction? Dismissal as appropriate sanction in cases of dismissal for (mis)conduct' (2011) 1 (44) *De Jure* 49-73.
[72] [2010] 1 BLLR 1 (SCA).
[73] N Smit 'How do you determine a fair sanction? Dismissal as appropriate sanction in cases of dismissal for (mis)conduct' (2011) 1 (44) *De Jure* 60.

misconduct focuses on sexual misconduct only, the other serious misconduct listed in s17 is ignored or considered less important.

1.7. Research Methodology

This is a desktop, literature-based study. It is done by researching and reviewing both primary and secondary resources. Primary sources are "those recorded rules of human behaviour which the state will enforce. They include the statute passed by the legislature, decisions of the court, decrees and orders, and regulations and rulings of administrative agencies."[74]

Secondary sources include textbooks, treatises, commentaries, journal articles and periodicals. Online sources are also used, as well as case law. The study also considers arbitration awards from the ELRC that deal with educator dismissals.

1.8 Limitations of the Study

This study focuses on the discipline of educators employed in public schools and employed by the State. It will only deal with substantive fairness and not the procedure employed by the employer in dismissal matters. It is only s17 offences that are explored with reference to s18 offences for comparison.

1.9 Structure of the Study

Chapter 1

Introduction

This introduction gives an overview of the study, including the research questions. It includes the literature review, methodology and the objectives of the study. The chapter introduces the legislation and the critical areas of interest, which will be expanded on in subsequent chapters.

Chapter 2

Legislative Framework for Educator Discipline

This chapter considers the legal framework within which the general employment relationship operates. It includes an analysis of the legislation applicable to the employment of educators, the EEA. The provisions of the LRA and EEA are examined in the context of the dismissal of educators. Particularly significant in this chapter is the breakdown of the s17 offences and the confusion

[74] M Cohen *Legal Research* 4 ed (1986) 9.

associated with the interpretation and categorisation of offences. As the SACE Act[75] also impacts on the discipline of educators, a comparison is made between s17 offences and equivalent offences in the SACE Act. The Employment Equity Act 55 of 1998 is reviewed in the context of discrimination as this study examines whether educators employed by the State are discriminated against unfairly when compared to educators who are SGB-employed. The chapter examines the ELRC Collective Agreement 3 of 2018, "Inquiries by Arbitrators in cases of Disciplinary Action Against Educators Charged with Sexual Misconduct in respect of Learners" in relation to s17.

Chapter 3

The Duty to Discipline and the Decision to Dismiss

This chapter looks at the factors that must be considered when contemplating a sanction of dismissal. It also looks at the impact of educator misconduct on learners and the employment relationship. The Court's position in *Sidumo and Another v Rustenburg Platinum Mines Ltd and others*[76] (hereafter *Sidumo*) and how this case changed the dismissal law landscape is included in this chapter. The role of the disciplinary code, disciplinary charges and discipline in the workplace is considered. The research question on the categorisation of charges is addressed here by examining the interpretation of ss17 and 18 charges and the rationale for categorising charges into ss 17 and 18. The SACE mandatory sanctions are compared to the offences in ss 17 and 18. Dismissal law is examined to determine whether the automatic dismissal of s17 is fair. The role of mitigation in determining a sanction is considered. The role of the presiding officer in s17 disciplinary hearings and arbitrations is examined.

Chapter 4

Fair or Unfair Discrimination?

This chapter addresses the question of whether s17 unfairly discriminates against educators who are employed in terms of the EEA. This is done by comparing state-employed educators with SGB-employed educators. The question addressed in this chapter is whether state-employed educators have an actionable claim of unfair discrimination on arbitrary grounds in terms of section 6(1) EEQA. Central to this chapter is *Harksen v Lane NO* [77] (hereafter *Harksen*), the charges in s17 are subjected to the *Harksen* test. Other significant Constitutional Court cases are examined in the context of one's rights to equality and dignity.

[75] 33 of 2000.
[76] (2007) 12 BLLR 1097 (CC).
[77] (1997) 11 BCLR 1489 (CC).

Chapter 5

Conclusion and Recommendations

The final chapter summarizes the insights gained from the study, answers the research questions, and provides recommendations specifically for legislative amendments.

CHAPTER TWO

Legislative Framework that Regulates Educator Discipline

2.1 Introduction

This chapter looks at the sources of law that contribute to the South African labour law system, specifically focusing on the legislation governing education. The aim is to understand the impact of the Constitution, and other legislation on educator discipline. The educator-specific legislation includes the EEA and the SACE Act.[78]

2.2 The Law Regulating a Fair Dismissal and Fair Labour Practice.

When considering the fairness of an educator's dismissal one must consider, the Constitution, the LRA, and the EEA.

All labour legislation must [comply] with the Constitution, and the conduct of all state governments, e.g., education and other organs of state, e.g., public schools, must comply with [these] provisions.[79] Section 2 of the Constitution emphasises that all law and conduct must be consistent with the Constitution, and the courts may invalidate any legislation that is contrary to the Constitution.[80] One of the considerations of this study is to determine whether s17 of the EEA amounts to discrimination and whether the section is constitutionally valid.

According to Garbers et al.,[81] s23 of the Constitution are directly applicable to the employment relationship. According to the Constitution, "Everyone has the right to fair labour practices,"[82] this is the fundamental labour right in the Constitution that permeates all labour legislation. It is impossible to define unfair labour practice as unfairness is a value judgment that varies depending on the specifics of each case.[83] The meaning of the right to fair labour practice must be gathered from the content given to it by the legislature and the decisions of specialist tribunals.[84] In the education sector, fairness must

[78] 31 of 2000.
[79] E Bray and J Beckmann 'The employment relationship of the public-school educator: A constitutional and legislative overview' (2001) 19(4) *Perspectives in Education* 117.
[80] E Bray and J Beckmann 'The employment relationship of the public-school educator: A constitutional and legislative overview' (2001) 19(4) *Perspectives in Education* 119.
[81] C Garbers et al. *The New Essential Labour Law* 7ed (2019) 12.
[82] s23.
[83] *National Education and Allied Workers Union v University of Cape Town & others* (2003) 24 *ILJ* 95 (CC) para 95.
[84] C Bosch 'Bent out of Shape: Critically assessing the application of the right to fair labour practices in developing South African Labour Law' (2008) 19 (3) *Stellenbosch Law Review* 374.

be assessed bearing in mind s28(2) of the Constitution, which focuses on the child's rights.[85] Furthermore, Coetzee adds, that " educators who are accused of sexual misconduct, face serious consequences for their current and future employment and therefore the need for fairness is critical in these cases." [86] The impact of a dismissal on educators may be worse than that of most employees, as a dismissed educator may also be deregistered from SACE, making re-employment as an educator impossible, thereby impacting on their right to dignity and ability to earn a living.[87] The International Labour Organisation and the United Nations Educational Scientific and Cultural Organisation,[88] argue that "teachers should have sufficient protection from arbitrary actions that could harm their careers or professional standing."[89]

There is a misconception that the right to fair labour practices only protects the employee, the Constitutional Court held in *National Education & Allied Workers Union v University of Cape Town*,[90] stated that s23 of the Constitution focuses on the connection between the employer and employee and how it should continue on terms that are fair to both parties. In view of the above the employer expects the educators to refrain from any form of misconduct and on the other hand the educator has an expectation of being subjected to a fair outcome when being disciplined.

In addition to the Constitution, the LRA is the primary source of labour legislation in employment law, it affords labour rights to employees, including the right not to be unfairly dismissed,[91] and the right to fair labour practices.[92] The primary object of the LRA is to give effect to the fundamental rights conferred on employees by the labour rights clause in the Constitution.[93]

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[85] The Constitution s28(2).
[86] SA Coetzee 'Promoting fair individual labour dispute resolution for South African educators accused of sexual misconduct (Part 1)' (2021) 29 (1) Journal *of South African Law* 30.
[87] SACE Code of Professional Ethics item 8.2.3. *https://www.sace.org.za/assets/documents/uploads/sace_58684-2018-11-22-Ethics%20brochure.pdf* accessed 16 October 2023.
[88] 'Recommendation Concerning the Status of Teachers' adopted 05-10-1966 by the Special Inter-governmental Conference on the Status of Teachers, Paris 46, available at https://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@sector/documents/normativeinstrument/wcms_162034.pdf accessed 17 October 2023.
[89] Recommendation Concerning the Status of Teachers' adopted 05-10-1966 by the Special Inter-governmental Conference on the Status of Teachers, Paris 46, available at *https://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@sector/documents/normativeinstrument/wcms_162034.pdf* accessed 17 October 2023.
[90] *National Education and Allied Workers Union v University of Cape Town & others* (2003) 24 *ILJ* 95 (CC) 40.
[91] LRA s185 (a).
[92] LRA s185(b).
[93] D Pillay 'The Constitutionalisation of Fair Labour Practices in South Africa.' New York Law School Public Law and Legal Theory Available at *http://ssm.com/abstract=638621* accessed 14 September 2022.

The provisions of the LRA apply to educators, despite the EEA being the primary legislation regulating the educators' employment relationships.[94] The relationship between the LRA and the EEA is evident in the following ways, the Minister may determine the appointment, promotion or transfer of an educator, subject to Chapter 2 of the EEA, LRA and any collective agreement concluded in the ELRC,[95] the employer must consider provisions of the LRA before effecting the discharge of an educator in terms of s11 of the EEA. [96] When considering the fairness of a s17 (1) dismissal the LRA must be considered.

The LRA requires that the employer prove that the dismissal is for a fair reason and effected in accordance with fair procedure.[97] This section of the LRA also requires that Schedule 8 of the LRA be considered when determining whether a dismissal is fair.

The disciplinary proceedings of educators must be in accordance with Schedule 2 of the EEA, this Schedule expressly includes Schedule 8 of the LRA.[98] Incorporating Schedule 8 of the LRA into Schedule 2 of the EEA ensures that educators are afforded the same protection as other employees of the LRA. [99] Schedule 8 is a guideline aimed at promoting mutual respect between employers and employees, and it also acknowledges the interests of the employer and employee. [100] Schedule 8 requires that all employers establish a disciplinary code in the workplace. It should take into consideration the working conditions as well as circumstances associated with the organisation's activities.[101] The disciplinary code for educators is part of the EEA in s17 and s18. Therefore, unlike a typical disciplinary code, it must be followed without flexibility as the disciplinary code is legislated.

Schedule 8 gives direction when dismissal is being considered, it requires that the gravity of the offence and the impact on the employment relationship must be considered.[102] Importantly, for this study, Schedule 8 requires that the employee's personal circumstances, the nature of the job and the circumstances of the infringement must be considered. Section 17 of the EEA, serious misconduct,

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[94] C De Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education* (unpublished LLD Dissertation, Stellenbosch.2022) 86.
[95] EEA s 6(2).
[96] EEA s 11(1).
[97] LRA s188(1).
[98] EEA Schedule 2 item 3(1).
[99] C De Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education* (unpublished LLD Dissertation, Stellenbosch.2022) 167.
[100] LRA Schedule 8 item 1(3).
[101] ST Mzangwa 'Legislation and Employment Relations in South Africa: A Narrative Overview of Workplace Dispute' (2015) (4) 1 *Journal of Governance and Regulation* 174.
[102] LRA Schedule 8 item 3(3)(4).

does not allow for mitigating factors to be considered, as dismissal is automatic once guilt has been established. Although Schedule 8 does allow for dismissal for serious offences, albeit the first offence,[103] it does not exclude such employers from considering mitigating factors as indicated in item 3(5) of Schedule 8 of the LRA.

The disciplinary code in ss17 and 18, and Schedule 2 in the EEA must be interpreted in the context of the school, and the learner's rights must be considered, not only the rights of the employers and employees.

2.3 The Impact of a Dismissal on One's Right to Dignity

One's right to fair labour practices is also reflected in the Bill of Rights. The Constitutional Court explained that work is part of one's identity and constitutive of one's dignity.[104] This is particularly significant to this study, as the dismissal of educators charged with a s17 offence must be examined in the context of the educators' right to dignity. Human dignity is when every human being is worthy of respect and equal treatment.[105] The inability to economically independent will impact one's self worth and self-respect. The educator's automatic dismissal for a s17 offence will impact the educator's right to dignity, this will be exacerbated if the dismissal is unfair, and one is dismissed purely because the dismissal is mandatory instead of it being an appropriate sanction.

In *Minister of Home Affairs and Others v Watchenuka and others,*[106] Nugent JA indicated that the freedom to engage in productive work is essential to human dignity, self-esteem, and a sense of self-worth, fulfilling what it is to be human. An employer's respect for the employee's dignity does not mean the employer loses their right to discipline or dismissal.[107] What is required is that the employee's right to work security is protected so that it is consistent with their right to dignity.[108]

Another Constitutional right significant to this study is s12 of the Constitution, "Freedom and security of the person." [109] This right is closely related to human dignity, and any infringement of one's bodily or psychological integrity will invariably affect one's dignity.[110] This right relates to the infliction of

[103] LRA Schedule 8 item 3(3).
[104] *Affordable Medicines Trust v Minister of Health RSA* 2005 (6) BCLR 529 (CC).
[105] C O' Mahony 'There is no such thing as a right to dignity' (2012*) International Journal of Constitutional Law* 10 (2)556
[106] 2003 ZASCA 142 para 27.
[107] A van Niekerk 'Dismissal for misconduct – Ghosts of justice past, present and future' (2012) *Acta Juridica* 116.
[108] A van Niekerk 'Dismissal for misconduct – Ghosts of justice past, present and future' (2012) *Acta Juridica* 116.
[109] IJ Prinsloo 'How safe are South African schools?' (2005) 25(1) *South African Journal of Education* 8.
[110] IJ Prinsloo 'How safe are South African schools?' (2005) 25(1) *South African Journal of Education* 8.

corporal punishment in schools. Corporal punishment is any intentional physical harm or discomfort done to a child with the intent to punish.[111] Corporal punishment in schools infringes the child's right to freedom and security.[112] Corporal punishment has been prohibited in terms of s10 of SASA. In terms of s17(1)(d), "an educator commits an offence if he or she seriously assaults a learner, student or other employee with the intent to cause grievous bodily harm." Such conduct is not only an offence in terms of s17(1)(d) of the EEA but a criminal offence and a violation of the victim's constitutional right to an environment free from harm.[113] One can therefore not consider educator misconduct without considering its impact on learner's rights. The sanction that an educator receives must be commensurate to the harm suffered by the learners, particularly charges of sexual assault and grievous bodily harm.

2.4 Does s17 Amount to Unfair Discrimination of State-employed Educators?

Unfair discrimination in the employment sphere is regulated through the Constitution, the LRA and the EEQA. The Constitution is central to the determination of unfair discrimination. Section 9(2) extends the concept of equality beyond the prohibition of unequal treatment and formal equality to achieve equal enjoyment of rights substantive equality.[114] Formal equality is also referred to as "equality in treatment." It is protected in ss9(3) and (4) of the Constitution by prohibiting unfair discrimination.[115] Substantive equality, also called the "equality of outcome," is promoted by adopting positive measures or affirmative action to empower disadvantaged groups in society.[116] Cooper explains substantive equality, as assessing whether a particular context requires identical or different treatment to achieve equality, and it is in chapters 2 and 3 of the EEQA.[117] Substantive equality was explained in *President of the Republic of South Africa v Hugo*,[118] where the Constitutional Court elaborated on s9(2) of the Constitution

> "Although unfair discrimination recognises a society which affords each human being equal treatment based on equal worth and freedom, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case will require careful consideration of the impact of the

[111] Section 27 Corporal Punishment available at *https://section27.org.za/wp-content/uploads/2017/02/Chapter-19.pdf* accessed 1 October 2023.

[112] IJ Prinsloo 'How safe are South African schools?' (2005) 25(1) *South African Journal of Education* 8.
[113] The Constitution s24(a).
[114] D Du Toit et al. *Labour Relations A Comprehensive Guide* 5 ed (2006) 574.
[115] C Garbers et al. *The New Essential Labour Law Handbook* (2019) 7ed 345.
[116] C Garbers et al. *The New Essential Labour Law Handbook* (2019) 7ed 345.
[117] C Cooper 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 823.
[118] (1997) 12 BLLR 1517 (CC).

discriminatory action upon the particular people concerned to determine whether its overall impact furthers the overall equality or not. The classification which is unfair in one context may not necessarily be unfair in a different context."[119]

Bray and Beckmann summarise the educator's employment relationship as one where all departments' legislation, policies, and conduct are subject to the Constitution to promote and provide a labour dispensation based on equality and employment equity.[120]
The LRA also prohibits unfair discrimination in dismissals, in s187. Automatically unfair dismissals are identified by the reason that prompted the dismissal.[121] Section 187(1) lists the reasons that will qualify a dismissal as automatically unfair.[122]

There is an overlap with the grounds of discrimination in s6 of the EEQA and s187(1) (f) of the LRA, except that the EEQA includes HIV and harassment as grounds for discrimination. As cited above, an employee dismissed for one of these reasons may theoretically seek relief through the EEQA, the LRA, or both.[123] Section 187 (1)(f) also resembles s9 of the Constitution, they all contain similar terms and concepts, and jurisprudence pertaining to the interpretation of and interpretation and application of any of them is relevant to the interpretation and application of the others.[124]

A dismissal is automatically unfair if it cannot possibly be fair or the reason contradicts the law.[125] The term automatically unfair dismissal denotes that if the reason for the release is on prohibited grounds, a

[119] D Du Toit et al. *Labour Relations A Comprehensive Guide* 5 ed (2006) 574.
[120] E Bray and J Beckmann 'The employment relationship of the public-school educator: A constitutional and legislative overview' (2001) (19) 4 *Perspectives in Education* 122.
[121] J Grogan *Dismissal* 4 ed (2022) 111.
[122] S187(1)(a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV;(b) that the employee refused ,or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;(c) a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer;(d) that the employee took action, or indicated an intention to take action against the employer by – (i) exercising any right conferred by *this* Act; or (ii) participating in any proceedings in terms of *this* Act; (e) the employees pregnancy, intended pregnancy, or any reason related to her pregnancy; (f) that the employer unfairly discriminates against an employee ,directly or indirectly ,on an arbitrary ground, including, but not limited to race, gender ,sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;(g) a transfer, or a reason related to a transfer, contemplated on section 197 or 197A; or (h) a contravention of the Protected Disclosures Act, 2000 by the employer, on account of an employee having made a protected disclosure defined in that Act.
[123] J Grogan *Dismissal* 4 ed (2022) 111.
[124] J Grogan *Dismissal* 4 ed (2022) 138.
[125] J Grogan *Dismissal* 4 ed (2022) 110.

finding that the dismissal is unfair must follow.[126] The employer cannot argue that they were protecting more important interests or following a fair procedure.[127]

In the context of this study, the educator will not have a claim under s187 of the LRA as the reason for the dismissal is not based on any of the listed grounds or unlisted grounds, instead, the educator is dismissed due to their misconduct. This educator will contest the dismissal in terms of ss185(a) and186 of the LRA. The second cause of action will be based on the EEQA. The primary relief sought in terms of the LRA is reinstatement, and this educator will claim compensation in terms of the EEQA's cause of action.

The final piece of legislation that governs discrimination in the workplace is the Employment Equity Act[128] (EEQA). The EEQA's primary purpose is to achieve equity in the workplace and prevent unfair discrimination. When addressing unfair discrimination disputes in the employment relationship, chapter 2 of the EEQA, instead of s9 of the Constitution, is the primary source of law.[129] This principle was confirmed in *Minister of Health v New Clicks SA (Pty) Ltd.*[130]

Discrimination is any act or omission that directly or indirectly imposes burdens, obligations, or disadvantages or withholds any person's benefits, opportunities, or advantages on one or more prohibited grounds.[131]

The EEQA addresses systemic discrimination that has characterised the workplace.[132] It attempts to correct the past demographic imbalances in South African workplaces.[133] The EEQA's objective is to achieve substantive equality in the workplace, it is transformative as it is both retrospective and prospective by addressing past discrimination through affirmative action and preventing future discrimination.[134] This Act prohibits unfair discrimination and requires that affirmative action be achieved using employment equity plans.[135] The notion of affirmative action is beyond the scope of this study, it is only unfair discrimination that is relevant.

The discrimination clause in the EEQA must be interpreted in compliance with the Constitution, specifically the right to equality, and the preamble of the Act.[136] This Act is a vehicle to eliminate

[126] J Grogan *Dismissal* 4 ed (2022) 110.
[127] J Grogan *Dismissal* 4 ed (2022) 110.
[128] 55 of 1998.
[129] D Du Toit et al. *Labour Relations Law A Comprehensive Guide* 6 ed (2014) 670.
[130] (2006) (1) BCLR 1 (CC) para 77.
[131] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 s1(viii).
[132] D Du Toit et al. *Labour Relations Law A Comprehension Guide* 6 ed (2006) 36.
[133] D Du Toit et al. *Labour Relations Law A Comprehension Guide* 6 ed (2006) 36.
[134] C Cooper 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 821.
[135] D Du Toit et al. *Labour Relations A Comprehensive Guide* 5 ed (2006) 572.
[136] Du Toit et al. *Labour Relations A Comprehensive Guide* 5 ed (2006) 572.

inequality, this is evident in the preamble, "the elimination of unfair discrimination in employment and ensuring the implementation of employment equity to redress the effects of discrimination."[137]

The prohibition of unfair discrimination relates to any employment policy or practice. Section 1 of the EEQA lists what employment practice or policy entails, this includes dismissal, which is relevant to this study. However, s10(1) of the EEQA states that dismissal for discriminatory reasons must be dealt with in accordance with the LRA, automatically unfair dismissal provision.[138]

Unfair discrimination in the EEQA differs from s187(1)(f) of the LRA. The LRA prohibits the dismissal of employees based on unfair discrimination. In contrast, the EEQA prohibits unfair discrimination of employees and applicants for employment during the employment relationship and before the employment relationship.[139]

In summary, the EEQA prohibits unfair direct or indirect discrimination and discrimination based on listed or unlisted grounds and it applies to employees and applicants.

This study addresses whether educators employed in terms of the EEA are unfairly discriminated against because they are employed in terms of the EEA when compared to educators employed by the school governing body (SGB). SGB- employed educators are not subjected to mandatory dismissal should they be found guilty of any of the offences listed in s17 of the EEA, instead the sanction meted out to these educators is guided by Schedule 8 of the LRA. The most appropriate sanction is considered, not an automatic sanction of dismissal. This is despite both groups of educators doing exactly the same job. A public school is the employer of an educator employed in terms of ss20(4)(5)[140] of SASA. These educators are employed additional to the establishment determined by the Member of the Executive Council (MEC of Education). These educators are privately employed in public schools by the SGB and are not considered as 'educators' for purposes of the EEA, hence their terms and conditions of employment and benefits are regulated by their contracts of employment[141] and general labour legislation like the LRA, BCEA and EEQA.

[137]EEQA Preamble.
[138] C Garbers et al. *The Essential Labour Law Handbook* 7 ed (2019) 348.
[139] EEQA s6(1).
[140] SASA s20(4), "a public school may establish posts for educators and employ educators additional to the establishment determined by the Minister of the Executive Council."
[141] E Bray and J Beckmann 'The employment relationship of the public-school educator: A constitutional and legislative overview' (2001) 19(4) *Perspectives in Education* 121.

In the context of this study, one must determine whether educators are discriminated against unfairly regarding the mandatory dismissal requirement of s17 of the EEA. This is dealt with in chapter 4 of this study.

State-employed educators must be dismissed if found guilty of an offence listed in s17. However, there is no compulsory dismissal of an educator employed by the SGB[142] even if the educator is guilty of an offence listed in s17 of the EEA. This is despite SGB-employed and state-employed educators working in public schools, teaching identical learners, and serving the same communities.[143] For this reason, this study looks at whether educators employed in terms of the EEA are unfairly discriminated against on an actionable arbitrary ground regarding s6(1) of the EEQA.

This study also examines whether s17 of the EEA complies with EEA Schedule 2, item 1(g), purpose, and scope to "prevent arbitrary or discriminatory actions by employers toward educators."

2.5 Regulation of Educator Misconduct through the EEA

The EEA regulates the employment of educators employed by the provincial education departments and the DBE.

The EEA defines an educator as.

> "Any person who teaches, educates, or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at any public school, departmental office or adult basic education centre and who is appointed in a post on any educator establishment under this Act."[144]

The disciplinary code for educators is legislated in ss17 and 18 of the EEA. Section 17 was introduced to the EEA by the Education Laws Amendment Act 53 of 2000. The Minister of Education at the time, Prof Kader Asmal, introduced the Education Laws Amendment Bill to the National Assembly on 2 September 2000.[145] He said that "the main goal of the Bill was to give educators who don't conduct themselves in a manner that meets our expectations for professional behaviour new disciplinary measures."[146] He added that "these educators must be removed from the education system to achieve

[142] SASA s20(4).
[143] SASA s 20(4)
[144] EEA s1.
[145] S Mnguni *The application of section 17 of the Employment of Educators Act* (unpublished LLM Nelson Mandela Metropolitan University, 2016) 38.
[146] S Mnguni *The application of section 17 of the Employment of Educators Act* (unpublished LLM Nelson Mandela Metropolitan University, 2016) 38.

moral rejuvenation."[147] This is understood to be the underlying objective of s17, which is the imposition of dismissal as a mandatory sanction for guilty educators.

This study questions the fairness and rationale for the categorisation of offences, as the categorisation of charges has a direct impact on the sanction being imposed on a guilty educator. Calitz and De Villiers also question the classification of offences, s17 serious misconduct includes sexual assault and sexual relationships; however, s17 does not include rape, rape is included in s18(5) under statutory offences. [148] They argue that this is not a logical classification considering the gravity of the offence of rape. It is the writer's view that although rape is a serious offence, it is not included in the category of serious misconduct listed in s17, however committing sexual assault on a learner, student or employee is included in s17.[149] Rape is included in the definition of sexual assault in the Criminal Law (Sexual Offences and Related Matters) Act [150]and therefore rape will qualify as sexual assault and mandatory dismissal will follow. It is uncertain as to the reasons for rape featuring in s18 of the Act, this is one of the anomalies that the study addresses and questions the rationale behind the categorisation of offences into serious misconduct and misconduct.

This study endeavours to determine whether the separation of offences that determine the sanction is fair. Coetzee also questions the categories of offences in s17 of the EEA, the offence of exposing learners to child pornography or pornography is not included in s17 of the EEA.[151] Cases where an educator has shown pornography to learners is dealt with in terms of s18(1) (q) which provides "while on duty conducts himself or herself in an improper, disgraceful or unacceptable manner." According to Coetzee, exposing children to pornography should carry a mandatory sanction of dismissal and this offence must be included in s17 of the EEA.[152] This is another example that illustrates the problematic categorisation of offences.

It is important to note that s18(1) is introduced as follows, "Misconduct refers to a breakdown in the employment relationship." however, such a phrase is not included in the introduction of s17, serious

[147] S Mnguni *The application of section 17 of the Employment of Educators Act* (unpublished LLM Nelson Mandela Metropolitan University, 2016) 38.
[148] K Calitz and C de Villiers 'Sexual abuse of pupils by teachers in South Africa: The vicarious liability' (2000) 137 (1) *SALJ* 4.
[149] EEA s17(1)(b).
[150] Act 32 of 2007 s5(1).
[151] SA Coetzee 'Educator sexual misconduct: Exposing or causing learners to be exposed to child pornography or pornography' (2015) 18 (6) *Potchefstroom Electronic Law Journal* 4.
[152] SA Coetzee 'Educator sexual misconduct: Exposing or causing learners to be exposed to child pornography or pornography' (2015) 18 (6) *Potchefstroom Electronic Law Journal* 4.

misconduct offences.[153] According to Rossouw,[154] this phrase is an indication of the legislator's seriousness in their attempt to eradicate the offences and misconduct listed in s17 of the EEA. This implies that the breakdown in the employment relationship is not a prerequisite for dismissal, the seriousness of the offence itself is sufficient to justify dismissal. De Villiers, on the other hand, argues that misconduct does not exist where there is a breakdown in the employment relationship, it occurs when the employer considers the conduct unacceptable.[155] She adds that a breakdown in the employment relationship relates to determining an appropriate sanction.[156] Noting De Villier's argument an automatic dismissal cannot be justified unless it has resulted in the breakdown in the employment relationship. This is dealt with in Chapter 3 of this study.

The writer submits that the purpose of the amendment in the context of sexual misconduct is clear, it is to minimise and, if possible, eliminate sexual misconduct in schools, the question is whether this was achieved. In 2010, ten years after the inclusion of s17 in the EEA, the Minister of Basic Education admitted that sexual abuse was becoming a significant problem in South African schools.[157]

This study endeavours to show that the categorisation of offences into serious misconduct and misconduct is problematic and may be confusing to those responsible for implementation. De Villiers found in her study that the data regarding educator misconduct was not recorded according to the charge category. Instead, it was recorded in broad categories.[158] She concludes that this may reflect the challenges with s17 and s18 of the EEA, which may result in inappropriate or inconsistent imposition of sanctions.[159] She adds that this may be due to a misunderstanding of how the EEA works and what the different types of misconduct entail. She also offers that charges may be practically manipulated to avoid dismissal.[160] This view encapsulates challenges associated with s17 offences.

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[153] JP Rossouw 'Decentralisation in South African public schools: A labour law perspective on the role of the principal in managing staff misconduct' (2001) 19 (4) *Perspectives in Education* 131.
[154]JP Rossouw 'Decentralisation in South African public schools: A labour law perspective on the role of the principal in managing staff misconduct' (2001) 19 (4) *Perspectives in Education* 131.
[155] C De Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education* (unpublished LLD, Stellenbosch University,2022) 403.
[156] C De Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education* (unpublished LLD, Stellenbosch University,2022) 403.
[157] M Khoza & S Masinga 'Sexual Abuse Rampant at Rural Schools' (15-10-2011) Mail and Guardian *https://mg.co.za/article/2010-10-15-sexual-abuse-rampant-at-rurlal-schools/* accessed 26 March 2023.
[158] C De Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education* (unpublished LLD dissertation, Stellenbosch,2022) 269.
[159] C De Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education* (unpublished LLD dissertation, Stellenbosch, 2022) 270.
[160] C De Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education* (unpublished LLD dissertation, Stellenbosch, 2022) 270.

2.5.1 Serious Misconduct (s17)

This section deals with the breakdown of the charges and the challenges associated with terminology. Chapter 3 of the study will examine each charge and the challenges related to its interpretation of the offence.

