

Promptness in Disciplinary Proceedings of Employees in one Department of Education in South Africa

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Abstract

Efficiency is one of the values and principles that appear in the Constitution. It is reflected in the legislative and policy framework that underpins how public services ought to be delivered. It requires that services be delivered effectively with due diligence to considerations of costs, time, and frugality. One of the enablers of efficiency is the promptness through which services should be delivered in the public sector. Promptness requires that services be delivered without unreasonable delay. Disciplinary proceedings in the public sector have the potential to hinder or enable the efficient delivery of diverse public services. This paper aims to investigate how the principle of promptness, as an aspect of efficiency, good, and just administration, is enacted in the disciplinary proceedings of the Department of Education in the Eastern Cape province of South Africa. Semi-structured and in-depth qualitative interviews were conducted. Policy documents and actual documents of the disciplinary cases were collected and analysed. The findings show that disciplinary proceedings of a complex nature and those involving senior officials are often protracted and fraught with delays that negatively impact the expected wheel of efficiency of the delivery of education services. The paper suggests what can be done to speed up disciplinary proceedings.

Keywords: Efficiency, promptness, disciplinary proceedings, public service, department of education

1. Introduction

Efficiency is one of the values and principles of public administration that the Constitution protects. It is reflected in the legislative and policy framework that underpins how public services ought to be delivered. Efficiency requires that public services be delivered effectively with due diligence to considerations of costs, time, and frugality. One of the enablers of efficiency is the promptness through which services should be delivered in the public sector. Promptness requires that services be delivered without unreasonable delay. Disciplinary proceedings in the public sector have the potential to hinder or enable the efficient delivery of diverse public services. This paper aims to investigate how the principle of promptness, as an aspect of efficiency, good, and just administration, is enacted in the disciplinary proceedings of the Department of Education in the Eastern Cape province of South Africa.

South Africa is a unitary state with nine provinces, giving it some federal features. The province of the Eastern Cape has a deep history of resistance against colonialist and apartheid systems. It is the home of legends like Nelson Mandela, Oliver Tambo, Robert Sobukwe, Steve Biko, and many others. It is largely rural with low socio-economic indicators compared to other provinces. There is one National Department of Basic Education and nine provincial Departments of Education. This paper is based on research conducted in the Eastern Cape Department of Education (ECDoE). The study focused on employees in the ECDoE who faced serious misconduct allegations that could lead to dismissal.

According to Grogan (2014), dismissals for misconduct form the majority of cases before the Commission for Conciliation Mediation and Arbitration (CCMA), bargaining councils, and the Labour Courts by way of review. In the education sector, when educators feel they are dismissed unfairly by education departments, they have a right to declare a dispute and refer it to an education bargaining council, the Education Labour Relations Council. In the past five financial years (2017/18 – 2021/22), 4986 disputes were referred to the Education Bargaining Council for reconciliation and/or arbitration; 29% (1436) were cases of alleged unfair dismissal. Unfair labour practices relating to unfair dismissal were second to those relating to promotion and appointments.

In the next section, I look at efficiency and promptness.

1.1 Efficiency and Promptness

Efficiency may have been borrowed from economics or business (Pops and Pavlak, 1991). It is now largely considered to be an influential traditional value of public administration (Frederickson, 1980; Henry, 1980; Lyster, 1999; Rosenbloom & Goldman, 1993; Rutgers & van der Meer, 2010). Wilson (1887, p. 197) observed that the purpose of public administration is “to discover, first, what government can properly and successfully do, and, secondly, how it can do these proper things with the utmost possible efficiency and at the least possible cost either of money or energy”. This means that efficiency has been with the government and the public service for a long time.

The word efficiency has many connotations. It “measures the degree to which an organization uses resources optimally to provide its services” (Szczepura, Davies & Fletcher, 1993, p. 39). Allocative efficiency describes the allocation of limited resources according to the needs of the consumers, while technical efficiency refers to the input and output relationship (Black, 2005, Calitz & Siebrits, 2005; Mann & Wüstemann). According to Cloete (1994: p. 82), efficiency in the public sector means “satisfying the most essential needs of the community to the greatest possible extent, in qualitative and quantitative terms using the limited resources that are available for this purpose”. Efficiency as a core value in public administration refers to a broad value spectrum: abilities to act, to act timely, knowledgeable, with integrity, and so on.” (Rutgers & van der Meer, 2010, p. 774).

Efficiency in public administration is associated with many benefits. It allows scarce resources to be used to achieve more public policy goals and enable the servicing of more citizens (Biloslavo, Bagnoli, & Figelj, 2012; Frederickson, 2010; Galligan, 1986; Pops and Pavlak, 1991). Technical efficiency may help the government provide more or better services without increasing taxes (Calitz & Siebrits, 2005). According to (Quinot, 2015), efficient public decision-making is an element of administrative justice that supports the social justice mandate of the public administration. Efficiency can limit public officials' unfettered discretion and arbitrariness (Galligan, 1986).

