

CHAPTER 10

EDUCATION LAW SOURCES REGULATING CLASSROOM MANAGEMENT

CONCEPTUAL ANALYSIS

1. Law- may be defined as those rules of conduct that are accepted as binding in a society and that ought to be obeyed by society at large, are enforced by the state and exist for purpose of regulating the affairs of society in a just and equitable manner.

2. Education Law- those components of constitution, other statute law, the common law and the case law, that create an education system and regulate multilateral interaction of individuals, groups, independent bodies and official authorities within that system.

Four education law sources.

- ✓ Constitution
- ✓ Legislation (statutes)
- ✓ Common law
- ✓ Case law

3. Policy

- ✓ It plays role and designed to complement educational laws
- ✓ It is not law and not mandatory
- ✓ It can be adopted in two routes, white paper which results in legislation, or policy flowing from enabling legislation

4. White paper

- ✓ Is a more detailed document which contains “a broad statement of government policy”.
- ✓ Public can comment on the white paper and “parliamentary committees may propose amendments or other proposals and send the policy paper back to the ministry to further final discussions and decisions”.

5. National education policy act 27 of 1996

- ✓ Minister must determine national education policy on, *inter alia*, the compulsory school education and admission of learners to education institutions, including the determination of age admission at schools.

THE IMPORTANCE OF EDUCATION LAW FOR CLASSROOM MANAGERS

- ✓ Helps in valid and lawful decisions
- ✓ Knowing about their own rights and obligations, as well as rights of others.
- ✓ Be aware of relevant legal principles and requirements
- ✓ Knowledge of particular positions in authority which have many legal implications
- ✓ Demand better provisions for safety of children
- ✓ Provide clear framework of an educator as professional person
- ✓ Applying legal prescriptions such as educational policy, rules and regulations promotes successful teaching

- IMPORTANT FUNCTIONS OF LAW IN THE EDUCATION SPHERE

- ✓ Facilitate and regulate behavior
- ✓ Creates harmony and order
- ✓ Determines powers and duties of functionaries
- ✓ Defines the parameters within which education activities are performed
- ✓ Protects the rights of individuals and groups involved in education
- ✓ Prescribes requirements for provision, governance and financing of education

EDUCATION LAW SOURCES

The constitution

- ✓ It is indicated as a separated source of law, over and above other legislation.
- ✓ Was adopted by an elected Constitutional Assembly and certified by constitutional court, and was not passed by parliament.
- ✓ It is the supreme law which has direct influence on all law, including legislation.

Legislation

- ✓ Is a law made by an organ of state vested with legislative authority
- ✓ National legislative authority is vested in parliament
- ✓ Legislative authority include legislature of provinces and municipal councils
- ✓ Legislative bodies in the three spheres of the government have original legislative powers, but within these spheres of the government the executive bodies have delegates or devolved authority to adopt subordinate legislation.

Common law

- ✓ Comprises of legal rules which are not originally written down and not enacted by legislature
- ✓ It can be altered by legislation
- ✓ South African common law have been developed from Roman-Dutch law and English law
- ✓ Common law principles which have been developed by courts now form part of case law

Case law

- ✓ The case reports describes the course that is taken by the most important court cases and also gives reasons for each judgment.
- ✓ The *stare desis* legal principle is based on effects that previous courts judgments have on later judgments.
- ✓ Authoritative and final judgments of the high court thus determine the administration of justice and are recognized as a source of law (case law).
- ✓ The *ratio decidendi* of a case consists of legal principles that court applies to the material facts in order to reach a decision.

Definition of legal subject.

- ✓ A legal subject is any “person” recognized in the law.
- ✓ A legal subject is *persona iuris*, that is, a person in the eye of law and such the bearer of rights and duties, and is vested with special status in the law, namely legal status.
- ✓ There are two classes of legal subject

-Natural persons (all human beings)

-juristic persons or entities other than human beings upon which the law bestows a legal personality.

- ✓ The term *person* does not refer to human being only, it also refers to an abstract fictitious legal body or associations of natural persons that forms a new kind of legal entity, which exists dependently of its members.
- ✓ A *juristic person* denotes specific kind of legal subject.
- ✓ School can be regarded as a juristic person

THE PLACE OF EDUCATION LAW IN THE SOUTH AFRICAN LEGAL SYSTEM

- ✓ Classification gives an overview of how different disciplines of law fit together and the place of education law in South African legal system.
- ✓ South Africa law is divided into material law and procedural law.
- ✓ Material law determine content and meaning of legal rules
- ✓ Procedural law relates to the manner in which material law is enforced.
- ✓ Material law is divided into public law and private law.
- ✓ Public law regulates the organization of state, the relationship between different organs of state, and the relationship between the state and the individual.
- ✓ Education law falls mainly in the sphere of public law because of the involvement of the state and its authoritative position in education in S.A.
- ✓ Constitutional law involves the working and the relationships of the most authoritative organs of state.
- ✓ It establishes these organs, determines their organization powers and govern their relationships.
- ✓ Administrative law defines the total of legal rules that grant people or institutions in authority the power to take action.
- ✓ Criminal law focuses on transgressions that violate interest of community.
- ✓ Private law orders the various rights and obligation of private persons.
- ✓ Law of *delict* is the important private law discipline for classroom manager
- ✓ *Adelictis* an unlawful, culpable act committed by a person, which infringes the right of another or cause him or her harm.

DEFINITIONS

1. Planning- is a preparation, that is something you do before starting a task or project.
2. Organizing-to arrange work to be as effective as possible within the boundaries of the available resources.
3. Leadership-the leader's ability to influence individual or a group towards the achievements of goals.
4. Control- assessing the work done and being done to re-align and correct it where necessary.
5. Co-operative learning- a team approach to learning where each member of the group is dependent on the other member to accomplish a specific learning task or assignment.
6. Extrinsic motivation- exists when people are motivated by outcome that is external functionally unrelated to the activity which they are engaged.
7. Intrinsic motivation- exists when someone works because of inner desire to accomplish a task successfully, whether it has some external values or not.

8. Communicate- transmitting of an idea by someone (the sender) and understanding therefore by another (the receiver).
9. Legitimate power-this power emanates from the learner's belief that the educator has the right to manage the learning environment.

Chapter 11 – Constitutional provisions regulating classroom management – Summary

- The constitution is the kingpin of our new democratic constitutional dispensation.
- Previously had a sovereign/supreme parliament → now have a supreme law (The Constitution)
- No other legislation or source of law has same legal status or force

Supremacy of the Constitution

- Sec 2 of the Constitution reads as follows: “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”
- All legislation must be compared to the Constitution to ensure that it does not contradict it.

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Constitutional Values

- Constitution sets out the spirit and underlying values of constitutional system that should be incorporated into education.
- School education/classroom management must be democratised in accordance with these values.
- Most NB values for classroom manager: human dignity, achievement of equality, advancement of human rights & freedoms, non-racism and non-sexism
- Court will take these values into consideration when it has to determine if a limitation of a right was reasonable i.t.o. Section 36 of Constitution
- Values e.g. human dignity (S10) and equality (S9) are also recognised as individual rights and are enshrined in the Bill of Rights

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Bill of Rights

- Bill of Rights (Ch 2 of Constitution) gives the essence of the social values upon which the new political, social and economic order is constructed.
- Forms cornerstone of the education dispensation
- NB to classroom managers

Equality (Section 9)

- Sec 9(1) – everyone is equal before the law and has right to equal protection and benefit of the law.
- Sec 9(2) – equality implies the full and equal enjoyment of all freedoms.