2.5.1.1 Section 17(1)(a) is "theft, bribery, fraud, or an act of corruption relating to examinations and promotional reports

These acts are limited to examinations and promotional reports, and a finding of guilt must result in dismissal. The Act names theft, bribery and fraud separately from the specific mention of corruption in section 17(1)(a).[161] This separation of terms may wrongly be interpreted to indicate that corruption is different from stealing, being bought off/paying off someone, or being involved in deception.[162] Both sections 17 and 18 were examined in *Despatch High School v Head of Department of Education, Eastern Cape*.[163] The principal was charged with stealing a cell phone belonging to the applicant, the school governing body. The cell phone was given to the principal for conducting school business, hence the theft occurred during the principal's employment. The applicant claimed the principal should have been charged with s17, not s18. The Court pointed out that the principal was correctly charged with s18, misconduct and not s17, serious misconduct. Section 17 was for serious offences and not common law offences or acts of dishonesty. In the context of this offence, theft is limited to examination and promotional reports only. This case illustrates the confusion with the terminology between these sections, and the consequences of being charged with the wrong section could unfairly result in the dismissal of an educator. In this case, the school governing body chose not to pursue criminal charges against the principal and instead reported the matter to the Department of Education so that disciplinary charges could be initiated against the principal.[164] Sections 17 and 18 of the EEA is the disciplinary code for educators and therefore exist separately from the criminal legal system.

2.5.1.2 Section 17(1)(b), "committing an act of sexual assault on a learner, student or other employee."

[161] E Serfontein and E De Waal 'The corruption bogey in South Africa: Is public education safe?' (2015) 35(1) *South African Journal of Education* 3.
[162] E Serfontein and E De Waal 'The corruption bogey in South Africa: Is public education safe?' (2015) 35(1) *South African Journal of Education* 3.
[163] (2003) 1 SA 217 (SCA).
[164] (2003) 1 SA 217 (SCA) para 5.

The EEA does not define sexual assault. This failure may result in educators escaping liability or being charged with a less serious charge contained in s18 of the EEA. This charge is "while on duty conducts himself or herself in an improper, disgraceful, or unacceptable manner.[165] This charge does not capture the seriousness of the offence. As a result of this gap in the EEA one must consider the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007. This Act gives a wide definition of sexual assault and sexual violation.[166]

The Department of Basic Education released the Protocol for Management and Reporting of Sexual Abuse and Harassment in Schools[167] in 2019 in response to the high prevalence of sexual abuse in South African schools. This document also recognises that abuse deprives learners of their inherent right to equality and dignity.[168] The protocol document not only deals with the mechanism of reporting incidents of sexual abuse, but it also outlines the process of sanctioning perpetrators. This document is relevant to this study as it includes Schedule 8 of the LRA, indicating that dismissals must follow a fair procedure and be for an acceptable reason.

The protocol document not only deals with the mechanism of reporting incidents of sexual abuse, but it also outlines the process of sanctioning perpetrators. This protocol document makes specific reference to the offences cited in Criminal Law (Sexual Offences and related matters) Act indicating that the document includes the reporting procedures for such offences listed in this Act.

SACE issued a report relating to educators, it indicated that between 2008 and 2012, out of 26 sexual misconduct cases reported, one resulted in imprisonment, four dismissals, six were found not guilty, and the rest were issued with less serious sanctions like written warnings.[169] In addition, educators charged with having a sexual relationship with a learner resulted in five teachers being struck off the roll, two dismissed, and the rest receiving warnings.[170] Educators in a sexual

[165] EEA s18(1)(q).
[166] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 s1.
[167]Protocol for the management and reporting of sexual abuse and harassment in schools available at *https://www.education.gov.za/Portals/0/DoE%20Showcase/Launch%20of%20protocol/Sexual%20Abuse%20and%20Harassment%20in%20Schools%20march%202019%20%20(1).pdf?ver=2019-03-13-093606-697* accessed 25 October 2022.

[168]Protocol for the management and reporting of sexual abuse and harassment in schools available at *https://www.education.gov.za/Portals/0/DoE%20Showcase/Launch%20of%20protocol/Sexual%20Abuse%20and%20Harassment%20in%20Schools%20march%202019%20%20(1).pdf?ver=2019-03-13-093606-697* page11 accessed 25 October 2022.

[169] K Calitz and C de Villiers 'Sexual abuse of pupils by teachers in South Africa: The vicarious liability' (2000) 137 (1) *SALJ* 76.
[170] K Calitz and C de Villiers 'Sexual abuse of pupils by teachers in South Africa: The vicarious liability' (2000) 137 (1) *SALJ* 76.

relationship with a learner in the school he or she is employed at must be dismissed,[171] despite this provision not all educators were dismissed. It is this inconsistent application of s17(1) that this study addresses. The writer's view is that the inconsistent application of s17(1) is due to the department officials' failure to understand the nature of the offences that are to be categorised as s17 or s18. This brings into question the effectiveness of s17 at the level of implementation. It also raises the critical question of consistency in the sanction imposed: are some educators being dismissed for a s17 offence while others are getting off with a warning? Coetzee argues that saving an educator's job or the schools reputation maybe reasons why educators are treated differently.[172]

Sexual assault of a learner will negatively affect the learner's right to human dignity.[173] According to Prinsloo, the sexual violence and harassment experienced by girls in South African schools impede their access to education on equal terms with male students.[174] This may result in a girl learner, who has been a victim of sexual assault dropping out of school, or their academic performance may be negatively affected. This is a violation of their right to equality and education.

2.5.1.3 Section 17(1) (c), "having a sexual relationship with a learner of the school where one is employed."

This offence is self-explanatory, however, the question that may perplex one is why the offence is limited to the school where the educator is employed. The offence of sexual relations with a learner from another school is covered in s18(1) (dd), "an educator commits a misconduct if he or she commits a common law or statutory offence." Furthermore, the conduct identified in this section will only be an offence if an educator has a sexual relationship with a learner that is below the legal age of consent. It is essential to consider the difference between s17(1) (c) and s18(1) (dd), the former refers to a sexual relationship, a relationship, by definition, is consensual, however, it will be an offence irrespective of whether the learners consented or not. On the other hand, s18(1) (dd) refers to common law or statutory offence, and this is not related to s17(1) (c), it is the writer's submission that there is no rationale as to why the learners must be in the same school as the educator.

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[171] EEA s17(1)(c).
[172] S Coetzee 'Holding the state directly liable for educator-on-learner sexual abuse' 19(1) *Child Abuse Research: A South African Journal.*
[173] S Coetzee 'Holding the state directly liable for educator-on-learner sexual abuse' (2018) 19(1) *Child Abuse Research: A South African Journal.*
[174] IJ Prinsloo 'How safe are South African schools? '(2005) 25(1) *South African Journal of Education* 7.

2.5.1.4 Section 17(1)(d) "seriously assaulting, with the intention to cause grievous bodily harm to a learner, student, or other employee."

The unlawful or intentional use of force against another person or instilling in someone else the belief that force will be used against them constitutes assault.[175] Assault intending to cause grievous bodily harm is a form of assault, however, committed to cause serious bodily injury. [176] In the context of the school, it is common for educators to inflict corporal punishment on learners, to be charged and found guilty of s17(1)(d), one must have inflicted corporal punishment with the intention to cause grievous bodily harm.

An incident of corporal punishment that translates to grievous body harm is a s17(1)(d) offence, other corporal punishment offences that qualify as assault are captured in s18(1) (r) of the EEA, "assaults, or attempts to or threatens to assault, another employee or another person." One may also be charged with corporal punishment in terms of s18(5)(f), which is "Contravening s10 of SASA." Veriava[177] summarises several corporal punishment cases, where non-governmental organisations undertook these case studies, and the South African Human Rights Commission reported on them in the print media. One of the cases reported on by Veriava was of a learner who died after an educator administered corporal punishment. The educator was dismissed as a result, however, there was insufficient evidence and the criminal charges were withdrawn.[178] Noting this case, we must note that murder is not a s17 offence in the EEA, instead it is included in 18(5)(e). This brings into question the rationality of the EEA categorisation of offences in s17 and s18.

In the *Centre of Child Law & Others v SACE & Others,*[179] the applicants took SACE to court regarding the lenient sanctions they meted out to educators who were guilty of corporal punishment, they argued that to protect children from harm and for the ban on corporal punishment to be taken seriously, SACE must review its sanctions.[180] The court ordered SACE to reconsider and review its "Mandatory Sanctions on Contravention of the Code of Professional Ethics" within 6 months of the order. The court added that this must be done to address the deficiencies in the decision-making process.

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[175] Common Law Offences – Definitions SAPS *https://www.saps.gov.za/faqdetail.php?fid=9* accessed 23 November 2022.
[176] Common Law Offences – Definitions SAPS *https://www.saps.gov.za/faqdetail.php?fid=9* accessed 23 November 2022.
[177] F Veriava '*Promoting effective enforcement of the prohibition against corporal punishment in South African schools' PULP* 2014 18.
[178] F Veriava '*Promoting effective enforcement of the prohibition against corporal punishment in South African schools*' PULP 2014 17.
[179] (61630/2020) [2022] ZAGPPHC 787 (13 October 2022).
[180] Section 27 Media Statement 'Centre for Child Law and Section27 take SACE to court for failure to hold teachers accountable for corporal punishment' available on *https://section27.org.za/2022/04/sace-court-case-april-2022* accessed 19 November 2022.

2.5.1.5 Section 17 (1) (e) "illegal possession of an intoxicating, illegal or stupefying substance."

According to this section, an educator must be dismissed if they are in possession of an illegal or stupefying substance, this offence does not require the educator to be under the influence of the substance. Boshoff justified this in an Education and Recreation Select Committee meeting in 2000, and he argued that s17(1)(e) was to prevent the sale and use of illegal drugs on school premises.[181] He added that being under the influence of an intoxicating, unauthorised or stupefying substance is included in s18(1) (p).[182]

Rossouw considers the categorisation of charges and argues that offences that one would consider extremely serious, dishonesty, victimising other employees, unfair discrimination, rape, murder and administering corporal punishment, are not included in s17, serious misconduct, but in s18, misconduct.[183] Furthermore, s18(1)(p) addresses the consumption and being under the influence of an intoxicating substance while on duty, both being under the influence and being in possession of an intoxicating substance are serious offences yet only being in possession of an intoxicating substance is a s17 offence.

Considering the above breakdown of s17 offences, the categorisation is problematic. As noted in the *Despatch* case the interpretation of the offence can lead to confusion. An educator must be dismissed if they had a sexual relationship with a learner in the school, they are employed however they may not necessarily be dismissed if the learner is from another school, surely a sexual relationship with any learner must be considered as serious. An intoxicated educator can pose a danger to others in the school however it is not considered serious, only being in possession of an intoxicating stupefying substance is categorised as a s17 offence.

2.5.2 Misconduct s18 of the EEA

The second category of offences in the EEA is listed under s18(1) titled misconduct. The list of offences is introduced with the definition of misconduct. "Misconduct refers to a breakdown in the

[181] S Mnguni *The application of section 17 of the Employment of Educators Act (unpublished* LLM Nelson Mandela Metropolitan University, 2016) 40.
[182] S Mnguni *The application of section 17 of the Employment of Educators Act (unpublished* LLM Nelson Mandela Metropolitan University, 2016) 40.
[183] JP Rossouw 'Decentralisation in South African public schools: A labour law perspective on the role of the principal in managing staff misconduct' (2001) 19 (4) *Perspectives in Education* 131.

employment relationship."[184] The reason for such an introduction can be confusing and unclear as not all misconduct results in a breakdown in the employment relationship.

Section 18(1) of the EEA lists 32 offences under the heading misconduct as well as further offences are listed under s18(5).[185] The educator found guilty of a s18 offence will not be automatically dismissed, instead one of the sanctions listed in s18(3) may be considered, and dismissal will depend on the nature and extent of the misconduct.[186] In *Edcon v Pillemer No*,[187] the court indicated that evidence must be led to show that the employment relationship has broken down. The mere commission of any misconduct in s18(1) will not necessarily result in a breakdown of the employment relationship, and it will depend on the nature of the misconduct, amongst other factors.

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[184] EEA s18(1).

[185] s18(1)(a)fails to comply with or contravenes this Act or any other statute, regulation or legal obligation relating to education and the employment relationship;s18(1)(b) wilfully or negligently mismanages the finances of the State, a school or an adult learning centre;s18(1)(c) without permission possesses or wrongfully uses the property of the State, a school, an adult learning centre, another employee or a visitor;s18(1)(d) wilfully, intentionally or negligently damages or causes loss to the property of the State, a school or an adult learning centre; s18(1)(e) in the course of duty endangers the lives of himself or herself or others by disregarding set safety rules or regulations;s18(1)f) unjustifiably prejudices the administration, discipline or efficiency of the Department of Basic Education, an office of the State or a school or adult learning centre;s18(1)(g) misuses his or her position in the Department of Basic Education or a school or adult learning centre to promote or to prejudice the interests of any person;s18(1)(h) accepts any compensation in cash or otherwise from a member of the public or another employee for performing his or her duties without written approval from the employer;s18(1)(i) fails to carry out a lawful order or routine instruction without just or reasonable cause;s18(1)(j) absents himself or herself from work without a valid reason or permission;s18(1)(k) unfairly discriminates against other persons on the basis of race ,gender ,disability, sex, pregnancy, marital status ,ethnic and social origin ,colour, sexual orientation,age,disability,religion,conscience,belief,culture,language,birth,family responsibility, HIV status, political opinion, or other grounds prohibited by the Constitution;s18(1)(l) performs poorly or inadequately for reasons other than incapacity;s18(1)(m) without the written approval of the employer, performs work for compensation for another person or organisation either during or outside working hours;s18(1)(n) without prior permission of the employer accepts or demands in respect of the carrying out of or the failure to carry out the educator's duties ,any commission ,fee, pecuniary or other reward to which the educator is not entitled by virtue of the educator's office, or fails to report to the employer the offer of any such commission ,fee or reward;s18(1)(o) without authorisation, sleeps on duty;s18(1)(p) while on duty.is under the influence of an intoxicating, illegal, unauthorised or stupefying substance, including alcohol;s18(1)(q) while on duty, conducts himself or herself in an improper, disgraceful or unacceptable manner;s18(1)(r) assaults, or attempts to or threatens to assault, another employee or another person; s18(1)(s) incites other personnel to unprocedural and unlawful conduct;s18(1)(t) displays disrespect towards others in the work-place or demonstrates abusive or insolent behaviour;s18(1)(u) intimidates or victimises fellow employees, learners or students;s18(1)(v) prevents other employees from exercising their rights to freely associate with trade unions in terms of any labour legislation;s18(1)(w0 operates any money-lending scheme for employees for his or her benefit during working hours or from the premises of the educational institute or office where he or she is employed;s18(1)(x) carries or keeps firearms or other dangerous weapons on State premises, without the written authorisation of the employer;s18(1)(y) refuses to obey security regulations;s18(1)(z) gives false statements or evidence in the execution of his or her duties;s18(1)(aa) falsifies records or any other documentation;s18(1)(bb) participates in unprocedural, unprotected or unlawful industrial action; s18(1)(cc) fails or refuses to follow a programme of counselling as contemplated in item 2 (4) of Schedule 1;subject himself or herself to a medical examination as contemplated as contemplated in item 3 (3) of Schedule 1 and in accordance with section 7 of the Employment Equity Act.1998 (Act 55 of 1998); or attend rehabilitation or follow a formal rehabilitation programme as contemplated in item 3 (8) of Schedule 1;s18(1)(dd) commits a common law or statutory offence;s18(1)(ee) commits an act of dishonesty or s18(1)(ff) victimises an employees for amongst others ,his or her association with a trade union.

[186] EEA s18(3)(i).

[187] (2009) 30 *ILJ* 2642 (SCA).

The lawmakers have also included s18(5),[188] which lists six offences that already feature in the list of offences in s18 (1), it will appear that these are considered serious offences, however not serious enough to feature in s17, serious misconduct. The section does make special mention of the possibility of dismissal if found guilty.[189]

2.5.3 Disciplinary Code and Procedures for Educators (Schedule 2 of the EEA)

The purpose of Schedule 2 is for the employer and employee to share a common understanding of misconduct and discipline.[190] Although Schedule 8 of the LRA forms part of Schedule 2 of the EEA in so far as it relates to discipline.[191] Schedule 2 is not aligned with the provision in Schedule 8 of the LRA, that requires the decision-maker to determine whether dismissal is the appropriate sanction.[192] In the context of s17(1) offences, this will not be possible as the decision-maker will be forced to dismiss the guilty educator and not consider any other appropriate sanction. The factors and circumstances that must be considered when a sanction of dismissal is contemplated are dealt with in Chapter 3 of this study.

Furthermore Schedule 2 singles out s18 and indicates that when the employer is contemplating misconduct proceedings in terms of this section, the employer must consider the impact of the misconduct, the nature of the educator's work and the circumstances under which the misconduct occurred.[193] It is unclear why s17 is excluded from this provision. Furthermore, ss 17(2) and 18(2) of the EEA are specific, when managing misconduct offences listed in these sections of the EEA, Schedule 2 is applicable. The Schedule also guides the sanctions that may be meted out and details the disciplinary and appeal process. Noting that s17 requires the guilty educator to be dismissed, it contradicts one of the principles of Schedule 2, which indicates that discipline must be corrective and not punitive.[194] Furthermore, item 7(17) (a) requires that the employee present evidence in mitigation, however an educator found guilty in terms of s17 does not have this opportunity as dismissal is compulsory.

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[188] EEA s18(5) (a) dishonesty, as contemplated in subsection (1)(ee); (b)victimising an employee for, amongst others, his or her association with a trade union, as contemplated in subsection (1)(ff); (c) unfair discrimination, as contemplated in subsection (1)(k); (d) rape, as contemplated in subsection (1)(dd); (e) murder, as contemplated in subsection (1)(dd); (f) contravening section 10 of the South African Schools Act 1996 (Act 84 of 1996),as contemplated in subsection (1) (dd).
[189] EEA s18(5).
[190] EEA Schedule 2 item 1(c).
[191] EEA Schedule 2 item 3.
[192] LRA Schedule 8 item 7 (b) (iv).
[193] EEA Schedule 2 item 3(3).
[194] EEA Schedule 2 item 2(a).

2.6 The Role South African Council of Educators (SACE) in Educator Misconduct.

No person may be employed as an educator by any employer unless registered with the Council, this also applies to lecturers and management of colleges appointed in terms of the EEA.[195] Educators who commit misconduct are not only disciplined by their employer, but they may also simultaneously be disciplined by the professional body they belong to, being SACE.

The SACE Disciplinary Procedures outline the Council's procedures when investigating alleged breaches.[196] The introduction of these procedures indicate that the approach of SACE is corrective and not punitive.

There is a distinction between employment-related and ethical matters. Ethical matters violate the code of professional ethics, whereas employment matters [relate] to [educators' service] conditions.[197] However, there is an overlap between some employment and ethical matters. Although the educator's employment relationship with the Head of Department in the province must be separated from their professional relationship with SACE, these relationships still have an impact on each other. For example, an educator who is struck off the SACE register may not be employed anywhere in the country.[198] An educator who has been deregistered from SACE must be dismissed by the provincial Department of Education.[199] The Department of Education must provide SACE with the details of any disciplinary action taken against an educator, except for those that resulted in a caution or reprimand.[200] De Villiers argues that the Department of Education and SACE's reporting is low and ineffective. De Villiers also raised concerns regarding SACE's failure to deregister dismissed educators, it brings into question the effectiveness of the professional body.[201] In 2021 the Minster amended the Terms and Conditions of Employment of Educators in terms of s4 of the EEA.[202] This put in place conditions attached to re-employment and indicated the periods that must lapse before re-employment will be considered. These periods are in accordance with the nature of the misconduct

[195] SACE Act 31 of 2000 s21.
[196] SACE Disciplinary Procedures https://www.sace.org.za/pages/disciplinary-procedures accessed 17 October 2023.
[197] C De Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education*. (unpublished LLD, Stellenbosch University,2022) 162.
[198] E Bray and J Beckmann 'The employment relationship of the public-school educator: A constitutional and legislative overview' (2001) 19(4) *Perspectives in Education* 113.
[199] SACE Act 31 2000 s21.
[200] EEA s 26.
[201] C De Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education*. (unpublished LLD, Stellenbosch University,2022) 164.
[202] GN 331 in GG 44433 09/04/2021.

committed. Educators found guilty of any s17 offence may not be re-employed, included in this category are educators found guilty of sexual harassment of a learner.[203] In the context of this study, if educators dismissed for a section 17 offence are not deregistered from SACE, they can find employment outside public education.[204] This will defeat the purpose of the section, which is to remove such educators from the education system.

2.6.1 SACE Code of Professional Ethics

The SACE Code of Professional Ethics outlines the conduct of the educator in relation to the different stakeholders. An educator may be deregistered or receive any other sanction for a breach of the SACE Code.[205] The stakeholders are the parents, learners, community, colleagues, and the employer.[206] The Code also dictates the procedure to investigate and discipline educators who contravene the Code.

2.6.2 Relationship between the SACE Code of Professional Ethics and the Disciplinary Code in the EEA.

Table 1: A comparison between the s17 offences in the EEA and the equivalent offences in the SACE Code.[207]

SACE Code of Professional Ethics	S17 EEA
3.6 refrain from improper physical contact with learners 3.9 refrains from any form of sexual harassment (physical or otherwise) of learners	17(1)(b) committing an act of sexual assault on a learner, student, or other employee
3.8 refrains from courting learners from **any** school 3.10 refrains from any form of sexual relationship with learners from **any** school	17(1)(c) having a sexual relationship with a learner of the **school where** he or she is employed
6.7 avoids any form of humiliation and refrains from any form of abuse (physical or otherwise) of his or her colleagues	S17(1)(d) seriously assaulting, with the intention to cause grievous bodily harm to, a learner, student, or other employee

[203] GN 331 in GG 44433 09/04/2021.
[204] SACE Website *https://www.sace.org.za/pages/the-code-ofprofessional-ethics*, accessed 1 October 2023.
[205] SACE Website *https://www.sace.org.za/pages/disciplinary-procedures*, accessed 1 October 2023.
[206] SACE Website *https://www.sace.org.za/pages/the-code-ofprofessional-ethics*, accessed 1 October 2023.
[207] SACE Website *https://www.sace.org.za/pages/the-code-ofprofessional-ethics*, accessed 1 October 2023

7.8 refrains from indulging and/or being in possession of intoxicating, illegal, and/or unauthorised substances, including alcohol and drugs, within the school premises and/or whilst on duty	17(1)(e) illegally possessing an intoxicating, illegal or stupefying substance.

What is noteworthy is that despite the similar, if not exact, offences contained in the SACE Code, as in s17 of the EEA, none of the offences in the SACE Code carries mandatory deregistration from SACE. In contrast, these offences in s17 carry a mandatory dismissal. Noting this discrepancy there is no common understanding of what qualifies as serious and dismissible misconduct between SACE and the Department of Basic Education.

2.7 Inquiry by Arbitrator - ELRC Collective Agreement 3 of 2018

The collective rights of educators are regulated through the LRA, as s35 provides for establishing bargaining councils in the public service. The ELRC is one of the sectoral bargaining councils established by the Public Service Coordinating Bargaining Council (PSCBC). It is the forum for collective bargaining in the education sector, and the collective agreements concluded in this forum play an essential role in determining the rules applicable to the employment of educators.[208] The registered scope of the ELRC is the state as the employer and the employees employed in terms of the EEA, [209] by providing dispute resolution services through conciliations and arbitration.

The ELRC does play a role in educator misconduct, educators who are dismissed in terms of s17(1)(a)(d) (e) or (f) and s18(1) of the EEA may refer an unfair dismissal dispute to the ELRC for conciliation and arbitration. Educators who are charged with sexual misconduct in relation to learners, under ss17 (1)(b) or (c), will have an inquiry by an arbitrator, not an internal disciplinary enquiry.[210] This is a compulsory arbitration in accordance with ELRC Collective Agreement 3 of 2018. These educators will not have an internal disciplinary enquiry nor an opportunity to appeal the outcome.[211] Instead, they will have the opportunity to review the arbitration award in accordance with s145 of the LRA.[212]

[208] C De Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education*. (unpublished LLD dissertation, Stellenbosch University,2022) 180.
[209] J Brand et al. *Labour Dispute Resolution* 2 ed (2008) 69.
[210] ELRC Collective Agreement 3 of 2018 'Providing for compulsory inquiries by arbitrators in cases of disciplinary action against educators charged with sexual misconduct in respect of learners.'
[211] EEA s25.
[212] ELRC Collective Agreement 3 of 2018 clause 5.2.

In terms of Collective Agreement 3 of 2018 is "Providing for Compulsory Inquiries by Arbitrators in Cases of Disciplinary Action against Educators Charged with Sexual Misconduct in Respect of Learners", , when an employer intends to take disciplinary action against an educator for alleged sexual misconduct committed against a learner, an enquiry by an arbitrator is mandatory.[213]

According to this collective agreement, the arbitrator must consider the concept of fairness as provided for in the LRA,[214] the SACE Code of Professional Ethics,[215] relevant international law, s28 of the Constitution[216] and the sanctions provided for in the EEA,[217] including mandatory dismissals prescribed in the EEA. This Collective Agreement is dealt with fully in Chapter 3 of this study.

2.8 Conclusion

This chapter presents an overview of the constitutional and legislative framework within which employment in education is regulated, particularly the right to fair labour practices and the right not to be unfairly dismissed.

The mandatory dismissal of an educator found guilty of s17(1)(b)(c) is not aligned with Schedule 8 item 3(5), which indicates that mitigating factors are to be considered before dismissal.

SACE Code of Professional Ethics includes offences equivalent to s17, however, none of the offences carries mandatory deregistration from SACE. The SACE Code and the EEA are not aligned concerning educator conduct, they should support and complement each other. SACE has been ordered to review their mandatory sanctions by the High Court, at the time of this study this was yet to be done.

This chapter illustrates that educators may be wrongly charged due to the diverse interpretations of the offences. The categorisation of serious misconduct and misconduct is problematic and questionable. The inclusion of s18(5) is a repetition of offences already listed in s18(1). Finally, the unjustifiable separation of misconduct into serious misconduct and misconduct poses a challenge to the effective management of educator discipline in public schools.

[213] ELRC Collective Agreement 3 of 2018 clause 3.1.
[214] ELRC Collective Agreement 3 of 2018 Clause 5.1.1.
[215] ELRC Collective Agreement 3 of 2018 Clause 5.1.2.
[216] ELRC Collective Agreement 3 of 2018 Clause 5.1.5.
[217] ELRC Collective Agreement 3 of 2018 Clause 5.1.6.

Chapter Three

The Duty to Discipline and the Decision to Dismiss

3.1 Introduction

This chapter focuses on the role of discipline in the employment relationship and the impact of educator misconduct on the education system. The educator's code of conduct is legislated in s17 and s18 of the EEA, and the procedure is contained in Schedule 2 of the EEA (Schedule 2). As indicated in Chapter 2 of this study, an employee's employment is linked to their constitutional right to dignity and their right to fair labour practices. It is against this background that disciplinary processes and decisions must unfold. Labour law jurisprudence and the general *bonimores* of society are also considered. Dismissal is built upon the following classification, automatically unfair dismissals, dismissals relating to the conduct or capacity of the employee and dismissals related to operational requirements.[218] This classification determines not only the forum in which dismissal disputes must ultimately be resolved but also the principles that must be applied by those decision-makers when deciding whether the dismissal is fair.[219] Educators employed in terms of the EEA refer their unfair dismissal disputes to the ELRC.[220]

"[When] determining the fairness of a dismissal, [three questions must be addressed] whether the termination of the employment relationship amounted to a dismissal, whether there was a fair reason for the dismissal, and whether the employer followed fair procedure before dismissing the employee."[221]

As this study focuses only on educator misconduct, specifically serious misconduct in terms of s17 of the EEA, this chapter focuses only on the dismissal of the educator for misconduct. In this context, this chapter focuses on the guidelines presented in The Code of Good Practice: Dismissal in the LRA (Schedule 8). In addition, the CCMA Guidelines on Dismissal Arbitrations (CCMA Guidelines) are also an important consideration when contemplating a sanction. Although these guidelines are for general application and educators have their own disciplinary code, they must also be considered.

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[218] J Grogan *Dismissal* 4 ed (2022) 102.
[219] J Grogan *Dismissal* 4 ed (2022) 102.
[220]ELRC Constitution available on Constitution of the Education Labour Relations Council (ELRC) Resolution No.3 of 1999.pdf (dhet.gov.za) accessed 17 October 2023.
[221] J Grogan *Dismissal* 4 ed (2022) 102.

The impact of s 17(1) offences listed in the EEA on the learners and the employment relationship is also an important consideration when determining whether the dismissal of the educator is fair and appropriate. This chapter looks at the impact of educator misconduct on the learners and the employment relationship. Section 17(1)(b), sexual assault on a learner, s17(1)(c), sexual relationship with a learner and s17(1)(d) seriously assaulting a learner has a profound impact on the learner as well as the employment relationship. Due to this impact, these charges occupy much of the focus in this chapter.

The EEA differentiates between misconduct and serious misconduct. This chapter considers the rationale for this differentiation and what factors determine whether an educator is charged in terms of s17 or s18.

Schedule 2 of the EEA regulates the procedure for disciplinary action, this study does not deal with the disciplinary process. Schedule 8 of the LRA is part of Schedule 2 of the EEA[222] insofar as it relates to discipline, and for this reason, this study looks at the principles in Schedule 8 in relation to the dismissal of the educator. This chapter considers when dismissal is appropriate and the factors that must be considered for a fair dismissal, this is considered in the context of Schedule 8 in the LRA, Schedule 2 in the EEA, CCMA Guidelines, and the Courts.

A comparison is made with s17 offences and the equivalent offences in the SACE Code of Professional Ethics, particularly offences that carry a mandatory sanction as s17 of the EEA does. This comparison is crucial as it illustrates how SACE and the Department of Education view the impact and nature of serious educator misconduct.

Sidumo & Another v Rustenburg Platinum Mines Ltd & others[223] (hereafter *Sidumo*) is a landmark judgment that dealt with dismissal. Therefore, this chapter will only be complete by reflecting on the principles of this case and other relevant cases.