Promptness is an integral element of efficiency. According to Pops and Pavlak (1991), efficiency becomes prominent when the responsiveness or timeliness of the decision is an important concern. Efficiency is an important goal that requires public service programmes and policies to be implemented without delay (Lyster, 1999). Making timely decisions is an aspect of good governance (Azeez, 2009, p.218). According to Meier & Bohte (2007, p. 127), “When administering a policy, a bureau is expected to be timely in the disposition of cases; that is, it should act with all reasonable speed”. According to them, to do so is to be responsive because being timely is the expectation of the citizens. In doing so, public service will gain power through citizen support, a reputation for effectiveness, and legitimacy. According to Mladenov (2014), promptness is a legal procedure requiring observing time limits. The concept of reasonable time should be assessed in light of the circumstances of each case.

To this end, efficiency is one of the important values of public administration that is intractably linked with promptness.

1.2 The Constitution

According to Van Heerden (2009), public officials are part of the executive and are instrumental in exercising executive functions in public administration. He says that public officials in South Africa must perform public administration effectively and efficiently. Specific sections in the constitution that frame and support the efficiency and promptness of disciplinary proceedings. Section 23(1) of the *Constitution* states that “everyone has the right to fair labour practices.” The procedural element of fair labour practices implies that disciplinary proceedings should not be excessively delayed because delay can taint the

process's fairness with unreasonableness. Section 35(3)(d) states, "Every accused person has a right to a fair trial, which includes the right to have their trial begin and conclude without an unreasonable delay." The speedy conclusion of disciplinary proceedings is underlined in this provision. Although the provision seems to apply in the context of courts, it equally applies in disciplinary hearings and arbitrations because of its quasi-judicial nature. Moreover, some of the employee disciplinary disputes are reviewed by courts.

Section 195(1) of the *Constitution* states, "Public administration must be governed by the democratic values and principles enshrined in the Constitution". In section 195 (1)(b), public administration is required to promote efficient, economical, and effective use of resources. One of the powers and functions of the Public Service Commission is provided in section 196 (4) (d), which proposes measures for ensuring effective and efficient performance within the public service. A department of education in one province is part of public administration and must efficiently use resources, including time in disciplinary proceedings.

Section 237 of the *Constitution* states, "All constitutional obligations must be performed diligently and without delay". Constitutional obligations are not limited to the major organs of the state, such as the executive, the judiciary, and the legislature. A provincial education department has delegated executive functions for implementing legislation and policies. Furthermore, disciplinary proceedings invoke constitutionally protected rights, such as those of labour relations, administrative justice, and education. They are obligations that are protected in the Bill of Rights. Section 8(1) states that the "Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary, and all organs of state." Section 2 of the Constitution says the "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." In terms of section 7(2) "the state must respect, protect, promote and fulfill the rights in the Bill of Rights." Thus, it can be reasonably concluded that to delay disciplinary proceedings is to delay a constitutional obligation. To do so, it is to act contrary to the requirements of the Constitution.

The constitution has other sections which require public officials, presiding officers, and judges to observe international commitments. Section 39 states that when interpreting the Bill of Rights, a court, tribunal, or forum must consider international law. Section 233 allows courts to prefer an interpretation consistent with international law when interpreting legislation. One example of relevant international law is the *1982 ILO Convention on the Termination of Employment (No. 158)* binding in South Africa as of 5 March 1997. Article 8(3) says, "A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination." This suggests that disciplinary proceedings must be timely and efficient. Article 10 of the *ILO Termination of Employment Recommendation, 1982 (No. 166)*, the soft law of this convention, says, "The employer should be deemed to have waived his right to terminate the employment of a worker for misconduct if he has failed to do so within a reasonable period of time after he has knowledge of the misconduct." Again, the

provision of reasonable time in international law accords well with the promptness and efficiency expected in disciplinary proceedings.

1.3 Case Law

The principle of promptness in disciplinary proceedings of employees is well established in South African jurisprudence. One of the earliest judgments is the case of the *Union of Pretoria Municipal Workers and Another v Stadsraad van Pretoria (1992)*, where the Industrial Court ordered the employee to be re-instated because the municipal council delayed the commencement of the inquiry by one year and one month from the date of the alleged transgression. The council could not explain why there was a delay of six months after the conclusion of the criminal prosecution. The case asserted that disciplinary action must be prompt so that the employee can effectively present his/her case. A delay can result in an inadequate recall or unavailability of witnesses.

In the case between *Nell v Minister of Justice and Constitutional Development and Another (2006)*, the decision of the Director-General of the Department of Justice and Constitutional Development to dismiss Mr. Nell on grounds of misconduct was reviewed and set aside by the High Court (Transvaal Provincial Division). Judge Southwood reasoned that if, for six years, the Department could not provide Mr. Nell with the bundle of main evidence supporting the charge of misconduct, the conclusion is undisputed that the Department has no case. Six years is a very long time.

In another case, *Cassimjee v Minister of Finance (2012)*, Judge Boruchowitz of the Supreme Court of Appeals ruled that an excessive or unreasonable delay in prosecuting an action constitutes an abuse of process and warrants the dismissal of an action. In this case, there was a period of 20 years when no steps were taken by either party to advance the action. The court developed a test that should be applied for an action to be dismissed for want of prosecution. There must be a delay, the delay must be inexcusable, the defendant must be seriously prejudiced, and all relevant circumstances should be examined. This test would be instrumental in subsequent cases when dealing with unreasonable delay in disciplinary cases.