- Sec 9(3) – the state may not unfairly discriminate directly or indirectly against anyone on the grounds of: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- Sec 9(4) – no person may unfairly discriminate directly or indirectly against anyone on one or more grounds of Subsection (3)
- National legislation must be enacted to prevent or prohibit unfair legislation.
- In school context: Children may not be unfairly discriminated against on grounds listed in Sec 9, especially Sec 9(2).
- Note: There is a difference between *differentiation* and *discrimination*.
- Equality does not require everyone to be treated the same.
- Equality lies not in treating everyone the same, but in treating everyone with equal concern and respect.
- Discrimination is a form of differentiation → differentiation on illegitimate grounds (See Sec 9 of the constitution as well as listed grounds)
- Differentiation of a listed ground = unfair
- Differentiation on an analogous ground not presumed to be unfair. Applicant will have to prove it constitutes unfair discrimination.
- Discrimination will constitute unfair discrimination when it differentiates between people in a way that infringes upon their right of human dignity.

The following factors need to be taken into consideration when determining if discrimination has an unfair impact:

- Position of the complainant in society, whether he/she was a victim in the past
- The nature of the discriminating law or action and purpose sought to be achieved by it
- Extent to which the rights of complainant have been impaired
- Whether there was impairment of the complainant's fundamental dignity

The promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2002 will be referred to as **The Equality Act**.

The schedule to Section 29 of Equality Act contains a list of practices that will constitute unfair discrimination. In education sector these include:

- Unfairly excluding learners from educational institutions, including learners with special needs

- Unfairly withholding scholarships, bursaries, or any other form of assistance from learners of particular groups identified by the prohibited grounds
- The failure to reasonably and practicably accommodate diversity in education

The Equality act provides that the “failing to take steps to reasonably accommodate the needs” of people on the basis of race, gender or disability will amount to unfair discrimination.

Court concluded that reasonable accommodation is an exercise of proportionality that will depend on the facts of each case.

It warned that the test for fairness of discrimination should not be reduced to a test of reasonable accommodation, but that factors listed in Sec 14 of Equality Act should also be considered.

A Brief Example

A girl was constantly sent out of class to the staff room because she is a Rastafarian and had dreadlocks.

Notes:

- Banishing the girl from class is unlawful and discriminatory. Sending a learner home or out of class to the staff room constitutes suspension and there are certain prescribed procedures to be followed before a learner is suspended.
- Court → school contravened Sec 3(6)(b) of School's act which states that preventing a learner from attending school can result in a fine or imprisonment
- School's insistence that she may attend school if she cuts off her dreadlocks constitutes unfair discrimination on the grounds of religion. (Differentiation based on religion)
- School further violated her rights to equality, human dignity, education and freedom of religion, **belief, opinion, expression, association and culture**

The following reasons were given for granting the order:

- ✚ Sec 28(2) of the Constitution guarantees that in every matter affecting a child, the child's best interest is paramount
- ✚ The invasion of the learner's right to education was of a serious nature and Continued

Human Dignity (Section 10)

- This provision recognises the right of people to be treated with respect and dignity
- This is an inherent right. Do not need to deserve it.

- Classroom managers should always keep learners' right to human dignity in mind.
- Actions that would constitute an infringement: labelling learners, using other learners to form a front against a specific learner, isolating a learner.

Freedom and Security of person (Section 12)

- Sec 12 states that everyone has the right to freedom and security of the person which includes the right to:
 - not to be deprived of freedom arbitrarily or without just cause
 - not to be detained without trial
 - to be free from all forms of violence from either public or private sources
 - not to be tortured in any way
 - not to be treated/punished in a cruel, inhumane/degrading way School punishment would be considered unreasonable, cruel or degrading if:
 - it was excessive and negligently administered
 - it resulted in physical/psychological injury
 - it was not in proportion to the offence
 - there were not sufficient causes for the punishment
 - it was inappropriate for a learner of that age

Privacy (Section 14)

The Constitution stipulates that everyone has a right to privacy, includes right not to have

- their person or home searched
- their property searched
- their possessions seized
- the privacy of their communications infringed

Govt Notice 776 of 1998 – searches and seizures at school are sometimes unavoidable.

e.g. when there is suspicion that there are drugs, dangerous weapons, stolen property or pornographic material on the school property

- Principal must take precautions to ensure that searches/seizures are reasonable and justifiable
- Classroom managers must make sure of the provisions for searching learners' cellphones in their schools' Codes of Conduct

- Searching one's cellphone is similar to reading one's private documents or listening to one's private conversations, and thus constitutes an infringement of a person's "inner sanctum"
- Schools should make sure that their Codes of Conduct contain detailed provisions (referring to all applicable laws) on the searching and seizing of cellphones, so that classroom educators are protected when they need to conduct such searches/seizures.

Freedom of Religion, belief and opinion (Section 15)

Section 15 → everyone has the right to freedom of conscience, religion, thought and opinion.

Classroom manager must uphold all learners' rights to above.

Nat Pol on Religion in Education → public schools must promote core values, their religion policy must be consistent with above values also, multilingualism, openness etc.

Classroom manager should therefore:

- Promote respect for religious traditions
- Advance respect 4 religious diversity
- Promote inter-religious tolerance
- Not indoctrinate learners into any belief or religion
- Honour religious backgrounds of learners
- Not allow the belittling of any religion/secular world view

Freedom of expression (Section 16)

- Sec 16 → Everyone has right to freedom of expression, which includes *inter alia*, the freedom to receive or impart information or ideas, freedom of artistic creativity, academic freedom and freedom of scientific research.
- Educators and learners don't give up this right when entering school
- Entitled to diverse opinions
- Sec 16(1) protects free expression *as well as* free speech
- The right to freedom of expression is linked to the right to freedom of belief, religion and opinion, the right to language and culture or right to belong to cultural, religious and linguistic communities.
- Right to freedom of expression EXCLUDES "advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm" Sec 16(2)(c)

Political rights (Section 19)

- Every citizen of RSA = right to establish a political party, to participate in the activities of a political party and to recruit members to the party.

- Educators may not use their classrooms to indoctrinate or force learners to join or vote for a specific party.
- Thus Educator's political rights may be limited → politics in classroom create tension

Environment (Section 24)

- Everyone, including learners and educators, has the right to an environment that is not harmful to their health or well-being.

Children (Section 28)

- Sec 28 provides additional protection for children (18yrs and under)
- Purpose is to protect children in vulnerable situations
- Children's rights guaranteed in this Section and relevant to classroom educators are the following:
 - Learner's right to appropriate alternative care when removed from the family.
 - Implications → children are under care of educator in classroom
 - Learner's right to be protected from maltreatment, neglect, abuse or degradation.

Implications for discipline and punishment: neither discipline nor punishment may constitute maltreatment, be abusive or degrading.