[222] EEA Schedule 2 item 3.
[223] (2007) 12 BLLR 1097 (CC).

3.2 Discipline

The employer has the right to maintain and enforce discipline in the workplace. This right has its origins in common law, several implied duties flow from the employment contract imposed on employees, the duty to enter into and remain at work, to perform diligently and competently, to obey lawful and reasonable instructions and to act in good faith and serve the interests of the employer.[224] However, the right to control and duties imposed on employees will only be meaningful if the employer has the right to discipline employees. The employer's right to discipline is recognised in the LRA and is contained in Schedule 8. This schedule sets out the broad guidelines for dismissal for misconduct, incapacity, and poor work performance, which is also relevant for the general maintenance of discipline.[225]

3.2.1 Discipline in the Employment Relationship

Education cannot function outside the socio-economic, cultural, and political context of the society it serves, all parties involved in the democratic education system, communities, students, parents and educators and the government are equal partners.[226] Therefore, as already indicated, the employment relationship between educator and employer is unique and more complex than the ordinary one. The employment relationship is a legal relationship between two parties, the employer, and the employee. The employer is the relevant Provincial Education Department (PED), specifically the provincial Head of Department (HOD). The employee is an educator employed in a public school holding a position established by the PED.[227]

The employment relationship is one where the employer exercises authority over the employee.[228] Ordinarily, the employment relationship is governed by the employment contract, however in South Africa, because of the high levels of unionisation amongst educators, employment comprises both individual and collective labour law. Consequently, teacher unions negotiate on behalf of educators' terms and conditions of service in the ELRC.[229]

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[224] C Garbers et al. The *New Essential Labour Law Handbook* 7ed (2019) 177.
[225] J Grogan *Workplace Law* 12 ed (2017) 127.
[226] E Bray and J Beckmann 'The employment relationship of the public-school educator: A constitutional and legislative overview' (2001) 19(4) *Perspectives In Education* 111.
[227] E Bray and J Beckmann 'The employment relationship of the public-school educator: A constitutional and legislative overview' (2001) 19(4) *Perspectives In Education* 112.
[228] E Bray and J Beckmann 'The employment relationship of the public-school educator: A constitutional and legislative overview' (2001) 19(4) *Perspectives In Education* 113.
[229] E Bray and J Beckmann 'The employment relationship of the public-school educator: A constitutional and legislative overview' (2001) 19(4) *Perspectives In Education* 113.

The duty to discipline educators employed in terms of the EEA rests with the HOD of the provincial education departments. In terms of s3(b) of the EEA, the HOD of the province is deemed to be the employer of educators employed in the province for purposes of the employment contract. However, the Education Laws Amendment Act 53 of 2000 allows for decentralizing decision-making power to the level of the school principal regarding disciplinary matters relating to staff misconduct.[230] In the education sector, the relationship between the principal and the educator in the public school may resemble that of an employer and employee, however the same legislation applies to them both as employees of the Head of Department of the province.[231]

3.2.2 Role of the Disciplinary Code in the Employment Relationship

All disciplinary systems must enjoy legitimacy amongst those they bind, and the employer must lay down reasonable rules that must be applied fairly and consistently. [232]

Disciplinary rules may be determined in two ways, firstly they may be imposed unilaterally, or secondly the employer may collectively agree with a registered trade union agreeing on the disciplinary code.[233]

In the context of employment, discipline serves to ensure that each employee makes a meaningful and effective contribution to the employer's objectives, in this context the most important objective of the employer is to provide quality basic education to the learners. As a result, employers have a responsibility to ensure that employees uphold standards of behaviour.[234]

The question which arises, is to what extent do the disciplinary rules bind the employer? The courts have followed a flexible approach regarding the employer's compliance with their disciplinary code.[235] Generally, employers must adhere to their disciplinary code. However, a degree of flexibility is acceptable, even when the collective agreement contains the disciplinary code.[236] Garbers *et al*. add that this approach is sensible as no disciplinary code can anticipate all future

[230] J.P Rossouw 'Decentralisation in South African Public Schools: A labour law perspective on the role of the principal in managing staff misconduct' (2001) 19 (4) *Perspectives in Education* 124.
[231]J.P Rossouw 'Decentralisation in South African Public Schools: A labour law perspective on the role of the principal in managing staff misconduct*'* (2001) 19(4) *Perspectives in Education* 127.
[232] J Grogan *Workplace Law* 12 ed (2017) 128.
[233] J Grogan *Workplace Law* 12 ed (2017) 130.
[234] J Grogan *Workplace Law* 12 ed (2017) 129.
[235] C Garbers et al. *The New Essential Labour Law Handbook* 7 ed (2019) 180
[236] C Garbers et al. *The New Essential Labour Law Handbook* 7 ed (2019) 180.

circumstances and be applied rigidly.[237] In some instances, it will be unfair to force employers to apply sanction guidelines as per the disciplinary code rigidly or to view any deviation from the disciplinary code as unfair to the employee.[238] The employer should treat its disciplinary code as a guideline and should not be bound to follow it "slavishly," however, it may still have regard for the Code.[239] In *Changula v Bell Equipment,*[240] the LAC said that the disciplinary code and standard procedure should be flexible and the provisions should not be mandatory. However, an employer may not depart from the provisions of the disciplinary code arbitrarily or for no valid reason. [241]

Considering the above and in the context of this study, the question is whether the educator must be dismissed if guilty of an offence listed in s17 of the EEA in every instance. In *Gcwensha v CCMA & Others*, [242] the employer deviated from the negotiated sanction and dismissed the employee, although the code prescribed a lesser sanction.[243] The Court found this acceptable and added that the disciplinary code is a guideline and should be adapted to suit the unique situation. The SCA also adopted this position in *Dube & Others v Nasionale Sweisware (Pty) Ltd. [244]* In this case the employer dismissed the employees instead of issuing warnings as was required by the disciplinary code. The Court was of the view that the deviation was warranted.[245]

In *Highveld District Council v CCMA,*[246] the Court said that "the mere fact that a procedure is an agreed one does not make it fair. Even if the employer follows an agreed upon disciplinary code the dismissal may still be unfair according to the LRA's requirements for a fair dismissal." In such cases, the employer cannot rely on compliance with its code.[247] In the context of this study, the compulsory sanction of dismissal in terms of s17 must still meet the standards of fairness.

Section 17 of the EEA deals with serious misconduct, and section 18 of the EEA deals with misconduct that does not attract compulsory dismissal but results in the breakdown of the

[237] C Garbers et al. *The New Essential Labour Law Handbook* 7 ed (2019) 180.
[238] C Garbers et al. *The New Essential Labour Law Handbook* 7 ed (2019) 180.
[239] D Du Toit et al. *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 443.
[240] 1992 13 *ILJ* 101 (LAC) 109B.
[241] *SAMWU obo Abrahams v City of Cape Town* (2008) 7 BLLR 700 (LC) 706.
[242](2006) 3 BLLR 234 LAC.
[243] C Garbers et al. *The New Essential Labour Law Handbook* 7 ed (2019) 180 -181.
[244] (1998) 19 *ILJ* 1033 SCA.
[245] C Garbers et al. *The New Essential Labour Law Handbook* 7 ed (2019) 180 -181.
[246] (2003) 24 *ILJ* 517 (LAC) para 14-16.
[247] J Grogan *Dismissal* 4 ed (2022) 256.

employment relationship.[248] In the arbitration award between *NATU obo Xolani Emmanuel Mabaso and the Department of Education KZN*,[249] the arbitrator expressed that sexual misconduct at work is considered serious and undermines the trust relationship between the employer and employee if the allegations are confirmed. The offence will be more serious due to the educator's position of trust and the complainant's vulnerability being a minor and a learner.[250] To reiterate, the employment relationship is based on trust and an educator who is found guilty of s17(1)(b), sexual assault against a learner or s17(1)(c), in a sexual relationship with a learner, will break down this trust relationship.

3.3 Disciplinary Charges

The charge should be formulated in precise and straightforward terms and spell out that the consequences could be dismissal.[251] Employees should be informed of the factual allegations against them using a form and language they can reasonably understand.[252] Chapter 2 of this study dealt with the breakdown of the charges and the associated challenges with the terminology used. This chapter will focus on the challenges related to the interpretation of the charges.

3.3.1 Interpretation of ss17 and 18 Charges

In the context of this study, the factors that must be considered when the charges are formulated are critical, as the employer must be sure that the educators' misconduct is chargeable in terms of s17 and not s18. An educator charged with 17(1)(b) and s17(1) (d) could also be charged with s18(1)(q) or s18(1)(r) or for the infringement of s10 of SASA "corporal punishment." The sanction for a guilty finding on a s18 charge may not necessarily result in dismissal, however, a guilty finding on a s17 charge must result in dismissal. Therefore, the interpretation of the offence that will result in the categorisation of the charge is critical to ensure a fair outcome.

In *MEC for Education KZN v ELRC & Others,*[253] the KZN Department of Education took on review an arbitration award. The arbitrator had found that the dismissal of the educator for sexual misconduct was unfair. The arbitrator found that the employer failed to show that the employee had contravened a rule and the employer failed to discharge its onus of proving that the dismissal was

[248] SA Coetzee 'Educator sexual misconduct: Exposing or causing learners to be exposed to child pornography or pornography' (2015) 18 (6) *Potchefstroom Electronic Law Journal* 4.
[249] PSES 198-09/10KZN 2010.
[250] SA Coetzee 'Educator sexual misconduct: Exposing or causing learners to be exposed to child pornography or pornography' (2015) 18(6) *Potchefstroom Electronic Law Journal* 5.
[251] J Grogan *Workplace Law* 12 ed (2017) 253.
[252] D Du Toit et al. *Labour Relations Law A Comprehensive Guide* 6 ed (2014) 455.
[253] (2011) ZALCD 24.

fair. The arbitrator also disputed the evidence presented by the learner. The educator was found guilty in the Magistrates Court of indecent assault and was sentenced to pay a fine of R6000. At the internal disciplinary hearing, he was charged with s17(1)(b) of the EEA for forcing a learner to have sex with him. He was also charged with violating s18(1)(f) of the EEA, "You unjustifiably prejudiced the administration, discipline and efficiency of the Department of Education by forcing a learner to have sex with you."[254] This is a typical example of overlapping charges, in which the same conduct may constitute a s17 or s18 charge. The Court said that finding an educator guilty under section s17(1) (a) to (f) cannot be said to lead to that educator's dismissal automatically. The Act is equivalent to an internal Disciplinary Code and provides the possible sanctions for a range of transgressions of code of conduct prescribed for educators."[255] The Court's position is clear regarding the mandatory dismissal of s17 of the EEA, dismissal of the educator must be fair and not because it's a mandatory sanction.

The overlap of charges, as stated, will have serious consequences for the educator. For this reason, the employer must be consistent when charging educators for misconduct. It will not be fair that some educators are charged in terms of s17, and others are charged in terms of s18 for the same misconduct. The misconduct is subject to the interpretation of the department official drawing up the charges, this may lead to inconsistent charges for the same offence. According to Coetzer, disciplinary charges are usually drawn up by line managers who need to be legally trained, he adds that failure to accommodate their lack of precision would constitute an insurmountable problem for employers who want to discipline employees.[256] It could also prejudice the employee, who may be unfairly dismissed because they were charged with the wrong section of the EEA.

Three awards will further illustrate the conceptual difficulties and inconsistencies when dealing with s17(1)(a) misconduct. *Mundzhedzi v Department of Education Limpopo*[257] (*Mundzhedzi*) in this case, the educator provided a learner with the memorandum of the Mathematical Literacy examination to rewrite the paper at the educator's house. In *SADTU obo Muller v Department of Western Cape*[258] (*Muller)* the educator awarded marks to unmarked scripts, these marks were later recorded onto the WCED Official Record Sheet as a final mark and were finally recorded in the learners' Assessment

[254] (2011) ZALCD 24 para 5.2.
[255] (2011) ZALCD 24 para 20.
[256] N Coetzer 'Substance over form – The importance of disciplinary charges in determining the fairness of a dismissal for misconduct' (2013) 34 *ILJ* 64.
[257] ELRC PSES 563-15/16 LP.
[258] ELRC PSES 815-17/18 WC.

Report. In *SADTU obo Fisher v Department of Education Western Cape*[259](*Fisher)*, the educator awarded marks for reading and oral assessments without conducting the assessments. In these cases, the main charge was s17(1)(a), and the alternate charge was dishonesty. These cases show that the charge of dishonesty, which is not an automatically dismissible charge may also be framed as a dismissible charge, s17(1)(a). This illustrates that these charges can be interchangeable and confusing, which may result in the educator being dismissed if charged with s17 instead of s18.

However, in *NAPTOSA obo Booysen v Department of Education, Western Cape*[260](*Booysen*), the educator was charged with dishonesty, in terms of s18(1) (ee), for providing learners with the answers to a test, instead of being charged with s17(1)(a). Although in the *Booysen* case, the educator was dismissed, the employer could have imposed any of the sanctions short of dismissal listed in EEAs18(3). De Villiers questions why Booysen was not charged with s17, instead, he was charged with dishonesty under s18(1) (ee).[261] She concludes that the wording of s17(1)(a) does result in conceptual difficulties and inconsistencies.

Further examples that illustrate the interpretation of ss17 and 18 charges are problematic:

NAPTOSA obo Kruger v HOD Western Cape Education Department,[262] the educator threw a stone at learner A and hit her with a stick, kicked learner B, pulled learner C away from his desk and threw a book in his face.[263] The educator was charged with s18(1)(r), assault and not s17(1)(d), grievous body harm. In *SAOU obo May v Department of Education Western Cape*,[264] the educator hit the learner's head against a desk, hit him in the face and kicked him.[265] The educator was charged with s18(1)(r) and not s17(1)(d). The writer views these offences as grievous bodily harm, yet the educators were charged with assault. Unfortunately, the courts have not ruled on the inconsistency and the ambiguous charges in s17 of the EEA.

[259] ELRC PSES 574-15/16 WC.
[260] ELRC PSES 1008-18/19 WC.
[261] C de Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education* (unpublished LLD dissertation, Stellenbosch University,2022) 319.
[262] ELRC PSES 781-16/17 WC.
[263] C de Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education* (unpublished LLD dissertation, Stellenbosch University,2022) 350.
[264] ELRC PSES 749 -18/19 WC.
[265] C de Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education* (unpublished LLD dissertation, Stellenbosch University,2022) 351.

De Villiers also found in her study that in *Moyo v Western Cape Education Department*,[266] the educator was accused of sexual assault and charged in terms of s18(1)(q). In *Chirwa v Department of Education Western Cape*,[267] the educator had sexual relations with a learner and was charged with S18(1)(q). Section 18(1)(q) is "while on duty, conducts themself in an improper, disgraceful, or unacceptable manner." This reinforces the argument that the categorisation of charges is left to the official's discretion in interpreting the misconduct and formulating the charge. This will lead to inconsistent charging.

It is trite in law that disciplinary charges do not have to be drawn up with the precision of criminal charges. However, although it is permissible to formulate the charges in a wide form and non-technical style, they must be specific enough to enable the employee to answer them.[268] Coetzee adds that the rule appears to be that, provided a disciplinary rule has been contravened and the employee knew that such conduct could be the subject of disciplinary proceedings and that the incorrect characterisation did not prejudice him, a sanction appropriate to the offence may be imposed.[269] This argument is not sustainable in the context of this study, as the sanction of mandatory dismissal as per s17 of the EEA depends on the categorisation of the charge.

In *National Union of Mineworkers & others CCMA & others,*[270] the court agreed with the arbitrator who looked at the description of the offence in the disciplinary code and the content of the charge and concluded that the wording of the charge was not unfair to the employee. However, again, this cannot be applied to ss17 and 18 of the EEA, as the wording of the charge will determine whether the charge is in the category of s17 or s18 of the EEA. The incorrect categorisation of the charge will be unfair to the employee where the charge should have been a s18 charge but was formulated as a s17 charge. Disciplinary rules are intended to create certainty and consistency in the application of discipline.[271] De Villiers refers to the distinction between s17 and s18 as a "curious distinction" as she views many listed offences in s18 as being serious, however they are not included in s17(1).[272] What further exacerbates the "confusion" is that s18(3) does allow for serious sanctions for s18

[266] ELRC PSES 811-18/19 WC.
[267] ELRC PSES 643-15/16 WC.
[268] N Coetzee 'Substance over form – The importance of disciplinary charges in determining the fairness of a dismissal for misconduct' (2013) 34 *ILJ* 57.
[269] N Coetzee 'Substance over form – The importance of disciplinary charges in determining the fairness of a dismissal for misconduct' (2013) 34 *ILJ* 63.
[270] (2011)32 *ILJ* 956 (LC).
[271] D Du Toit et al. *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 443.
[272] C de Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education* (unpublished LLD dissertation, Stellenbosch University,2022) 248.

offences, however s18(5) appears to restrict this to certain types of misconduct listed in s18(5). De Villiers argues that the EEA views the seriousness of the misconduct as being determined by the sanction imposed and not its inherent nature. De Villiers further contends that the EEA does not acknowledge that relatively minor misconduct may be considered serious depending on the context.

Apart from charges being incorrectly categorised and formulated by the officials responsible, De Villiers makes a compelling argument that indicates that officials presiding over disciplinary matters do not adequately utilise and implement the legislative framework regarding disciplinary guidelines that regulate the imposition of an appropriate sanction.[273] In *SALIPSWAU obo Zaula v Department of Education, Western Cape*[274] the educator was found guilty of sexually harassing a learner over a period of three years. The presiding officer imposed a sanction of a final written warning. In *Arendse v Department of Education Western Cape,* the educator was charged with sexual assault and improper conduct for kissing a learner on the neck.[275]The sanction imposed was a final written warning and assessment by a social worker. In both these cases, the Department of Education appealed to the Minister and the educators were dismissed.

3.3.2 Rationale for the Categorisation of Charges

The distinction between serious misconduct and misconduct was introduced to the EEA in 2000 through s10 of the Education Laws Amendment Act 53 of 2000. Section 17 lists six offences considered serious misconduct, however, there are offences in s18, which by any standards should be regarded as serious but do not feature in s17.

Section 17(1)(a) refers to theft, fraud or corruption relating to examinations or promotional reports. The term examinations include not only examination question papers but also the examination administration, this includes examination timetables and allocation of invigilators. Therefore, according to this section, an educator found guilty of theft, fraud and corruption relating to administration must be dismissed. The question in this regard is whether a mandatory sanction of dismissal is appropriate in every circumstance.

[273] C de Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education* (unpublished LLD dissertation, Stellenbosch University,2022) 336.
[274] ELRC PSES 224 – 16/17WC para 8.
[275] ELRC PSES 860-16/17 WC para 12 and 37.

Section17(1)(b)(c) of the EEA refers to sexual assault of any person and sexual relationships with learners, respectively, it is serious misconduct, and the guilty educator must be dismissed, it does not refer to rape as a dismissible offence but statutory offences, which include rape and assault are referred to in s18 as less serious forms of misconduct.[276] Calitz and De Villiers view this as an illogical classification considering the gravity of the offences and, more significantly, considering that s18 offences may attract the sanction of dismissal, albeit not mandatory.[277] The writer's interpretation of s 18(5)(d) and (e), the offences of rape and murder, differs from that of Caltz and De Villiers. The writer's interpretation of this section is that the EEA does not refer to these offences taking place within the school, it refers to the offences taking place outside the school. Noting all the offences listed in s18 is specific when described, and it indicates where the offence took place (while on duty) or against whom (learner, student, or another employee), the offences of rape and murder do not specifically include this. If the offence of rape referred to in s18(5)(d) did refer to rape while on duty, the educator would be charged in terms of s17(1) (b) "sexual assault on a learner, student or another employee."

Furthermore, it is important to accept that sexual offences and sexual relations between educators and learners have become more complicated than meets the eye. The sexual relationship between the educator and the learner is a power relationship.[278] In some instances, parents support these relationships as the teacher provides financial support to impoverished homes.[279] Despite this, it is still an offence, however it is unlikely to be reported.

The offences listed in s17 must be of such a serious nature that any mitigation by the educator will be of no assistance. Loliwe[280] recommends that s17 and s18 of the EEA merge without qualifying it as either serious misconduct or misconduct, as both deal with educator misconduct. In addition, the word "must be dismissed" must be rephrased so that it respects the rights of educators without undermining the victim.

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[276] K Calitz and C De Villiers 'Sexual abuse of pupils by teachers in South African schools: The vicarious liability of education authorities' (2020) 137(1) *SALJ* 83.
[277] K Calitz and C De Villiers 'Sexual abuse of pupils by teachers in South African schools: The vicarious liability of education authorities' (2020) 137(1) *SALJ* 83.
[278] S Ntethe 'Teachers' misconduct in South African schools' Academia available on *https://www.academia.edu/8562322/Teachers_misconduct_in_South_African_schools* accessed 18 April 2023.
[279] S Ntethe 'Teachers' misconduct in South African schools' Academia available on *https://www.academia.edu/8562322/Teachers_misconduct_in_South_African_schools* accessed 18 April 2023.
[280] FS Loliwe *Workplace Discipline in the Public Education Sector* (unpublished LLM thesis Nelson Mandela Metropolitan University 2014) 58-59.

3.3.3 Relationship between the SACE Code of Professional Ethics and s17 of EEA

As indicated in Chapter 2 of this study, SACE is the professional body for educators, and registration is compulsory. The SACE Code of Professional Ethics sets the standards of ethical conduct for educators, one of the objectives of the SACE Code of Professional Ethics is for educators to "act in a proper and becoming way such that their behaviour does not bring the teaching profession into disrepute."[281] This Code lists different offences in the following categories, educator and learner, educator and parent, educator and the community, educator and their colleagues and the educator and the profession. Like s17 of the EEA, SACE does have mandatory sanctions for certain offences, this is discussed fully below.

The range of sexual misconduct relating to a learner listed in the SACE Code of Professional Ethics is considerably wider than the two sexual offences in s17 of the EEA. In Chapter 2, of this study there is an overview of the offences listed in the SACE Code of Conduct vis-a-vi s17 EEA offences, this is expanded on below in relation to the SACE Mandatory Sanctions.[282]

3.3.3.1 SACE Mandatory Sanctions on Contraventions of the Code of Professional Ethics in 2020[283]

The SACE Mandatory Sanctions policy includes the sanction and the main considerations that must be considered when contemplating a sanction for a particular offence. These considerations include intention, negligence and the harm caused.[284] Every qualified, employed educator must be registered with SACE, one can only be employed as an educator if registered.[285] So too, an educator removed from the SACE register cannot be employed as an educator. This is akin to being dismissed as one is deprived of employment. Regarding the EEA, an educator who is removed from the SACE register shall be deemed to have resigned from the day after being removed from the register.[286]

[281] SACE Code of Professional Ethics Clause 2.5.
[282] SACE Code of Professional Ethics; Clause 3.6 Improper physical conduct with a learner; Clause 3.8 Courting learners from any school; Clause 3.9 Any form of sexual harassment of learners; Clause 3.10Any form of sexual relationship with learners from any school; Clause 3.11 Exposing or displaying pornographic materials to learners or keeping same in his possession; Clause 3.12 sexting with learners; Clause 3.13 sending pornographic materials to learners.
[283] SACE Mandatory Sanctions approved by SACE Council 9 June 2020.
[284] SACE Mandatory Sanctions approved by SACE Council 9 June 2020.
[285] SACE Act 31 of 2000 s21 (1)(2).
[286] EEA s15.

The offences are recorded according to the following categories: sexual misconduct, assault and corporal punishment, theft, fraud, bribery and financial mismanagement and substance abuse. These are offences listed in the SACE Mandatory Sanctions that relate to the offences listed in s17(1) of the EEA. The offences listed in the SACE Code of Professional Ethics and the SACE Mandatory Sanctions are more expansive when compared to s17 of the EEA.

The category of sexual misconduct includes offences relating to pornography, sexual grooming and sexual relations with any learner, these offences are not included in the list of offences in s17(1) of the EEA.[287] The principle considerations that must be considered when determining a sanction for these offences are, whether the misconduct was negligent or intentional, whether the educator was aware that the conduct was an offence, the harm caused to the learner, did they gratify themselves through the flirting, did the educator self -correct before they were required to do so.[288] If the educator acted negligently and did cause harm, then an indefinite removal from the SACE register must be considered.[289] If the misconduct was intentional, irrespective of the harm, there must be indefinite removal from the SACE register.[290]

Coetzee puts forward a compelling argument as to why the offence of exposing a child to child pornography or pornography should be a serious misconduct and included in s17 of the EEA.[291] In this article, Coetzee links the exposure of a learner to pornography to sexual grooming. However, she substantiates that a once-off exposure cannot be considered sexual grooming, sexual grooming is a process.[292] She supports this by indicating that it is an offence in the Criminal Law (Sexual Offences and Related Matters) Act.[293] This conduct is also considered an offence in the Children's Act 38 of 2005.[294] Coetzee looks at the classification from the Films and Publications Act 65 of 1996. Material classified as XX in terms of this Act is regarded as very harmful to children, and the

[287] SACE Mandatory Sanctions Approved by Council 9 June 2020 clause 7.7.1 Sexual Misconduct sexual intercourse with a learner from any school, making remarks of a directly sexual nature to a learner, forceful sexual intercourse with a learner, parent or colleague, showing pornography to a learner, showing pornographic material to colleagues on school premises, possession of pornographic material on school premises, possession of pornographic material of learners, proposing love to learners, sexual grooming of a learner and flirting with learners.
[288] SACE Mandatory Sanctions Approved by Council 9 June 2020 clause 7.7.1
[289] SACE Mandatory Sanctions Approved by Council 9 June 2020 clause 7.7.1
[290] SACE Mandatory Sanctions Approved by Council 9 June 2020 clause 7.7.1.
[291] SA Coetzee 'Educator sexual misconduct: Exposing or causing learners to be exposed to child pornography or pornography' (2015) 18(6) *Potchefstroom Electronic Law Journal* 2128.
[292] SA Coetzee 'Educator sexual misconduct: Exposing or causing learners to be exposed to child pornography or pornography' (2015) 18(6) *Potchefstroom Electronic Law Journal* 2111.
[293] 32 of 2007 s18 (2).
[294] S1(c).

distribution or exhibition thereof to the public is prohibited.[295] She proposes that exposure to this category of material should be included as an offence in s17 of the EEA.[296] Presently, an educator charged with this offence will be charged with conducting themselves in an unprofessional manner.[297] SACE does include displaying pornography to a learner/s as an offence, and the mandatory sanction for this is harsh, removal from the SACE register without the option of readmission, if there was harm caused or the conduct was intentional or reckless.[298]

The category of assault[299] includes threats of assault, corporal punishment and murder as opposed to s17(1) which only includes grievous body harm. The educator will be removed from the register if the violation resulted in harm or if the educator was intentional or negligent.[300]

The category of theft[301] is also more extensive compared to the EEA, which includes financial mismanagement, theft, and money lending. If it was an honest misunderstanding the educator may be suspended for up to 10 years. If there was harm caused to a learner, the educator may be removed from the register indefinitely. If the conduct was intentional removal from the register is indefinite.[302]

Substance abuse is the final category that will be examined. Substance abuse[303] includes the distribution of alcohol to learners and dealing with drugs. These offences would attract the sanction of indefinite deregistration if they caused harm or were done intentionally or recklessly. In terms of the EEA, an educator will be dismissed if in possession of an intoxicating, illegal or stupefying substance. SACE will deregister an educator for possession or consumption of alcohol on the school premises.

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[295] SA Coetzee 'Educator sexual misconduct: Exposing or causing learners to be exposed to child pornography or pornography' (2015) 18(6) *Potchefstroom Electronic Law Journal* 2128.
[296] SA Coetzee 'Educator sexual misconduct: Exposing or causing learners to be exposed to child pornography or pornography' (2015) 18(6) *Potchefstroom Electronic Law Journal* 2118.
[297] EEA s18(1)(q).
[298] SACE Mandatory Sanctions Approved by Council 9 June 2020 Clause 7.7.1.
[299] SACE Mandatory Sanctions Approved by Council 9 June 2020 Clause 7.7.2 include, contraventions relating to assault and corporal punishment include threat of assault, assault, assault causing swelling and bruising, assault causing grievous body harm, corporal punishment, culpable homicide, attempted murder, murder.
[300] SACE Mandatory Sanctions Approved by Council 9 June 2020 Clause 7.7.4.
[301] SACE Mandatory Sanctions Approved by Council 9 June 2020 Clause 7.7.4 Theft, fraud, bribery, and financial mismanagement include theft, fraud, examination fraud, misappropriation of funds, dishonesty during employment, unlawful possession of school property and financial mismanagement.
[302] SACE Mandatory Sanctions Approved by Council 9 June 2020 Clause 7.7.4.
[303] SACE Mandatory Sanctions Approved by Council 9 June 2020 Clause 7.7.3 driving the school vehicle under the influence of alcohol, possession or consumption of alcohol on school premises, use and distribution of alcohol, use and dealing with drugs on school premises, criminal conviction for possession or dealing in illegal substances.

In the *Centre of Child Law & Others v SACE & Others*[304] educators who had assaulted learners, causing serious harm to the learners, were removed from the register, suspended for ten years, and issued a fine of R15000 and R5000 suspended. The applicants submitted that these sanctions were not appropriate as they were lenient considering the extent of the offence. They further contended that the respondent's adoption of 'mandatory sanctions' permits no discretion and does not give effect to the rights of the child.[305] The Court ordered that SACE revise the mandatory sanctions. The amendment of the mandatory sanctions must address the deficiencies in the decision – making process.

The SACE Code of Professional Ethics outlines the disciplinary process.[306] The investigator will determine whether there is sufficient evidence showing that the code was breached, if so the matter will be referred to the disciplinary committee who will refer the matter to a disciplinary panel for a hearing.[307] The SACE CEO will then issue a summons to the educator listing details of the breaches of the code.[308]At the hearing the presiding officer puts the charge to the educator and asks that the educator plead.[309] The presiding officer in a SACE disciplinary enquiry does not decide on the sanction, once the presiding officer has decided that the educator has breached the SACE Code of Professional Ethics, the educator and the SACE prosecutor must make representations to the presiding officer on an appropriate sanction.[310] This is an opportunity for educators to lead evidence in mitigation, unlike s17 of the EEA, where the employee cannot provide mitigating factors as dismissal must follow a guilty finding on any of the s17 offences These recommendations are then submitted to the disciplinary committee, where the recommendations may be ratified or varied. The educator may refer the findings to the appeals committee.[311]
Noting the above, the sanctions meted out by SACE are not aligned with s17 of the EEA. Furthermore, the offence of causing a learner to perform any of the acts listed in s17(1)[312] is not listed as an offence in the SACE Code of Professional Ethics.