In *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal (2013)*, Judge Skweyiya, of the Constitutional Court found that a delay by three years and 20 months by the MEC in launching a review application was unreasonable, inexcusable, unexplained, and was far beyond six months which was found to be reasonable. The judge reasoned that substantial delay restricted the court's ability to accurately determine the decision's lawfulness because memories decline, and documents and evidence get lost. At the surface level, this may seem to apply in courts only. It is equally applicable in disciplinary proceedings if the prescripts applicable at the level are applied.

In the case of *Moroenyane v Station Commander of the South African Police Services, Vanderbijlpark (2016)*, Judge Snyman of the Labour Court dismissed an application by Mr. Moroenyane, who sought to interdict the respondent from proceeding with the disciplinary hearing. He argued that a lengthy delay should not lead to a finding of unreasonableness or unfairness. The test to be applied in disciplinary proceedings for a finding of an undue delay

is that the delay must be unreasonably long, be without an explanation, steps taken by the employee, material prejudice to the employee, the nature of the allegations, and all these factors considered holistically. The test's significance is that it was specifically crafted for disciplinary proceedings.

In *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape, and Others* (2019), Judge Petse of the Constitutional Court concluded that dismissing an employee was procedurally unfair owing to the extraordinary delays in instituting and concluding the disciplinary proceedings expeditiously. It took two years and eight months for the outcome of the appeal. This is one of the most relevant judgments. It is a judgment by the highest court in the land. It is a judgment against the ECDoE, which is the subject of the investigation of this paper. It confirms that efficiency, timeliness, and promptness strongly affect the procedural fairness of disciplinary proceedings.

I now turn to some of the key laws and policies that are critical in employee disciplinary proceedings.

1.4 Legislation & Policy

There are at least two pieces of legislation that may provide a guide to employee discipline in public service. It is the *Labour Relations Act, No. 66 of 1995*, as amended. It is the foundation law for all matters related to the discipline of employees in South Africa. It gives effect to section 23, the right to fair labour practices. It has a *Code of Good Practice: Dismissal*, which guides the procedures to be followed if proceedings may lead to dismissal. The other law is the *Promotion of Administrative Justice Act, No. 3 of 2000*. It is a law of general application. Its significance in disciplinary proceedings is that a decision to dismiss an employee may be construed as an administrative action that should be reasonable, lawful, and procedural fair. Both pieces of legislation may be used in a court of law to review and set aside impugned disciplinary decisions and their procedures.

The Eastern Cape Department of Education has three types of employees whose discipline is regulated by three prescripts. There are educators who are mainly in schools and others who are office-based. Their disciplinary proceedings are regulated by *Schedule 2: Disciplinary Code and Procedures for Educators*. It is promulgated in terms of the *Employment of Educators Act, No. 76 of 1998*, as amended. The second category of employees is public servants. Many of them are office-based, and others are in schools. Their discipline is controlled by the *Public Service Co-ordinating Bargaining Resolutions 1 of 2003 (PSCBC, 2003)*. The prescript is promulgated in terms of the *Public Service Act, No. 103 of 1994 (RSA, 1994)*. The third set of employees is the Senior Management Service. It is a group of public officials from the Director to the Head of Department. Their prescript is the *SMS Handbook* issued in terms of *Public Service Act No. 103 of 1994 as amended*.

Below I will flag sections and items from the prescripts that reinforce the promptness requirement in disciplinary proceedings. I will mainly cite from *Schedule 2: Disciplinary Code and Procedures for Educators* knowing that these are also similarly articulated in the other two prescripts.

In terms of Item 2(b), one of the principles underlying the Code is that discipline must be applied promptly. Employees must be timeously informed of allegations of misconduct (Item 2(d) (iii)). Disciplinary hearings must be concluded within the shortest possible time (Item 2)(g)). Employees must be given a notice of five working days before the hearing date (4 (1)). The disciplinary hearing must be held within ten days after the notice (Item 7(1)). In terms of Item 7.3(g) of *Resolution 1 of 2003*, a hearing may continue without the employee if there is no valid reason. In cases of serious misconduct, the employer may suspend the educator on full pay for a maximum period of three months (Item 6(1)). The employer must do everything possible to conclude a disciplinary hearing within one month of the suspension or transfer (Item 5 (3)). If an employee is suspended, the employer must do everything to conclude the disciplinary hearing within one month (60 days) of suspension. Further postponement by the presiding officer must not exceed 90 days (Item 5(3)(b)).

The employer must enquire about the reasons for the delay and give directors for a speedy conclusion of the proceedings (Item 5(3)(c)). The presiding officer must communicate the final outcome of the hearing to the employer and educator within five working days (Item 7(18)). The employee must submit an appeal to the executing authority within five days of receiving the notice of the final outcome (Item 9(2)(2)). In terms of Item 8.8 of *Resolution 1 of 2003*, departments must finalise appeals within 30 days, failing which, in cases where the employee is on precautionary suspension, they must resume duties immediately and await the outcome of the appeal while on duty. The employer must immediately implement the decision of the appeal authority (Item 9(6)(6)).