- ✚ Sec 28 → child's best interests must be paramount in every matter concerning the child ("best interests of the child")
- ✚ Schools, as organs of the state, have the constitutional duty to observe and promote the "best interests of the child" standard
- ✚ Means that everything classroom managers do in classroom must be done in best interest of children in general, the specific class they are teaching and each individual learner.
- ✚ e.g. "best interests of child" for discipline: May not be in best interest to suspend a very disruptive learner, but it may be in the best interest of the rest of the learners!
- ✚ Upholding classroom and school rules may be vital for a disciplined classroom where effective teaching and learning can take place

Education (Section 29)

- In terms of Sec 29(1)(a), everyone has the right to a basic education
- This is a positive right, which means that it places a positive duty on the State to provide education.
- Right to basic education is not a right to be progressively realised over time but that the State must take all reasonable measures with immediate effect to realise the right.

- The right to basic education is also an empowering right.
- In terms of Sec 7(2) of the Constitution, you have the duty to “respect, protect and fulfil” learners' right to education.
- NB schools are organs of the State → you are bound by the positive duty to provide effective education.

Katrina Tomasevski → developed a framework for analysing state members' toward realising the right to education.

The framework consists of four interrelated principles: availability, accessibility, acceptability and adaptability:

- The availability principle deals with whether there are enough “functioning educational institutions and programmes”. For a school to be functional it requires trained, professional and committed educators.
- The accessibility principle requires that “educational institutions and programmes have to be accessible to everyone without discrimination”.
- The acceptability principle deals with the acceptability of “the form and substance of educations, including curricula and teaching methods”. Your classroom must aim to educate children to reach their full potential and become contributing citizens.
- The adaptability principle requires that education “be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings”

Access to information (Section 32)

Every person has right to access information held by the State or an organ of the State if this info is necessary for the exercising or protection of any of his/her rights.

Promotion of Access to Information act 2 of 2002 → purpose is to:

- foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information.
- Promote actively a society in which people of SA have effective access to info to enable them to fully exercise and protect their rights.
- e.g. → If an educator complained about disruptive student, need to have recordings of the misbehaviour; and the student has the right to this information.
- Therefore NB that a classroom manager ensures that he/she has a well-organised system of records!

Just Administrative Action

- Bill of Rights contains guarantees with regard to the way in which the State administration will deal with individuals.
- Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- Everyone whose rights have been adversely affected by such administrative action has the right to be given written reasons.
- In the classroom context, administrative action includes daily acts performed by educators during the course of managing the classroom.
- e.g. Disciplining a learner who neglected to do his homework is an administrative action
→ may not infringe on learner's right to just administrative action.

Limitation of Rights (Section 36)

- Above Sections from the Bill of Rights contain e.g.s of rights and freedoms that are protected and guaranteed to every citizen of the country, including children.
- Classroom managers have a legal duty to uphold these rights in the school context → if not may face legal action.
- NB → rights are not absolute and do not apply absolutely.
- Sec 36 → rights may be limited by law, provided that the reasons for imposing a limitation are reasonable and justifiable.
- Principals and educators can therefore place a restriction on learner's rights while at school and for sound reasons

Chapter 12

Education Law provisions regulating classroom administration.

Intro: Administrative law is a complex legal system that touches virtually every part of the legal system. As classroom managers it is important that you know the constitutional, legislative and common law requirements for just administrative action, and that you are able to apply these requirements in your classroom administration and management.

Defining administrative law

The division of public law that regulates the activities of the public administration, in other words its powers and functions.

Public administration – understood as the “organs of State” (this means that all administration of national, provincial and local spheres of the government are entrusted with *assisting* the government in the exercise of executive authority and public enterprises.

In administrative law the emphasis is on the particular activity, designated as “administrative action”.

Another characteristic of administrative law is that it regulates the legal relationship between the organs of state which, and/or administrators who are in position of authority. Also individuals or groups in subordinate positions. (Known as “public law relationships”).

Conclusion: Administrative law regulates the administrative actions (activities) of national/provincial

- departments of basic education
- professional teaching organizations
- district offices
- schools and the relationships between them
- also the unequal relationships (like principal-educator and educator-learner relationship)

Administrative law in practice

As a classroom manager you must be able to 1. Recognize whether administrative law is involved in any given situation 2. Whether administrative action is involved. (Identify the characteristics common to administrative law when confronted with a particular set of facts.

Case study: Educator takes away students phone, because she did not complete her work and used phone in class. Parents were upset, because she walked home without phone in case of emergency.

Feedback

Are there legal relationships present in the scenario?

The law governs relationships between legal subjects. In this scenario there is a relationship between GG (learner) and Mr B (educator)

Is the relationship a public law relationship?

Mr B exercises public authoritative power over GG, which leaves GG in a subordinate position (The subordinate position could be a private individual or a juristic person).

‘Remember administrative law is a discipline within the “public law” branch of law’

The exercise of public power may affect the rights and interests of the subordinate party in the relationship – relationship of inequality/ vertical rel.

Typical of a vertical relationship is that the power of the body or person in authority to compel the other party to act in a specific way.

In this case study the subordinate person is unable to use her cellphone for a certain period of time.

Identify the administrative action in the scenario

Another characteristic of law is that it consists of all the rules that facilitate and regulate human action and interaction in a particular society. The “action” here refers to the conduct of the party who exercises authority over the other person.

The action in this scenario is Mr B (exercising public power) confiscating GG’s cellphone.

Was the action authorised by law?

(Was the person of authority allowed to act the way he did)

In the scenario, the educator confiscated GG’s cellphone and the educator derives his authority from his/her professional duties

(which are set out in “empowering legislation” such as Schools Act, in terms of which the Guidelines for Governing Bodies were compiled, the Employment of Educators Act 27 of 1998 to which the Personnel Administrative Measures was added as an addendum, and the SACE Code of Professional Ethics, as contained in the South African Council for Educators Act 31 of 2000.)

Did the action comply with the requirements of the law?

(Relates to the way or manner in which authority or power has been exercised). People in the position of authority are not allowed to abuse or exploit his or her power – the administrative law protects those who are vulnerable as a result of their subordinate position.

Public law involves the interests of the community.

All administrative actions by people exercising public power must be ‘lawful, reasonable and procedurally fair’

If not, how may the actions be corrected (controlled)?

The law provides protection against any possible harm that result from the exercise of power by someone in authority.

What can GG's parents' do to get her property back? Should they immediately approach the court of law and institute legal proceedings? The answer is no, the courts are the last resort.

Control

1. Internal –This is the administrative control (non-judicial) exercised not the education administrative itself (in the school or department). Less expensive method of control in which more senior official review the action. The SACE is an example of an internal controlling body, and this body has the power to investigate disputes and institute disciplinary action against educators. This means that channels for internal appeal have been established within the education structures themselves (eg. Department, governing body and school).

2. External –This is a judicial control exercised by the courts outside the education structure. Judicial control of administrative action is performed by the courts (the judiciary) and is therefore obviously of a judicial nature.

Identifying and defining administrative action

In administrative law the identification or recognition of any conduct as “administrative action” is of particular importance. The conduct of people in authority is referred to as “administrative action” and it is defined in Section 1 of the Promotion of Administrative Justice Act as any decision taken, or any failure to take a decision by

- a) An Organ of State when:
 - a. Exercising a power in terms of the Constitution or a provincial constitution or
 - b. Exercising public power or performing a public function in terms of any legislation or
- b) A natural or juristic person, when exercising a public power or performing a public function in terms of an empowering provision which adversely affects the rights of any person and which has a direct, external legal effect.

Schools perform administrative actions when “exercising a public power and performing a public function in terms of any legislation...”

Classroom managers, as natural persons, also perform administrative actions when exercising public power that adversely affects the rights of a learner and that has a direct, external legal effect.

