IN THE EDUCATION LABOUR RELATIONS COUNCIL

CASE NO: PSES627-09/10

DATE: 29 MAY 2015

In the matter between

H. JANSSEN	APPLICANT
and	
THE DEPARTMENT OF EDUCATION – KWA-ZULU NATAL	RESPONDENT
INCLUDING	
THE ELRC	RESPONDENT
MR. (Arbitrator of 1st ARB)	RESPONDENT
THE MEC FOR EDUCATION KWA-ZULU NATAL	RESPONDENT

CLOSING ARGUMENT

I, Helge Janssen, APPLICANT state the following:

COMMON OBJECTIVES of the CONSTITUTION and LABOUR LAW.

(**Read out to the court**) Sections taken from the Labour Relations Act 1995. **(pages 570-3 of my bundle left with Mr. (2nd Arbitrator).**

1. Any democratically elected government operates within the constitution. It is charged with acting, whatever the specific policies follow, to advance constitutional goals and within procedures that ensure that those goals are realised. It cannot pursue private objectives or irregular activities inconsistent with those purposes, which it is charged to uphold.

"Hence people entrusted with working within democratic structures should not pursue a private agenda which is inconsistent with the tenets of the constitution". Quote Raymond Suttner – Daily Maverick

2. All courts are enjoined, when applying and developing the common law, to have due regard to the spirit, purport and objectives of the Bill of Rights. This calls for a reconsideration of some of the assumptions underlying the common-law contract of employment, in *particular the employer's power of command and unfettered rights in respect of promotion and dismissal.*

3. Section 186(2) defines an "unfair labour practice" as "an unfair act or omission that arises between an employer and an employee" and involves:

   a) Unfair conduct by the employer relating to the promotion, demotion, probation, or training of an employee, or relating to the provision of benefits to an employer.

4. With regard to the freedom to rely directly on the Constitution, employees may **rely directly on the Constitution** to challenge practices not covered by the Labour Relations Act 1995, like transfers. This issue, however, remains to be developed by the courts.

5. **Unfairness:** Generally unfairness implies a failure to meet an OBJECTIVE STANDARD, and includes **arbitrary, capricious or inconsistent conduct, regardless of whether it is intentional or negligent.**

6. Any agreement which interferes with the employee's existing terms and conditions of employment has to involve the employee in order to be valid.

Health & Democracy ***(update for this 'closing argument')***

The relationship between human rights, policy and law

In studying health and campaigning for health rights, we need to understand the difference between human rights, policy and law:

Human rights:

In many countries human rights are not recognised in laws and are therefore not enforceable by courts. In South Africa, however, our Constitution's Bill of Rights means that the rights that are listed there are justiciable. This means they are legally enforceable if there is a dispute.

Policy:

Policy is not law, but can sometimes be based on law. Policy is often a stage that takes place before a law is made or amended. For example, a policy explains how human rights can be protected in a new law.

Law:

Laws set out the rules of a country and must be followed by everyone. The highest law of South Africa is the Constitution, including the Bill of Rights. This Constitution says, "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state". This means that human rights that are set out in the Constitution *must guide every law in South Africa.*

COMMON CONCLUSIONS VIA CLARIFICATION OF EXISTING EVIDENCE

1. According to the Constitution there are only two types of employment viz:

   a) Fixed term

   b) Indefinite

2. Nobody has clarified why the word **'TERMINATE'** was written next to my name on page 23 of Mr. (Respondent) bundle. This is ***sinister*** in the light of the fact that the Ed. Dept. claimed I was on a fixed term contract. If this were true, my contract was due to run its natural course. THIS UNCONTESTED FACT supports the fact that I was fired. Had I been mentally healthy, had the school not been in utter chaos, I would still be teaching in that post today.

3. The chaos in the school experienced as a *daily onslaught* to my well-being was *not contested.* I supplied Newspaper cuttings to these courts (pg 110 (Julius Malema), pgs 295-296 AND fb conversation with pupil pgs 670-673 left with Mr. (Arbitrator) 25.05.10). Reports of incidents which I wrote at the time and submitted to Mr. (arbitrator) pgs 509/24. It must be concluded that there was therefore common agreement on the untenable situation within the school. Mr. (Respondent) has been given a copy of the entire bundle (17.03.15) pages 01 to 679 and was given ample time to respond.