[304] (2022) High Court of South Africa Gauteng Division Case no 61630/2020.
[305] (2022) High Court of South Africa Gauteng Division Case no 61630/2020 para 30.
[306] SACE Code of Professional Ethics Disciplinary Procedures.
[307] SACE Code of Professional Ethics Disciplinary Procedures clause 3.9.
[308] SACE Code of Professional Ethics Disciplinary Procedures clause 4.1.
[309] SACE Code of Professional Ethics Disciplinary Procedures clause 5.7.1.
[310] SACE Code of Professional Ethics clause 6.2.
[311] SACE Code of Professional Ethics clause 9.
[312] EEA s17(1)(f).

3.4 Sexual Relations with Learners and Sexual Assault in Schools

In March 2023, the Minister of Basic Education responded to the Democratic Alliance in Parliament regarding educator misconduct.[313] These parliamentary questions related to the number of reports received on sexual misconduct, the number of hearings held, the number of educators found guilty of sexual misconduct and the number of educators struck off the SACE register indefinitely.[314] The number of sexual misconducts reported steadily increased from 2019 to 2022.[315]This was also the case for educators found guilty of sexual misconduct. However, there was a decline in the number of educators struck off the SACE register, from 19 in 2019/20 to 4 in 2021/22.[316]

3.4.1 Protocol for the Management and Reporting of Sexual Abuse and Harassment in Schools.[317]

This document published by the Department of Basic Education includes the definitions of sexual abuse, sexual offences, and sexual harassment. It provides standard operating procedures for addressing allegations of sexual abuse perpetrated by learners, educators, and school staff. The protocol enables educators and employees of the DBE to identify, intervene, report, and provide support to all who are sexually abused or harassed in school. [318]Importantly this document provides definitions of sexual abuse and sexual offences by referred to in the Children's Act[319] and the Criminal Law (Sexual Offences and Related Matters) Amendment Act.[320] It is therefore immaterial whether the EEA provides these definitions or not as the definitions from these Acts must be used.

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[313] National Assembly Internal Question Paper available on https://www.education.gov.za/Portals/0/Media/Parliamentary%20Questions/PQs%200523/NA%20618.pdf?ver=2023-05-03-121106-000 accessed 30 September 2024.

[314]National Assembly Internal Question Paper available on https://www.education.gov.za/Portals/0/Media/Parliamentary%20Questions/PQs%200523/NA%20618.pdf?ver=2023-05-03-121106-000 accessed 30 September 2024.

[315]National Assembly Internal Question Paper available on https://www.education.gov.za/Portals/0/Media/Parliamentary%20Questions/PQs%200523/NA%20618.pdf?ver=2023-05-03-121106-000 accessed 30 September 2024.

[316] National Assembly Internal Question Paper available on https://www.education.gov.za/Portals/0/Media/Parliamentary%20Questions/PQs%200523/NA%20618.pdf?ver=2023-05-03-121106-000 accessed 30 September 2024.

[317] The Protocol for the Management and Reporting of Sexual Abuse and Harassment in Schools available on https://www.education.gov.za/Portals/0/DoE%20Showcase/Launch%20of%20protocol/Sexual%20Abuse%20and%20Harassment%20in%20Schools%20march%202019%20%20(1).pdf?ver=2019-03-13-093606-697 accessed 5 April 2024.

[318] The Protocol for the Management and Reporting of Sexual Abuse and Harassment in Schools available on https://www.education.gov.za/Portals/0/DoE%20Showcase/Launch%20of%20protocol/Sexual%20Abuse%20and%20Harassment%20in%20Schools%20march%202019%20%20(1).pdf?ver=2019-03-13-093606-697 accessed 5 April 2024.

[319] 38 of 2005.

[320] 32 of 2007.

Of particular significance to this study is that that protocol document includes the disciplinary procedure for an educator who is the alleged offender. In this regard it refers to the ELRC Collective Agreement 3 of 2018, and the provisions contained in the SACE Disciplinary Code and Procedures for Educators.[321] The ELRC Collective Agreement is discussed fully below. The protocol document categorizes sexual offences into 4 levels, level 1 being the least serious and level 4 being the most serious. Level 4 includes sexual assault and rape; sexual assault is included in s17(1) of the EEA.[322] However it only dictates the consequences for learners who are perpetrators of sexual abuse per category and not educators. Therefore, the process to discipline educators charged with sexual offences remains regulated by the EEA and Schedule 2 of the EEA.

3.4.2 Inquiry by Arbitrator

ELRC Collective Agreement 3 of 2018, is the collective agreement that requires an educator be subjected to an arbitration when accused of sexual misconduct against a learner. Educators charged with sexual misconduct in terms of s17(1)(b) and s17(1)(c) [323] will be subjected to this process. This must be implemented in terms of s188A of the LRA and applies to all educators employed in terms of the EEA.

The ELRC Constitution provides for Inquiry by Arbitrator.[324] However, there are discrepancies between section 188A of the LRA and clause 32 of the ELRC Constitution. Section188A of the LRA requires the employer to institute an inquiry by arbitrator however clause 32 provides that either the employer or the employee may, with the other party's written consent, request the general secretary to conduct an inquiry by arbitrator into misconduct allegations.[325] The practical implication of an inquiry by arbitrator is that the internal disciplinary hearing, the appeal in relation to such hearing, and the mandatory conciliation procedure are bypassed, and the process moves directly to arbitration.[326] The purpose of this agreement is to protect learners from unnecessary

[321] The Protocol for the Management and Reporting of Sexual Abuse and Harassment in Schools clause 4.2 available on *https://www.education.gov.za/Portals/0/DoE%20Showcase/Launch%20of%20protocol/Sexual%20Abuse%20and%20Harassment%20in%20Schools%20march%202019%20%20(1).pdf?ver=2019-03-13-093606-697* accessed 5 April 2024.
[322] EEA s17(1)(b).
[323] ELRC Collective Agreement 3 of 2018 clause 3.1.
[324] ELRC Constitution Part C clause 32.
[325] SA Coetzee 'Promoting fair individual labour dispute resolution for South African educators accused of sexual misconduct (Part 1)' 2021 *Journal of South African Law* 40.
[326] SA Coetzee 'Promoting fair individual labour dispute resolution for South African educators accused of sexual misconduct (Part 1)' 2021 *Journal of South African Law* 40.

trauma by expecting them to give evidence about sexual misconduct by educators several times.[327] The issue of securing evidence from a learner is a particular challenge if they are required to give evidence more than once, sometimes years after the disciplinary hearing at the arbitration.[328]

This collective agreement requires that the SACE Code of Professional Ethics[329] be considered when a determination is made, importantly, it also obligates the arbitrator to consider the mandatory sanctions required by the EEA, it is only s17 of the EEA that imposes a compulsory sanction of dismissal.

According to Grogan, a tribunal exercising an independent discretion on a sanction is free to draw its conclusion without regard to the sanction chosen by the employer and may substitute a lesser penalty should this be favoured.[330] In the context of s17, how can the presiding officer or the arbitrator, in the case of Collective Agreement 3 of 2018, exercise an independent discretion when the sanction of dismissal is mandatory? This is dealt with later in this chapter.

This collective agreement removes the educator's right to a disciplinary hearing and an internal appeal and reduces possible remedies only to have the award reviewed.[331] Van Niekerk explains s188A in the case of *South African Transport and Allied Workers Union v MSC Depots (Pty) Ltd.*[332] The crux of s188A of the LRA, is to avoid duplication between internal and external hearings which will allow for such hearings to be concluded in the shortest possible time.[333] Section 188A (1) requires written consent from the employee, or there must be a collective agreement. [334] In effect, the Collective Agreement does away with the requirement of written consent, making an inquiry by arbitrator mandatory.[335]Allowing consent to be replaced by a collective agreement and nullifying the s188A requirement of written consent by making inquiry by arbitrator mandatory removes "the

[327] C de Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education* (unpublished LLD dissertation, Stellenbosch University,2022) 345.
[328] C de Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education* (unpublished LLD dissertation, Stellenbosch University,2022) 345.
[329] ELRC Collective Agreement 3 of 2018 clause 5.1.2.
[330] J Grogan *Dismissal* 4 ed (2022) 181.
[331] SA Coetzee' Promoting fair individual labour dispute resolution for South African educators accused of sexual misconduct (Part 1)' 2021 *Journal of South African Law* 33.
[332] (2013) 34 *ILJ* 706 (LC).
[333] (2013) 34 *ILJ* 706 (LC) para 11.
[334] SA Coetzee' Promoting fair individual labour dispute resolution for South African educators accused of sexual misconduct (Part 1)' 2021 *Journal of South African Law* 40.
[335] SA Coetzee 'Promoting fair individual labour dispute resolution for South African educators accused of sexual misconduct (Part 1)' 2021 *Journal of South African Law* 41.

peg on which the pre-dismissal procedure contemplated in s188A hangs."[336] According to Maloka and Peach, consent is essential because by consenting to the s188A procedure, the employees surrender their right to defend the allegations of misconduct in an internal disciplinary hearing.[337]Another reason why written consent from the employee is important in s188A is that if the educator is dismissed, the educator will not be able to exercise their right to declare a dispute about their alleged unfair dismissal.[338] Coetzee argues that there is a disconnect between Collective Agreement 3 of 2018 and the educator's legal right to appeal against the sanction of dismissal in terms of EEA s 25(2).[339]

Galant agrees with Maloka and Peach and adds that s188A(4)(a) of the LRA requires informed consent, and an employee should consent only after being notified of the allegations against them.[340] This implies that an employee can agree only concerning a specific charge and that consent cannot be included in the employment contract unless section 188A(4)(b) applies.[341]

LRA sets specific requirements when embarking on a process of inquiry by an arbitrator, which include, "the employee's written consent,"[342] "an employee may only consent to an inquiry in terms of this section after the employee has been advised of the allegation."[343] In addition, the LRA requires that the "council or a commissioner must attempt to resolve the dispute through conciliation,"[344] and failing to resolve the dispute through conciliation, the dispute may be arbitrated.[345] The question arises whether allowing individual consent to be replaced by a collective agreement is compatible with the legislature's intention and existing dispute procedures available to South African educators.[346]

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[336] TC Maloka and V Peach 'Is an agreement to refer a matter to an inquiry by an arbitrator in terms of section 188A of the Act 66 of 1995 a strait jacket' 2016 *De Jure* 369.
[337] Maloka and Peach 'Is an agreement to refer a matter to an inquiry by an arbitrator in terms of section 188A of the Act 66 of 1995 a straitjacket." 2016 *De Jure* 369.
[338] SA Coetzee 'Promoting fair individual labour dispute resolution for South African educators accused of sexual misconduct (Part 1)' 2021 *Journal of South African Law* 41.
[339] SA Coetzee' Promoting fair individual labour dispute resolution for South African educators accused of sexual misconduct (Part 1)' 2021 *Journal of South African Law* 41.
[340] G Galant 'Pre-dismissal arbitration: a quizzical look at a novelty' 2002 Law*, Democracy & Development* 114 - 116
[341] G Galant 'Pre-dismissal arbitration: a quizzical look at a novelty' 2002 Law, Democracy and Development 114- 116.
[342] LRA s188A (3)(b).
[343] LRA s188A (4).
[344] LRA s191 (4).
[345] LRA s191 (5).
[346] SA Coetzee 'Promoting fair individual labour dispute resolution for South African educators accused of sexual misconduct (Part 1)' 2021 *Journal of South African Law* 41.

ELRC Collective Agreement 3 of 2018 was signed 18 years after promulgating the Education Laws Amendment Act. At that point, educators accused of sexual misconduct with learners would have had the opportunity to appeal the outcome of the internal hearing, if the appeal was dismissed, the educator still had the opportunity to refer an unfair dismissal dispute to the ELRC.[347] However, since the implementation of this collective agreement, these doors are closed to the accused educator. The only option is to have the arbitration award reviewed.[348] The question is whether lawmakers would have included s17 had they anticipated the subsequent developments regarding the sexual misconduct of educators.

De Villiers found in her study that this Collective Agreement has little impact on the serious misconduct of educators, basing her findings on arbitrations held in the Western Cape; she found for the period September 2018 to June 2020, only two such arbitrations took place.[349] The ELRC reported in the Annual Report 2020/2021,[350] 29 arbitration awards were issued in terms of Collective Agreement 3 of 2018 and in the Annual Report 2021/2022[351] it was reported that 31 such awards were issued.

3.5 Dismissal

The Constitution guarantees everyone the right to fair labour practices. The LRA confers on all employees the right not to be unfairly dismissed[352] and provides remedies to unfairly dismissed employees.[353] An acceptable reason related to dismissal for misconduct involves the employer's legitimate loss of trust in an employee related to one or more incidents, demonstrating a lack of trustworthiness on the part of the employee.[354] The LRA does not afford the employer any recourse if the employee terminates the employment contract unless the employer institutes a claim for breach of contract under common law.[355]

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[347] ELRC Collective Agreement 6 of 2016 *https://elrc.org.za/docs/elrc-constitution-part-c-dispute-resolution-procedures-basic-education-and-tvet/*
[348] LRA s145.
[349] C de Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education* (unpublished LLD dissertation, Stellenbosch University,2022) 345.
[350] ELRC Annual Report 2020/*21 https://www.google.com/url?sa=i&url=https%3A%2F%2Felrc.org.za%2Fwp-content%2Fuploads%2F2020%2F10%2FELRC-Annual-Performance-Plan-2020-* page 117 accessed 10 April 2024.
[351] ELRC Annual Report 2021/22 *https://elrc.org.za/wp-content/uploads/2021/03/ELRC-Annual-Performance-Plan-2021-22.pdf* page 137 accessed 10 April 2024
[352] LRA s185.
[353] LRA s193.
[354] D du Doit et al. *Labour Relations Law A Comprehensive Guide* (2014) 442.
[355] D Pillay 'The Constitutionalisation of Fair Labour Practices in South Africa.' New York Law School Public Law and Legal Theory available at *http://ssm.com/abstract=638621*, accessed 14 September 2022.

South African dismissal law is closely aligned with international law. The basic principle of the Termination of Employment Convention 158 of 1982 is that the employer must have a fair reason to terminate the employment contract. [356]

The law relating to unfair dismissals is contained in the LRA, and the relevant codes of good practice are issued in terms of the Act. The disciplinary code for educators employed in terms of the EEA is found in ss17 and 18 of the EEA, and Schedule 2 of the EEA contains procedural guidelines.

3.5.1 Meaning of Dismissal

Under the LRA, a dismissal occurs when the employment relationship terminates in accordance with the reasons cited in s186(1).[357] Dismissal occurs when the employment relationship is terminated at the instance of the employer (except when it is constructive dismissal), there must be some act that denotes that the employer has brought the contract to an end.[358] A dismissal may be affected by words or conduct.[359]

The definition of dismissal in the LRA is extensive and is captured in s 186(1). For purposes of this study, s186(1) (a) of the LRA is relevant, this is when the employer ends the employment with or without notice. This is also referred to as summary dismissal when the reason for the termination is that the employee committed a serious breach of contract.[360] For example, the employer will end the employment relationship without notice if an employee is dismissed for misconduct. In addition to this section s188 of the LRA refers to unfair dismissals that are not automatically unfair, this section requires the employer to prove that the dismissal was for a fair reason based on the employee's conduct,[361] incapacity,[362] or the employer's operational requirements.[363] The section also requires that the dismissal be in accordance with fair procedure. Section 189 of the LRA refers to dismissals based on the operational requirements of the employer.

[356] C Garbers et al. *The New Essential Labour Law Handbook* 7 ed (2019) 125.
[357] J Grogan *Dismissal* 4 ed (2022) 14.
[358] J Grogan *Workplace Law* 13 ed (2020) 128.
[359] J Grogan Workplace Law 13 ed (2020) 128.
[360] C Garbers et al. *The New Essential Labour Law Handbook* 7 ed (2019) 127.
[361] LRA s188(1)(a).
[362] LRA s188(1)(a).
[363] LRA s188(1)(b).

3.5.2 What is a Fair Dismissal?

According to the LRA, every employee has the right not to be unfairly dismissed.[364] However, it does not define what unfairness or fairness is. Cohen argues that fairness is a flexible concept based on the individual's circumstances of a particular case, competing rights and interests of employers and employees, and the interests of society as a whole.[365] The concept of fairness was addressed in *Nehawu v University of Cape Town*, wherein the Constitutional Court analysed the right to fair labour practices, the focus was the relationship between the employee and employer and the continuation of the relationship on fair terms for both.[366] This confirms the interpretation of the constitutional right to fair labour practice that being that fairness applies to the employer and employee. This was also reiterated by the Constitutional Court in *Sidumo*.[367] Ngcobo J held that the Commissioner must make a value judgement in order to determine whether a dismissal is fair.[368] This decision is limited by the need for the Commissioner to consider the interests of the employee as well as that of the employer to reach a fair, impartial judgement on the sanction's fairness.[369] This enquiry starts with the employer and employee starting on equal footing due to the employer and employee's right to fair labour practices.[370] Van Niekerk adds that the Commissioner must consider all relevant factors and determine where the balance falls.

In the context of this study, the enquiry will include not only the interests of the educator and the Department of Education but also, importantly, the learner's interests, which must be protected as much as that of the employer and educator.[371] The mandatory dismissal of the educator, as required in s17, considers the interests of the department and learners only, this cannot be fair.

In accordance with the approach to fairness, the Commissioner must determine whether the employer's decision to dismiss was fair, the Commissioner is not required to defer to the employer's decision but consider all circumstances.[372] What are these circumstances? *Sidumo* attempted to put a list of circumstances together, albeit not exhaustive, the importance of the rule [that was] breached, the reason the employer imposed the sanction of dismissal [and] the basis of

[364] LRA s185(a).
[365] T Cohen 'Procedurally fair dismissals – Losing the Plot?' (2005) 17 *SA Merc LJ* 33.
[366] (2003) 2 BCLR 154; A Van Niekerk 'Dismissal for Misconduct – Ghosts of Justice, Past, present and future' 2012 *Acta Juridicia* 102.
[367] (2007) 12 BLLR 1097 (CC).
[368] (2007) 12 BLLR 1097 (CC) para 180.
[369] (2007) 12 BLLR 1097 (CC) para 180.
[370] A Van Niekerk 'Dismissal for Misconduct – Ghosts of Justice, Past, present and future' 2012 *Acta Juridicia* 102.
[371] The Constitution s28(2).
[372] A Van Niekerk 'Dismissal for Misconduct – Ghosts of Justice, Past, present and future' 2012 *Acta Juridicia* 110.

the employee's challenge to the dismissal.[373] "The harm caused by the employee's conduct, the effect of the dismissal on the employee and his long service."[374] The impact of educator misconduct on learners is discussed in detail in paragraph 3.5.3.3 below.

How does s17 of the EEA measure up to the above principles outlined in *Sidumo*? Undoubtedly, all the rules listed in s17 of the EEA are important in the schooling context, however does the infringement of a rule in s17 warrant dismissal for every listed offence? Furthermore, in accordance with the CCMA Guidelines, when a disciplinary code accords a sanction for serious misconduct, it is generally accepted that the sanction is appropriate, when the code is more severe in the prescribed sanction than the generally accepted norms, the employer must provide reasons for prescribing such a sanction.[375] Therefore, it is understandable that sexual relations with learners, sexual assault and grievous body harm must be considered serious misconduct, and the employer of educators employed in terms of the EEA do not need to justify the accompanying mandatory dismissal.[376] Sexual misconduct by an educator defeats the *in loco parentis* principle, as discussed earlier in this chapter. Furthermore, such conduct infringes on the child's constitutional right to human dignity and basic education, this was raised in Chapter 2. In addition, children enjoy special constitutional protection.[377] Importantly, as indicated in the CCMA Guidelines,[378] the Courts have identified certain conduct as serious misconduct, including sexual harassment.

3.5.3 When is Dismissal Appropriate?

As indicated earlier, for a dismissal to be fair, it must be substantively and procedurally fair. This study focuses on the substantive fairness of dismissal regarding s17 of the EEA. Schedule 8 requires that dismissal must be an appropriate sanction to be fair.[379] Presiding officers in internal disciplinary inquiries must exercise their discretion reasonably and honestly regarding the general principles of fairness.[380] Regarding dismissal in terms of s17 of the EEA, the presiding officer is not allowed to exercise their discretion fairly or reasonably, as the sanction of dismissal is mandatory.

[373] (2007) 12 BLLR 1097 (CC) para 78.
[374] A Van Niekerk 'Dismissal for Misconduct – Ghosts of Justice, Past, present and future' 2012 *Acta Juridicia* 108.
[375] CCMA Guidelines on Misconduct Arbitrations item 96.
[376] CCMA Guidelines on Misconduct Arbitrations item 96.
[377] S Coetzee 'Holding the state directly liable for educator-on-learner sexual abuse' (2018) 19(1) *Child Abuse Research: A South African Journal* 34.
[378] CCMA Guidelines on Misconduct Arbitrations item 97.
[379] Schedule 8 item 7 (iv).
[380] J Grogan *Dismissal* 4 ed (2022) 180.

The choice of sanction doesn't hinge on logical or legal grounds where one can definitively determine whether the decision-maker was correct or incorrect. It is possible that two reasonable decision-makers may disagree that dismissal was appropriate and other instances where no reasonable person could regard the dismissal as appropriate.[381]

The question remains when dismissal is appropriate. The decision to dismiss is a subjective assessment, and there is no scientific criteria for it.[382] There was an attempt to address this in *County Fair Foods v CCMA,*[383] wherein the court said that "assessment of the employee's conduct and choice of sanctions for violation of employment rules falls under the employer's authority, and interference is only warranted in cases where the dismissal is deemed unfair."[384] In the same judgement, the court said an unreasonable dismissal induces a "sense of shock."[385] This approach has become known as the "reasonable employer" test.

This test was replaced with the reasonable decision-maker test in the *Sidumo,* the court said that "commissioner must determine whether a dismissal is fair. A commissioner is not given the power to consider afresh what they would do but to decide whether what the employer did was fair. In arriving at a decision, a commissioner is not required to defer to the employer's decision. What is required is that they must consider all relevant circumstances."[386]

Considering the above principles, the presiding officer is the reasonable decision-maker in the s17 disciplinary enquiry. However, the presiding officer's hands are tied, as they cannot consider all relevant circumstances and make a value judgement. Therefore, instead, the sanction of dismissal must be imposed. Educators, who have not been dismissed for sexual offences relating to learners have a right to dispute their dismissal at arbitration like any other employee. Section17 of the EEA does not exclude them from this right. Educators who refer unfair s17 dismissals to arbitration will have to prove that they are not guilty of the offence.[387]

Dismissal must be for a fair reason. Schedule 8 provides five guidelines as to when misconduct will constitute a fair reason for dismissal, did the employee contravene a rule or workplace standard, and if the rule was broken, was it a reasonable or valid rule, was the employer aware of the rule or reasonably expected to know of it, did the employer consistently apply the rule and was dismissal

[381] J Grogan *Dismissal* 4 ed (2022) 181.
[382] J Grogan *Dismissal* 4 ed (2022) 182.
[383] (1999) 20 *ILJ* 1701 (LAC) para 11.
[384] J Grogan *Dismissal* 4 ed (2022) 182.
[385] J Grogan *Dismissal* 4 ed (2022) 182.
[386] (2007) 12 BLLR 1097 (CC) para 79.
[387] *https://elrc.org.za/docs/elrc-constitution-part-c-dispute-resolution-procedures-basic-education-and-tvet/*

appropriate for the infringement of the rule.[388] This study addresses whether the dismissal in terms of s17 of the EEA is aligned with s188(1) of the LRA and is substantively fair in every instance. A follow-up question is whether the dismissal is the appropriate sanction for the infringement of the rule.

To justify the dismissal, the employer must demonstrate that they had no alternative other than dismissal and that continuing the employment relationship was not a viable option.[389] The employer cannot rely on the "breach of the trust relationship" to justify the dismissal, it is only one factor.[390] Bearing this in mind, the writer is of the view that the employer cannot justify a lighter sanction for an educator found guilty of sexual misconduct or grievous body harm. However, regarding the other offences listed in s17, dishonesty, fraud, corruption, theft and bribery, the writer is of the view that all the relevant circumstances will determine the sanction for an educator found guilty, and dismissal should not be mandatory regarding these offences.

In *Edcon v Pillemer,*[391] the Court had to review the commissioners finding that the dismissal of the employee was unfair. In this case, the employee was charged with dishonesty. The main takeaway from this judgement was that the employer did not provide evidence to show that the trust relationship had broken down.[392] According to Newaj, the court focused mainly on the lack of evidence that proved that the trust relationship had broken down and failed to consider the serious misconduct committed.[393]

Newaj[394] examined several judgments post-*Edcon* where the courts reviewed and set aside the commissioners' findings that dismissal was unfair for acts of dishonesty. She focuses on the concept of implied intolerability. She supports the view that evidence is unnecessary to establish the breakdown in the trust relationship as the seriousness of the misconduct will imply this. [395]An

[388] LRA Schedule 8 item 7.
[389] C Garbers et al. *The New Essential Labour Law Handbook* 7 ed (2019) 220.
[390] C Garbers et al. *The New Essential Labour Law Handbook* 7 ed (2019) 220.
[391] (2010) 1 BLLR 1 (SCA).
[392] K Newaj 'The impact of dishonesty on employment: Edcon, prior and beyond' (2016) 79(3) *Journal for Contemporary Roman-Dutch Law* 430.
[393] K Newaj 'The impact of dishonesty on employment: Edcon, prior and beyond' (2016) 79(3) *Journal for Contemporary Roman-Dutch Law* 438.
[394] K Newaj 'The impact of dishonesty on employment: Edcon, prior and beyond' (2016) 79(3) *Journal for Contemporary Roman-Dutch Law* 438-440.
[395] K Newaj 'The impact of dishonesty on employment: Edcon, prior and beyond' (2016) 79(3) *Journal for Contemporary Roman-Dutch Law* 438-440.

example she cites is the case of *ABSA Bank Ltd v Naidu and Others*[396] where the court said that remorse is not an absolute bar against dismissal. Dismissal is justifiable if the employee is grossly dishonest. In *Pick 'n Pay Retailers (Pty) Ltd v CCMA*, the commissioner found the dismissal was unfair, as there was no evidence that the employment relationship had broken down. However, the court indicated that misconduct involving dishonesty would usually impact the employment relationship.[397]

Newaj further quotes Rycroft, who says the court's role is to assess the entirety of the misconduct and decide whether it is unreasonable to expect the employer to tolerate it.[398] She concludes that the courts are moving away from the *Edcon* approach.
According to Mischke,[399] trust becomes an issue in dishonesty-related misconduct, such as theft, unauthorised possession, fraud, or misrepresentation. This form of dishonesty is not included in s17. Instead, it is dishonesty relating to promotional reports only.

3.5.3.1 The Impact of the Misconduct on the Employment Relationship

The Courts have measured the impact of the misconduct primarily on the common law concept of the trust relationship and whether the misconduct has rendered the employment relationship intolerable. These are subjective concepts and must be determined objectively. In *Engen Petroleum Ltd v CCMA & Others*[400] Zondo JP said that the court or arbitrator must objectively evaluate whether the employment relationship is intolerable by considering all the facts and circumstances of the case.[401] The notion of trust is open to a subjective interpretation, and the requirement for trust must be linked in a material way to an act of misconduct before one can argue intolerability.[402] In *AutoZone v DRC of Motor Industry and Others,*[403] the Labour Appeal Court held that if the offence involves a scheme of dishonesty, it is reasonable to assume that the employer will lose trust in the employee. This is because the misconduct demonstrates a level of untrustworthiness, making the relationship intolerable.

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[396] (2015) 36 *ILJ* 602 (LAC) (24 October 2014).
[397] *Pick 'n Pay Retailers (Pty) Ltd v Maluleke and Others* (2020) 12 BLLR 1229 (LAC).
[398] K Newaj 'The impact of dishonesty on employment: Edcon, prior and beyond' (2016) 79(3) *Journal for Contemporary Roman-Dutch Law* 441.
[399] Mischke, D 'The breakdown of trust: Operational perspectives on the appropriate sanction' (2010) 19 *CLL* 71.
[400] (2007) 28 *ILJ* 1507 (LAC) para 84.
[401] (2007) 28 *ILJ* 1507 (LAC) para 84.
[402] A Rycroft 'The Intolerable Relationship' 2012 Indus *LJ* 2283.
[403] (2019) 6 BLLR 551 (LAC) para 12.

As indicated, *Edcon v Pillemer*[404] established that the employer must provide evidence to show that the employment relationship had broken down to justify dismissal.[405] However, Grogan believes this is not so, his view is that the SCA held that the Commissioner's finding was that the company failed to justify the dismissal.[406] Grogan adds that the misconception presented by *Edcon* was corrected in *Anglo Platinum (Bafokeng Rasemone Mine) v De Beer,*[407] where the court accepted that serious misconduct was proof enough that the employment relationship was rendered unsustainable.[408] Furthermore, he adds that the arbitrator must determine whether the employment relationship has broken down. In *Afrox Healthcare v CCMA &* Others,[409] the court assessed the appropriateness of the sanction, in so doing, the court considered the nature of the employer's business, being a healthcare service provider and the public's expectation of zero tolerance towards negligence, which may impact patients' lives. Although in *Edcon v Pillemer NO & Others* (SCA),[410] the SCA held that the onus is on the employer to lead evidence showing that the employment relationship has broken down, it is possible that the breakdown in the relationship will be established simply by the nature of the offence and the circumstances of the dismissal.

In *Woolworths v Mabija*,[411] the LAC accepted that it was not necessary for evidence to be led to prove the breakdown in the employment relationship, the gravity of the misconduct can speak for itself.