Legal requirements for valid (just) administrative action

1. Constitutional requirements

Just administrative action

33 (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights.

Suppose a parent complains about you and the principal, without asking for your side of the story, takes it as a given that you are guilty and reprimands you. You allege unjust administrative action, your common law right or the Promotion of Administrative Justice Act? – You will rely on the Act.

Despite the commencement of the Promotion of Administrative Justice Act, Section 33 remains a free-standing constitutional right.

However according to Hoexter one can only rely directly on this right in exceptional cases such as:

- To challenge the validity of the Promotion of Administrative Justice Act itself.
- To challenge original legislation that is allegedly infringing on the right to administrative justice.
- To challenge an interpretation of a provision(s) of the Promotion of Administrative Justice Act as being inconsistent with Section 33 of the constitution.

You will not be able to rely directly on the common law administrative law because the underlying principles were subsumed by Section 33 of the constitution. Common law will only have direct application in instances where the Constitution or the Promotion of Administrative Justice Act does not apply; thus in cases of the exercise of private power.

Constitutional requirements for just administrative action.

- Lawful, the action must comply with all the requirements or prescripts of the law. These prescripts are found in the Constitution, case law and common law.
- Reasonable, the action must have a reasonable effect or result. This means that the discretion exercised by the person in authority and the decision taken by him must be correct, and also based on objective facts and circumstances.
- Procedurally fair, the correct procedure must be followed by the person in authority in taking a decision. This means that the subordinate party must be given the opportunity

to defend his or her position or present their side of the story before decisions are made, and the person of authority must act impartially in exercising their power.

Page 229 at the bottom is repetitive. Please read if you need more explanation on how GG's rights were adversely affected.

2. Legislative requirements for valid administrative action

The legislature has been instructed to give effect to the constitutional provisions by means of enacting national legislation. 2 such examples:

- The Promotion of Administrative Justice Act 3 of 2000
- The Promotion of Access to Information Act 2 of 2000

The Promotion of Administrative Justice Act 3 of 2000

This Act gives effect to the right to just administrative action. It sets out the requirements for procedurally fair administrative action in Section 3 and 4 respectively. The Act also provides for written reasons to be requested when a person has been adversely affected by any decision.

Section 3 deals with the procedural fairness of administrative actions. In terms of Section 3 (2)(b), it is required of the administrator that he/she:

- Must inform the learner in good time of the nature and purpose of the proposed administrative action
- Must give the learner reasonable opportunity to make representations
- Must give the learner a clear statement of the administrative action (what kind of action will be taken)
- Must give the learner adequate notice of any right or review or internal appeal (if applicable)
- Must give the learner adequate notice of the right to request written reasons in terms of Section 5.

Section 3(3) provides the administrator with discretion to either allow or disallow a person the opportunity to;

- Obtain assistance and in serious cases, legal assistance
- Present and dispute info and arguments
- Appear in person

Grounds of review in terms of the promotion of administrative justice act

Another feature of the Promotion of Administrative Justice Act is that it provides for the review of administrative action (Section 6). If these requirements have not been met, a court or tribunal can be approached to review the action, the grounds of review include:

- The administrator was
 - o Not authorised to take such administrative action
 - o Biased or can reasonably be suspected of being abused
- Prescribed procedures or conditions were not complied with
- The action was procedurally unfair
- The action was:
 - o Taken for an unauthorised reason
 - o Taken for an ulterior purpose or motive
 - o Taken because irrelevant considerations were taken into account or because relevant considerations were not taken into account
 - o Influenced by the unwarranted or unauthorised dictates of another person or body
 - o Taken in bad faith/ arbitrarily/ unconstitutional or unlawful

The Promotion of Access to information Act 2 of 2000

Parents, educators and learners can use this Act to access information held by the national Department of Basic Education, governing bodies or any organ of state related to education to protect and exercise their rights, interests and privileges in the education environment.

3. Common law requirements for valid administrative action

(Common law comprises legal rules that are not enacted by the legislature but that have, over time become accepted as the underlying basic laws of society)

Overarching requirements for valid administrative action

In common law the requirements are contained in the requirements that administrative action must be in *intra vires* (within the power of or conferred by law). *Ultra vires* and *administrator must apply his/her mind* to the matter.

The common law requirements to act *intra vires* and not *ultra vires*

Ultra vires literally means “beyond the power”. An action that is considered *ultra vires* is when a person has exceeded his/her authority or acted beyond the power granted to him/her.

- The administrator must exercise their powers for an authorised purpose.
- The administrator must exercise their powers using authorised procedures

The common law requirements that the administrator must apply his or her mind to the matter

Administrative action must be performed in good faith, which relates to the subjective state of mind of the person or body taking the action. Bad faith refers to some measure of dishonesty and, in a looser sense, to a failure to apply the mind. (For more info Pg234).

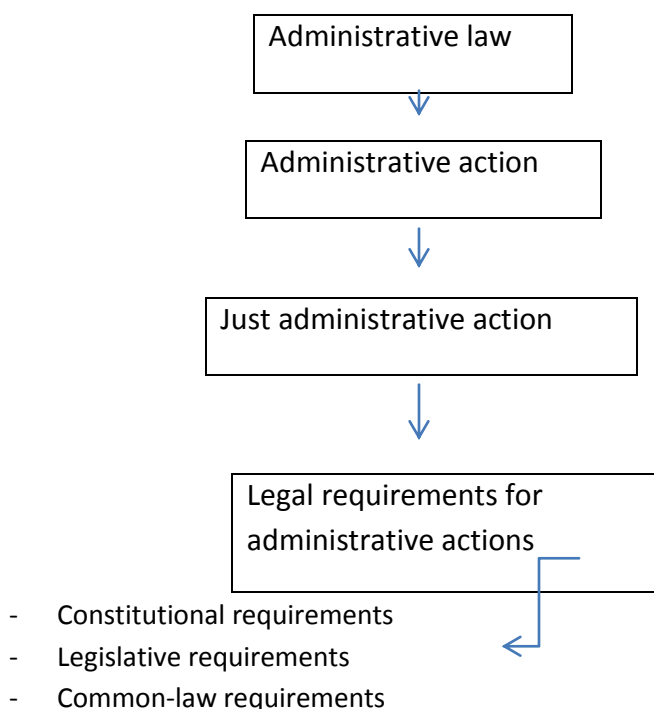
Common law requirements for procedurally fair administrative action

The common law requirements for procedural fairness are contained in the rules of natural justice and are based on the following to principles:

- The *audi alteram partem* (to hear the other side)
 - A person must be given an opportunity to be heard on the matter
 - Such a person must be informed about the considerations against him/her.
 - Reasons must be given by the administrator for any decision taken
- The *nemo iudex in sua causa* (no one may be the judge in his or her own case – the rule against bias or partiality).
 - The administrative body must be impartial and free from bias.

Ex. If governing body suspends a learner and the learner lodges an appeal against the decision, the governing body may not hear the appeal. A separate independent body should hear the appeal.

