

EDUCATION LABOUR RELATIONS COUNCIL
Established in terms of the LRA of 1995 as amended



COLLECTIVE AGREEMENT 3 OF 2018

25 SEPTEMBER 2018

**PROVIDING FOR COMPULSORY INQUIRIES BY
ARBITRATORS IN CASES OF DISCIPLINARY ACTION
AGAINST EDUCATORS CHARGED WITH SEXUAL
MISCONDUCT IN RESPECT OF LEARNERS**

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H.C.M.

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**INQUIRIES BY ARBITRATORS IN CASES OF DISCIPLINARY ACTION AGAINST
 EDUCATORS CHARGED WITH SEXUAL MISCONDUCT IN RESPECT OF
 LEARNERS**

LEGAL FRAMEWORK

- The Constitution of the Republic of South Africa
- The Labour Relations Act No 66 of 1995
- Employment of Educators Act No 76 of 1998
- The South African Schools Act No 84 of 1996
- The South African Council for Educators Act No 31 of 2000
- ELRC constitution, 2016
- UN Convention on the Rights of the Child (CRC), 1995
- African Charter on the Rights and Welfare of the Child (ACRWC)
- Code of Professional Ethics for educators of the South African Council for Educators;

THE PARTIES NOTE AS FOLLOWS:

- Whereas the parties to this council are concerned that learners who are victims of alleged misconduct committed by educators, are often required to give the same evidence about the same events in several hearings in different forums exposing them to unnecessary mental trauma;
- Whereas section 28 of the Constitution provides that the best interests of children are of paramount importance in all matters concerning the child;
- Whereas section 188A of the Labour Relations Act provides for an enquiry by an arbitrator taking the place of an internal disciplinary enquiry;

NOW THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. SCOPE

This agreement applies to and binds:

- 1.1 The Employer, as defined in the Employment of Educators Act 76 of 1998 as amended;
- 1.2 The Trade Unions in the Education Sector; and

- 1.3 All employees of the employer as defined in the Employment of Educators Act 76 of 1998, whether such employees are members of trade union parties to this agreement or not.

2. DEFINITIONS AND INTERPRETATION

- 2.1 "**General Secretary**" means the General Secretary of the ELRC;
- 2.2 "**Dispute Resolution Procedures**" means the dispute resolution procedures of the ELRC as contained in Part C of the ELRC constitution of 2016;
- 2.3 "**Employer**" means employer as defined in the Employment of Educators Act, or any person with delegated authority from the employer to institute disciplinary proceedings against educators;
- 2.4 "**Learner**" means any person receiving education or obliged to receive education in terms of the South African Schools Act;
- 2.5 "**SACE**" means the South African Council for Educators, as intended in the South African Council for Educators Act, No 31 of 2000

3. REFERRAL OF DISPUTES AND APPOINTMENT OF ARBITRATORS

- 3.1 In all matters in which an employer wants to take disciplinary action against an educator for alleged sexual misconduct committed towards any learner, an inquiry by an arbitrator (also known as a disciplinary hearing in the form of an arbitration), as intended in section 188A of the Labour Relations Act, and clause 32 of the Dispute Resolution Procedures of the ELRC, shall be mandatory.
- 3.2 In all such matters, the employer shall initiate the disciplinary process by completing ELRC Form E12 and referring the matter to the ELRC in order for the General Secretary to convene a disciplinary inquiry in the form of an arbitration, which will take the place of the internal disciplinary enquiry.
- 3.3 The employer as referring party must:
- 3.3.1 Sign the referral form in accordance with clause 36 of the Dispute Resolution Procedures;
- 3.3.2 Attach to the referral form written proof, in accordance with clause 38 of the Dispute Resolution Procedures that the referral was served on the educator;
- 3.3.3 Attach to the referral form proof that the educator has been advised in writing of the allegations of misconduct against him or her, and, if applicable, the possibility of any mandatory sanction of dismissal that may be prescribed by law.