What is clear from the prescripts is that the principle of promptness is given effect in the form of timelines in different stages of the proceedings. For example, there must be no delays in charging the employee; the hearing must start not later than ten days after the notice has been issued; the precautionary suspension and disciplinary hearing must not exceed three months; the presiding office must pronounce the sanction within five days, the employee must appeal within five days, appeals must be finalised within 30 days. With all things equal, a serious case of transgression, for example, including full suspension, must have an outcome of appeal after five to six months. Generally, this means most disciplinary proceedings must be concluded in six months. The responsibility for ensuring promptness in disciplinary proceedings lies with the employer; thus, the employer should not be the author of the delay.

2. Research Methodology

The study was qualitative in nature. I used maximum variation sampling (Patton, 2015) to select documents from 15 disciplinary cases and 19 participants for semi-structured interviews. In all, 324 documents were collected from cases of absenteeism, insubordination, corporal punishment, fraud and dishonesty, sexual assault, sexual relationships, and financial mismanagement. Most of the cases had reached the appeal stage and arbitration level. The types of documents that were collected were investigation reports, notices of disciplinary hearings, suspension letters, appointment letters of the employer representative and presiding officer, a bundle of evidence, closing arguments, mitigation, aggravation, presiding officers'

reports, approval of sanction internal memos, finding and sanction letters, notices of appeal, the outcome of appeal letters, settlements agreement, and arbitration awards.

Out of the 19 participants that were interviewed, four of them had the experience of being subjected to disciplinary proceedings by the ECDoE. It was an official, a principal, a deputy principal, and a deputy director. Seven of the 19 participants had experience defending union members in disciplinary hearings and arbitration. It was an ECDoE labour relations office, a union executive office, a union attorney, a union paralegal office, a full-time union steward, a union organiser, and a union labour relations office.

Nine of the 19 participants had experience representing the employer in disciplinary hearings and arbitrations. They were three directors, a deputy director, a labour relations officer, a senior education specialist, a lawyer, and a labour relations officer. Eight of them had experience presiding over disciplinary hearings. There were three directors, a deputy director, two labour relations officers, a senior education specialist, and a lawyer.

It took six months to collect the data. All the interviews were recorded, transcribed, and read several times for patterns and themes. The transcripts that had a language other than English were translated into English. I used timelines to sequence events and dates in the collected documents. I used codes for cases and participants. I used what (Patton, 2015, p. 561) refers to as “abduction,” a type of qualitative analysis that combines deductive and inductive logic. It was deductive in that I had pre-set answers that I was looking to questions such as: are disciplinary proceedings completed within a reasonable time or stipulated frameworks? At the same, inductively, I was able to get reasons for the delay from other answers of the participants as they emerged from the data.

Ethical considerations were observed. Ethical clearance to conduct the study was obtained at the University of the Witwatersrand. The Eastern Cape Head of Department permitted to gain access. Consent and permission for all interviews and corresponding disciplinary documents were obtained.

3. Research Findings

The following are the findings from documents that were collected and interviews that were conducted. Six areas from the data illustrate how the principle of promptness is enacted in disciplinary proceedings in the Eastern Cape Department of Education. These are investigations, precautionary suspensions, disciplinary hearings, approval of the sanction, and appeal. I have selected those to report research findings.

3.1. Investigations

The promptness of disciplinary proceedings is affected by investigations that take a long time to complete. Investigations involving complicated and serious cases of fraud, corruption, sexual harassment, and underage learners take a long time. Some of these cases exceed thirty days to months, and they delayed the start of many disciplinary hearings. There were minor technicalities and procedures that impacted the pace of the investigations. A departmental

official conducting an investigation may not have a car on the planned day, sometimes arriving at a school without an appointment, and the teacher under investigation is not cooperating and would want to consult the union or legal representative. There are also instances where officials did not want to investigate others; instead, they dump cases in the labour relations office. The following are some of the illustrative quotes:

You know, it depends on what type of investigation you are doing. This thing of the sexual relationship with the learner, that type of investigation takes a very long time. You need to be sensitive, especially if it is an underage learner.

If there is still an investigation that is continuing that is not finalized, it takes too long. If it is the case, a fraudulent case, it is a complex matter; you take, you appoint people from outside, and it takes three months for them just to investigate that case.

... but your investigation exceeded the stipulated period. You suspend this person for investigation, 30 days lapse, then another 30 days lapse without any action, whereas the Resolution says after 30 days, there must be a hearing.

Yes, investigations may take a long period. For instance minor things like transport, it is not easy to go and make an investigation to get to that area because the labour relations officer is supposed to request a car from another section, and it depends on that section if cars are available on that date, you wanted the person to go there today, is only able after three days the person arrives without an appointment, the teacher is not there, is attending a workshop. So, there are a number of reasons. In other cases, a person says, I will not answer you; I have my union, please; if you want, I'll consult my union first. So, you cannot continue. Another one says, no, speak to my lawyer. So, you become frustrated as you are investigating the case.

The employer is responsible for conducting investigations. The investigations inhibit the timely start of disciplinary proceedings, especially when employees are suspended.

3.2. Precautionary suspensions

Evidence from the documents collected indicates that most employees who commit serious acts of misconduct are put on precautionary suspension. Most cases have letters of intention to suspend, followed by letters of precautionary suspension. There a very few cases that had letters lifting suspensions. From the records, it seems that lifting suspensions was not the norm. Most suspensions go beyond the stipulated time of three months to eight and 15 months. Some delays were caused by technicalities, such as corrections made to the letter lifting the suspension and technical assistance provided by lawyers to the department. The following quotes indicate that some suspensions are induced by media attention, continuing investigations hinder the start of the hearing, and some employees are suspended and not charged.