Education law provisions regulating classroom administration



CHAPTER 13: EDUCATION LAW PROVISIONS REGULATING LEARNER DISCIPLINE

Classroom management and discipline

The classroom educator has the obligation to establish a disciplined and purposeful classroom that will facilitate constructive teaching and learning. The following are the requirements by the *guidelines for the consideration of governing bodies in adopting a code of conduct for learners*:

- The emphasis must be on teaching and learning leading to **self-discipline**
- The disciplinary process must be **fair and educative**
- Learners should **be protected** against abuse
- The authority to discipline **may not be delegated to fellow learners**

Difference between discipline and punishment

- Discipline is **intrinsic**, punishment is **external**
- Discipline is **educative**, punishment is **punitive**
- Discipline is for the sake of **self-actualization**, punishment is the exercise of control for **compliance**

Responsibilities of classroom managers

As organs of state, schools are bound by international law to **promote human rights**. Since educators fulfill their functions in the name of the school, they are bound by the constitution to **promote the bill of rights**.

The process of establishing positive discipline consists of the following interrelated steps:

- **Distinguish** between discipline and punishment
- Focus on **relationships**
- Create a **supportive** learning environment
- Apply **constructive ways to respond to misbehavior**

The DOE suggests educators adopt a proactive approach by:

- Preparing for lessons
- Exercising self-discipline
- Ensuring learners are stimulated

Every classroom manager should adopt classroom rules. In terms of *guidelines for the consideration of governing bodies in adopting a code of conduct for learners*:

- **Learners must be involved** in formulating rules
- Rules must be consistent with the **code of conduct**
- Rules must be **clear**
- **The consequences** of breaking rules should be indicated

In addition, classroom rules should meet various **legal requirements**:

- **Constitution requirements** must be taken into account
- **Statutory requirements** must be taken into account
- **Common law** requirements must be taken into account
- **Existing rules** must be taken into account
- Rules should not prescribe the **impossible**

Categories of rules:

- Rules regarding learner behavior
- Rules on school work
- Rules regarding safety

Scope of disciplinary power

Disciplinary power is **vested in parents, principals and educators**. Disciplinary powers are usually derived from common law and especially from the ***in loco parentis***(**in the place of the parent**) principle. This principle does not imply that the parent is replaced, the parent merely delegates authority. The powers of parents and educators to discipline children are **restricted by law**.

Punishment

Punishment is **not forbidden**.

Education law sources regulating punishment

- The constitution
- Legislation (the schools act)
- Common law
- Case law

Types of punishment and legal implications

It is important that punishment methods are **fair and do not infringe on the learners constitutional rights**. Types of punishment with legal implications are:

- Minor sanctions
- Corporal punishment
- Detention

Minor sanctions (failure to be at class on time, **bunking**, dishonesty)

- ✓ A verbal warning
- ✓ A reprimanding look
- ✓ Withdrawal of privileges

Sanctions for level 2 misconduct (if the learner repeats level 1, **smoking**, disrespect)

- ✓ A disciplinary talk with the learner
- ✓ Talks with parents
- ✓ Written warnings

Sanctions for level 3 misconduct (**gambling**, theft, cheating, inflicting injury to another)

- ✓ A written warning that the learner may be suspended
- ✓ Referral to a social worker
- ✓ Community service (requires HOD approval)

Level 4 and 5 misconduct are carried out by the principal and governing body.

Corporal punishment

Corporal punishment is **outlawed** in South Africa. According to section 10(1) of the schools act, no person may administer corporal punishment at a school to a learner. **Parents may not give educators permission** to use corporal punishment. Section 12 of the constitution states that everyone has the right not to be punished or treated in a cruel way. Anyone who uses corporal punishment **may be charged with assault**. The principal's discretionary powers do not extend to making a decision to use corporal punishment.

Detention

Detention is commonly used as an **alternative to corporal punishment**. Imposing detention must be done in a **fair and reasonable** way and should be guided by common sense.

Some of the common factors to bear in mind are:

- ❖ The level of the misconduct
- ❖ The age of the learner
- ❖ The distance the learner has to travel home
- ❖ Availability of transport

Educators should give learners and parents **fair warning – in writing**. Details about how discipline is used should be in the Code of Conduct and be **made known to all learners and parents**.

EDLHODM Exam prep - Summary Chapter 14 – Education law provisions regulating learner safety

Introduction

- Many learners in South Africa experience cases of violence, HIV and Aids, drugs and unsafe situations such as negligence and sexual misconduct from classroom managers.
- An important responsibility of the classroom manager is the supervision and care of learners while they are in the classroom.
- Classrooms must be managed in line with the schools safely plans and programmes.

The law of delict and safety in classrooms

- The law of delict = section of private law
- Deals with civil wrongs against another person – the injured party goes to court to seek compensation from the damages of the wrongdoers.
- Different types of delict = defamation, assault and invasion of privacy.

An educator or learner can only be held delictually liable if their conduct meets certain requirements for delictual liability such as:

1. One person (eg: the educator) has caused harm or damage to another person. The conduct (act) must be voluntary human act and may be positive (doing something) or omission (failure to do something).
2. The act that causes harm must be wrongful (i.e. it must be legally unreasonable in terms of legal convictions of the community). The *boni mores* principle is applied to test for unlawfulness and the test is to see whether the harm was unjustified or not. If there is an absence of wrongfulness, the defendant will not be held liable.
3. The act must be the result of fault in form of intent (*dolus*) or negligence (*culpa*). 'Fault' is the blameworthy attitude of someone who has acted wrongfully.
4. There must be a causal link between the conduct of the wrongdoer and the harmed victim. Therefore, it must be proven that the victim's injury was caused by the person being charged with negligence - relationship between the act and the injury.

5. A delict is a wrongful act which has harmful consequences therefore there must be a link between the negligent conduct and injury (physical or mental). It must be proven that damage occurred.

Negligence

> Negligence = failure to exercise the necessary degree of care for the safety and well-being of others.

> occurs as a result of a failure to act when there is a duty or occurs as a result of acting in an improper manner.

A classroom manager can be found guilty if he or she:

1. Fails to provide proper supervision
 2. Fails to aid the injured or ill
 3. Allows learners to play unsafe games
 4. Fails to provide adequate instructions
 5. Takes unreasonable risks
- The *reasonable person test* tests for negligence. ->the objective is to test if the person acted carelessly.
 - The 'reasonable person' is known as the *bonus paterfamilias* or the *diligens paterfamilias*.-> it is a concept created by the law in order to have a workable, objective norm for conduct in society. The reasonable person is an average person.
 - The defendant is judged to have been negligent if they act differently to how they usually act.
-
- **Two concepts are taken into consideration to determine negligence: reasonable foreseeability and reasonable preventability.**

For the purpose of liability, acts of negligence (culpa) arise if:

1. A *diligens paterfamilias* (care as the parent would) in the position of the defendant –
 - a. Would foresee the reasonable possibility of his conduct injuring another person or property and causing him patrimonial loss OR
 - b. Would take the necessary steps to guard against such occurrence.
 2. The defendant failed to take such steps.
- A reasonable expert is like a reasonable person but with an added relevant expertise.

- It is important to note that the standard of a reasonableness expected of an educator is different to the standard of reasonableness expected of a principal.
- The *in loco parentis* principle is to blame for the confusion of the standard of the 'reasonable parent' as it is used to determine the delictual negligence of educators.
- The standard of care for children exercised by parents is not appropriate for determining the possible negligence of educators. → the correct standard of care is that of the 'reasonable educator'.
- Classroom educators are not only acting in the place of parents but also in their own professional capacity.
- In the past, educators were expected to do what the reasonable parents might do in certain circumstances.
- The *duty of care doctrine* states that before applying the reasonable person test, the court has to establish if the defendant owes a duty of care. If there is no duty of care owed, there cannot be negligence.
- **Foreseeability = foresee potential dangers. We must test to see if the outcome was actually foreseeable.**
- **Preventability = did the individual act in a reasonable manner, did they take all the necessary steps to prevent accidents/injury.**
Consider the nature and extent of the risk and damage incurred.