- 3.4 If sub-clause 3.3 of this agreement has been complied with, the provisions of clauses 17.2.1, 17.2.2, and 17.2.3 of the Dispute Resolution Procedures shall apply.
- 3.5 In appointing an arbitrator to preside over any inquiry in terms of this collective agreement, the General Secretary shall, with due regard to the age of the child who is the victim, and the nature and complexity of the charges against the educator, appoint an arbitrator who:
- 3.5.1 is competent to deal with the specific case;
 - 3.5.2 has sufficient experience in hearings involving minor children as witnesses and victims;
 - 3.5.3 has sufficient experience in evaluating and assessing the evidence of child witnesses;
 - 3.5.4 has sufficient knowledge of the legal principles relevant to the specific case;
 - 3.5.5 has sufficient experience in hearings in which intermediaries are used (if the matter is a case in which an intermediary may possibly be appointed);
 - 3.5.6 has sufficient experience in hearings involving charges of sexual misconduct against children.
- 3.6 An arbitrator should not accept an appointment as arbitrator in a case in terms of this collective agreement unless he or she has all the attributes listed in clause 3.5 hereof, having regard to the age of the child who is the victim and the nature of the charges against the educator.

4. PROCEDURES APPLICABLE TO INQUIRIES/ARBITRATIONS

- 4.1 Sections 138, 142 and 143 to 146 of the Labour Relations Act, with the necessary changes required by the context, apply to an inquiry in terms of this collective agreement. In the case of any conflict between the provisions of any section in the Labour Relations Act, and the Dispute Resolution Procedures, the relevant provision in the Dispute Resolution Procedures shall take preference.
- 4.2. The following provisions of the Dispute Resolution Procedures, with the necessary changes required by the context, apply to an inquiry in terms of this collective agreement:
- 4.2.1 Clause 12, read with clause 18.3;
 - 4.2.2 Clauses 17.3, 17.5, 17.6.2, 17.7;
 - 4.2.3 Clause 17.4, with the qualification that the educator may also be represented in the arbitration proceedings by a co-employee;
 - 4.2.4 Clauses 18.1, 18.2 and 18.5;
 - 4.2.5 Parts 11, 12 and 13
- 4.3 The General Secretary shall in every arbitration in terms of this collective agreement where a witness or witnesses under the biological or mental

age of eighteen years will testify, appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary and the arbitrator shall ensure that such witness (irrespective of whether the witness testifies on behalf of the employer party or the educator party), give his or her evidence through that intermediary. If however a witness under the biological age of eighteen years states that he or she prefers to give evidence without the assistance of an intermediary and the arbitrator is satisfied that the witness understands the implications of that decision, an arbitrator may direct that the witness need not give evidence through an intermediary.

- 4.4 In respect of any witness under the biological or mental age of eighteen years, the arbitrator may (irrespective of whether or not that witness gives his or evidence through an intermediary), direct that the witness gives his or her evidence at any place which -
- 4.4.1 is informally arranged to put that witness at ease;
- 4.4.2 is arranged in a manner in which any person whose presence may upset that witness, is outside the sight or hearing of that witness (This may for example include, but is not limited to closed circuit television, similar electronic media, screens, one way mirrors);
- 4.5. Subject to the election of a witness not to make use of an intermediary as provided for in clause 4.3, any examination, cross-examination or re-examination of a witness in respect of whom an intermediary has been appointed, except examination by the arbitrator, must not take place in any manner other than through that intermediary. Such intermediary may, unless the arbitrator directs otherwise, convey the general purport of any question to the relevant witness in a way that is appropriate to the age or mental conditions of the witness.
- 4.6 The ELRC shall retain a panel of persons who, in the opinion of the General Secretary, are competent to act as intermediaries, having regard to their experience and qualifications. Persons on this panel may be, but need not be, intermediaries used by the Department of Justice. An arbitrator who appoints an intermediary, must appoint a person from this panel as intermediary.
- 4.7 An arbitrator may permit a witness under the biological or mental age of eighteen years to use anatomical dolls, puppets, drawings, mannequins, or any other demonstrative device that the arbitrator deems appropriate for the purpose of assisting the witness in testifying.
- 4.8 Where it appears to an arbitrator that a witness under the biological or mental age of eighteen years does not understand the nature of the oath, the arbitrator should not ask the witness to take the oath, but may nevertheless receive the evidence of such witness if the arbitrator is satisfied that:

- 4.8.1 the witness is capable of giving an intelligible account of events;
and
 - 4.8.2 the witness understands the difference between the truth and lies,
as well as the importance of telling the truth.
- 4.9 In considering the evidence presented by the witnesses in these circumstances the provisions governing the law of evidence must be applied.
- 4.10 In addition to all the powers of arbitrators provided for in this collective agreement, an arbitrator shall have all the powers that arbitrators generally have to determine the procedures to be adopted during arbitration proceedings.

5 THE OUTCOME/JUDGEMENT/ARBITRATION AWARD

- 5.1 An arbitrator arbitrating a dispute in terms of this collective agreement must, in the light of the evidence presented, and with reference to the following, direct what action, if any shall be taken against the educator:
- 5.1.1 the concept of fairness as provided for in the Labour Relations Act, as interpreted by the Courts;
 - 5.1.2 the SACE Code of Professional Ethics for educators;
 - 5.1.3 the United Nations Convention on the Rights of the Child (CRC) in 1989;
 - 5.1.4 the African Charter on the Rights and Welfare of the Child;
 - 5.1.5 the best interests of the child as enshrined in section 28 of the Constitution of the Republic of South Africa;
 - 5.1.6 the sanctions provided for in the Employment of Educators Act, including the mandatory sanctions of dismissal prescribed for certain forms of misconduct by the Employment of Educators Act;
 - 5.1.7 any other relevant factor.
- 5.2 The judgement of an arbitrator in an inquiry in terms of this collective agreement shall be final and binding, and has the same status as an arbitration award under the Labour Relations Act. There shall be no appeal against such award, provided that any party to the dispute may exercise the right to have the award reviewed by the Labour Court as provided for in the Labour Relations Act.
- 5.3 The arbitrator shall not in his or her award disclose the name and surname of:
- 5.3.1 any witness who was under the biological or mental age of eighteen years at the time of giving evidence; or
 - 5.3.2 a victim who was under the biological or mental age of eighteen years at the time when misconduct (of which the educator was charged before the arbitrator) was committed against such victim;

5.4 Within 14 days after the award of the arbitrator has been served on the parties, the General Secretary shall send a copy of the award to SACE.

6 DISPUTE RESOLUTION PROCEDURE

6.1 Any dispute arising from the application or interpretation of this collective agreement shall be referred to the *Council* for resolution in terms of its dispute resolution procedures. However, should it during the course of an inquiry in terms of this collective agreement become necessary to interpret any provision of this collective agreement, the panellist appointed to preside over that inquiry, shall have jurisdiction to interpret this agreement.


7 DATE OF EFFECT

7.1 The provisions of this Collective Agreement shall take effect on the date of signing.

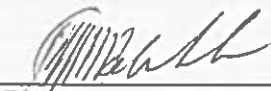
8 SIGNING OF THE COLLECTIVE AGREEMENT

Thus done and signed at Centurion on the 25 day
of September 2018

ON BEHALF OF THE STATE AS EMPLOYER

DEPARTMENT	NAME	SIGNATURE
BASIC EDUCATION	H.M. Mkhulu	

ON BEHALF OF THE EMPLOYEE PARTIES

TRADE UNION	NAME	SIGNATURE
SADTU	MUIGWENA MALULEKE	
CTU-ATU		