As indicated earlier in this chapter, educator misconduct impacts the employment relationship, and the harm caused to the learner must also be considered. Important in the context of this study is *Transnet Freight Rail v Transnet Bargaining Council & Others*' here, emphasis was placed on deterrence as being as important as a breakdown in trust.[412] Steenkamp J said that the importance of the rule and the implication of the transgression is an essential consideration when determining the fairness of the dismissal. The learned judge said that one must consider what message a lenient sanction for the infringement of an important rule will send to other employees. He adds that the need to deter other employees from committing the same offences is a legitimate reason for

[404] (2010) 1 BLLR 1 (SCA).
[405] J Grogan *Dismissal* 4ed (2009) 188.
[406] J Grogan *Dismissal* 4ed (2009) 188.
[407] (2015) 36 *ILJ* 1453 (LAC).
[408] J Grogan *Dismissal* 4 ed (2009) 188.
[409] (2012) 7 BLLR 649 (LAC) para 23.
[410] (2010) 1 BLLR 1 (SCA) para 20-22.
[411] (2016) 37 *ILJ* 1380 (LAC).
[412] A Rycroft "The Intolerable Relationship" 2012 *Indus LJ* 2283.

dismissal and is a response to risk management. [413]There can be no argument that in the school context, sexual relationships with a learner[414], sexual assault[415] and causing grievous bodily harm[416] are very serious offences. The sanction of dismissal for these offences will send a strong message to other educators that such conduct will not be tolerated. Rycroft argues that it is not only intolerability and the breakdown in the trust relationship that determines the fairness of a dismissal, but one must also take deterrence into account.[417] The writer submits that deterrence is a motivating factor for s17(1) to carry a mandatory sanction for dismissal, however, the dismissal must still be fair and appropriate.

3.5.3.2 Impact of Educator Misconduct on the Learner

Educators are required to act in place of a parent by carrying out legal responsibilities and functions in line with the constitutional rights afforded to the child. This is the common law principle of *in loco parentis.* According to Prinsloo, dealing with children demands a higher standard of care than when dealing with adults, hence, educators' conduct will be subject to more rigorous evaluation.[418] Teachers who sexually assault a learner, or have a sexual relationship with a learner, have authority over learners on the school grounds and during normal school sessions but they are also granted authority over the learners during extra-mural activities away from the school grounds.[419] According to Louw,[420] if a child is under the care and control of the school, the educators of that school owes the child in their care a legal duty to prevent the learner from being exposed to physical harm.

3.5.3.3 The Concept of *in loco parentis* in Education

The concept of *in loco parentis* may be a common law principle, however it has made its way into our law. The offences in s17 of the EEA, besides being criminal offences, also breach the principle of *in loco parentis.* The National Education Policy Act 27 of 1996 facilitates the transformation of the national system of the education system and upholds the fundamental rights of South Africans, the SACE Code of Professional Ethics enhances this with respect to school violence.[421] The

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[413] *Transnet Freight Rail v Transnet Bargaining Council & Others* (2011) ZALCJHB 15 Page 21 para 4
[414] EEA s17(1)(c).
[415] EEA s17(1) (b).
[416] EEA s17(1)(d).
[417] A Rycroft "The Intolerable Relationship" 2012 *Indus LJ* 2283.
[418] IJ Prinsloo 'How safe are South African schools? '(2005) 25 (1) *South African Journal of Education* 5.
[419] IJ Prinsloo 'How safe are South African schools? '(2005) 25 (1) *South African Journal of Education* 6.
[420] A Louw '*Acquisition of parental responsibilities and rights*.' (unpublished LLD dissertation University of Pretoria 2009).
[421] ST Mampane 'Exploring the Practice of in loco parentis in Public Schools' (2018) 16 *Bulgarian Comparative Education Society* 185.

Protection from Harassment Act 17 of 2011 and the Sexual Offences and Related Matters Act 6 of 2012 do not specifically mention educators but criminalise a wide range of violence.[422]

In the context of s17 offences, this doctrine of *in loco parentis* is significant as it gives perspective to the offences' impact and how they are viewed. It is necessary to consider the importance of a safe school environment from a legal perspective, focusing on the state's obligation in terms of s29(1)(a) of the Constitution to ensure that everyone receives a basic education which is in line with Article 28 of the Convention on the Rights of the Child.[423] The Department of Basic Education must protect children from harm and abuse in line with s28 of the Constitution.[424] Relevant to this study is also the United Nations Convention on the Rights of the Child, article 19 which guarantees that when a child is under the care of parents or guardians or any other caregiver they have a right to be free from all forms of abuse, including sexual abuse as well as physical and mental abuse, harm, neglect and maltreatment.[425] This will include learners under the care of educators. This is reiterated in the Children's Act, [426] which provides that in all matters concerning the well-being of the child, the child's best interest is of paramount importance.[427]

Prinsloo argues that "educators in a school have a legal duty in terms of the common law principle, *in loco parentis*, to ensure the safety of learners in their care." [428] The *in loco parentis* principle requires that the teacher undertakes the role of the parent, as parents trust the teachers with the supervision and education of their children.[429] Ensuring a safe environment where meaningful learning can occur falls within this duty of care delegated by the parent to the teacher.[430] In a safe school environment, every child should have the right to human dignity, freedom and security of the person and the right to privacy.[431] The well-being and respect of learners should be upheld, ensuring their freedom from any violence and preventing any form of punishment that is cruel, inhumane and

[422] ST Mampane 'Exploring the Practice of in loco parentis in Public Schools' (2018) 16 Bulgarian Comparative Education Society 185.
[423] K Calitz and C De Villiers 'Sexual Abuse of pupils by teachers in South African schools: The vicarious liability of education authorities' (2020) 137(1) *The South African Law Journal* 80.
[424] K Calitz and C De Villiers 'Sexual Abuse of pupils by teachers in South African schools: The vicarious liability of education authorities' (2020) 137(1) *The South African Law Journal* 80.
[425] United Nations Convention on the Right of the Child' available at *https://www.unicef.org/child-rights-convention* accessed 13 October 2023.
[426] 38 of 2005.
[427] Children's Act 38 of 2005 s9.
[428] IJ Prinsloo 'How safe are South African Schools?' (2005) 19 (4) *Perspectives in Education* 9.
[429] K Calitz and C De Villiers 'Sexual abuse of pupils by teachers in South African schools: The vicarious liability of education authorities' (2020) 137(1) *The South African Law Journal* 81.
[430] K Calitz and C De Villiers 'Sexual abuse of pupils by teachers in South African schools: The vicarious liability of education authorities' (2020) 137(1) *The South African Law Journal* 81.
[431] IJ Prinsloo 'How safe are South African Schools?' (2005) 19 (4) *Perspectives in Education* 6-7.

degrading.[432] Parents expect a school to take special care of their children in terms of their education and protect them from harm during those hours when they are under the authority and care of the school. Sexual assault[433] of a learner, having a sexual relationship with a learner,[434] and seriously assaulting[435] a learner impacts the learner physically and emotionally. It hampers their right to education, equality, and security, essential to meaningful learning.[436]

Educators have an important duty to protect the learner's Constitutional rights noting that educators have *in loco parentis* status. [437] An educator found guilty of having a sexual relationship with a learner, sexually assaulting a learner, or seriously assaulting a learner, as listed in s17(1) of the EEA, will be breaching their duty to act *in loco parentis*.

In the *MEC for Education of KwaZulu Natal v ELRC & Others*[438] the arbitrator reinstated the respondent who was dismissed for a s17 offence. The arbitrator concluded that the employer failed to prove the dismissal was fair nor prove that a rule was contravened.[439] However, the court reviewed and set aside the award as the arbitrator needed to consider all the evidence before him. In such a case, a decision must be taken regarding the learners as victims.[440]

In addition to the *in loco parentis* principle, fiduciary duty is another concept that must be considered in the context of the learner-teacher relationship. A fiduciary is a person who stands in a position of trust towards another and must act in that person's best interests.[441] This sums up the learner-teacher relationship. An educator who has a sexual relationship with a learner breaches the fiduciary trust relationship.

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[432] IJ Prinsloo 'How safe are South African Schools?' (2005) 19 (4) *Perspectives in Education* 7.
[433] EEA s17(1)(b).
[434] EEA s17(1)(c).
[435] EEA S17(1)(d).
[436] K Calitz and C De Villiers 'Sexual Abuse of pupils by Teachers in South African Schools: The vicarious liability of education authorities' (2020) 137(1) *The South African Law Journal* 81.
[437] IJ Prinsloo 'How safe are South African Schools?' (2005) 19 (4) *Perspectives in Education* 6.
[438] (2011) ZALCD 24 (2 June 2011).
[439] *MEC for the Province of KwaZulu Natal v Education Labour Relations Council and Others* (2011) ZALCD para 9
[440] FS Loliwe *Workplace Discipline in the Public Education Sector* (unpublished LLM thesis Nelson Mandela Metropolitan University, 2014) 32.
[441] M Zuker 'The trilogy of cases' 2002 *Educare News* 20.

3.5.3.4 The Zero-Tolerance Approach

According to the Oxford Dictionary, "the zero–tolerance" approach "imposes a punishment for every infraction of the rule."[442] Generally, this approach was applied to dishonesty at the workplace, however, it is the writer's view that a zero-tolerance approach is what s17 of the EEA attempts to adopt regarding the listed offences.

Despite the employer establishing that the employee contravened a reasonable rule that they were aware of, and other employees were also disciplined for violating the rule, it must still be established that dismissal is the appropriate sanction.[443] According to Garbers et al., an employer must provide evidence to justify the dismissal and not simply rely on the zero-tolerance rule, which would mean that the dismissal follows automatically once the infringement of the rule is established.[444] So too, must the employer, in the case of the dismissal of an educator in terms of s17 of the EEA, justify the dismissal and not rely on the compulsory dismissal required by the section. In *Shoprite Checkers (Pty) Ltd v CCMA & Others,*[445] the court found that the dismissal was harsh despite the employee contravening a zero-tolerance rule. The court added that the law does not allow an employer to adopt a zero-tolerance approach to all infractions, irrespective of the offence's appropriateness or proportionality, and then expect a commissioner to adhere to such an approach.[446] The court added that fairness is the cornerstone of the law governing termination, and an employer cannot negotiate this or designate a 'no go' area for Commissioners.[447]

The employer must provide evidence that the dismissal was fair, the misconduct and the zero-tolerance rule are only two factors. Schedule 8 items 3(5) and (7) provide several factors that must be considered.[448]

In light of the above, it is the writer's submission, that the employer cannot simply rely on the mandatory dismissal prescribed in s17, the dismissal must still meet the standards of fairness set by the courts and the LRA.

[442] The Oxford Dictionary 2nd Ed 1989.
[443] C Garbers et al. *The New Essential Law Handbook* 7 ed (2019) 218.
[444] C Garbers et al. *The New Essential Law Handbook* 7 ed (2019) 218.
[445] (2015) 36 *ILJ* 2273 (LAC).
[446] (2015) 36 *ILJ* 2273 (LAC).
[447] (2015) 36 *ILJ* 2273 (LAC).
[448] C Garbers et al. *The New Essential Law Handbook* 7 ed (2019) 218.

3.5.3.5 Corrective or Progressive Discipline

Schedule 8 embraces the concept of corrective or progressive discipline.[449] "Efforts should be made to correct behaviour through a system of graduated disciplinary measures such as counselling and warnings." [450] Schedule 8 also indicates that dismissal must be reserved for serious misconduct or repeated offences.[451] Progressive discipline acknowledges that the goal of discipline at the workplace is primarily geared to reform or rehabilitate the offending employee.[452] Section 17 of the EEA does not embrace this concept; the harshest sanction is meted to the guilty educator. At this point, there must be a reference to Schedule 2 of the EEA. Firstly, as already pointed out, Schedule 2 of the EEA expressly indicates that Schedule 8 is part of the schedule regarding discipline.[453] Secondly, the first principle listed in Schedule 2 of the EEA is that discipline is a corrective and not a punitive measure.[454] Considering this, s17 of the EEA is not aligned with these principles. The writer submits that offences in s17 are serious however apart from sexual assault, sexual relationships with a learner and grievous body harm it is possible the other offences involving examination reports and possession of a stupefying substance may be subjected to a sanction that will enable the principle of corrective discipline, while at the same time considering contextual factors and the employee's circumstances. The writer in no way suggests that these offences will never attract dismissal however dismissal for these offences should not be automatic.

Furthermore, item 3(3) of Schedule 2 of the EEA lists the considerations the employer must consider when dealing only with misconduct listed in s18 of EEA, it is unclear why these considerations do not also apply to s17. This item indicates that the employer must consider the circumstances surrounding the alleged misconduct, the nature of the educator's work and responsibilities and the degree to which the misconduct affects the DBE.[455] This schedule also indicates that the factors listed are not a closed list and therefore self-defence may also be considered. The second provision listed in Schedule 2 item 3(1) is the nature of the educators work and responsibilities. All educators have the same responsibilities whether they are charged with s17 or s18. It is therefore the writer's view that these provisions should also apply to s17 misconduct.

[449] LRA Code of Good Practice: Dismissal item 3 (2).
[450] LRA Code of Good Practice: Dismissal item 3 (2).
[451] LRA Code of Good Practice: Dismissal item 3 (2).
[452] J Grogan *Workplace Law* (2014) 152-3.
[453] EEA Schedule 2 item 3(1).
[454] EEA Schedule 2 item 2(a).
[455] EEA Schedule 2 3(a)(b)(c).

Apart from the principles of corrective discipline, the Code canvasses the principles of graduated disciplinary measures such as counselling and warnings.[456] According to Grogan, dismissal should not be applied if a lesser sanction would serve the purpose.[457] He adds that one of the primary aims of disciplinary measures is to rectify behaviour and assist employees who have transgressed so they contribute effectively to the organisation. [458] In the context of this study, an educator who has a sexual relationship with a learner or commits an act of sexual assault cannot continue contributing to the DBE's vision. It is therefore the writers view that it would be justified for these offences to carry a mandatory sanction of dismissal, however the sanction for the other listed offences should aligned to the provisions in Schedule 8 of the LRA.[459] The DBE envisions a South Africa where all citizens will have access to lifelong learning, education, and training. This will enhance their standard of living and create a prosperous and democratic country.[460] According to Calitz and De Villiers, sexual abuse of learners impedes their right to education, equality and security, which is essential to meaningful learning.[461] This was also raised in *Juma Masjid Primary School & others v Essay NO & others,* everyone has a right to a high quality education in a secure learning environment that does not compromise s child's health, this includes an environment free from abuse or fear of abuse.[462] The question that deserves attention in the context of rehabilitation of an educator guilty of sexual misconduct is, can we risk that this educator will be rehabilitated, as the stakes are too high? The writer answers this in the negative and confirms the writer's earlier submission that a dismissal must follow a finding of guilt for sexual offences listed in s17 of the EEA.

The sanctions prescribed by the employer's disciplinary code for a specific offence and are generally regarded as the first source to consider when determining the appropriateness of the sanction. [463] In the context of this study, s17(1) of the EEA prescribes dismissal for the offences listed in the section. The question is whether an alternative sanction is appropriate for some listed offences. Various theories have developed around the concept of alternative sanctions. For example,

[456] LRA Code of Good Practice: Dismissal Item 3(2).
[457] J Grogan *Dismissal* (2010) 165.
[458] J Grogan *Dismissal* (2010) 165.
[459] LRA Schedule 8 item 3.
[460]Department of Basic Education Website *https://www.education.gov.za/AboutUs/AboutDBE/tabid/435/Default.aspx#.text=Our%20vision%20is%20of%20a,prosperous%20and%20democratic%20South%20Africa* accessed 17 October 2023.
[461] K Calitz and C De Villiers 'Sexual abuse of pupils by teachers in South African schools: The vicarious liability of education authorities' (2020) 137 (1) *SALJ* 73.
[462] K Calitz and C De Villiers 'Sexual abuse of pupils by teachers in South African schools: The vicarious liability of education authorities' (2020) 137 (1) *SALJ* 80.
[463] K Bassuday 'Disciplinary sanctions in the alternative' (2016) 37 *ILJ* 2252.

the penance theory sees an alternative, lesser sanction, as an opportunity to restore the broken relationship.[464] By offering the alternative sanction to dismissal, the employer allows the employee to avoid dismissal by accepting a serious but not final sanction. [465] However, this theory focuses only on restoring the employment relationship and no other factors like the effect of deterrence are considered.[466] The sanction meted out for sexual misconduct, as listed in s17 of the EEA, must serve as a deterrence, precedents must be set in this regard as sexual misconduct by an educator has an irreparable impact on the learner. There can therefore be no alternative sanction for sexual offences.

It may be possible that giving the employee a serious sanction besides dismissal may be effective for the offences of dishonesty s17(1) (a), and possession of an intoxicating substance, s17(1)(e), while considering the circumstances of the employee and the contextual factors relating to the offence. In addition, the sanctions of demotion or suspension without pay are serious enough to pose a deterrent to others, and the employee will be held accountable at the same time. However, in the context of education this will impact service delivery as alternative personnel must replace the educator if suspended and this may not always be possible.

Another alternative theory to dismissal is the covenant theory, this theory focuses on reaching an agreement with the employee regarding the nature of the alternative sanction.[467] According to Bassuday, this could lead to greater legitimacy as the employee has a choice as to whether they should be dismissed.[468] Implementing this theory regarding s17 offences may be effective as the educator may appreciate that they have committed a serious offence, and any recidivism will result in dismissal. These terms must be communicated to the educator on the imposition of the alternate sanction.

[464] K Bassuday 'Disciplinary sanctions in the alternative' (2016) 37 *ILJ* 2256.
[465] K Bassuday 'Disciplinary sanctions in the alternative' (2016) 37 *ILJ* 2256.
[466] K Bassuday 'Disciplinary sanctions in the alternative' (2016) 37 *ILJ* 2257.
[467] K Bassuday 'Disciplinary sanctions in the alternative' (2016) 37 *ILJ* 2252.
[468] K Bassuday 'Disciplinary sanctions in the alternative' (2016) 37 *ILJ* 2252.

3.6 Role of Mitigation in the Decision to Dismiss.

Evidence presented by the employee that could persuade the presiding officer to impose a lesser penalty is referred to as mitigating factors.[469] However, Conradie JA cautioned that mitigation is understood in criminal law and has no place in employment law.[470]

According to the Schedule 8, the employer must consider the employee's circumstances, including but not limited to their length of service, prior discipline record, and personal circumstances when determining whether to dismiss them.[471] As already indicated, the Schedule 8 is part of Schedule 2 of the EEA in so far as it relates to misconduct.[472] Schedule 2 of the EEA item 17 (a), the chair of the disciplinary enquiry must give the educator the opportunity to present evidence in mitigation. This is aligned with Schedule 8. Despite this, an educator does not have the opportunity to provide evidence in mitigation as s17 requires a mandatory dismissal, and therefore, mitigation will serve no purpose. In this respect, s17 conflicts with item 17(a) of Schedule 2 of the EEA.

One of the considerations when contemplating dismissal is the gravity of contravention.[473] This entails two enquiries, the sanctions prescribed by the employer and mitigating factors, including the circumstances of the contravention.[474]

In the absence of any harm or loss to the employer mitigating factors include, pleading guilty, remorse, a willingness to submit to a lesser sanction may reduce the chance of future contraventions of the rule.[475] The employee's circumstances include the length of service, previous disciplinary record and personal circumstances.[476] None of these can determine the appropriateness of the dismissal as a penalty on its own.[477] These factors must be considered and weighed together to decide whether dismissal is justified.[478] The employee's personal circumstances must be work-related, e.g., an employee close to retirement.[479]

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[469] Skills Portal 'How do mitigating circumstances affect disciplinary hearings?' available at *https://www.skillsportal.co.za/content/how-do-mitigating-circumstances-affect-misconduct-hearings* accessed 17 October 2023.
[470] *De Beers Consolidated Mines Ltd v CCMA* (2001) 9 BLLR 995 (LAC) para 22.
[471] LRA Schedule 8 item 3(5).
[472] EEA Schedule 2 item 3(1).
[473] CCMA Guidelines on Misconduct Arbitration item 94.
[474] CCMA Guidelines on Misconduct Arbitration item 95.
[475] CCMA Guidelines on Misconduct Arbitration item 98.
[476] CCMA Guidelines on Misconduct Arbitration item 106.
[477] C Garbers et al. *The New Essential Labour Law Handbook* 7 ed (2019) 219.
[478] C Garbers et al. *The New Essential Labour Law Handbook* 7 ed (2019) 219.
[479] CCMA Guidelines on Misconduct Arbitration item 106.

3.6.1 Employees Circumstances

Whether mitigating circumstances can be considered depends on the circumstances of the offence, length of service, status in the organisation, disciplinary record and personal circumstances.[480] Length of service is usually a mitigating factor, however, it may be that the misconduct is so serious that the long service will not outweigh it.[481] In *Goldfields Mining SA (Pty) Ltd v CCMA,*[482] the LAC found that long service was an aggravating factor due to the impact of the misconduct on the employer. The employer puts trust in an employee with long service, and this may work against the employee when the employer is considering a sanction.[483] The court found that dismissing an employee for fighting, with 30 years of service, was fair. [484]

In *De Beers Consolidated Mines v CCMA*, the court indicated that, "long service is no more than material from which an inference can be drawn regarding the employee's probable future reliability. It does not lessen the gravity of the misconduct or serve to avoid the appropriate sanction."

Grogan questions how much weight must be accorded to the employee's personal circumstances. Employees of more advanced years may have greater difficulty obtaining employment and lose their right to pensions.[485] Dismissal of employees with dependents affects a more significant number of people. Employers must consider these circumstances but not lay themselves open to charges of inconsistency. [486] In the context of this study, it would be difficult to justify not dismissing an educator for sexual misconduct or grievous body harm based on personal circumstances, including length of service, as the nature of the offence will warrant dismissal despite compelling mitigating factors.

"Serious or gross misconduct refers to misconduct of such gravity that it makes the employment relationship intolerable and may justify dismissal [at the] first [instance]."[487] However, each case must be judged on its own merits.[488] When considering sexual offences and grievous body harm, the impact of the misconduct on the employment relationship can never outweigh the impact of the offence on the victim and therefore there can be no alternative to dismissal.

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[480] LRA Schedule 8 item 5.
[481] D Du Toit et al. *Labour Relations Law A Comprehensive Guide* 6 ed (2014) 448.
[482] (2014) 1 BLLR 1216 20 (LAC).
[483] C Garbers et al. *The New Essential Labour Law Handbook* 7ed (2019) 225.
[484] *Nelson Mandela Bay Metropolitan Municipality v Independent Municipal & Allied Trade Union obo Tshabalala & Others* (2019) 40 *ILJ* 1021 (LAC).
[485] J Grogan *Dismissal* 4 ed (2022) 197.
[486] J Grogan *Dismissal* 4 ed (2022) 197.
[487] D Du Toit et al. *Labour Relations Law A Comprehensive Guide* 6 ed (2014) 446.
[488] D Du Toit et al. *Labour Relations Law A Comprehensive Guide* 6 ed (2014) 447.

In *Grey v Education Labour Relations Council,*[489] the arbitrator concluded that a sexual relationship with the learner had been shown to exist and that, despite the appellant's years of service and clean disciplinary record, his dismissal was substantively fair. Sexual offences listed in s17 of the EEA are serious offences and will warrant dismissal for the first offence. The writer concludes that there should not be a blanket approach when dealing with all s17 offences only because s17 of the EEA imposes a mandatory dismissal, the dismissal must still be fair based on the merits of the individual case.

3.6.2 Nature of the Employee's Job

Section 17 of the EEA does not allow the educator to present mitigating factors to avoid dismissal. The question is whether mitigation will assist the employee considering the nature of the misconduct, particularly sexual misconduct, and serious assault. It is the view of the writer that an educator guilty of sexual misconduct cannot continue to work in the school environment, as indicated above, dismissal will be justified.

Notably in the context of this study is what the court said in *De Beers Consolidated Mines Ltd v CCMA & Others.*[490]

> "Dismissal is not an expression of moral outrage, much less an act of vengeance. On the contrary, it is, or should be, a sensible operational response to risk management in the enterprise."

Considering the above, the Department of Education is responsible for protecting learners' constitutional rights and responding appropriately to potential risks that may compromise a safe learning environment. For example, an educator guilty of sexual misconduct or serious assault against a learner is a risk to the learners. Furthermore, the impact of the misconduct on the child's right to dignity must also be considered when determining whether an educator guilty of sexual misconduct or serious assault must be dismissed.

Finally, to quote *Sidumo*[491]

> "when determining whether the dismissal was appropriate and fair, the arbitrator must take into account the totality of circumstances, including the purpose and importance of the rule that has been

[489] (2015) *ILJ* 2802 (LAC) para 8.
[490] (2000) *ILJ* 1051 (LAC) para 22.
[491] (2007) 12 BLLR 1097 (CC) para 78.

> breached, the reason the employer imposed the sanction of dismissal, the harm caused by the employees conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of the dismissal on the employee and the employee's service record. This list is not exhaustive."

In general, mitigating for a lenient sanction may assist an employee in getting a sanction other than dismissal, however the writer is of the view that it will not assist an educator guilty of sexual misconduct and grievous body harm. It is not only the circumstances of the educator that must be considered, but also that of the learner, as well as the interests of the Department of Education, are important considerations.

3.7 How Did *Sidumo* Change the Dismissal Law Landscape?

Educators who are dismissed may refer an unfair dismissal to the ELRC, if the educator is charged with sexual misconduct against a learner, the ELRC will arbitrate the matter as per Collective Agreement 3 of 2018. Educators may exercise their right to have the ELRC award reviewed in accordance with s145 of the LRA. For this reason, *Sidumo* is relevant. This judgement has brought about finality regarding how one should approach the fairness of a dismissal. Ultimately, a fair dismissal is what the Constitution[492] and LRA[493] advocate for.

In *Sidumo*, the employee was a security guard and was dismissed for not following the company policy regarding searching other employees. The CCMA found that the employment relationship was not rendered intolerable and replaced dismissal with a final written warning. On review, the Labour Court[494] also found that the dismissal was unfair and viewed *Sidumo' s* conduct as one of incapacity instead of misconduct. On appeal, the LAC [495] also found in favour of *Sidumo*. However, the SCA[496] found that the commissioner's findings were not consistent with the requirement of rationality imposed on commissioners by the Promotion of Administrative Justice Act 3 of 2000, which applied to the review of arbitration awards. The SCA found that the task of imposing sanctions vests in the employer. The commissioner must determine whether the employer has

[492] The Constitution s23(1).
[493] LRA s185.
[494] *Rustenburg Platinum Mines v CCMA* (2004) 1 BLLR 34 (LAC).
[495] *Rustenburg Platinum Mines v CCMA* (2004) 1 BLLR 34 (LAC).
[496] *Rustenburg Platinum Mines v CCMA* (2006) 27 *ILJ* 2026 (SCA).

exercised its discretion fairly.[497] The Labour Court and Commissioners are to determine whether there is a fair reason for the dismissal and not look for the fair reason.[498] The SCA set aside the commissioner's award.

The case then came before the Constitutional Court. This court had to decide whether the SCA was right in concluding that a commissioner must accept that the employer must prove that the sanction was fair rather than the only fair sanction.[499]

While the judgement was reserved in the Constitutional Court, the LAC in *Engen Petroleum v CCMA*[500] found that the reasonable employer test had no place in South African law. It was in conflict with the LRA requiring commissioners to exercise their opinions.[501] Although the LAC, in this case, differed from the SCA in *Rustenburg Platinum Mines v Sidumo,*[502] they were bound by the SCA and set aside the award and reinstated the employee.[503]

In *Sidumo,* the Constitutional Court finally laid the reasonable employer test to rest and embraced the reasonable decision-maker test. Commissioners must exercise their own concepts of fairness when determining whether a dismissal is fair and appropriate.[504] "The test is whether a reasonable commissioner will agree that the sanction of dismissal is appropriate."[505]

As already indicated in this chapter, the writer's view is that dismissal for sexual misconduct and serious assault will be fair and appropriate. However, there are other offences listed in s17 of the EEA apart from assault and sexual misconduct, these include dishonesty relating to promotional reports, illegal possession of an illegal or stupefying substance and causing a learner to commit any of the listed offences. A blanket approach to dismissal for these offences will be unfair as the circumstances around the offence or the circumstances of the educator are ignored when such a dismissal is imposed.

[497] J Grogan Dismissal 4 ed (2022) 184.
[498] J Grogan Dismissal 4 ed (2022) 184.
[499] J Grogan *Dismissal* 4 ed (2022) 185.
[500] (2007) 28 *ILJ* 1507 (LAC).
[501] J Grogan *Dismissal* 4 ed (2022) 185.
[502] *Rustenburg Platinum Mines v CCMA* (2004) 1 BLLR 34 (LAC).
[503] J Grogan *Dismissal* 4 ed (2022) 185.
[504] J Grogan *Dismissal* 4 ed (2022) 185.
[505] J Grogan *Dismissal* 4 ed (2022) 188.

3.8 Basic Education Laws Amendment Bill (BELA Bill)

It is necessary to mention the BELA Bill in this study as the proposals do attempt to resolve challenges raised in this chapter and this study as a whole, regarding the categorisation and interpretation of offences. This Bill seeks to amend the SASA and EEA.[506] Significant to this study is the proposals relating to educator sexual misconduct. It is proposed that s17(1) (c) be amended as follows "an educator must be dismissed if he or she is found guilty of sexual harassment, sexual assault, rape, or statutory rape of a learner. This amendment will provide clarity and provide guidance in these cases.[507]

It is also necessary to provide clarity regarding the definitions of misconduct and serious misconduct in a manner that aligns with the Constitution, the Children's Act, and existing sexual offences laws. It is further proposed that the information and allegations of an educator being investigated for sexual misconduct be shared with schools where the educator seeks employment. The EEA must require schools to share the outcome of disciplinary proceedings with the PED and SACE regardless of the perceived seriousness of the allegation, this will apply to sexual misconduct.[508]

3.9 Conclusion

Discipline and disciplinary codes are the responsibility of the employer. The sanctions that the employer imposes must be procedurally and substantively fair. The courts have been reluctant to interfere with these processes unless they are blatantly unfair. Section17 makes dismissal compulsory for an educator guilty of a s17 offence, the dismissal must still meet the fairness requirements, and the employer cannot hide behind the provisions of this section to justify the dismissal.

Section 17 of the EEA must be viewed as protecting children's rights, every child has a right to be protected from "maltreatment, neglect, abuse, and degradation. protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional, or moral harm or hazards."[509] The Children's Act was enacted to give effect to

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[506] DBE Website *https://www.education.gov.za/ArchivedDocuments/ArchivedArticles/BELA-Bill-Sexual-Misconduct.aspx* accessed 9 April 2024.