Certain factors need to be taken into consideration when deciding if the educator has acted in accordance with the standards of the reasonable educator:

1. Whether the educator works with things that are dangerous eg: woodwork or dangerous machinery.
2. Whether the educator deals with individuals who have some form of disability or incapacity. Greater care must be taken when teaching small children.
3. Whether there was a situation of sudden emergency. The doctrine of 'sudden emergency' will apply where one will make different judgements when in an emergency situation.
4. Whether the educator has relied on another person to act in a reasonable manner.

Contributory fault

- Determines the extent of the defendant's liability and takes two forms: contributory intent and contributory negligence.

The following exist if:

1. The defendant intentionally caused harm to the learner: the defendant will not be able to rely on contributory negligence.
2. There was contributory intent on the part of the learner but only negligence on the part of the defendant: the learner has no claim. I.e. if the learner fails to demonstrate the degree of care usually expected of a person of that age, knowledge and experience. Should this be the case, the defendant (educator) will not be held solely liable. *this is more applicable for older learners*

HIV and Aids and safe classrooms

General guidelines for classroom managers

- Classroom managers should ensure that the *National Policy for learners with HIV/Aids, for learners and public schools, and students and educators in Further Education and Training Institutions* is addressed in the classroom rules.

Classroom managers should take note of the following:

1. If any information has been given to the classroom manager about a learner with HIV or Aids, it must be kept confidential. No learner is obligated to state whether or not they have HIV or Aids.
2. Information about a learner with HIV or Aids may only be disclosed with the consent of:
 - a. The child, who is older than 12 (or if the child is younger than 12 but mature enough to understand the implications of disclosure.)
 - b. The parent or caregiver if the child is under 12.
 - c. The designated child protection organisation arranging placement of the child if the child is under 12.
 - d. The superintendent or person in charge of a hospital if the child is under 12.
 - e. A children's court, if consent is unreasonable withheld or the parent or caregiver is incapable of giving consent.
3. A learner with HIV or Aids should lead as full of a life as possible and should not be denied a quality education.
4. The risk of contracting HIV within the context of sexual relations is significant. Educators are not permitted to have sexual relations with learners. (If this happens, the matter must be handled in terms of the Employment of Educators Act).
5. An educator may not discriminate unfairly against any learners with HIV or Aids. They should also not make speculations of who they suspect may have HIV or Aids. Different treatment of learners with HIV or Aids must be fair and justifiable.

6. The classroom manager must ensure that there is always a pair of latex or rubber gloves available in the classroom and that learners know where the first-aid kits are stored.
7. The classroom rules should include provisions regarding the unacceptability of behaviour that may create the risk of HIV transmission. This should be in line with the schools Code of Conduct.
8. Classroom rules should include clear and understood procedures for dealing with any incident where there are open wounds, sores, breaks in the skin, grazes and open skin lesions.

Testing

If the classroom manager has contracted HIV and is convinced that they contracted it during an incident where a learner was injured, they can ask the learner to be tested for HIV. HOWEVER, the test must be authorised by a court.

No child may be tested for HIV except when:

1. It is in the best interest of the child
2. A health worker or any other person may have contracted HIV due to contact with any substance from the child's body that may transmit HIV.

Universal infection control measures

Because of the right to privacy and confidentiality, a classroom manager can only ensure adequate protection by implementing universal infection control measures. These precautions need to be applied in all situations that involve blood and bodily fluids.

The universal precautions involve the following:

1. It should be assumed that all persons are potentially infected and all blood, open wounds, sores, breaks in the skin, grazes and open skin lesions, as well as bodily fluids should be treated as potentially infectious.
2. All open wounds, sores, breaks in the skin, grazes and open skin lesions should be completely and securely covered with a non-porous or water-proof dressing or plaster.
3. Cleansing and washing should always be done under running water and not in containers of water.
4. All persons attending to blood spills, open wounds, sores, breaks in the skin, grazes and open skin lesions, bodily fluids and excretions, should wear protective latex gloves or plastic bags on the hands.

5. If a surface has been contaminated with bodily fluids and excretions that could be contaminated with blood, that surface should be cleaned with running water and fresh, clean household bleach and paper towels or disposable cloths.
6. Blood-contaminated material should be sealed in a plastic bag and incinerated or sent to an appropriate disposable firm.
7. If instruments (eg: scissors) become contaminated with blood or other bodily fluids, they should be washed and placed in a strong household bleach solution for at least an hour before use.
8. Needles and syringes should not be reused, but should be safely disposed of.

Drug-free classrooms

- There is a serious drug problem growing in South African schools.
- There is an increase in binge drinking and dagga use amongst learners as well as an increase of drugs on school premises.

Education law sources regulating searches and seizures in schools

- When cognisance is taken of the right of learners to human dignity, and their right to privacy, educators are not authorised to conduct searches or confiscate property belonging to learners.
- However, certain Acts authorise searches and seizures in schools. These legal instruments differ in respect to the type of search authorised, the person authorised to conduct the searches and seizures, and the requirements to be met before a search or seizure could be regarded as lawful.

Random vs individual searches

- There are many inconsistencies with regard to the type of search that is permissible under the different legal instruments (individual vs random).
- The Schools Act grants a principal the power to conduct random searches and seizures however, the *National Policy on the Management of Drug Abuse by Learners in Public and Independent Schools and Further Education and Training Institutions* prohibits random searches of individuals.
- The *Regulations for Safety Measures*, the *Regulations to Prohibit Initiation Practices* and the *Guidelines for the consideration of governing bodies in adopting a code of conduct for learners* – only authorise searches of individuals but do not address random searches.

Persons authorised to conduct searches and seizures

- The Schools Act authorises the principal to conduct random searches of a group of learners or the property of a group of learners.
- When body searches are done, the person conducting the search must be of the same gender as the learner being searched.
- Police officials may conduct warrantless searches in terms of the *Regulations for Safety Measures* or in the absence of such police official, the principal or his/her delegate may conduct a search. *the delegate is likely to be a senior educator and not just any educator*

The following definitions are essential when dealing with conduct searches:

1. A **dangerous object** means any explosive material or device, any firearm or gas weapon, any article, object or instrument that may cause bodily harm to a person or damage property, or to make a person temporarily paralysed or unconscious, or any object that the Minister of Education may, by notice in the *Gazette*, declare to be a dangerous object for the purpose of this Act.
2. **Illegal drug** means any unlawful substance that has a psychological or physiological effect; or any substance having such effect that is possessed unlawfully.
3. Any official educational, cultural, recreational or social activity of the school within or outside the school premises is regarded as a **school activity**.

Requirements for lawful searches

- Reasonable suspicion required when **random searches** are conducted differs from the reasonable suspicion required when **individual searches** are conducted.
- All legal instruments except the Schools Act require “individualised suspicion”.
- The Schools Act requires “fair and reasonable suspicion” before a *random search* may be conducted.
- Before an individual learner is searched, the person conducting the search must be able to justify acting on a reasonable suspicion. The person must be able to prove a connection between the:
 1. Particular learner and the transgression the learner is suspected of
 2. Particular object sought and the transgression
 3. Particular object and the place searched
- This is called the *nexus requirement*.
- This requirement rules out the possibility of legally valid mass or random searches.
- It is impossible to prove that there is a direct connection between the suspicion and individual learners in the group searched.