4. I was completely STONEWALLED and lead on wild goose chases in attempting to secure witnesses for this case. To send a subpoena via the Courts costs approx R950. When I arrived to deliver the subpoena to Mrs. (Teacher BHS) I was told she was absent. I phoned the school the *following day* and spoke to (secretary) and she confirmed that Mrs. (Teacher) was at

school. I faxed the subpoena to the School and requested that it be forwarded to her. I phoned (Secretary) (BHS) to confirm receipt of fax. ***Mrs (Teacher) did not attend.*** Proof of faxes emailed to ELRC plus attendant pages to be forwarded to Mr. (Arbitrator).

5. Mr. (Respondent) spent more than five minutes in consultation with Mrs. (Witness 1 Teacher) prior to her appearance to witness. Due to the lengthy time he was taking, I went to look for Mr. (Respondent) ***and I witnessed him intently engaging with*** Mrs. (Witness 1 Teacher) in the waiting room! ***Is this in order?*** *Mr. (Arbitrator) made no mention of this fact. The impunity is somewhat alarming. This throws doubt on Mr. (Arbitrator) presumed impartiality.*

6. It was not contested in Mrs. (Witness 1 Teacher) testament that it was 'in her understanding' that the post offered was a UTE post as per internal policy of the school. *That was Mrs. (Witness 1 Teacher's) perception.* At no point was it made clear that that was *MY perception*, or that there was any *CONSENSUS to this understanding*. Hence there was no point in me needing to accuse Mrs. (Witness 1 Teacher) of lying in the hearing. Any other interpretation of her statement is therefore PREJUDICED. The allegation (Mr. Respondent) that I *had knowledge* that I had been appointed as a 'UTE' after this interview, remains fallacious***.***

7. What everybody except me (it seems) fails to understand is that the entire notion of appointing anybody as a UTE is legally spurious as it holds no legal jurisdiction. (Must I repeat this ad infinitum?)

8. I stated that Mrs. (Witness 1 Teacher), who was present at the interview with Mr. (Principal), has a *'selective memory'* as she ***conveniently fails*** to remember *vital details* of the interview or salient events within the school at the time. For e.g. such as the offers made by Mr. (Principal) that would make up for the shortfall to my salary i.e. PENSION, MEDICAL AID, A HOUSING SUBSIDY AND ADJUSTMENTS TO MY SALARY AS PER THE NEWLY IMPLEMENTED OSD POLICY OF THE EDUCATION DEPARTMENT or who in the school had contested the Deputy Principals post (which was in dispute) which became a HUGE bone of contention within the school. Mr. (Respondent) contested this line of questioning and this objection was **upheld** by Mr. (Arbitrator) *without sound reason. I refused to continue interrogating the witness.*

9. I never made any claim that at the interview I was 'permanently appointed' as stated by Mr. (Arbitrator) in a question to Mrs. (Witness 1 Teacher). Being 'permanently appointed' and being offered a permanent post are completely opposing concepts in a time sequence. *This framing of the question by Mr. (Arbitrator) remains curious in the light of his role of impartiality.*

10. A verbal agreement is a legally binding agreement. Offers made to me by Mr. (Principal) and which seems to be a point of confusion for Mrs. (Witness 1 Teacher), as she conveniently 'cannot remember' what was offered by Mr. (Principal) in the interview. There was a *discussion around these issues* (Pension, Medical Aid, Housing Subsidy and OSD) as I was initially sceptical of Mr. (Principal's) offer and I had requested him to clarify. It was only after he pointed out the *long-term benefits* of a PENSION that I succumbed to his

plea. How she cannot remember this therefore becomes convenient in terms of having a 'selective memory'. *This would be evident to any fair-minded person.*

11. ALL forms supplied to these courts by Mr. (Respondent) CORROBORATES the *appointment offer made by Mr. (Principal)* and completely negates any notion of being employed as a UTE. The term has NO LEGAL JURISDICTION. (Do I have to keep saying this ad infinitum?) *This corroboration was uncontested.*