You get a headline today; a teacher is accused of raping schoolgirls. The immediate response you suspend the teacher while you are still going to do an investigation into the matter. I find that after six months; the teacher is on suspension. You are struggling to get into the investigation part of the process.

Now, you can go to 60 days ... a chairperson simply capitalising by saying the employee is suspended with full pay is not an issue. Is receiving a salary under duress, under

psychological torture because the public knows this person that every day woke up early to go to work, but ... the person is no longer...

So, when we talk about reasonable time, I think what you need to look at, you need to look at the circumstances of the different cases. I would say, firstly, you must comply with the rules when it relates to if you suspend a person, you must charge a person within a certain period of time. That disciplinary hearing must commence; by commence, I mean it must have its first sitting, whether that sitting results in a postponement or non-postponement or whatever the case might be, that can only be guided and dictated by the circumstances ... What we need to avoid when it comes to disciplinary processes, we need to avoid having a person on suspension and not charge him or having a person on suspension and charge him without a foreseeable date.

No, no, no. The answer is No there. Because the Code says you may suspend a person for 60 days, during those 60 days, that person shall have been tried and the case heard. You know why you charged the person ... you know why you are saying the person must be suspended; he has done ABC... the tendency of departments is that they go beyond 60 days to 600 days, and yet they continue to pay the person. It is wrong; it is wrong.

There may be instances where employees are suspended, not as a precautionary measure, but as a sanction intended to punish employees psychologically.

3.3. Disciplinary hearing/inquiry

The data from interviews and the documents collected indicate that most disciplinary hearings exceed the stipulated time of one month to conclude. They also go beyond three to eight months and even two years to complete. One of the reasons for the delay is the failure to charge, which is linked to suspension and sometimes not providing the evidence bundle on time.

You cannot take two years for a disciplinary hearing. For example, they wrote a suspension letter, and the date of suspension expired, and I went back to school for work. They came and took me out of the school. There was no hearing and no investigation.

They take extreme periods of time if you compare the public service and especially education to the private sector ... I just came from hearing yesterday where the incident is 11 months old and the process is day one to proceed with it.

They will send a charge sheet to an employee, but that sheet is supposed to be accompanied by evidence to support why we are charging you. Most of the time, they do not do that, and at the time of the hearing, the employee representative will want that information; these cases will drag, drag because we can't continue on that day if the other one said I don't have documents they will support it.

What causes you to fail to charge this person in 2015? What causes you to fail to charge this person at the beginning of 2016? Now it is towards the end of 2017 you charge that person ... this thing is no longer fresh in his or her mind; there's a time-lapse.

You know, the Act simply uses the word reasonable, and I think what always makes it difficult is when employees are complaining that the process that is dragging for too long or

perhaps misconduct happened last year and charges are brought in 12 months later. Now, you must argue whether it is reasonable, and it will depend on the person listening to it.

Another reason for the delay is the involvement of lawyers and the nature of the case. Some hearings are postponed because of an application and ruling on legal representation. Some participants indicated that senior managers involve lawyers who are there to delay the processes.

Well, again, you must make a distinction at what level it takes. It takes place at the normal level of your normal employees like teachers; we don't have much problems with the formal process. If there is serious misconduct, it can be handled very quickly because we try to keep lawyers of this business as much as possible. When lawyers get into the disciplinary process, they come into that process for one reason: to delay the proceedings, and the proof of this is when you go into your disciplinary hearings for your senior managers. We are now having a hearing that is in excess of one year to two years. It is being delayed. So, while the hearings at that level, senior managers, might be more complicated, but it has become for legalistic, that it really defeats the purpose, that it should be a process where people could indicate whether they were right or wrong.

Not at all. Not at all, remember, I made mention of legal practitioners who would always like to prolong because they are benefiting; they would like the case to be postponed so that ...claiming, you know, that might be one aspect, is impeding us in trying to finalise cases within reasonable time.

Another delay is scheduling a suitable time for the key participants in the hearings. These are the

You've got five people whose diaries you must take into consideration. Now, realistically speaking, you have got to find a date that suits five people. You prepare those dates, maybe two months ... all of a sudden, you find the employee has, for some reason, fired the legal representative. The presiding office had to make a decision: do we force the employee to continue without a legal representative, or do we give him an opportunity to get another one? You have an opportunity to get another one. Then you've got to look for another date for five employees, five people again.

The chairperson has to go and deal with another case and therefore postpone; the employee is struggling with representation, postpones, the shop steward is double booked, and so on.

The reason for delay would be the unavailability of the chairperson, and the business of the initiating officer or the employee representative would be involved with another case on that side and that side ... all those things and to frustrate that employee maybe because that employee is on suspension.

This case took almost a year. One time the employer said he was not given the authority to be an employer representative.

Many participants indicated that delays resulted from a lack of monitoring and/or lack of consequence management and lack of responsibility or accountability. The following quotes illustrate this point.

They wasted time because the department didn't monitor the key witness ... he would come drunk, and the hearing would be postponed ... it should not prolong if there was someone monitoring ... saying that you are a key witness, you are supposed to attend this regularly until you finish your cross-question.