- The provisions for searches and seizures should be read together with the limitation clause because they presume curtailment or restriction of a learners right to human dignity and privacy in certain circumstances.

Before a search is conducted, a principal (or his delegate) must take the following factors into account:

1. The best interests of the learners to be searched, as well as the best interests of the other learners at the school.
 2. The safety and health of the learners to be searched, as well as the safety and health of the other learners at the school.
 3. Reasonable evidence of illegal activity.
 4. All relevant evidence received.
-
- The Schools Act requires that the search be conducted in a manner that is reasonable and proportional to the suspected illegal activity.
 - Only the Schools Act makes specific mention of body searches. The following requirements must be met:
 1. If the principal is of the same gender as the learner, he/she must conduct the search.
 2. If the principal is not of the same gender as the learner, he/she must delegate the task to a delegate of the same gender as the learner.
 3. The search must be conducted in a private area and not in view of another learner.
 4. One adult witness of the same gender as the learner must be present.
 5. The search may not extend to a search of a body cavity of the learner.

Requirements for lawful seizures

The Schools Act lays down the following requirements for seizures:

1. The item must be clearly labelled. Things that needs to be put on the label are: The name of the learner in whose possession the object or drugs was or were found, the time and the date of the search, an incident reference number, the name of the person who searched the learner, the name of the witness and any other information that may be necessary to identify the item or the incident.
2. The item must be recorded in the school record book.
3. The item must then be handed over to the police. The police must dispose of the item in terms of the Criminal Procedure Act 51 of 1977. If the police cannot immediately collect the item, the principal must take the item to the nearest police station.
4. The police must issue a receipt for the item.

- The Schools Act disallows the institution of criminal proceedings by the school against a learner in whose possession a dangerous object or illegal drugs were found.
- Only disciplinary proceedings may be instituted.
- Searches and seizures on school premises by police officials and the institution of criminal proceedings by the police are not prohibited merely because they are not expressly provided for in the Schools Act.

Guidelines for searches and seizures in schools

The following guidelines give a good indication of how to go about conducting a search:

1. The learner being searched should be informed of the educators intention to conduct a search as well as the purpose of the search and the alleged transgression of which the learner will be guilty should the suspected evidence be found. This information session should be brief and factual. A standardised form should be compiled to record such information.
2. The classroom manager should avoid infringing the learners right to privacy by naming the item sought and giving the learner the opportunity to hand over the object voluntarily or to indicate where it is located.
3. Begin the search by first searching areas or containers that are most likely to contain the item sought.
4. The search should take place in the presence of the learners concerned, a person of the learner's choice and a second witness.
5. Avoid damaging property at all costs.
6. The search should not be prolonged.
7. Body searches should be avoided, but if one is absolutely unavoidable, the classroom manager conducting the search must be of the same gender as the learner being searched.
8. Before commencing a body search or making physical contact, assess whether the level of intrusion correlates with the item sought. Eg: if you are searching for a weapon, the level of intrusion may be regarded as reasonable as opposed to the level of intrusion when searching for stolen money.
9. Always do a visual inspection before proceeding with a body search.
10. It is recommended that the class rules on searches should be in line with the schools safety programmes, which should be compiled with input from and the support of a variety of public and private agencies.

Chapter 15: Education law provisions regulating the employment of the classroom manager

The employment of the classroom manager is regulated by general labour relations legislation such as the Labour Relations Act 66 of 1995 (hereafter referred to as the Labour Relations Act) and also by labour relations legislation that only applies to education, namely the Employment of Educators Act.

The Labour Relations Act 66 of 1995 on strikes and lockouts (Chapter 4, Sections 64–68)

- The term *strike* can be defined as ‘the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to the term *work* in this definition includes overtime work, whether or not it is voluntary or compulsory’.
- The term *lockout* can be defined as ‘the exclusion by an employer of the employees from the employer’s workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees’ contracts of employment in the course of or for the purpose of that exclusion’ (see Section 213 of the Labour Relations Act).

The Labour Relations Act 66 of 1995 on dismissal (Chapter VIII, Sections 185–197) and the Code of Good Practice (Appendix 8)

Dismissal means that:

- 1) An employer terminated a contract of employment with or without notice.

- 2) An employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms, but the employer offered to renew it on less favourable terms, or did not renew it.
- 3) An employer refused to allow an employee to resume work after she:
 - a) took maternity leave in terms of any law, collective agreement or her contract of employment, or
 - b) was absent from work for up to four weeks before the expected date and up to eight weeks after the actual date of the birth of her child.
- 4) An employer who dismissed a number of employees for the same or similar reasons offered to re-employ one or more of those employees but refused to re-employ another.
- 5) An employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.

The Labour Relations Act sets out specific reasons for dismissal which cannot be accepted.

The following are examples of reasons for a dismissal which automatically make a dismissal unfair.

- The employee took part in union activities.
- The employee took part in a protected strike or protest action.
- The employee refused to do the work of someone who was on strike.
- The employee was pregnant (or any reason related to pregnancy).
- The employer unfairly discriminated against an employee on arbitrary grounds such as race, age, religion, sex, gender, sexual orientation or family responsibilities.
- The employee was forced to accept a change in working conditions (Department of Labour 1996: 8).

However, in the following two instances an employer may retire an employee if:

- the employee has reached the normal or agreed retirement age
- the reason for dismissal is based on an inherent requirement of the job (for example, in a Catholic diocese, the religious practice of the bishop's secretary is closely related to the nature of the job; if the secretary abandons the religious faith or changes to another faith, this may be grounds for dismissal) (Department of Labour 1996: 8).

In the Code of Good Practice (Appendix 8) three kinds of fair dismissal are discussed.

These are dismissals for the following reasons:

MISCONDUCT

This means that an employee has done something unacceptable. For misconduct, note the following:

- All employers must establish disciplinary rules that stipulate the required behavioural norms for their employees.
- When necessary, employers must attempt to rectify the behaviour of employees.
- Dismissal should only occur in the case of serious or repeated misconduct.
- Examples of serious misbehaviour are gross dishonesty or malicious damage of the employer's property, deliberate threat to the safety of another person, physical attack on the employer, a co-worker, client or customer and gross insubordination.
- When a decision to dismiss is made, factors such as the circumstances of the employee, the nature of the work and the circumstances surrounding the offence must be taken into account.

INCAPACITY

This means that an employee is too ill or too injured to work or does the work poorly. For incapacity, note the following:

Poor health or injury

- When an employee is temporarily not able to work, the nature of the work, the period of absence, the seriousness of the illness or injury and the possibility of getting a temporary substitute for the ill or injured employee are taken into account as relevant factors. In cases of permanent unfitness for work, the employer must investigate the possibility of alternative employment, or the adaptation of the employee's duties to accommodate the employee's disability.
- The nature and cause of the unfitness is relevant in determining the fairness of any dismissal.
- Consideration must be given to employees who have been injured at work or have contracted work-related illnesses.
- Certain guidelines must be observed by the person who decides whether a dismissal due to poor health or injury is unfair.

Poor performance

- An employee can be appointed for a reasonable trial period, but the work circumstances must be taken into account.
- After the trial period the employee may under certain circumstances be discharged because of poor performance.