[507] DBE Website *https://www.education.gov.za/ArchivedDocuments/ArchivedArticles/BELA-Bill-Sexual-Misconduct.aspx* accessed 9 April 2024.

[508] DBE Website *https://www.education.gov.za/ArchivedDocuments/ArchivedArticles/BELA-Bill-Sexual-Misconduct.aspx* accessed 9 April 2024.

[509] Children's Act 38 of 2005.

children's Constitutional rights. Similarly, educators also have the constitutional right to fair labour practices.[510] The question is when there are competing rights, whose rights prevail? The Children's Act [511] prescribes that in "all matters concerning the care, protection and well-being of a child, the standard that the child's best interest is of paramount importance, must be applied." In terms of the Constitution s28(2), "A child's best interest is of paramount importance in every matter concerning the child." It is clear from s28(2) of the Constitution that the child's rights must prevail over the rights of any other person, including educator's rights. However, it does not mean that dismissal for every offence listed in s17(1) of the EEA is fair regarding the above.

Shoprite Checkers clarifies that although the employer adopts a zero-tolerance approach concerning specific offences, as in s17 of the EEA, the employer cannot impose this approach on the commissioners. Therefore, commissioners may deviate from the mandatory sanctions required by s17 in the interests of fairness.

A breakdown in the employment relationship has long been a deciding factor as to whether the sanction of dismissal must be imposed. However, it has been argued that the misconduct's nature will determine the employment relationship's status. It is unlikely that the employment relationship will remain intact when an educator has committed sexual misconduct, as such conduct is also criminal. Such educators also pose a danger to the school environment.

Notably, according to the Criminal Law (Sexual Offences and Related Matters) Amendment Act,[512]persons included on the National Sex Offenders Register may not be employed in a position that places them in a position of control or care over children.[513] Therefore, one can deduce that an educator found guilty of sexual misconduct relating to a learner, in terms of s17 of the EEA, cannot expect to continue with the employment relationship. This will not apply to an educator guilty of having a sexual relationship with a learner,[514]as this is not a criminal offence.

[510] The Constitution s23.
[511] Act 38 of 2005 s9.
[512] 32 of 2007 s41 (1)(a).
[513] S Coetzee 'Holding the state directly liable for educator-on-learner sexual abuse' (2018) 19(1) *A South African Journal* 36.
[514] EEA s17(1)(c).

Chapter Four

Fair or Unfair Discrimination

4.1 Introduction

In South Africa, racial discrimination was the prevailing practice and discrimination, and inequality were characteristic elements of employment relationships.[515] The first attempts to address unfair discrimination were in the 1980s, through Industrial Council agreements in 1981, discrimination based on sex, race and colour was outlawed.[516] The term unfair discrimination in the employment context was first included in the concept of unfair labour practice in the 1988 amendments to the LRA 28 of 1956. Unfair discrimination was defined as discrimination based on race, sex, or creed.[517] Discrimination by apartheid legislation was not considered unfair.[518]

Educators employed in terms of the EEA are public servants in the Republic, therefore the Public Service Act 103 of 1994 (PSA) applies to them. The Department of Public Service and Administration (DPSA) is mandated by s195(1) of the Constitution to set fundamental values and principles to which the public service must adhere. The Minister of the Department of Public Service is responsible for establishing norms and standards in labour relations, including the conduct of employees.[519] Educators employed in the public service are excluded from the disciplinary processes applicable to other public servants in the PSA, as educators have their own disciplinary code.[520] This chapter examines whether educators who are public servants are unfairly discriminated against when compared to SGB- employed educators. The Disciplinary Code and Procedures for the Public Service regulates the disciplinary proceedings for the public service, it does not prescribe dismissal for serious misconduct,[521] instead it allows for the employee to present mitigation, and it requires that the chair sanction the employee depending on the seriousness of the misconduct and the employee's previous record.[522]

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[515] D Du Toit et al. *Labour Relations A Comprehensive Guide* 5 ed (2006) 571.
[516] D Du Toit et al. *Labour Relations A Comprehensive Guide* 6 ed (2014) 653.
[517] D Du Toit et al. *Labour Relations A Comprehensive Guide* 5 ed (2006) 653.
[518] D Du Toit et al. *Labour Relations A Comprehensive Guide* 5 ed (2006) 654.
[519] South African Government Website *https://www.gov.za/about-government/government-system/public-administration* accessed 25 April 2023.

[520] PSA s2(2).
[521] PSCBC Resolution 2 clause 6.
[522] PSCBC Resolution 2 of 1999.

The judgements of the Constitutional Court are examined to determine the jurisprudence and precedents they have set as a road map to understanding unfair discrimination in the employment relationship.

4.2 The Right to Equality in the Employment Relationship

Educators must be free to practice their profession without fear of discrimination or arbitrary action that will result in their dismissal. According to Du Toit, labour rights must be positioned in the context of social justice as they are mutually supportive in attaining the objectives of freedom and dignity.[523]

Du Toit quotes Kentridge, saying that equality is not just a likeness but also a matter of difference. Those who are different should be treated differently, this is as important as those who are alike should be treated the same.[524] Equality is distinguishing between groups and individuals to accommodate their different needs and interests.[525]

When examining unfair discrimination in employment, one must make a connection between dignity, equality, and unfair discrimination under the auspices of the Constitution.[526] When an unfair discrimination matter is brought before the court, the court will consider the nature of the "discriminated" group and whether they suffered patterns of disadvantage in the past, the nature and purpose of the discriminatory provisions or power, and the impact of the discrimination on the rights or interests of the group. [527]

There are discrepancies in how discrimination is dealt with under the auspices of the LRA compared to the EEQA. The LRA deals with unfair discrimination only in the context of dismissal, [528]whereas the EEQA prohibits unfair discrimination in any employment policy or practice.

Another noteworthy difference between the LRA and EEQA is that the labour context has embraced substantive equality, although conduct may be discriminatory, it may be justified if designed to

[523] D du Toit 'The Right to Equality versus Employer "Control" and the Employee "Subordination": Are Some More Equal than Others?' (2016) 37(1) *ILJ* 4.
[524] D du Toit 'The Right to Equality versus Employer "Control" and the Employee "Subordination": Are Some More Equal than Others?' (2016) 37(1) *ILJ* 5.
[525] D du Toit 'The Right to Equality versus Employer "Control" and the Employee "Subordination": Are Some More Equal than Others?' (2016) 37(1) *ILJ* 11.
[526] C McConnachie 'Human Dignity, 'Unfair Discrimination' and Guidance' (2014) 34(3) *Oxford Journal of Legal Studies* 610.
[527] *Harksen v Lane NO* (1997) 11 BCLR 1489 (CC) para 51-52.
[528] LRA s187.

redress inequality.[529] This is not a consideration when determining an automatically unfair dismissal. When determining the unfairness of discrimination per constitutional jurisprudence, the position of the complainant's group in society and the impact on the individual as part of the group are considered.[530] In the *Leornard Dingler Employee Representative Council & others v Leornard Dingler (Pty) Ltd & others* case,[531] the applicants alleged that the respondent unfairly discriminated against them because they were refused admission to the Staff Benefit Fund as they were black. As a group black people in the country had been discriminated against in the past, before the country's dispensation transitioned to democracy in 1994. Educators claiming discrimination in terms of s17 of the EEA must establish that they are part of a group that had experienced past discrimination and are worthy of protection.[532]

4.3 Direct and Indirect Discrimination

Discrimination may be direct or indirect. Direct discrimination arises when a person is treated unequally on one or more prohibited listed or unlisted grounds.[533] According to Dupper, direct discrimination is when people are not treated as individuals, when characteristics, which are generalised assumptions, are assigned to individuals who are members of that group, irrespective of whether the individual displays the characteristics or not.[534] Dupper contends that direct discrimination occurs when the differentiation between employees is overtly based on one or more of the criteria listed in s6(1) of the EEQA or on an unlisted ground.[535]

Indirect discrimination is when the policy or practice appears neutral but adversely impacts a particular group.[536] The purportedly neutral barrier excludes members of a specific group who cannot overcome the barrier.

In *Leonard Dingler,*[537] the Labour Court found direct and indirect discrimination. The company unfairly discriminated against black employees by not offering them membership in the staff benefit fund because they were paid weekly. All white workers were paid monthly. Secondly, the Court found indirect discrimination, as the restriction to join the staff benefit fund only benefitted monthly

[529] C Cooper 'The Boundaries of Equality in Labour Law' (2004) 25 ILJ 828.
[530] C Cooper 'The Boundaries of Equality in Labour Law' (2004) 25 ILJ 828.
[531] (1997) 11 BLLR 1438 (LC).
[532] The group that this study focuses on is state-employed educators.
[533] C Cooper 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 826.
[534] OC Dupper *Essential Employment Discrimination Law* (2004) 40.
[535] OC Dupper *Essential Employment Discrimination Law* (2004) 41.
[536] C Cooper 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 826.
[537] (1998) 19 *ILJ* 285 (LC).

paid employees, this had a negative impact on black employees. Thirdly, the company unfairly discriminated against black workers on arbitrary grounds, as only monthly paid employees could join the staff benefit fund.[538] The EEQA does not define arbitrary grounds. In *Kadiaka v Amalgamated Beverage Industries,*[539] the court said an arbitrary ground is "capricious or proceeding merely from will and not based on reason or principle." The Court added when discrimination is carried out arbitrarily and without cause or intention it is considered unfair.[540]

In *Naidoo v Parliament of the Republic of South Africa,*[541] the applicant claimed that the differentiation in wages amounted to unfair discrimination based on arbitrary grounds. Employees who were from SAPS and who filled vacancies were paid more than those who not previously work for SAPS. He claimed that this was arbitrary, capricious. and unjustifiable. The applicant argued that the court should adopt a wide interpretation of "arbitrary" and "any other ground"[542] should include any actions which are irrational and unjustifiable. However, the respondent argues that a narrow interpretation should be adopted, "any other ground" should be interpreted to mean grounds that are based on attributes that are based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or affect them in a comparable manner.[543] The court adopted a narrow view and held that the effect of the introduction of "any arbitrary ground" in s6(1) of the EEQA is that the ground must affect human dignity to constitute unfair discrimination.[544] It has to be shown that the dignity or equality of a person, or that their personal attributes or characteristics have been impaired or prejudiced. The arbitrary grounds must be analogous to the grounds that are listed in s (1) of the EEQA.[545]

Taking note of this case, do state-employed educators have a claim for unfair discrimination based on arbitrary grounds, the arbitrary grounds being that they are employed in terms of the EEA or the

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[538] C Cooper 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 823.
[539] (1999) *ILJ* 373 (LC) para 43.
[540] (1999) *ILJ* 373 (LC) para 43 – 44.
[541] (2019) 40 *ILJ* 864 (LC).
[542] EEQA s6(4).
[543] (2019) 40 *ILJ* 864 (LC) para 39.
[544] (2019) 40 *ILJ* 864 (LC) para 35.
[545] 'Is arbitration a sufficient ground to establish unfair discrimination in wage differentiation in wage differentiation disputes in terms of s6(1) of the EEA" available on *https://www.cliffedekkerhofmeyr.com/news/publications/2019/Employment/employment-alert-4-march-Is-arbitrariness-a-sufficient-ground-to-establish-unfair-discrimination-in-wage-differentiation-disputes-in-terms-of-s61-of-the-EEA.html* accessed 9 April 2024.

fact that the state is the employer and are therefore subjected to a mandatory sanction of dismissal whereas SGB employed educators are not subjected to a mandatory dismissal.

4.4 Grounds of Discrimination

The word 'grounds' is used in s 9 of the Constitution as the differentiating criteria, it refers to the distinguishing feature, characteristics or circumstance based on which a distinction is made.[546] Every distinction and differential treatment is based on a "ground of differentiation," and a complainant must be able to indicate the ground on which the differentiation took place, whether on a listed or unlisted ground.[547]

In *Ntai v SA Breweries*,[548] the court indicated that, "mere differentiation in pay between employees who do similar work or work of equal value does not mean there was an act of discrimination. It becomes discrimination only when the differentiation is based on or linked to an unacceptable ground."

The absence of a causal link between differentiation and a ground of discrimination will lead to a dismissal of the unfair discrimination claim.[549]

The grounds listed in s9 of the Constitution are the grounds that were used to discriminate against individuals in the past.[550] Their common feature is that these are human attributes that are either immutable or extremely difficult to change.[551] They are intimately part of the human personality and are generally subject to stereotyping and prejudice.[552] According to Cooper, some of the reasons have to do with what is termed the " associational life of humans, intellectual expressive and religious life of humans or a combination of these."[553] Cooper argues that the relationship between these grounds is complex, and we should not attempt to fit them into limited categories.[554]

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[546] LM Rautenbach and E Fourie 'The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act' (2016) 1 *Journal of South African Law* 117.
[547] LM Rautenbach and E Fourie 'The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act' (2016) 1 *Journal of South African Law* 120.
[548] (2001) 22 *ILJ* 214 (LC) para 17.
[549] C Cooper 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 824.
[550] C Cooper 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 818.
[551] CRM Dlamini 'Equality or Justice? Section 9 of the Constitution revisited – Part ll' *Journal for Juridical Science* 17.
[552] CRM Dlamini 'Equality or Justice? Section 9 of the Constitution revisited – Part ll' *Journal for Juridical Science* 17.
[553] C Cooper 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 818.
[554] C Cooper 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 818.

Unlisted grounds were defined in *Harksen* as grounds based on attributes or characteristics that have the potential to "impair the dignity of persons as human beings or affect them in a comparably serious manner."[555] Determining discrimination is an objective enquiry, and intent or motive is irrelevant.[556]

Educators who claim discrimination must establish grounds based on the criteria above. Section 6(1) of the EEQA prohibits unfair discrimination and, like the Constitution, the EEQA does not define unfair discrimination.[557] Before the amendment in 2013, the EEQA mirrored s9(3) of the Constitution and then added family responsibility, HIV status and political opinion. In 2013, the EEQA was amended to include the phrase "or any other arbitrary ground" to the list of grounds.[558] Before the amendment, the word "including" in s6 of the EEQA implied that the list of grounds in the section was not a closed list, as in s9(3) in the Constitution.[559] The explanatory memorandum indicates that the amendment aimed to make it clear that discrimination is prohibited on both arbitrary and unlisted grounds in that section. The amendment was also aligned with the terminology used in s187(1)(f) of the LRA.[560]

4.4.1 Can Educators Claim Discrimination Based on Arbitrary Grounds?

How do the courts interpret "arbitrary grounds"? In *New Way Motor & Diesel Engineering (Pty)Ltd v Marsland,*[561] the court had to determine whether the employee's dismissal was automatically unfair in that he was discriminated against based on his depression. The LAC held that when assessing whether discrimination occurred on an arbitrary ground, it must be determined whether the conduct impaired the complainant's dignity.[562] In *Kadiaka v Amalgamated Beverage Industries*,[563] the Court defined arbitrary ground as "capricious or proceeding merely from will and

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[555] *Harksen v Lane NO* (1998) 1 SA 300 (CC) para 46.
[556] C Cooper 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 818.
[557] LM Rautenbach and E Fourie 'The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act' (2016) 1 *Journal of South African Law* 117.
[558] LM Rautenbach and E Fourie 'The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act' (2016) 1 *Journal of South African Law* 119.
[559] LM Rautenbach and E Fourie 'The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act' (2016) 1 *Journal of South African Law* 119.
[560] LM Rautenbach and E Fourie 'The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act' (2016) 1 *Journal of South African Law* 118.
[561] (2009) 12 BLLR 1181 (LAC).
[562]Labour Guide 'What is Unfair Discrimination an arbitrary Ground?' available at *https://labourguide.co.za/general/what-is-unfair-discrimination-on-an-arbitrary-ground/* accessed 20 October 2023.

[563] (1999) *ILJ* 373 (LC) par 42; LM Rautenbach and E Fourie 'The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act' (2016) 1 *Journal of South African Law* 119.

not based on reason or principle." Following this meaning, the arbitrary ground will broaden the scope of the prohibition of unfair discrimination from grounds that undermine human dignity to merely irrational grounds.[564]

Cooper argues that the term arbitrary brings together enquiries into the existence of discrimination and its fairness or unfairness, these enquiries should be kept separate as they involve different considerations.[565]

In the context of this study, the impact of differentiation between state-employed educators and those who are not will impact the human dignity of the former group, as dismissal will impact one's dignity. If the argument is that differentiation is not based on a listed ground and does not impact one's human dignity, it is not unfair discrimination. In that case, this will be a narrow conception of the harm caused by discrimination.[566] However, Courts have used a broader, [567] expansive definition of human dignity. In *President of the Republic of South Africa v Hugo*[568] the court stated that human dignity would be impaired whenever a legally relevant differentiation treats people as "second-class citizens," "demeans them," or "treats them as less capable for no good reason," or otherwise offends "fundamental human dignity." In *Prinsloo v Van der Linde*[569] (*Prinsloo*) the court gave an even more expansive interpretation of when treatment will be discriminatory, by adding that it is not only an infringement of human dignity but also "other forms of differentiation, which in some way affect persons adversely in a comparably serious manner," will constitute harm prohibited by the non-discriminatory provisions of the Constitution.[570]

Every instance of differential treatment is based on a ground of differentiation, and the complainant must show on which ground the differentiation took place, regardless of whether it is a listed or unlisted ground.[571] To qualify as an arbitrary ground, there must be a ground on which it was

[564] LM Rautenbach and E Fourie 'The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act' (2016) 1 *Journal of South African Law* 119.
[565] C Cooper 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 825.
[566] P de Vos 'Equality for all? A Critical analysis of the equality jurisprudence of the Constitutional Court (2000) 63 *THRHR* 63.
[567] P de Vos 'Equality for all? A Critical analysis of the equality jurisprudence of the Constitutional Court.' (2000) 63 *THRHR* 62.
[568] 1997 (6) BCLR 708 (CC).
[569] *Prinsloo v Van der Linde* (1997) (3*) SACR* 1012 (CC).
[570] P de Vos 'Equality for all? A Critical analysis of the equality jurisprudence of the Constitutional Court.' (2000) 63 *THRHR* 66.
[571] LM Rautenbach and E Fourie 'The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act' (2016). 1 *Journal of South African Law* 113.

alleged that the discrimination took place.[572] A "prohibited ground" or "illegal ground" is the differential criterion forming the differentiation's basis.[573] Prohibited grounds are not rationally linked to any legitimate purpose. Even if it is rationally linked, it may infringe on one's human dignity or have a similar serious consequence that the limitation clause cannot justify.[574]

In *Prinsloo,*[575] the court held that noting the history of the country the term discrimination has come to mean the unfair treatment of people based on qualities and traits that are associated with them.[576] This means that the arbitrary grounds must be connected to the attributes or characteristics of the person. This was also the position in *Harksen*,[577] "there will be discrimination on an unspecified (arbitrary) ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings."[578]

When one considers the listed grounds, they have all been used to marginalise and oppress persons associated with these attributes or characteristics in the past. These grounds can potentially demean a person's "inherent humanity dignity."[579]

It can be deduced from the Constitutional Court in *Harksen* and *Prinsloo,* that when dealing with discrimination on a listed or arbitrary ground, the following are considered, the ground must be a characteristic attached to the individual, the ground must be unchanging over time, society must have marginalised or oppressed a person who had this characteristic or attribute, and it must impair the individual's human dignity in a serious manner. [580]

The complainant who relies on arbitrary grounds must prove the conduct is irrational and amounts to unfair discrimination, it will then follow that the burden to prove that the discrimination is fair

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[572] LM Rautenbach and E Fourie 'The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act' (2016). 1 *Journal of South African Law* 120.
[573] LM Rautenbach and E Fourie 'The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act' (2016). 1 *Journal of South African Law* 120.
[574] LM Rautenbach and E Fourie 'The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act' (2016) 1 *Journal of South African Law* 120.
[575] 1997 (3) SA 1012 (CC).
[576] 'Understanding the Concept of Arbitrary Discrimination' Consolidated Employers Organisation available at *https://ceosa.org.za/understanding-the-concept-of-arbitrary-discrimination/* accessed 25 July 2023.
[577] (1997) 11 BCLR 1489 (CC).
[578] "Understanding the Concept of Arbitrary Discrimination" Consolidated Employers Organisation available at *https://ceosa.org.za/understanding-the-concept-of-arbitrary-discrimination/* accessed 25 July 2023.
[579] "Understanding the Concept of Arbitrary Discrimination" Consolidated Employers Organisation available at *https://ceosa.org.za/understanding-the-concept-of-arbitrary-discrimination/* accessed 25 July 2023.
[580] "Understanding the Concept of Arbitrary Discrimination" Consolidated Employers Organisation available at *https://ceosa.org.za/understanding-the-concept-of-arbitrary-discrimination/* accessed 25 July 2023.

will rest with the employer.[581] In *Ntai v SA Breweries*,[582] the applicants referred a dispute to the Labour Court in terms of the now repealed item 2(1)(a) of Schedule 7 of the LRA, entitled "Residual Unfair Labour Practices." This item has been replaced with the comparable clause in s 6(1) of the EEQA. The court dismissed the application that the pay difference was based on arbitrary grounds because the applicants failed to specify the ground upon which the alleged discrimination was based.[583] The court could not assess the alleged "arbitrary" discrimination without identifying the arbitrary ground of discrimination. For educators to succeed with a cause of action, they must overcome the hurdle of establishing the grounds for discrimination.

Considering the above, educators employed by the State are treated differently when compared to educators employed by the SGB, this is based on the different employers. It may be argued that the legitimate purpose is to permanently remove such educators from the schooling environment to ensure that learners and others in the school are not exposed to the serious misconduct of these educators. it may also be that such dismissal will prevent others from engaging in such misconduct. This objective however will not necessarily remove SGB-employed educators from the schools. Furthermore, any dismissal must be guided by Schedule 8 of the LRA, which indicates that dismissal must be reserved for serious or repeated offences. Progressive and corrective discipline is encouraged,[584] and the employee's circumstances must be considered, including length of service, previous misconduct, and personal circumstances.[585] Therefore, irrespective of the purpose of s17 of the EEA, the mandatory dismissal requirement of s17 of the EEA, the dismissal must still be fair in the context of s188 of the LRA.

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4.4.2 Burden of Proof

Section 9(3) of the Constitution lists the grounds of discrimination. Section 9 (5) provides that differentiation on the listed grounds is presumed to be unfair, this was confirmed in *Harksen,* where the Court held that these grounds have been used or abused in the past to marginalise, oppress, and classify people who have been connected to these qualities or attributes.[586] One can rebut the presumption by proving that the differentiation has had no effect on impairing human dignity or a

[581] EEQA s11.
[582] (2001) 22 *ILJ* 214 (LC).
[583] '*Ntai and Others v SA Breweries' Ltd* available at Collaboration Space – equality Law *file:///C:/Users/musa/Desktop/Ntai%20v%20SA%20Breweries%202001%20LC%20Summary.pdf* accessed 25 July 2023.

[584] LRA Schedule 8 item 3 (2).
[585] LRA Schedule 8 item 3 (5).
[586] *Harksen v Lane NO* (1997) 11 BCLR 1489 (CC) para 50.

similar effect.[587] Regarding unlisted grounds, the complainant must prove the differentiation on the unlisted ground can impair human dignity, which the Constitutional Court calls "discrimination" and prove the discrimination is unfair.[588] Rautenbach and Fourie are critical of the inclusion of "potential," they argue that "potential" has no legal consequences as how one would prove the ground has the "potential" to be unfair discrimination. [589]They add that the only consequence of claiming discrimination on a listed or unlisted ground is the burden of proof.[590]

The LRA is silent on the burden of proof to establish discrimination and its fairness or unfairness.[591] The LRA deals with unfair discrimination only in the context of automatically unfair dismissals. In the context of dismissal in general, the onus is on the employee to establish there was a dismissal, and the employer must prove that the dismissal was fair.[592] The Labour Court followed the Constitutional Court in Leornard *Dingler Employee Representative Council & others v Leornard Dingler (Pty) Ltd & others,*[593] where the grounds of discrimination, either on listed or unlisted grounds, were for the applicant to establish.[594] In *Ntai*,[595] the court was aware of the difficulty placed on the complainant to prove the discrimination. The court held that the complainant need only establish a prima facie case of discrimination, the respondent must then submit a response.[596] This was in line with s11 of the EEQA, however the EEQA was later amended in 2014, and the burden of proof has changed. If the discrimination alleged is on a ground listed in s6(1) of the Act the employer must prove that the discrimination did not take place or that it was rational and not unfair or unjustifiable.[597] If the alleged discrimination was not on a ground listed in s 6(1) of the EEQA, it is the complainant who must prove that the discrimination is not rational and amounts to unfair discrimination.[598] Educators who claim unfair discrimination will rely on the EEQA as it is

[587] LM Rautenbach and E Fourie 'The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act' (2016) (1) *Journal of South African Law* 113.
[588] LM Rautenbach and E Fourie 'The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act' (2016) (1) *Journal of South African Law* 113.
[589] LM Rautenbach and E Fourie 'The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act' (2016) (1) *Journal of South African Law* 113.
[590] LM Rautenbach and E Fourie 'The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act' (2016) (1) *Journal of South African Law* 113.
[591] C Cooper 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 828.
[592] LRA s 192.
[593] (1997) 11 BLLR 1438 (LC).
[594] C Cooper 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 828.
[595] (2001) *ILJ* 472 (LC); LM Rautenbach and E Fourie 'The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act' (2016) 1 *Journal of South African Law* 120.
[596] C Cooper 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 828.
[597] Employment Equity Amendment Act 47 of 2013 s11(1).
[598] Employment Equity Amendment Act 47 of 2013 s11(2).

specific to employment law, and the EEQA was promulgated to give effect to s9 of the Constitution.

Cooper suggests that the wording of s11 of the EEQA may be misleading as it may be understood that a mere allegation of discrimination will suffice when proving the existence of discrimination, she argues that there must be at least some facts from which an inference of discrimination may be made.[599] The ILO has stated that the complainant must establish a prima facie case before the burden shifts to the respondent to prove the conduct is not based on prohibited grounds.[600]

In cases where discrimination was based on a listed ground, it was deemed to be unfair and could be disputed by considering the effects of the discrimination on the employee, the reason for the discrimination, and the employee's social standing.[601] When the discrimination is on an unlisted ground, the unfairness would have to be established by the employee.[602]

An educator charged in terms of s17 of the EEA will have to establish the grounds of discrimination, such an educator may rely on the fact that they are state-employed as opposed to being SGB-employed. Such an educator must also produce prima facie evidence of discrimination, the employer will then bear the burden of proving that the discrimination is not unfair.

4.5 Discrimination and Differentiation in the Workplace

What is unfair discrimination in the workplace? The starting point to unpack this term is differentiation which is central to unfair discrimination. Differentiation occurs when an employer treats employees or applicants for employment differently or uses policies or practices that exclude certain groups of employees, this is not always unfair.[603] Differentiation becomes discrimination if a link can be established between the differentiation and one or more of the listed or unlisted grounds of discrimination.[604] Employers may practice differentiation by paying one employee more, promoting one employee over others, or employing one applicant instead of another.[605] Employers must have compelling reasons for differentiating between employees or applicants, these explanations must not amount to unfair discrimination. An example of fair, acceptable

[599] C Cooper 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 829.
[600] C Cooper 'The Boundaries of Equality in Labour Law' (2004) 25 ILJ 829.
[601] C Cooper 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 829.
[602] C Cooper 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 829.
[603] OC Dupper et al. *Essential Employment Discrimination Law* (2004) 33.
[604] OC Dupper et al. *Essential Employment Discrimination Law* (2004) 33.
[605] OC Dupper et al. *Essential Employment Discrimination Law* (2004) 33.

discrimination is when an employer does not appoint a pregnant applicant to work in a position requiring her to work with dangerous chemicals, for this reason, discrimination is permissible if it is justified within the framework of the law.[606] The Constitution, LRA and EEQA prohibit unfair discrimination by using the word unfair to qualify discrimination, this indicates that mere differentiation is not necessarily prohibited.[607] The Constitutional Court defined unfair discrimination as differentiation that violates human dignity or differentiation with similar serious consequences.[608]

Discrimination in its neutral sense arises when an employee is treated differently from his colleagues in circumstances normally accepted as warranting different treatment in some respects.[609] Grogan illustrates the difference between discrimination through examples, a sweeper is not discriminated against because she earns less than the accountant.[610] This is differentiation. Discrimination will occur when the same employer pays two sweepers different salaries for doing the same work.[611]

According to de Vos, a differentiation that is usually required to run society will contravene s9(1) of the Constitution if it can be shown that the state did not act rationally when differentiating between individuals and groups of individuals.[612]

One may be discriminated against without differentiation, without the employee being compared to another employee. An example is an employee being dismissed based on her religion, the employee does not have to prove that employees of other religious beliefs were not dismissed.[613]

The phrase "on any arbitrary ground" in s187(1)(f) does not extend the reach of automatically unfair dismissal claims to any ground that appears irrational or unfair, in the context of the EEQA, the LAC ruled that the phrase only refers to grounds that affect the employee's dignity.[614]

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[606] OC Dupper et al. Essential Employment Discrimination Law (2004) 34.
[607] CRM Dlamini 'Equality or Justice? Section 9 of the Constitution revisited – Part ii' (2002) 27 (2) *Journal for Juridical Science* 17.
[608] *Prinsloo v Van der Linde* (1997) (3) SACR 1012 (CC) para 33; *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) para 43; *Harksen v Lane NO* (1998) 1 SA 300 (CC) para 50.
[609] J Grogan *Dismissal* 4 ed (2022) 139.
[610] J Grogan *Dismissal* 4 ed (2022) 139.
[611] J Grogan *Dismissal* 4 ed (2022) 139.
[612] P de Vos 'Equality for all? A Critical analysis of the equality jurisprudence of the Constitutional Court.' (2000) 63 *THRHR* 62.
[613] J Grogan *Dismissal* 4 ed (2022) 139.
[614] *Naidoo v Parliament of RSA* (2020) 41 *ILJ* 1931 (LAC); J Grogan *Dismissa*l 4 ed (2022) 140.

Considering this approach, educators who claim that they are discriminated against on arbitrary grounds because they are dismissed in terms of s17 will have to prove that it impairs their dignity. This will be after they have established the ground for discrimination.