12. Mrs. (Witness 1 Teacher) denied the fact that Mr. (Principal) should have requested a LOCUM to replace Mrs. (Life Science Teacher) as she was going on accouchement leave. This is most odd as this is *normal procedure within schools*. When Mrs. (Life Science Teacher) returned she was not given back her classes. Instead she sat in the Library as the school Librarian had left at the end of May 2009 and was not replaced. As she was a Life Science Educator, would this mean she would have been declared in excess? (I say this in the light of the fact that Mr. (Principal) advertised a vacancy for a Life Science Educator Grades 10 -12 in the Sunday Times which was NOT A VACANT POST.)

13. According to Mrs. (Witness 1 Teacher) evidence it becomes apparent that Mr. (Principal) was playing a double game at my expense and without her knowledge?

14. At no point did Mr. (Principal) state my dates of appointment in any specific terms as required by law when taking up a 'fixed term' post. *In the light of the appointment offer of a permanent post this is self evident.*

15. Mrs. (Witness 1 Teacher) 'could not remember' any aspects of this conversation other than to refer to 'internal policy'.

16. It is TOTALLY UNREASONABLE to have expected me to be aware of 'internal policy' regarding appointments at Brettonwood High School. *This would be evident to any fair-minded person.*

17. It was uncontested that Mr. (Principal) quite clearly had his own agenda in appointing me to his school and that my appointment was irregular and constitutes an unfair labour practice:

    a) There cannot be two appointment statuses running concurrently. The onus must fall in my favour as the application form (1 of Mr. (Respondent's) bundle) quite clearly states period of appointment from 18.05.09 to INDEFINITE. This had not been filled in 'by error' (as suggested by Mrs., Witness 2 for the Ed. Dept.) as Mr. (Principal) had signed the form on 26.05.09 after I had taken up the post and would corroborate the offer made by Mr. (Principal). This same term of appointment was applied to page 3 of Mr. (Respondent's) bundle also signed by Mr. (Principal) on the same date 26.05.09. **Refer to point 5 of COMMON OBJECTIVES above.**

    b) One cannot have a period of appointment within an application form which has a specific starting date and an INDEFINITE concluding date which then becomes adjustable depending on prevailing prejudices. The meaning of the word INDEFINITE is not arbitrary or adjustable. This is

directly linked to the two types of employment statuses as stated in the Constitution.

c) The unfairness of being appointed to a post which was NOT VACANT but in DISPUTE (the Deputy Principal post) was not contested.

d) Mrs. (Witness 2 Ed. Dept Rep) clarified that the offer made to me by Mr. (Principal) of Medical Aid and Housing Subsidy could not have applied to me if my appointment was in a fixed term capacity. The only condition Mr. (Principal) made was that I would have to wait three months to make application for Medical Aid. I was told Housing Subsidy would only come into effect after a year. The chaos in the school and the pressures to deal with victimization made application for Medical Aid impossible.

e) Mrs. (Witness 2 Ed. Dpt. Rep) clarified the point that there were TWO PENSION options when taking up an appointment. Mr. (Principal) offered me ONE of the options and that was the ongoing option as per a long term appointment.

f) Mrs. (Witness 2 Ed. Dept. Rep) clarified the point that my filling out the application form page 4 of Mr. (Respondent's) bundle was irregular, as the post had not been advertised via Government Gazette. However I would not have been aware of this fact (the irregularity) but would have seen this as being in line with Mr. (Principal's) offer of a permanent post and that I would then be serving a period of probation (one year) which is normal when the purpose of the appointment is INDEFINITE. However, this confirms the irregularity of Mr. (Principal) professionalism. *This*

would be evident to any fair-minded person. **Refer to point 5 of COMMON OBJECTIVES above**.

g) Mrs. (Ed. Dpt. Rep) clarified that if an Educator was employed in a permanent capacity that they would **not** have been sent the Z83 form. She claimed that if this form had been previously printed then this would just be an update. (pg 67 Mr. (Respondent) bundle) This form was **never sent to me** (neither was I issued a letter of appointment) and hence the printing of this form on 06.05.09 constitutes an attempt **at fraud** as it had not been printed before.