- Certain guidelines exist to determine whether dismissal because of poor performance is unfair.

OPERATIONAL REASONS

This means that the employer needs to cut back on staff for economic reasons or no longer needs the type of work performed by certain employees – usually called retrenchment.

Note what the Labour Relations Act has to say about operational reasons:

- An employer must provide all the relevant information on the proposed retrenchments.
- An employer must pay a retrenched employee severance pay equal to at least one week's pay for every year of completed service.
- An employer must select the employees to be dismissed according to criteria agreed to by the consulting parties, or if there are no agreed criteria, according to criteria that are fair and objective (Department of Labour 1996: 9).

The Labour Relations Act sets out how consultation with regard to retrenchments should take place. The employer should try to reach an agreement on the following:

- Ways to avoid the retrenchments
- Ways to reduce the number of people retrenched
- Ways to limit the harsh effects of retrenchment
- The method for selecting the retrenched employees
- Severance pay (Department of Labour 1996: 9)

THE EMPLOYMENT OF EDUCATORS ACT 76 OF 1998

Termination of services (Chapter 4, Sections 10–16)

The services of educators may be terminated by the employer on the grounds of retirement, resignation and the discharge of educators.

The *retirement* of educators is addressed in Section 10. The normal mandatory retirement age is 65 years, but there are exceptions.

According to Section 15, an educator may *resign* by giving 90 days' notice in writing. A shorter period of notice may be approved by the employer at the request of the educator. The *Education Law and Policy Handbook* (Juta. 2007: 3A 12) mentions that a shorter period is possible under certain circumstances, for example when a replacement is already available and

the post can readily be filled or when the employee's appointment with a new employer may be jeopardised by the 90-day notice period.

An educator may be *discharged* from service by the employer (for an educator in the service of a provincial department, it is the HOD of that department)

- a) on account of ill-health in the circumstances referred to in Schedule 1 (Subsection 11(1)(a) was amended and Schedule 1 added by the Education Laws Amendment Act 53 of 2000)
- b) on account of the abolition of the educator's post or any reduction in, or reorganisation or readjustment of, the post establishments of departments, schools, institutions, offices or centres
- c) if, for reasons other than the educator's own unfitness or incapacity, the educator's discharge will promote efficiency or economy in the department, school, institution, office or centre in which the educator is employed, or will otherwise be in the interest of the state
- d) on account of unfitness for the duties attached to the educator's post or incapacity to carry out those duties effectively. In Section 16 (as amended by Section 9 of the Education Laws Amendment Act 53 of 2000) it is stipulated that if it is alleged that an educator is unfit for the duties attached to the educator's post or is incapable of carrying out these duties efficiently, the employer must assess the capacity of the educator and may take action against the educator in accordance with the incapacity code and procedures for poor work performance as provided in Schedule 1
- e) on account of misconduct
- f) if the educator was appointed in the post in question on the grounds of misrepresentation made by the educator relating to any condition of appointment. The educator in such a case will be deemed to have been discharged on account of misconduct
- g) if, in the case of an educator who is appointed on probation, the appointment is not confirmed. An educator who is appointed in a permanent capacity is also deemed to be discharged if
 - a) he or she is absent from work for a period exceeding 14 *consecutive* days without permission
 - b) he or she assumes employment in another position while absent from work without permission
 - c) he or she assumes other employment or resigns while suspended from duty
 - d) he or she assumes other employment or resigns while disciplinary steps against him or her have not been disposed of.

Misconduct

Defining misconduct

In Section 17(1) (as amended by Section 10 of the Education Laws Amendment Act 53 of 2000) it is stipulated that an educator must be dismissed if he or she is found guilty of serious misconduct such as:

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

The procedure to be followed if it is alleged that an educator committed serious misconduct is set out in Schedule 2.

Misconduct is defined in Section 18as 'a breakdown in the employment relationship'.

An educator commits misconduct if he or she:

- a) fails to comply with or contravenes this Act or any other statute, regulation or legal obligation relating to education and the employment relationship
- b) wilfully or negligently mismanages the finances of the state, a school or an adult learning centre
- c) without permission possesses or wrongfully uses the property of the state, a school or an adult learning centre, another employee or a visitor
- d) wilfully, intentionally or negligently damages or causes loss to the property of the state, a school or an adult learning centre
- e) in the course of duty endangers the lives of himself/herself or others by disregarding set safety rule or regulations
- f) unjustifiably prejudices the administration, discipline or efficiency of the Department of Education, an office of the state or a school or an adult learning centre
- g) misuses his or her position in the Department of Education or a school or an adult learning centre to promote or prejudice the interests of any person

- 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
- i) fails to carry out a lawful order or routine instruction without just or reasonable cause
- j) absents himself or herself from work without a valid reason or permission
- k) unfairly discriminates against other persons on the basis of race, gender, disability, pregnancy, marital status, ethnic and social origin, sexual orientation, age, disability (sic!), religion, conscience, belief, culture, language, birth, family responsibility, HIV status, political opinion or other grounds prohibited by the Constitution
- l) performs poorly or inadequately for reasons other than incapacity
- m) without the written approval of the employer, performs work for compensation for another person or organisation either during or outside working hours
- n) without prior permission of the employer accepts or demands in respect of the carrying out of, or 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
- o) without authorisation sleeps on duty
- p) while on duty is under the influence of an intoxicating, illegal, unauthorised or stupefying substance, including alcohol
- q) while on duty conducts himself or herself in an improper, disgraceful or unacceptable manner
- r) assaults, or attempts to assault or threatens to assault, another employee or another person
- s) incites other personnel to un procedural and unlawful conduct
- t) displays disrespect towards others in the workplace or demonstrates abusive or insolent behaviour
- u) intimidates or victimises fellow employees, learners or students
- v) prevents other employees from exercising their rights to freely associate with trade unions in terms of any labour legislation
- w) operates any money-lending scheme for employees for his or her own benefit during working hours or from the premises of the educational institution or office where he or she is employed
- x) carries or keeps firearms or other dangerous weapons on state premises without the written authorisation of the employer
- y) refuses to obey security regulations
- z) gives false statements or evidence in the execution of his or her duties.
- aa) falsifies records or any other documentation;
- bb) participates in unprocedural, unprotected or unlawful industrial action;

- cc) fails or refuses to – (i) follow a formal programme of counseling as contemplated in item 2(4) of Schedule 1; (ii) subject himself or herself to a medical examination as contemplated item 3(3) of Schedule 1 and in accordance with Section 7 of the Employment Equity Act, 1988 (Act 55 of 1998); or (iii) attend rehabilitation or follow a formal rehabilitation programme as contemplated in item 3(3) of Schedule 1;
- dd) commits a common law or statutory offence;
- ee) commits an act of dishonesty; or
- ff) victimises an employee for, amongst others, his or her association with a trade union.

Actions against educators found guilty of misconduct

If an educator is found guilty of misconduct the employer may take the following actions (South Africa 1998a: S 18(3)):

- a. Counselling
- b. A verbal warning
- c. A written warning
- d. A final written warning
- e. A fine not exceeding one month's salary
- f. Suspension without pay for a period not exceeding three months
- g. Demotion
- h. A combination of the sanctions referred to in paragraphs a) to f)
- i. Dismissal, if the nature and extent of the misconduct warrants dismissal

Education law provisions regulating employment of educators