The equality provision in the Constitution is two-fold in that it prohibits unfair discrimination and promotes and guarantees equality. The first is about ensuring and advancing equality, which states that everyone has the right to equal treatment under the law, full and equal enjoyment of all rights and freedoms, equality before the law and affirmative action.[615] The second dimension is the prohibition of unfair discrimination.

The Constitutional Court held in the *Prinsloo* case that unfair discrimination is mere differentiation with the addition of a "further element," which involves the impact of differentiation, mere differentiation has less serious consequences than unfair discrimination.[616]

4.6 Unfair Discrimination and Equality – The Position of the Court

The Constitutional Court contextualised and developed a framework for adjudicating discrimination claims.[617] The Constitutional Court laid down the law in the cases of *Hugo,*[618]*Larbi-Odam and Others v MEC for Education (North-West) and another,*[619] *Prinsloo*[620] *and Harksen,*[621] when determining unfair discrimination and the underlying principles for the right to equality.

The *Harksen* case is the leading authority and became the traditional test in discrimination disputes. This case is used to illustrate the Constitutional approach to unfair discrimination. The case dealt with the right not to be unfairly discriminated against in terms of s8 of the interim Constitution. In this case, the Constitutional Court had to determine the constitutionality of the provisions of the Insolvency Act 24 of 1936.

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[615] CRM Dlamini 'Equality or Justice? Section 9 of the Constitution revisited Part ll' (2002) 27(2) *Journal for Juridical Science* 16.
[616] LM Rautenbach and E Fourie 'The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act' (2016) (1) *Journal of South African Law* 112.
[617] M Loyson *A critical analysis of the changing nature of the test for adjudication of discrimination in employment* (unpublished LLM thesis, Nelson Mandela Metropolitan University,2009) 7.
[618] (1997) (6) BCLR 708 (CC).
[619] (1997) (12*)* BCLR 1655 (CC).
[620] (1997) (3*) SACR* 1012 (CC).
[621] (1997) 11 BCLR 1489 (CC).

The court followed a three-stage enquiry to make its determination. The first step was determining whether the law differentiated between individuals or groups. If it did, was there a rational connection between the differentiation and the legitimate governmental purpose the provision was designed to achieve? [622] At this stage, the court will consider whether the purpose of the provision is legitimate and, if so, whether the differentiation has a rational connection to that purpose.[623] At this stage, the onus is on the applicant.

If the purpose is illegitimate or there is no rational connection between the differentiation and the governmental purpose, the law infringes the applicant's right to equal protection of the law s8(1).[624] The court must then consider whether there is justification for using the limitation clause. However, there may still be unfair discrimination if there is a rational connection.[625] In that instance the court then proceeds to a two-stage analysis, first looks at whether the discrimination is based on any of the grounds listed in s8(2), the court refers to these as specified grounds. Secondly, whether the differentiation is based on attributes or characteristics attached to people which have the potential to impair their fundamental human dignity as human beings or adversely affect them in a comparably serious manner. In that case, this is referred to as unspecified grounds.[626] This must be objectively determined.

If the differentiation amounts to discrimination, the enquiry will proceed to the next step which is to determine whether the discrimination is unfair.[627] If the discrimination is on a specified ground, it is presumed unfair, and the onus is on the respondent to rebut this presumption. The complainant must prove that it is unfair if it is on an unspecified ground.[628]

When determining whether the conduct is unfair, the impact on the complainant's dignity is the primary consideration.[629] In the *Harksen* [630] case, the court considered the complainants' position in society and whether they were part of a group that was discriminated against in the past, if so, it is more likely that the discrimination is unfair. The court also considered the purpose of the provision, which was not to impair the complainant's dignity but rather to achieve a worthy societal goal.

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[622] W Freedman 'Understanding the Right to Equality' (1998) 114 *SALJ* 245.
[623] W Freedman 'Understanding the Right to Equality' (1998) 114 *SALJ* 245.
[624] W Freedman 'Understanding the Right to Equality' (1998) 114 *SALJ* 245.
[625] *Harksen v Lane NO* (1997) 11 BCLR 1489 (CC) para 45.
[626] W Freedman 'Understanding the Right to Equality' (1998) 114 *SALJ* 246.
[627] W Freedman 'Understanding the Right to Equality' (1998) 114 *SALJ* 246.
[628] W Freedman 'Understanding the Right to Equality' (1998) 114 *SALJ* 246.
[629] *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) para 41.
[630] *Harksen v Lane NO* (1997) 11 BCLR 1489 (CC) para 51-2.

Once the conduct is found to be unfair, the conduct in question will be a violation of s8(2) of the Constitution. It will then be necessary to determine whether the unfair conduct is justified regarding the limitation clause.[631]

Finally, the test for unfairness is central to the Constitutional Court's analysis of the equality clause. The assessment focuses on the impact of the discrimination from the victim's point of view.[632] In this study, the resultant discrimination between educators and SGB-employed educators means that educators are automatically dismissed if found guilty of a s17 serious misconduct, the dismissal impacts not only one's right to dignity but also one's right to fair labour practice. If one had to use the argument that was used in *Harksen*, teachers are not part of a vulnerable group deserving of protection, and therefore, the discrimination may not be unfair. However, in *Hugo,* the court said that the prohibition of unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups, but the purpose of the new democratic order is to establish a society in which all human beings are accorded equal dignity and respect regardless of their membership of a particular group.[633] All human beings should be accorded equal dignity irrespective of belonging to a specific group. According to this view, educators may claim discrimination although they are not a vulnerable or previously disadvantaged group. This is dealt with fully in subsequent paragraphs.

In *Prinsloo*[634] the court had to determine whether the presumption in s84 of the Forest Control Act of 1984 infringed on the applicant's right to equality. In terms of s84 of the Act, there is a presumption of negligence if a veld fire occurred on the land outside the fire control area unless the contrary can be proven. The presumption only applies to landowners inside the fire control areas who fail to fulfil their statutory obligations of taking fire control measures. Landowners outside the fire control areas were not subjected to such obligations, hence no presumption of negligence affected them. The fire in question occurred outside the fire control area. The court found that the differentiation brought about by s84 of the Forest Control Act did not impair the dignity of the owner outside the fire control area.[635]

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[631] W Freedman 'Understanding the Right to Equality' (1998) 114 *SALJ* 246.
[632]W Freedman 'Understanding the Right to Equality' (1998) 114 *SALJ* 250.
[633] *President of the Republic of South Africa v Hugo* (1997) (4) SA 1 (CC) para 41.
[634] 1997 (3) SA 1012 (CC).
[635] E de Wet 'Interpretation of equality clause in Bill of Rights' (1998) 8 *Amicus Curiae* 30.

It was the court's position that it was necessary to identify the criteria that distinguish legitimate differentiation from differentiation that was unconstitutional.[636] The court accepted that differentiation was necessary for the common good and to regulate the affairs of inhabitants, this rarely constituted unfair discrimination, and the court referred to it as "mere differentiation."[637] The court further stated that it is necessary to prove that there is no logical connection between the differentiation and the proposed justification for government action before determining whether or not "mere differentiation" violates s8 of the interim Constitution.[638] If there is no rational relationship, the differentiation violates s8. The court added that if the discrimination resulted in people being treated differently in a way that impairs their fundamental dignity as human beings, it would be regarded as violating s8 (2) of the interim Constitution.[639]

De Wet is critical of the court's approach in *Prinsloo*, notably how the court linked unfair discrimination to one's inherent dignity.[640] The court's view was that "unfair discrimination, when used in terms of s8(2), means treating people differently in a way that impairs their fundamental dignity as human beings, who are inherently equal in dignity."[641] De Wet disagrees with the court's approach and argues that discrimination that does not impair one's dignity should not be ruled out as unfair differentiation. De Wet argues that the court should first have determined the impact of the differentiation independently before considering whether the section impaired one's fundamental dignity.[642]

In *City Council of Pretoria v Walker,*[643] the applicant sued the respondent for arrears charges for services rendered from July 1995 to April 1996.[644] The respondent, Walker, was a resident of "old" Pretoria. This predominantly white area was amalgamated with two black townships to form a new district under the City Council of Pretoria.[645] The residents of "old" Pretoria were charged a consumption-based tariff, whereas the township residents were charged a lower flat rate. The

[636] CRM Dlamini 'Equality of Justice? Section 9 of the Constitution revisited – Part ll' (2002) 27(2) 18.
[637] CRM Dlamini 'Equality or Justice? Section 9 of the Constitution revisited – Part ll' (2002) 27(2) *Journal for Juridical Science* 19.
[638] CRM Dlamini 'Equality or Justice? Section 9 of the Constitution revisited – Part ll' (2002) 27(2) *Journal for Juridical Science* 19.
[639] CRM Dlamini 'Equality or Justice? Section 9 of the Constitution revisited – Part ll' (2002) 27(2) *Journal for Juridical Science* 19.
[640] E de Wet 'Interpretation of equality clause in Bill of Rights' (1998) 8 *Amicus Curiae* 30.
[641] E de Wet 'Interpretation of equality clause in Bill of Rights' (1998) 8 *Amicus Curiae* 30.
[642] E de Wet 'Interpretation of equality clause in Bill of Rights' (1998) 8 *Amicus Curiae* 30.
[643] (1998) (3) BCLR 275 CC.
[644] *City Council of Pretoria v Walker* (1998) (3) BCLR 257 (17 February 1998) para 1.
[645] M Loyson *Substantive Equality and Proof of Employment Discrimination* (unpublished LLM thesis, Nelson Mandela Metropolitan University,2009) 110.

Council only acted against defaulters from "old" Pretoria who were in arrears but failed to take such action against those in the township who were in arrears while installing meters was in progress. The respondent argued that the appellant's conduct breached s8 of the interim Constitution as there was no rational connection between the discriminatory measures taken and any legitimate governmental purpose. The respondent alleged that they were unfairly subsiding those in the township.

The Court quoted from *Prinsloo,*[646]

> "Regarding mere differentiation, the constitutional state is expected to act rationally. It should not regulate arbitrarily or manifest "naked preferences" that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. Therefore, the purpose of this aspect of equality is to ensure that the state is bound to function rationally."

The court adopted the rationality criteria from *Prinsloo*, which is applicable whether dealing with "equality before the law" or "equal protection of the law."[647] The Court held that the differentiation was rationally connected to a legitimate governmental objective. They were temporary and used to provide a continuity of service while phasing in equality through the establishment of meters. In the context of this study, the objective of s17 (1) is to remove educators who commit serious misconduct from the education system and for s17 (1) to serve as a deterrent. This is a legitimate purpose. The Court found no violation of s8(1) of the interim Constitution, and the cross-subsidisation was not unfair.

The court then considered whether there was unfair discrimination in relation to s8(2) of the Constitution. The court held that the prohibition of direct and indirect discrimination in s8(2) focused on the consequences of the conduct and not only the conduct. The court found that the Council's different treatment of residents in black and white areas constituted indirect discrimination on the grounds of race and, therefore, violated s8(2). It would be artificial to compare an area known to be an overwhelmingly "black area" and another known to be overwhelmingly "white" on the grounds of geography only.[648] The application of a geographic

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[646] *City Council of Pretoria v Walker* (1998) (3) BCLR 257 (17 February 1998) para 87.
[647] M Loyson *Substantive Equality and Proof of Employment Discrimination* (unpublished LLM thesis, Nelson Mandela Metropolitan University,2009) 112.
[648] M Loyson *Substantive Equality and Proof of Employment Discrimination* (unpublished LLM thesis, Nelson Mandela Metropolitan University,2009) 113.

standard may appear neutral but is racially discriminatory because race and geography are closely related.[649] The court went further to say that the respondent belongs to a group that was not previously disadvantaged by the racial policies of the past. Still, as a racial minority, they could be regarded as a vulnerable group. The court found that cross-subsidisation was not unfair. The flat rate did not adversely impact the respondent in any material way, nor was there any invasion of the respondent's dignity.[650] Although educators employed by the State, as a group were not previously disadvantaged the mandatory dismissal requirement of s17 does materially impact on their dignity.

The court then considered the council's selective enforcement against persons whose accounts were in arrears. The court said that this conduct by the council affected the respondent in a comparably serious way with the effect of infringing their right to dignity.

Section 8 does not only protect historically disadvantaged groups, nor does it limit the grounds for unfair discrimination to those listed in s8(2) or to those comparable to this section.[651] All patterns of unequal treatment could amount to unfair discrimination and a violation of the equality clause.[652] The difference is that where the discriminatory measures do not relate to one of the specified grounds in s8(2), the presumption of unfairness formulated in s8(4) does not apply.[653] This case illustrates that mere differentiation in the treatment of different groups of individuals does not automatically translate into unfair discrimination and the infringement of the equality clause in the Constitution. The fact that the two groups paid different property taxes did not infringe s9 of the Constitution and did not materially impact the respondent's dignity. It also supports the argument in *Hugo*[654] that identical treatment does not translate into equality because the right to equality is based on substantive equality against which the impact of the differentiation must be evaluated.[655]

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[649] M Loyson *Substantive Equality and Proof of Employment Discrimination* (unpublished LLM thesis, Nelson Mandela Metropolitan University,2009) 113.
[650]M Loyson *Substantive Equality and Proof of Employment Discrimination* (unpublished LLM thesis, Nelson Mandela Metropolitan University,2009) 116.
[651] E de Wet 'Interpretation of equality clause in Bill of Rights' (1998) 8*Amicus Curiae* 29.
[652] E de Wet 'Interpretation of equality clause in Bill of Rights' (1998) 8 *Amicus Curiae* 29.
[653] E de Wet 'Interpretation of equality clause in Bill of Rights' (1998) 8 *Amicus Curiae* 29.
[654] *President of the Republic of South Africa v Hugo* (1997) (4) SA 1 (CC) para 41.
[655] F Van Zyl and C Fritz ' Different cities, different property-tax-rate Regimes: Is it fair in an open and democratic society ?' available *file:///C:/Users/musa/Downloads/ajol-file-journals_418_articles_245751_submission_proof_245751-4981-589518-1-10-20230412%20(1).pdf* accessed 1 April 2024.

Another noteworthy case is *Larbi-Odam v MEC of Education (North-West)*[656] (*Larbi-Odam*)**.** In this case, the applicants were teachers who were denied permanent employment in the Department of Education in the North-West province because they were not citizens. The respondent had advertised 5000 temporary teaching posts, and foreigners occupied 700 positions. Several foreign educators received notices of termination based on their citizenship. The applicant's initial cause of action was an interdict restraining the respondent from implementing Regulation 2(2). Regulation 2(2) of the regulations regarding the Terms and Conditions of Employment of Educators[657] provided that only South African citizens could be appointed to permanent teaching posts in public schools with certain exceptions. The respondent committed to not terminating the services pending the outcome in the Constitutional Court. The eight applicants were temporarily employed teachers and were issued with termination notices. These teachers were permanent residents, and some had temporary resident permits.

The court reiterated that *Hugo, Harksen,* and *Prinsloo* had established an equality analysis under s8 of the interim Constitution.[658] The court quoted from *Hugo*, that everyone will be treated with the same respect and dignity, regardless of their affiliation with a specific group.[659] Foreign educators are human beings irrespective of citizenship and must be accorded dignity and respect. The court then proceeded to unpack the test for unfair discrimination stated in the *Harksen* case. Once discrimination had been established, the court determined whether the discrimination was unfair, again following the *Harksen* test. The court turned to *Hugo* to assess the impact of the bias on the group that had been disadvantaged and the nature of the interests that had been affected by the discrimination.[660] As the ground of differentiation was citizenship is not listed in s8(2), the Court quoted *Prinsloo* as the differentiation on an unspecified ground, and this was formulated in *Prinsloo.*[661] The court said citizenship was not a listed ground of prohibited discrimination in the Constitution. The court justified its findings by citing that foreigners were a minority group with little political muscle, citizenship was a personal attribute difficult to change.[662] The applicants had faced threats and intimidation, which highlighted their vulnerability.[663] As a result, foreign citizens are a vulnerable group. The court added that citizenship was of particular significance as individuals

[656] (1997) 12 BCLR 1655 (CC).
[657] GN R1743 of GG 16814 13/11/1995.
[658] *Larbi-Odam and Others v MEC of Education (North-West) and Others* (1997) 12 BCLR 1655 (CC) para 15.
[659] *President of the Republic of South Africa v Hugo* (1997) (4) SA 1 (CC) para 16.
[660] *Larbi-Odam and Others v MEC of Education (North-West) and Others* (1997) 12 BCLR 1655 (CC) para 17.
[661] *Larbi-Odam and Others v MEC of Education (North-West) and Others* (1997) 12 BCLR 1655 (CC) para 15.
[662] *Larbi-Odam and Others v MEC of Education (North-West) and Others* (1997) 12 BCLR 1655 (CC) para 19.
[663] *Larbi-Odam and Others v MEC of Education (North-West) and Others* (1997) 12 BCLR 1655 (CC) para 20.

were in the past deprived of their rights and benefits based on their citizenship, where citizenship was governed by race.[664] The court concluded, noting the above, that regulation 2(2) is based on traits and qualities that could jeopardise the basic human dignity of non-citizens who were subject to the regulation.[665]

In determining the unfairness of the discrimination, the court looked at the impact of the discrimination on the appellants, this entailed considering the nature of the group, the nature of power exercised, and the nature of the interests involved. The court concluded that one's profession was an essential part of one's life, security of tenure allows one to plan and build one's family, social and professional life, knowing that one cannot be dismissed without good cause.

The court held that denying the applicants permanent jobs, although they were allowed to live and work in the country, was unfair discrimination.[666] The court added that "denying permanent residents security of tenure despite their qualifications, competence and commitment is harsh." [667] The court declared the regulation invalid as it was unfair discrimination and inconsistent with s8(2) of the interim Constitution. The court concluded that the regulation was also unjustified under s33(1) of the interim Constitution. The court said that the government's aim should be to reduce unemployment among citizens and permanent residents. It is illegitimate to reduce unemployment among citizens and increase unemployment among permanent residents.[668] Regulation 2(2) of the Regulations regarding the "Terms and Conditions of Employment of Education" in Government Gazette 16814 GN R1743 was inconsistent with the Constitution.[669]

The Constitutional Court cases cited above provide an authoritative interpretation of the equality clause in the Constitution. The *Harksen* test serves as a critical guideline on how discrimination disputes must be settled.

4.7 Did the Constitutional Court Get It Right?

The principles cited above have subsequently been followed in other cases, as they have laid the foundation of how the equality clause in the Constitution must be interpreted. However, this has

[664] *Larbi-Odam and Others v MEC of Education (North-West) and Others* (1997) 12 BCLR 1655 (CC) para 19.
[665] *Larbi-Odam and Others v MEC of Education (North-West) and Others* (1997) 12 BCLR 1655 (CC) para 20.
[666] *Larbi-Odam and Others v MEC of Education (North-West) and Others* (1997) 12 BCLR 1655 (CC) para 26.
[667] *Larbi-Odam and Others v MEC of Education (North-West) and Others* (1997) 12 BCLR 1655 (CC) para 25.
[668] *Larbi-Odam and Others v MEC of Education (North-West) and Others* (1997) 12 BCLR 1655 (CC) para 32.
[669] *Larbi-Odam and Others v MEC of Education (North-West) and Others* (1997) 12 BCLR 1655 (CC) para 49.

been criticised by various commentators.[670] A common critique has been the Constitutional Courts' focus on the impact of the conduct on dignity when determining whether any conduct or provision in the law is unfair discrimination.[671]

Albertyne and Goldblatt view the Constitutional Court's focus on the value of dignity at the core of equality as misplaced.[672] They argue that the right to substantive equality should be given a meaning independent of dignity.[673] They believe that disadvantage and harm should be the criterion when determining when discrimination is unfair and violates the equality clause. Considering this, if one had to examine the disadvantage and harm suffered by educators dismissed when charged in terms of s17 of the EEA, this is extreme in the employment context. Any dismissed employee ordinarily suffers financial hardship and loss of livelihood, threatening their economic independence and family. It is, therefore, the writer's view that when determining the fairness of discrimination in a dismissal case, it is essential to examine the harm suffered by the employee and in the context of this study the impact of the misconduct on the learners.

Dlamini cites Fagan,[674] who also believes that the Constitutional Court was wrong in importing dignity as central to unfair discrimination.[675] According to Fagan, unfair discrimination infringes either an independent constitutional right or an egalitarian principle entrenched in the Constitution when it gives benefits or imposes burdens on some but not on others.[676] He also believes that the dignity analysis of equality lacks foundation.[677] Discrimination is unfair if there is no morally

[670] CRM Dlamini 'Equality or Justice? Section 9 of the Constitution revisited – Part ll' (2002) 27(2) *Journal for Juridical Science* 23.
[671] CRM Dlamini 'Equality or Justice? Section 9 of the Constitution revisited – Part ll' (2002) 27(2) *Journal for Juridical Science* 23.
[672] C Albertyn and B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 254.
[673] CRM Dlamini 'Equality or Justice? Section 9 of the Constitution revisited – Part ll' (2002) 27(2) *Journal for Juridical Science* 23. C Albertyn and B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 254.
[674] A Fagan "Dignity and Unfair Discrimination: a value misplaced and a right misunderstood" (1997) *South African Journal of Human Rights* Vol 14.
[675] CRM Dlamini 'Equality or Justice? Section 9 of the Constitution revisited – Part ll' (2002) 27(2) *Journal for Juridical Science* 23.
[676] CRM Dlamini 'Equality or Justice? Section 9 of the Constitution revisited – Part ll' (2002) 27(2) *Journal for Juridical Science* 23.
[677] CRM Dlamini 'Equality or Justice? Section 9 of the Constitution revisited – Part ll' (2002) 27(2) *Journal for Juridical Science* 23.

relevant reason for the disparity of treatment.[678] Another critique is by Davies, who opines that equality is central to our Constitution and should not depend on another right, dignity.[679]

The Constitution requires the consideration of foreign law when interpreting the Bill of Rights.[680] The Canadian Courts [681] have located dignity at the centre of the equality principle. In *Law v Canada* [682] the court said that a key component of the equality principle is dignity.[683] To maintain equality our society cannot accept legal distinctions that violate human dignity, treat some people as less than equals or make them appear less capable than others, dignity is central to the equality principle.[684] This was also the position in the case of *Prinsloo* where the court said that there will be a violation of s8(2) where discrimination leads to treating people differently in a way that diminishes their basic human dignity. [685]

Fredman argues that equality is independent and over and above dignity, as dignity does not inevitably entail equality.[686] She adds that dignity is an independent element in discrimination law, requiring the complainant to prove that they have been disadvantaged and a lack of respect was shown to them.[687]

Fredman's argument was also raised by the Canadian Court in *R v Kapp,*[688] in this case, the federal government in Canada wanted to enhance Aboriginal involvement in commercial fishing. Through the Aboriginal Fisheries Strategy, they issued communal fishing licences and granted them 24-hour sole access to the river.[689] The appellants ignored the prohibition and were fishing during the prohibited time.[690] The appellants argued that the fishing licences discriminated against them based on race.[691] The court responded by indicating that the program's purpose was to provide economic

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[678] CRM Dlamini 'Equality or Justice? Section 9 of the Constitution revisited – Part ll' (2002) 27(2) *Journal for Juridical Science* 24.
[679] CRM Dlamini 'Equality or Justice? Section 9 of the Constitution revisited – Part ll' (2002)27(2) *Journal for Juridical Science* 23.
[680] The Constitution s39(1)(c).
[681] S Fredman 'Substantive equality revisited' (2016) *I*CON* 14(3)724-5.
[682] (1999) 1 SCR 497.
[683]S Fredman 'Substantive equality revisited' (2016) *I*CON* 14(3)724.
[684] S Fredman 'Substantive equality revisited' (2016) *I*CON* 14(3)725.
[685] *Prinsloo v Van der Linde* (1997) (3) SACR 1012 (CC) para 33.
[686] S Fredman 'Substantive equality revisited' (2016) *I*CON* 14(3)725.
[687] S Fredman 'Substantive equality revisited' (2016) *I*CON* 14(3)725.
[688] (2008) SCC 41.
[689] CanLII Connects *https://canliiconnects.org/en/summaries/39039* accessed 8 August 2023.

[690] CanLII Connects *https://canliiconnects.org/en/summaries/39039* accessed 8 August 2023.
[691] CanLII Connects *https://canliiconnects.org/en/summaries/39039* accessed 8 August 2023.

opportunities to the Aboriginals. The Supreme Court unanimously upheld the validity of the exclusive licences. The court had to interpret s15(1) and s 15(2) of the Canadian Charter. The court interpreted these sections as guaranteeing substantive equality. The court found that the Aboriginal Fisheries Strategy had a remedial purpose, targeting a disadvantaged group.[692] The court stated that it is challenging to apply human dignity as a legal standard because it is a subjective idea that has proven to be an additional burden for those pursuing equality.[693]

Dlamini attempts to justify the use of dignity when determining unfair discrimination.[694] He argues that the reason the Constitutional Court uses dignity as a focus is that the court started from the premise that equality does not mean that everyone should be treated equally, whatever their circumstances.[695] He adds that whether differentiation or classification is unfair will depend on another element, and he sees this as human dignity.[696] The central role that human dignity played in equality jurisprudence was first established in *Hugo*,[697] where Goldstone J followed the Canadian judgement of *Egan v Canada,* [698] where the Court placed human dignity at the heart of the court's equality enquiry. In *Egan,* the Court stated that if it does not signify a commitment to acknowledge each person's equal worth as a human being, irrespective of individual differences the legal guarantee of equality means nothing. This view of equality is inextricably linked to dignity, and this view was elaborated on in *Prinsloo*,[699] where the court said that discrimination involves not only violations of a person's dignity but also other types of distinctions that have an equally devastating impact on people. The focus on the individual's dignity and worth as a foundation for equality rights also central in *Law v Canada.*[700] In this case, the Supreme Court located dignity at the centre of the equality principle and said " Equality means that our society cannot tolerate legislative distinction that treats certain people as second class citizens, that demean them, that treat them, less capable for no good reason, or that otherwise offend fundamental human dignity."[701]The final

[692] Equal Rights Trust *https://www.equalrightstrust.org/sites/default/files/ertdocs//Microsoft%20Word%20-%20Supreme%20Court%20of%20Canada%20-%20R%20v%20Kapp%20_5_.pdf* accessed 8 August 2023.

[693] S Fredman 'Substantive equality revisited' (2016) *I*CON* 14(3)726.
[694] CRM Dlamini 'Equality or Justice? Section 9 of the Constitution revisited – Part ll' (2002) 27(2) *Journal for Juridical Science* 23.
[695] CRM Dlamini 'Equality or Justice? Section 9 of the Constitution revisited – Part ll' (2002) 27(2) *Journal for Juridical Science* 23.
[696] CRM Dlamini 'Equality or Justice? Section 9 of the Constitution revisited – Part ll' (2002)27(2) *Journal for Juridical Science* 24.
[697] *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC).
[698] (2009) 2 S.C.R.
[699] *Prinsloo v Van der Linde* (1997) (3) SACR 1012 (CC) para 47.
[700] (1999) I.S.C.R. 497, 59 (Can).
[701] S Fredman 'Substantive equality revisited' (2016) *I*CON* 14(3) 724.

Canadian case surveyed is *Gosselin v Quebec*,[702] in this case, the applicant claimed discrimination based on age, welfare beneficiaries received a lower income if they were below the age of 30 years. The applicant's claim that the lower income was discrimination was rejected, and the court held that proving discrimination was not only based on proof that one was treated differently based on a characteristic, in addition one had to prove that this disadvantage regarded her as of less value than others. Furthermore, the court held that the allocation of different sums of money to the different groups did not indicate that one group's dignity was more important than the others.

Despite the differing views between the Canadian Courts and *Prinsloo*, the South African courts have viewed the impact of discrimination on one's dignity as a factor to be considered when determining unfair discrimination. In addition, Albertyne and Goldblatt's view was that one must also consider the harm caused, any employee suffers considerable harm when dismissed. According to Steinmann," The law lacks a principled definition of human dignity."[703] McClelland defines human dignity as involving some notion of equality, all humans have a special kind of worth and that there are some range of actions that should never be directed at persons.[704] Justice Chaskalson, writing extrajudicially points out " respect for dignity implies respect of each person, and the right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner."[705] In *MEC of Education KZN v Pillay* [706] the court said that dignity and identity are inseparably linked, as one's sense of self-worth is defined by one's dignity. Therefore, one must consider the harm caused to the educator and the impact of the dismissal on the educator's dignity when determining whether a s17 dismissal amounts to unfair discrimination. The question is whether the dignity of an educator will be infringed if the educator is guilty and dismissed of a s17 offence. It is the writers view that once the educator is found guilty of the misconduct it will be difficult to show that their human dignity has been adversely affected.

4.8 School Governing Body (SGB) Employed Educators

The employment of educators in public schools falls into two broad categories: educators employed by the State and SGB employees. The EEA regulates the employment of educators employed by the State.[707] The SASA allows school governing bodies to employ educators and non–educators in

[702] (2000) 4 S.C.R 429 (Can).
[703] R Steinmann 'The Core Meaning of Human Dignity.' (2016) *PELJ* 19(1) 22
[704] RT. McClelland 'A Naturalistic View of Human Dignity' (2011) *The Journal of Mind and Behaviour* 32(1) 5.
[705] R Steinmann 'The Core Meaning of Human Dignity.' (2016) *PELJ* 19(1) 22.
[706] (2008) 1 SA 474 (CC) para 53.
[707] EEA s 2.

addition to the posts established for the school by the MEC of Education in the province.[708] The EEA does not apply to educators employed in public schools by the school's governing body, as these educators do not fall under the definition of educator in the EEA.[709] These educators will have their employment contract and relationship subject to general employment laws, the LRA and the BCEA and their respective employment contracts.[710]

Apart from public schools, the South African schooling system also includes independent schools established in terms of s46 of SASA, also referred to as independent schools. Educators employed in independent schools are not considered in this study,as they are not subjected to the EEA. Despite the different employers, the SGB and the State, these educators share everyday responsibilities in public schools. The principle of *in loco parentis* will apply to all educators irrespective of who the employer is. SGB-employed educators must also fulfil their constitutional responsibilities, including treating the learners with dignity[711] and ensuring their rights are paramount in every matter concerning the child.[712] They are also subjected to the SACE Code of Professional Ethics. State-employed and SGB-employed educators' core duties and responsibilities are the same.