I am going to tell you now, 50% of the time, and I'm being moderate there, 50% of the time cases take long, longer than 90 days. You'll have a case that has been live for two years. It is a disciplinary case, two years, and yet the department will not say ... as a result, we've taken the decision to charge the HR managers for failing to do their work. So that case is there, and then no one is held accountable for it not being finalised. If you don't charge a person at least to get people to provide a reason why it is taking long ... I delay it; there is no likelihood that anything is going to be done against me; that's the biggest challenge. Dealing with those that fail to respect the provisions, especially around the fairness of these things, that for me is the biggest challenge.

We can take discipline as a line function issue, and every manager sees himself in that role, it is going to speed up the process. But if you think there is an office that we can refer everything to, it is going to impact your question. So, I am saying that if everybody begins to understand their role, how it plays itself out, it is a challenge.

Some participants indicated that the employee's circumstances and the right to cross-examination have a bearing in slowing the pace of the disciplinary hearings. Employees get sick, depressed and submit sick certificates and get bereaved.

- They come there with sick certificates. Now we have the Gumbi case that says we must look at the certificate to find out if it incapacitates him to continue with the hearing, ok. We've got to look at that, sick certificates, another example like a bereavement, ok. I've been in a disciplinary hearing where we were all ready to roll, and on that morning, all of a sudden, the employee was bereaved.
- Let me say 90% of the delay in a disciplinary hearing is not the employer, it's the employee, and the presiding officer has to go to thread so carefully in denying postponements to employees.
- You wait ... these things are painful ... there is no day that is free ... there is no hour of happiness in that situation ... then when they drag that hurts your soul ... like me, I ended up being sick and depressed.
- They're not. They elongate; what was done is a waste of time, they don't even achieve the reason why they were instituted. It is a waste of time; it's a waste of money. It destroys people's morale.
- The employee's representative then has a right to cross-examine on behalf of the employee; he can take two days to cross-examine that witness; as an employer's representative, you don't have the ability to short-circuit that cross-examination because then you are interfering with the right of natural justice, are you not, and as the presiding officer you can only constrain it to a certain extent, otherwise you will find yourself in a reviewable situation ... I have been in the circumstances like that where the employee's representative in one of my cases has cross-examined a witness for four days.

Another issue that came strongly from the participants was related to staff capacity. There were few members of internal staff who could handle the specific prescripts for educators and line managers in districts who were either unwilling or lacked training on handling discipline matters. The negative impact of inadequate capacity is that unprosecuted cases may result in a culture of impunity.

In some cases, you do not want to risk and take someone who is not conversant with prescript, that is, your Employment of Educators Act, to preside. He might not be conversant with section 17 ... that says if I am found guilty, I must be dismissed because that person is not from within. So, in most cases, we take people from within the department to preside in those cases hence the problem of capacity and being understaffed. Yeah, we are not able to finish and complete those cases within a reasonable time based on the fact that we do not have enough capacity to deal with those cases.

Lack of training and because there is an issue of capacity which cause all this issue of disciplinary hearings because of a lack of capacity and ego of district managers; they don't want to do everything they don't want to take decisions; they just escalate everything to the province.

...the biggest problem they have at the moment is staffing. There are not enough people to fulfill the mandate of disciplinary procedure, including the part of HRD where wellness comes in, and referrals to wellness and that type of thing.

So, you'll have a situation where transgressions take place, but they can't be processed speedily because this one person or these two people are dealing with 50 others at the same time, which then has the unintended consequence of number one suggesting that the teacher whose case has been reported but nothing is happening, suggest to that person that I can do whatever, I can commit another offense because nothing gets done.

The disciplinary hearing stage of the proceedings is delayed by failure to charge, not presenting the evidence bundle on time, involvement of lawyers, scheduling of the players in the hearings, lack of consequence management, personal circumstances of the employee, cross-examination, and staff capacity.

The next section focuses on the stage of finding and sanction following the hearing.

3.4. Outcome of the Disciplinary Hearing

Evidence from the collected documents and interviews indicated that the presiding officer does not communicate the final outcome of the hearing to the employer and employee within five working days of concluding the hearing as required. Sometimes, it takes three weeks, one month, two months, three months, and up to nine months. The following are some of the quotes from the participants:

For this case of sexual harassment, the sanction recommended sanction was delivered on 21 July to Head Office; the sanction came now a week before the school closed that week that the school closed, last week. Last week was a holiday; it took like two months just to approve the sanction.

We don't necessarily get frustrated when the sanction does not come on time because our members will still be paid... It is in our interest that this person will still pay for his car or

finish, pay for his house, and take his child to school while we are still waiting for the sanction.

The sanction of a presiding officer is regarded as a recommendation that must be processed internally in the department for approval. Most sanctions will be processed by officials of the Labour Relations directorate (Assistance Director, Deputy Director, and Director), then to a Chief Director, the Chief Financial Officer, and the Superintendent General. It is a bureaucratic procedure. It takes an even longer period before the employee knows the final outcome of a disciplinary hearing in instances where the department appeals the sanction of the presiding officer.

I am likely making an inference that some members of the trade union may interfere with the disciplinary system by putting a spanner in the running wheel in defence of their members. Another inference is that the departmental officials may manipulate weak presiding officers to change their sanctions.