In the context of this study, there is no obligation for the employers of SGB-employed educators to dismiss them should they commit an offence listed in s17 of the EEA, as this Act is only applicable to educators employed by the Department of Education.[713] The disciplinary process of these educators will be in accordance with the disciplinary code of the respective SGB employer. The dismissal of these educators must be in accordance with the LRA. According to s188(1) of the LRA, a dismissal is unfair if the employer fails to prove that it was affected in terms of a fair procedure or for a fair reason, or both. Section 188(2) indicates that when one is required to determine the fairness of a dismissal, Schedule 8 must be considered. Schedule 8 "allows for justifiable deviations from the Code, hence following the guidelines of the Code must be the norm, and departure must be justified."[714]

[708] SASA s20(4)(5).
[709] EEA s1.
[710] C De Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Quality Basic Education*. (unpublished LLD dissertation, Stellenbosch University,2022) 169.
[711] The Constitution s10.
[712] The Constitution s28(2).
[713] EEA s1; s2.
[714] LRA Code of Good Practice: Dismissal 8 item 1.

State-employed and SGB-employed educators serve the same public interests, yet when it comes to offences listed in s17, these educators are treated differently, for example, an SGB-employed educator who is found guilty of committing grievous bodily harm will not be automatically dismissed. Instead, in these circumstances, the employer will be guided by Schedule 8, specifically whether dismissal is an appropriate sanction.[715] This is not the case when a state-employed educator is guilty of the same offence, dismissal will automatically follow if the educator is found guilty, per s17 of the EEA. This study aims to determine whether this amounts to unfair discrimination.

The purpose of s17 of the EEA is to ensure that educators found guilty of the serious offences listed in the section are removed from the school system to ensure that no future harm can be inflicted on learners or others. It also serves as a deterrent to other educators. However, the SGB-employed educators in the same school may commit the same offence as state-employed educators and may not be dismissed, although they serve identical learners, and communities and importantly do the same job. This appears to be unfair, as a dismissal of an employee in the public sector, in the same workplace with the same job description and interests to protect, is treated differently because the employer differs. This difference in treatment is based purely on the fact that one employee is employed by the State and the other is employed by the SGB. The writer does not view this difference in treatment as justified. This will be considered more extensively later in this chapter. The school environment is unique compared to other public sector institutions, as there are state and privately employed individuals in the workplace doing the same job.

4.9 The Application of the Public Service Act 103 of 1994 (PSA) to State Employed Educators

The PSA defines public service as persons employed in posts on the establishment of departments and in addition to the establishment of the department. [716] Educators are included in this definition, however, subject to the qualifications that the provisions of the Act will be applicable only in so far as they are not contrary to the laws governing their employment.[717]

According to s197(1) of the Constitution, "There is a Public Service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day." The Constitution also states that the terms and

[715] LRA Code of Good Practice: Dismissal item 7 (iv).
[716] PSA 103 of 1994 s8.
[717] PSA 103 of 1994 s2.

conditions of employment in the public service must be regulated by national legislation.[718] The PSA is the constitutionally mandated legislation that governs the terms and conditions of employment in the public sector.[719] The purpose of the PSA is to provide for the organisation and administration of the public service of the Republic and to regulate the conditions of employment in the public service, terms of office, discipline, retirement, and discharge of members from the public service.[720]

The public service comprises three main sectors: general education and training and public and protection services.[721] Although educators are part of the public service, the Public Service Act distinguishes between educators and other employees, as educators' conditions of service including discipline are regulated through education-specific legislation.[722] These are the South African Schools Act 84 of 1996, the Employment of Educators Act 76 of 1998 and the Further Education and Training Act 98 of 1998.[723]
The writer views this distinction as justified as the education sector is unique, in that it serves children who enjoy special protection in terms of the Constitution,[724] and other legislation. The right to quality basic education[725] is a constitutional right and therefore a specific employment dispensation must be afforded to educators.

The PSA provides for the organisation and administration of the public service of the Republic, the regulation of conditions of employment, terms of office, discipline, retirement, and discharge of members of the public service and related matters.[726] The PSA uses the term officer to refer to any person permanently appointed in terms of the Act.[727]

[718] The Constitution s197(2).
[719] J Brand et al. *Labour Dispute Resolution* (1997) 62.
[720] Preamble of the PSA.
[721] E Bray and J Beckmann 'The employment relationship of the public-school educator: A constitutional and legislative overview' (2001) (19) 4 *Perspectives in Education* 115.
[722] E Bray and J Beckmann 'The employment relationship of the public-school educator: A constitutional and legislative overview' (2001) (19) 4 *Perspectives in Education* 115.
[723] E Bray and J Beckmann 'The employment relationship of the public-school educator: A constitutional and legislative overview' (2001) (19) 4 *Perspectives in Education* 115.
[724] The Constitution s28.
[725] The Constitution s29.
[726] GN R877 in GG 40167 29/07/2016.
[727] PSA 103 of 1994 s1.

Public officials must strive to attain public service goals, including the ethical goals of efficiency and effectiveness. Therefore, educators must also comply with these standards, as they are public servants despite having specialised legislation regulating their service conditions. [728]

4.10 Are Educators Charged and Dismissed in Terms of s17 of the EEA Unfairly Discriminated Against?

This chapter seeks to determine whether s17 of the EEA unfairly discriminates against educators, thereby impacting fair and rational decision-making in disciplinary hearings dealing with s17 offences. The question is, are state-employed educators unfairly discriminated against when compared to SGB-employed educators who are not subjected to mandatory dismissal for any offence committed?

The paragraph below is an examination of s17 offences listed in the EEA. De Wet summarises the test used in *Harksen* to determine unfair discrimination.[729] This two-stage analysis will be applied to the offences in s17 of the EEA in the following paragraphs. The *Harksen* case refers to the interim Constitution; however, this will apply *mutatis mutandis* to s9 of the Constitution.

4.10.1 Does Section 17(1) Pass the *Harksen* Test?

Following the *Harksen* test, one must first determine whether educators are treated differently when compared to SGB employees.

According to the *Harksen* test, it must first be determined whether educators charged in terms of s17 of the EEA are treated differently compared to SGB-employed educators. The answer to this is yes. The follow-up question is whether a rational connection exists between s17 and a legitimate governmental purpose.

Section 17(1)(a) refers to "theft, bribery, fraud or an act of corruption regarding examinations or promotional reports." In the education context, the promotion of a learner refers to a learner progressing to the next grade, such a learner must attain all the learning outcomes to progress. The writer submits that any conduct outlined in s17(1)(a) will undermine the integrity of the education system. Hence, the legitimate purpose of the provision is established.

[728] PSA 103 of 1994 s2.
[729] E de Wet 'Interpretation of equality clause in Bill of Rights' (1998) 8 *Amicus Curiae* 29.

Section 17(1)(b) refers to an educator sexually assaulting a learner, student, or employee. The Department of Basic Education admits that sexual abuse is common in SA schools, and schools have become violent and unsafe, particularly for girls.[730] The Department added that sexual abuse has a long-term impact on learners, it affects their self-esteem and school performance and may even result in the child dropping out of school.[731] In this publication, the Department does refer to the compulsory dismissal of educators found guilty of sexually abusing learners or being in a sexual relationship with learners. It goes further to justify the dismissal by indicating that a teacher who sexually abuses learners should not be a teacher, and there is a need to restore confidence in the profession as research by the Medical Research Council had shown that their educators committed 33% of the rapes of girls in SA.[732] The purpose of this section is clear, therefore, the employer has adopted zero tolerance to sexual assault, schools must be safe zones for learners and employees, and therefore, the purpose of the provision is legitimate and aimed at eliminating such conduct from schools.

Section 17(1)(c) refers to an educator having a sexual relationship with a learner in the school that they teach, the purpose of this section is that educators are in positions of power in schools, and they should not use this to influence learners to enter consensual sexual relationships with them. If such a relationship in the school goes unpunished, it will not set a good precedent for others in the school. Relationships of this nature in the school may also be in contravention of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[733] if the learner is under the legal age to consent to sex. Hence, the legitimate purpose of this provision is established.

Section 17(1)(d) refers to an educator causing grievous bodily harm to a learner, student, or other employer. The SASA and The Abolishing Corporal Punishment Act[734] prohibits corporal punishment in schools. However, STATS SA reported that in 2019, 1 million children out of 13 million children between the ages of 5 and 17 experienced some form of violence in school;

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[730] Sexual Abuse in Schools: Submission by Department of Education to Task Group on Sexual Abuse in Schools available at *https://www.gov.za/documents/sexual-abuse-schools-submission-department-education-task-group-sexual-abuse-schools* accessed 27 August 2023.

[731] Sexual Abuse in Schools: Submission by Department of Education to Task Group on Sexual Abuse in Schools" available at *https://www.gov.za/documents/sexual-abuse-schools-submission-department-education-task-group-sexual-abuse-schools* accessed 27 August 2023.

[732] Sexual Abuse in Schools: Submission by Department of Education to Task Group on Sexual Abuse in Schools" available at *https://www.gov.za/documents/sexual-abuse-schools-submission-department-education-task-group-sexual-abuse-schools* accessed 27 August 2023.

[733] 32 of 2007.

[734] 32 of 2007.

educators inflicted 84% of the violence.[735] This report also added that schools should provide a nurturing environment, which will determine learners' academic, social, and occupational future. Furthermore, any violence in schools must be prohibited, as schools should be safe spaces where learners learn without fear of assault, and other employees must work in an environment without threats of violence or assault. Hence, the legitimate purpose of this section is established.

Section 17(1)(e) refers to educators who are in the illegal possession of an intoxicating, illegal or stupefying substance. Schools are drug-free and alcohol-free zones as they are places that minors occupy.[736] Furthermore, educators should be setting good examples for their learners. The legitimate purpose of this section is established.

Section 17(1)(f) refers to an educator causing a learner to perform any of the acts in the preceding sections as listed above. It has been established that the acts in the section have a legitimate purpose in ensuring a conducive learning environment. Educators are persons of power and influence in schools, and they should not use this to influence learners to perform any of the offences listed in s17(1), therefore the legitimate purpose of this section is established.

It has been established that there is no breach of s9(1) of the Constitution. As there is a rational connection between the provision and the legitimate governmental purpose, one must proceed to determine whether there is unfair discrimination based on s8(2) of the Constitution. It must be determined whether the differentiation amounts to discrimination and, if it does, whether it is unfair discrimination.[737]

Here, the educator must establish the grounds of differentiation, it may be on specified grounds listed in s8 or unspecified grounds. The grounds of discrimination are that different employers employ SGB-employed educators compared to educators employed in terms of the EEA. Different employers are the only difference between state-employed and SGB-employed educators, and this does not qualify as unlisted grounds for determining the unfairness of discrimination. As a result of

[735] Corporal Punishment still in schools despite ban available at *https://www.statssa.gov.za/?p=16128* accessed 27 August 2023.

[736] National Strategy for the Prevention and Management of Alcohol and Drug Use Amongst Learners in Schools available at *https://www.kzneducation.gov.za/images/documents/Resources/SNES/PreventionOfAlcoholAndSubstanceAbuse/National_Strategy_Management_of_substance_abuse.pdf* accessed 17 October 2023.

[737] *Harksen v Lane No & Others* 1998 (1) SA 300 (CC) para 45.

failing to establish the grounds of discrimination, it must be concluded that s17 does not unfairly discriminate between educators employed by the State and SGB-employed educators.

4.11 Limitation of the Bill of Rights (Section 36)

In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others,*[738] the Court explained the limitation of foundational rights, by quoting *Fraser v Children's Court Pretoria North and Others,*[739] the core of the Constitution is the right to equality, a violation of this right can only be justified with a convincing argument which makes it harder to uphold when basic principles like equality are involved. For a limitation to be legitimate it must serve an important purpose. Darcy sums it up as a two-fold test. There must be a clear, sustainable justification for the limitation, and the purpose must be significant enough to override a value that the very ethos on which the Constitution is based.[740]

The limitation and the balancing of rights were also dealt with in *Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers & Others*, [741] in this case, the property owners sought the Court's intervention regarding loud picketing workers preventing the tenants from trading. The court had to consider the organisational rights of the workers to access the workplace and s23 of the Constitution, these rights had to be weighed against the tenant's rights to trade in a conducive environment and the owner's right to property, as no rights are absolute. The court found that SACCAWU and its members can exercise their rights reasonably without interfering with the property owners and tenants. The loss suffered by the tenants was a justifiable limitation on their right to property and to trade.[742]

The use of a two-stage approach when determining whether a constitutional right has been infringed is an interpretation of the allegedly infringed right, and the second is to determine whether the action is a limitation of the right in question.[743] The second stage includes determining whether the limitation is justifiable in terms of s36 of the Constitution. This analysis involves a proportionality exercise where the intent and results of the violating provisions are evaluated in relation to the degree of the infringement.[744] Kruger raises concerns over this approach when determining whether

[738] (1999) (3) SA 173 (CC).
[739] (1997) (2) SA 261 (CC).
[740] D du Toit 'The Right to Equality versus Employer 'Control' and the Employee 'Subordination': Are Some More Equal than Others?' (2016) 37(1) *ILJ* 11.
[741] (2010) 31 *ILJ* 2539 (KZD).
[742] (2010) 31 *ILJ* 2539 (KZD) para 60.
[743] R Kruger 'Equality and unfair discrimination: Refining the Harksen test.' (2011) (128) 3 *SALJ* 502.
[744] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 46.

unfair discrimination should be made. She argues that unfair discrimination impairs the complainant's dignity and may be justifiable in an open and democratic society based on human dignity, equality, and freedom.[745] She adds that the Constitutional Court has paid little attention to this, possibly because it is superfluous and analysis into the justification enquiry was unnecessary, and the unfairness and justification enquiry are separate enquiries, requiring different considerations. [746] According to Van der Vyver, fairness relates to the interests of the persons or groups of persons affected by the differentiating provision. "[At the same time], reasonableness enquiry focuses on the purpose of the differentiation, with the fairness enquiry preceding the reasonableness enquiry."[747] Once the Court has determined the legitimate government purpose, it would be difficult to reach a different conclusion when engaging in the limitation analysis. [748] Kruger proposes that the fairness and justification analysis must be dealt with holistically, not separate enquiries.[749]

Rautenbach agrees with Kruger, the court used the rational relationship test as a threshold requirement for the application of the general limitation clause to both unfair discrimination and other differentiations, whereas the test is part of the general limitation clause and that dealing with the question of whether unequal treatment amounts to unfair discrimination in two phases is unnecessary.[750] In *NCGLE v Minister of Justice,*[751] the court abandoned the guideline that a general rational relationship inquiry must always remain part of the application for the test for unfair discrimination. Rautenbach argues that the *Harksen* steps are problematic, as long as all relevant factors are considered, and different applications of the right indicate different routes ultimately arriving at the same place.[752]

Rautenbach and Fourie acknowledge that the limitation of rights must be used at some point, they argue that what has been considered in the first stage of the unfair discrimination analysis need not

[745] R Kruger 'Equality and unfair discrimination: Refining the Harksen test.' (2011) (128) 3 *SALJ* 503.
[746]R Kruger 'Equality and unfair discrimination: Refining the Harksen test' (2011) (128) 3 *SALJ* 503.
[747] JD Van der Vyver 'Right to Equality before the Law' (1998) 61 *THRHR* 367, R Kruger 'Equality and unfair discrimination: Refining the *Harksen* test." (2011) (128) 3 *SALJ* 503.
[748] R Kruger 'Equality and unfair discrimination: Refining the Harksen test' (2011) (128) 3 *SALJ* 504.
[749] R Kruger 'Equality and unfair discrimination: Refining the Harksen test' (2011) (128) 3 *SALJ* 504.
[750] IM Rautenbach 'Overview of Constitutional Court Decisions on the Bill of Rights '(2005) 2 *Journal of South African Law* 373.
[751] (1998) 12 *BCLR* 1517 (CC) para 18.
[752] IM Rautenbach "Overview of Constitutional Court Decisions on the Bill of Rights "(2005) 2 *Journal of South African Law* 373.

be considered again later.[753] These writers concluded this debate by indicating that the Constitutional Court held that unfair discrimination is justifiable in terms of s36 and has created a conceptual problem, unfair discrimination can be fair.[754] They add that this problem is caused by a failure to recognise the difference between the meaning of fairness in s9(3), defined by the Constitutional Court and the generic meaning of fairness.

The writer supports the views of the writers above, who argue that once the purpose of the provision is established, testing whether the limitation clause saves the provision in question will be unnecessary. In this Chapter of the study, the *Harksen* test was used to determine whether the compulsory dismissal imposed by s17 of the EEA is fair or unfair without enquiring whether the limitation clause must also play a part in that determination. If one had to use the limitation clause analysis after the *Harksen* test found the provision to be unfair, it would amount to the same as determining whether the purpose of the provision was legitimate.

4.12 Conclusion

This chapter aims to determine whether educators employed by the state are discriminated against when compared to SGB-employed educators.

Following the Constitutional Court's perspective on unfair discrimination, educators are not unfairly discriminated against in the context of s17 of the EEA. State-employed educators cannot establish a ground of discrimination that the court will accept.

State-employed educators are not a group worthy of protection that has suffered past disadvantages and discrimination.[755] Furthermore, s17 of the EEA is not directly aimed at impairing the dignity of educators. Instead, it aims at achieving a worthy, important societal goal,[756] which is to protect the integrity of the education system[757] and protect learners and others from sexual abuse,[758] violence and assault. [759] It also attempts to eliminate the possession of alcohol and other illegal stupefying

[753] LM Rautenbach and E Fourie 'The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act' (2016) (1) *Journal of South African Law* 114.
[754]LM Rautenbach and E Fourie 'The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act' (2016) (1) *Journal of South African Law* 116.
[755] *Harksen v Lane NO (1997) 11 BCLR 1489 (CC)* para 51-52.
[756] *Harksen v Lane NO (1997) 11 BCLR 1489 (CC)* para 51-52.
[757] EEA s17(1)(a).
[758] EEA s17(1)(b)(c).
[759] EEA s17(1)(d).

substances[760] on the school campus, as schools are institutes of learning occupied by young children who must be protected from exposure to such substances. This section also prevents educators from using their power of influence to incite or cause learners to commit any listed offences in s17.[761] Educators charged with a s17 offence and dismissed will be able to challenge the dismissal in terms of the LRA s186, these educators may appeal the outcome as provided for in the EEA[762] or refer an unfair dismissal dispute to the ELRC.

[760] EEA s17(1)(e).
[761] EEA s17(1)(f).
[762] EEA s25.

Chapter Five

Conclusions Recommendations and Findings

5.1 Introduction

This concluding chapter focuses on the findings in the preceding chapters, this is done in relation to the research questions specified in Chapter 1. This study aims to determine the impact s17 of the EEA on fair and rational decision-making.

5.2 Findings

5.2.1 The SACE Code of Professional Ethics and the EEA s17(1) are not aligned and do not complement each other.

5.2.2 Section 17(1) does not meet the standards set in Schedule 8 of the LRA in determining a sanction.

5.2.3 It has been found that there is inconsistent application of disciplinary charges.

5.2.4 The EEA s18(3) lists the possible sanctions that may apply to an educator found guilty of a s18(1) offence, included in this list of sanctions is dismissal.[763] Later, however, this is followed by s18(5), which lists offences already listed in s18(1), and it is stated that educators may be dismissed if found guilty of these offences. The rationale behind this duplication is uncertain.

5.2 5 The Disciplinary Code on the EEA applies only to state-employed educators, despite SGB-appointed educators also employed in public schools. What is considered misconduct for state-employed educators may not be deemed to be misconduct for SGB-employed educators.

5.2.6 Section 17(1) does not allow the presiding officer to act as a reasonable decision-maker, as the presiding officer cannot apply his mind to the most appropriate sanction. Instead, a mandatory sanction of dismissal must result if the educator is found guilty of a s17 offence.

5.2.7 According to s28(2), the child's rights are paramount regarding every matter regarding the child. However, this cannot justify the dismissal for every offence listed in s17(1) of the EEA, except for

[763] EEA s18(3)(1).

sexual misconduct and grievous body harm against a learner. The mandatory dismissal for all other offences in s17(1) does not comply with Schedule 8 of the LRA.

5.2.8 Sexual harassment is not cited as a specific offence in either ss17 or 18, instead, an educator may be charged with s18(1)(q), improper conduct.

5.2.9 It was found that an employer may justifiably deviate from the disciplinary code under certain circumstances. However, the Department of Education may not deviate from the disciplinary code of educators as it is contained in the EEA.

5.2.10 The conduct and discipline of SGB-employed educators are regulated by the Code of Conduct at their respective workplace. As such, they are not subjected to the mandatory dismissal if found guilty of a s17 offence. This is despite SGB-employed educators serving the identical interests as state-employed educators and, importantly, are *in loco parentis*.

5.2.11 It was found that educators employed by the state will not be able to establish the grounds for discrimination, as the grounds of discrimination must be "based on attributes and characteristics which have the potential to impair the human dignity of persons as human beings or affect them in a comparably serious manner."[764] The difference between SGB-employed educators and state-employed educators is that different employers employ them. The difference in employer does not establish a ground for unfair discrimination.

5.2.12 State-employed educators as a group are not worthy of protection as they have not suffered past discrimination. Therefore, educators dismissed because they are found guilty of an offence listed in s17 may have an unfair dismissal claim under the LRA and not a claim for unfair discrimination.

5.3 Recommendations

5.3.1 The categorisation of charges

Serious misconduct in s17 and misconduct in s18 should not be separated. All offences must be contained under one section called misconduct.[765] The presiding officer will use the guiding

[764] E de Wet 'Interpretation of Equality clause in Bill of Rights' (1998) 8 *Amicus Curiae* 29.
[765] C De Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Basic Education* (unpublished LLD dissertation, Stellenbosch University, 2022) 486.

principles in Schedule 2 of the EEA, Schedule 8 of the LRA and the principles in relevant court judgements to determine an appropriate sanction.

Should this recommendation not find favour, the following recommendations must be considered.

5.3.1.1 Section 17(1)(b)(c) and (d) provides that "An educator must be dismissed if found guilty of committing an act of sexual assault on a learner, student, or other employee." This must remain a dismissible offence.

5.3.1.2 The presiding officers employed by the Department of Education and other officials responsible for the formulation of charges must be trained continuously. The charge must be correctly framed and supported by the outcome of the investigation.

5.3.1.3 The charge sheet must reflect the s17(1) charge, and the alternate s18(1) must also be proffered. This will allow presiding officers the opportunity to apply their mind as to the appropriate sanction and not be compelled to dismiss the educator if guilt is established.

5.3.1.4 The offences in the SACE Code of Professional Ethics must be aligned with the offences listed in s17 of the EEA. The SACE Mandatory Sanctions must reflect the sanction of dismissal for offences listed in s17 of the EEA. This will ensure that the objectives of s17 are met.

5.3.1.5 Schedule 2 advocates for corrective instead of punitive discipline, this clause must exclude s17.

5.3.2 Amendments to EEA and SASA

5.3.2.1 Amendment of s17(1)(c)

An educator must be dismissed if found guilty of "having a sexual relationship with a learner of the school where he or she is employed[766]."

The "school where he or she is employed" should be replaced with "at any school."

[766] C De Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Basic Education* (unpublished LLD dissertation, Stellenbosch University, 2022) 404.

5.3.2.2 Amendment to s18(1)

"Misconduct refers to the breakdown in the employment relationship." This must be removed as every misconduct does not break down the employment relationship. If that were so, educators would be dismissed for every offence,[767] and this would not be a fair or rational decision.

5.3.2.3 Amendment of s18(5)

An educator may be dismissed if they are found guilty.

(a) Dishonesty, as contemplated in subsection (1) (ee)

(b) Victimising an employee for, amongst others, their association with a trade union, as contemplated in subsection (1) (ff)

(c) Unfair discrimination, as contemplated in subsection (1)(k)

(d) Rape, as contemplated in subsection (1) (dd)

(e) murder, as contemplated in subsection (1) (dd)

(f) contravening section 10 of the South African Schools Act,1996 (84 of 1996), as contemplated in subsection (1) (dd)

This section must be deleted as it serves no purpose. It is a repetition of offences already listed in s18. The introduction of this section, "educator may be dismissed," is unnecessary and confusing as dismissal is always possible if the educator is found guilty regarding this section of the EEA.[768]

5.3.2.4 Scope of Applicability

The EEA should include in the scope of applicability that the Act applies to ALL educators employed in public schools, irrespective of the employer, in so far as the provision relates to discipline**.**[769]

[767] C De Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Basic Education* (unpublished LLD dissertation, Stellenbosch University, 2022) 403.
[768] C De Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Basic Education* (unpublished LLD dissertation, Stellenbosch University, 2022) 405.
[769] C De Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Basic Education* (unpublished LLD dissertation, Stellenbosch University, 2022) 483.

5.3.2.5 SASA s16 Governance and Professional Management of Public Schools

Section 3: "The principal must undertake the professional management of the school under the authority of the Head of Department."

The above provision should include "SGB- employed educators must be subjected to the disciplinary code in the EEA.

5.3.2.6 Timeframes - Amendment to Schedule 2 of the EEA

Due to the gravity of the sanction of dismissal, when charged with 17, item 5(1) must be amended to allow the educator to prepare a response to the charges adequately, this will include securing witnesses and representation.

Currently, item 5(1) states, "The educator must be given written notice of at least five working days before the date of the hearing."

Amend as follows: "The educator must be given written notice of at least ten working days before the hearing date when charged with a s17 offence."

5.3.2.7 Remove the Disciplinary Code from the Act.

The disciplinary code in ss17 and 18 must be removed from the body of the Act. Instead, it must be contained in an annexure to the Act. This will allow flexibility when determining the category of charge that best suits the offence.

5.3.2.8 Sexual Harassment

Section 17(1)(b) must expressly include sexual harassment as an offence in relation to learners.

5.4 Advocacy

The Department of Education and SACE must extensively embark on awareness campaigns informing educators of acceptable standards of conduct. This will assist in eliminating or minimising misconduct in schools. This will assist in achieving the objective of s17.

5.5 Recommendations By C De Villiers[770](Recommendations the writer supports)

5.5.1 EEA s17 (e), the possession of alcohol or substances should not be subject to its illegality, as alcohol and other substances may be legal. This offence should be combined with the consumption and or provision of the substance to other persons.[771]

5.5.2 Sexual misconduct must include rape, sexual assault (violation and abuse, compelling or exposing someone to sexual offences or acts, sexual harassment, sexual grooming, relationships of learners at any school, conviction of any offence in terms of the Sexual Offences Act.) These items must be clearly defined in terms of the relevant legislation.[772]

5.5.3 The EEA must define misconduct as any intentional or negligent breach of the following fundamental duties of an educator. This includes.

- The duty to enter and remain in service.
- The duty to perform diligently.
- The duty to show respect and to obey the lawful and reasonable instructions of the employer, and
- The duty to act in good faith towards the employer and to promote the employer's interests.

An educator who does not commit a listed offence may still be charged with the above.

5.6 Future Research

1. What is the impact of s17 of the EEA in decreasing the occurrence of s17 offences in schools in the public sector.
2. Does ELRC Collective Agreement 3 of 2018 amount to informed consent of the employee as required by section 188A of the Labour Relations Act?

5.7 Conclusion

Serious misconduct (s17) was included in the EEA through the Education Laws Amendment Act 53 of 2000.[773] Since this amendment and the insertion of s17 in the EEA, the law has developed

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[770] C De Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Basic Education* (unpublished LLD dissertation, Stellenbosch University, 2022).
[771] C De Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Basic Education* (unpublished LLD dissertation, Stellenbosch University, 2022) 488.
[772] C De Villiers *The Impact of the Legislative Regulation of Individual Educator Performance on the Delivery of Basic Education* (unpublished LLD dissertation, Stellenbosch University, 2022) 487.
[773] South African Website *https://www.gov.za/documents/education-laws-amendment-act* accessed 17 October 2023.

through jurisprudence and subsequent legislation and legislative amendments. This includes the LRA Amendments, which include Act 42 of 1996, Act 127 of 1998, Act 12 of 2002[774], Act 6 of 2014 and Act 8 of 2018. The EEQA was amended as follows. Act 65 of 2002, Act 68 of 2002, Act 52 of 2003, Act 11 of 2013, Act 47 of 2013, Act 4 of 2022. This illustrates the evolution of the law meeting employment relationships' changing needs. In addition to this is the jurisprudence developed by the courts. Since promulgating the Education Laws Amendment Act 53 of 2000, landmark court cases have changed the employment law landscape. The insertion of s17 met the demands of the Department of Education at the time of its promulgation. As an explanation for this insertion, Adv Boshoff indicated that the introduction of s17 in the EEA reflected the current educational scenario. [775] However, 23 years later, does it meet the standards set by the courts and subsequent legislation, particularly the law regulating dismissals? The findings of this study indicate that the EEA must be modernised and updated to keep abreast of international and domestic law, this includes the principles established by the Courts.

The impact of dismissal on an employee is profound, and there cannot be an automatic response to a finding of guilt, as is required by s17 of the EEA. The reasonable decision-maker test emanating from *Sidumo*[776] has become a well-established principle in dismissal law. However, the presiding officer in a disciplinary enquiry does not have the opportunity to act as a reasonable decision-maker, instead, they must dismiss the guilty educator.

Finally, the court has ruled in *MEC for Education KZN v ELRC & others,* [777]that the dismissal of an educator cannot be fair simply because s17 of the EEA requires it.
The writer concludes that s17 of the EEA does not allow for fair and rational decision-making.

[774] Office of the President *https://www.ilo.org/dyn/travail/docs/2249/Amended%20Labour%20Relations%20Act.pdf* accessed 12 October 2023.

[775] JP Rossouw and E de Waal 'Employer tolerance with educator misconduct versus learners' rights'(2004) 24(4) *South African Journal of Education* 287.

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UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

Mrs Thirona Moodley (9041786)
School Of Law
Howard College

Dear Mrs Thirona Moodley,

Original application number: 00020681
Project title: The Impact of s17 of the Employment of Educators Act 76 of 1996 on Fair and Rational decision - making.

Exemption from Ethics Review

In response to your application received on 13 February 2023 , your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:
Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

[redacted]

Mr Matthew Blain Kimble
Academic Leader Research
School Of Law

DECLARATION REGARDING ORIGINALITY

I, T. Moodley declare that:

A. The research reported in this dissertation, except where otherwise indicated, is my original research.

B. This dissertation has not been submitted for any degree or examination at any other university.

C. This dissertation does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.

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Signed: [redacted]

Date: 7 April 2025