3.5. Appeal

Evidence from the collected documents indicates that the outcome of appeals to the executive authority takes longer. The requirement for the prescripts is that it should be at least one month. Some took one month, others two months, others four months, six months, and 11 months. The ones that stood out as most outrageous and unreasonable were those that took two years and four months, four years, and eight years for the employees to know the outcome of their appeal. Some of these have forced the department to settle with the employee.

An employee will be dismissed, and the appeal ... they don't care after that ... will register and pass the degree at university ... the appeal come out after three years ... found guilty and dismissed ... Do you see where our weakness is? I mean, justice delayed is justice denied. When you appeal, does it take three years to decide? We don't care because it is not our money. The person declared a dispute and returned to work.

We lost the case in arbitration because the appeal took two years from the MEC back. Then the Commissioner said but this guy has been working for two years, and he has not done anything wrong, so it is not like you cannot work with him again, and he reinstated the guy based on the long time it takes for an appeal to come back.

Once the sanction is out, you immediately appeal, and funny enough, you are given only five days to appeal, but at times takes more than two years for that appeal to come back. Yes, of late, it has been taking about six months on average for appeals to come back. It prejudices the process.

It's worse with the appeal, the appeal in the department, government; I know some of them wait for an appeal authority ... they take time for the MEC to sit and look at this. MECs are busy people, and they will convene a panel of authorities.

I always say to members, if the appeal is not back, don't worry because you are still not under any sanction because when that appeal comes back, it may throw you outside the yard. So don't fight for an appeal to come back, but naturally, members will always feel anxious.

Appeals cannot be said to be consistent with promptness and efficiency. They are the worse stage of disciplinary proceedings, followed by precautionary suspension for excessive delays.

4. Conclusion and Recommendation

This paper aimed to investigate how the principle of promptness, as an aspect of efficiency, is enacted in the Department of Education in the Eastern Cape province of South Africa. I illustrated how efficiency is a traditional value of public administration and is entrenched in the Constitution, jurisprudence, legislation, and disciplinary policy. I clarified how promptness is an integral part of efficiency.

I found that the disciplinary proceedings in the ECDoE were fraught with delays in at least five stages, namely during investigations, precautionary suspensions, the disciplinary hearing, the outcome of the hearing, and during an appeal to the executive authority. The last stage of appeal was the most excessive and unreasonable of them all.

I recommend that the department should strike a balance between precautionary suspension and the need for sound investigation. It seems to me that swift investigations did not follow quick suspensions. I recommend that the department explore the possibility of implementing a digital system of tracking cases similar to the one used in other courts in South Africa. This may limit delays, especially at the level of the executive authority, and thwart potential interference by third parties. I recommend that the department institute sustained training sessions for managers to take up their responsibility of managing informal discipline proactively. The sessions could include investigation skills so that there is a critical mass of managers who could speed up some investigations. If this is done effectively, the number of serious and repeated less serious cases could decline over time and lessen the burden on a few labour relation officers.

I recommend that the employer strengthens its oversight, accountability, and consequence management. This Head of Department has the ultimate responsibility for this. However, in disciplinary proceedings, promptness is the functional responsibility of the labour relations directorate. I recommend the department find creative ways to cut the bureaucratic procedure of approving the presiding officer's sanction or at least ensure communication with the employee should the employer appeal the sanction. I recommend that the ECDoE explore the option of arbitration instead of disciplinary hearings when it comes to serious, complex, and high-profile cases involving lawyers.

In conclusion, I concur with Galligan (1996) when he says:

A society which is able to say with good reasons that its citizens are generally treated fairly, in sense of fairness according to law, is indeed a rare and enlightened society ... fair treatment according to law is not the ultimate in justice, but it is a vital part of any sense of justice" (p. xviii)

Promptness, along with efficiency, are constitutional imperatives. To act inconsistently is to subvert the ideal of good administration and social justice.

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References

- Azeez, A. (2009). Contesting "Good Governance" in Nigeria: Legitimacy and Accountability Perspectives. *Journal of Social Science*, 21(3) pp. 217-224.
- Biloslavo, R., Bagnoli, C., and Figelj, R.R. (2012). Managing dualities for efficiency and effectiveness of organisations. *Industrial Management & Data Systems*. Vol. 113, No. 3, pp. 423-442.
- Black, P. (2005). Benchmark Model of the Economy: Positive and Normative Approaches. In Black, P.A.; Calitz, E.; Steenekamp, T.L. (eds) *Public Economics*. Cape Town: Oxford University Press.
- Calitz, E. (2005). Public Sector in the Economy. In Black, P.A.; Calitz, E.; Steenekamp, T.L. (eds) *Public Economics*. Cape Town: Oxford University Press.
- Cassimjee v Minister of Finance (455/11) [2012] ZASCA 101 (1 June 2012).
<http://www.saflii.org/za/cases/ZASCA/2012/101.html>
- Cloete, J.J.N. (1994). *Public Administration and Management*, eighth revised edition, Pretoria:
Van Schaik.
- DPSA (Department of Public Service and Administration) (2003) Senior Management Handbook. <https://www.dpsa.gov.za/dpsa2g/documents/sms/publications/sms hb2003.pdf>
- ELRC (Education Labour Relations Council). 2017-2018 Annual Report. Centurion.
- ELRC (Education Labour Relations Council). 2018-2019 Annual Report. Centurion.
- ELRC (Education Labour Relations Council). 2019-2020 Annual Report. Centurion.
- ELRC (Education Labour Relations Council). 2020-2021 Annual Report. Centurion.
- ELRC (Education Labour Relations Council). 2021-2022 Annual Report. Centurion

Frederickson, H. G. (1980). *New Public Administration*. Alabama: University of Alabama Press.

Frederickson, H. G. (2010). *Social Equity and Public Administration: Origins, Development, and Applications*. Amonk: M.E. Sharpe.

Galligan, D. J. (1996). *Due Process and Fair Procedures: A Study of Administrative Procedures*. Oxford: Clarendon Press.

Grogan, J. (2014). *Workplace Law*, 11th edition. Cape Town: Juta & Company.

Henry, N. (1980). *Public Administration and Public Affairs*, Second Edition, Englewood Cliffs: Prentice Hall.

Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal (CCT 10/13) [2013].

ILO Termination of Employment Recommendation, 1982 (No. 166).

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R166

ILO Termination of Employment Convention, 1982 (No. 158)

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C158#:~:text=A%20worker%20whose%20employment%20is,employment%20during%20the%20notice%20period.

Lyster, R. (1999). The Effect of a Constitutionally Protected Rights. In Harris, M. & Partington, M. (eds) *Administrative Justice in the 21st Century*. Oxford: Hart Publishing.

Mann, S. and Wüstemann, H. (2010). "Efficiency and utility: an evolutionary perspective", *International Journal of Social Economics*, Vol. 37 Issue: 9, pp.676-685.

Meier, K. J. and Bohte, J. (2007). *Politics and the Bureaucracy - Policymaking in the Fourth Branch of Government*. (5th edition). Belmont: Thompson Wadsworth.

Mladenov, M. (2014). The Promptness as A Legal Cosmopolitanism, *Akademios*, No 3. (34), pp. 123-126.

Moroenyane v Station Commander of the South African Police Services - Vanderbijlpark (J1672/2016) [2016] ZALCJHB 330 (26 August 2016).
<http://www.saflii.org/za/cases/ZALCJHB/2016/330.html>

Nell v Minister of Justice and Constitutional Development and Another (410/2006) [2006]

ZAGPHC 265; [2006] 7 BLLR 716 (T); (2006) 27 ILJ 2063 (T) (2 February 2006). <http://www.saflii.org/za/cases/ZAGPHC/2006/265.html>

Pops, G.M. and Pavlak, T.J. (1991). *The Case for Justice: Strengthening Decision Making and*

Policy in Public Administration. San Francisco: Jossey-Bass.

PSCBC (Public Service Coordinating Bargaining Council) (2003). Resolution 1 of 2003:

Amendments to Resolution 1 of 1999: Disciplinary Code and Procedures for the Public Service, Pretoria: Centurion.

Quinot, G. (2015). *Administrative Justice in South Africa - An Introduction*. Cape Town: Oxford University Press.

Rosenbloom, D. H., Kravchuk, R. S. & Clerkin, R. M. (2009). *Public Management – Understanding Management, Politics, and Law in the Public Sector*. (Seventh Edition). New York: McGraw-Hill.

Rosenbloom, D.H. & Goldman D.D. (1993). *Public Administration: Understanding Management, Politics, and Law in the Public Sector*. (3rd Edition). New York: McGraw-Hill.

RSA (Republic of South Africa) (1995) Labour Relations Act (Act 66 of 1995). Pretoria: Government Printer.

RSA (Republic of South Africa) (1996) The Constitution of the Republic of South Africa, (Act 108 of 1996), Pretoria: Government Printers.

RSA (Republic of South Africa) (1998) Employment of Educators Act (Act 76 of 1998). Pretoria: Government Printer.

RSA (Republic of South Africa) (2000) Promotion of Administrative Act (Act 3 of 2000). Pretoria: Government Printer.

RSA (Republic of South Africa) (1994) Public Service Act (Act No 103 of 1994). Pretoria: Government Printer.

Rutgers, M. R. and van der Meer, H. (2010). The Origins and Reflections of Efficiency in Public

Administration: Regaining Efficiency as the Core Value of Public Administration. *Administration & Society*, 42 (7), pp. 755-779.

Stokwe v Member of the Executive Council: Department of Education, Eastern Cape, and Others (CCT33/18) [2019]. <http://www.saflii.org/za/cases/ZACC/2019/3.html>

Szczepura, A., Davies, C. & Fletcher, J. (1993). Efficiency and Effectiveness in General Practice. *Journal of Management in Medicine*, Vol. 7, No. 5, pp.36-47.

Union of Pretoria Municipal Workers and Another v Stadsraad van Pretoria (1992) 13 ILJ 1563 (IC).

Van Heerden, M. (2009). The constitutional obligation on government to perform public administration efficiently and effectively, *Politeia*, Vol 28, No 1, pp 46-65.

Van Heerden, M. (2009). Promotion of Administrative Justice Act, 2000: Three types of



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Administrative Actions. *Journal of Public Administration* 11(44), pp. 183-195.

Wilson, W. (1887). The Study of Public Administration. *Political Science Quarterly*, vol. 2,
pp.
197-222.