h) Mrs. (Ed. Dept. Rep) clarified the fact that not all departments (such as hers) within Education would have been aware that the post of Deputy Head was under dispute. This clarified the discrepancy that exists regarding the internal running of schools and the breakdown of communications between departments within the Dept. of Ed.

i) Mrs. (Ed. Dept. Rep) failed to satisfactorily clarify the **SALARY LEVEL 06** next to my name on the Winet Printout which was vague and 'ad lib'.

j) ***Pages 1 – 5 of Mr. (Respondent) bundle were WITHHELD by Mr. (1st Ed. Dept representative)*** in the previous court case dated 14.May.2010. I am lead to believe that this is perjury. I was told that these forms (which were kept in my files as confirmed by Mrs. (Ed. Dept. Rep) was 'classified information' and that I had no right to access them. Mr. (Respondent at 1st ARB) had all my files with him in the court hearing. **(Lines 20 -21 of page 54 of Mr. (Respondent) bundle).** Had this court case been held with an

honest intention to resolve a case of 'unfair dismissal' with INTEGRITY, the following 5 year destruction to my life would not have occurred. This has thrown doubt as to the INTEGRITY OF ELRC PROCEDURE and has *increased my scepticism of this current court case.* The lack of INTEGRITY OF MR. (Respondent at 1st ARB) further points to COLLUSION between him and Mr. (Arbitrator at 1st ARB), Arbitrator for the ELRC who issued two conflicting awards.

k) The 'hands off policy' with regards to the internal running of schools has given Principals a free hand to run their schools as they see fit. In the hands of an astute Principal this could add to the functionality within the dynamic of a school. *However, this has allowed unscrupulous Principals to run a school as a fiefdom.*

l) It was on this basis (internal impunity) that Mr. (Principal) felt he could wangle my appointment at the school, while offering me a permanent post 'within' the school, causing confusion within the Education Department. As such he was playing a double game with my life. The Education Department still stands accountable as Mr. (Principal) is mandated by the Education Department via his appointment and is beholden to them for any **capricious or inconsistent conduct which is an unfair labour practice.**

18. The term UTE is obsolete. It has no legal jurisdiction. It was used as an employment category between the years 1998 and 2001 for the REDEPLOYMENT of educators who were declared to be in EXCESS of the PPN of a school. *Must I repeat this ad infinitum?*

19. I was not being REDEPLOYED to this post within the school, which would have at least been CONSISTENT with a UTE. The term UTE cannot have some arbitrary interpretation according to the prevailing bias. ***This proves that the use of this term by the Ed. Dept. ever since 2001 was irregular.***

20. No person is UNPROTECTED in the constitution of South Africa and this term reminds of the type of thinking of the old apartheid regime and is out of step with the Constitution. As a result (probably of this court case) the term UTE is no longer used in any Education Departmental faculty.

21. Mr. (Respondent) has failed to clarify the reasons for Mr. (Principal) removal from office which had been repeatedly requested.

22. The untenable situation within the school was not contested and therefore remains a fore-gone conclusion with added evidence of newspaper reports of the type of problems within the school and the eventual removal of Mr. (Principal) from office. *This is curious in the light of Mrs. (Witness 1 Teacher) lack of memory regarding internal events in the school and further underlines her lack of credibility as a witness.*

23. It was not contested that the caning of pupils by Mr. (HOD) created trauma in the pupils to the point that ***normal disciplinary responses escalated to a crisis.***

24. The NON-CLARIFICATION to the staff of the basis of my appointment to the school further exasperated my situation as it is NOT UNREASONABLE to conclude that due to the subterfuge and shenanigans that went on in the staff room, that it would have been construed that I was being ‘groomed’ for the

post, leading to resentment from certain interested parties. This indicates a lack of psychological acumen on the part of Mr. (Principal). *This would be evident to any fair-minded person.* This could be likened to a father who buys a bicycle for his child and then sends his child to the shop without informing him of road traffic rules.

25. My mental health and well-being were not contested and therefore remains a proven reality of the devastating effect the constant disruptions had on my life leading to complete exhaustion, emotional and psychological collapse. This incapacitated me with regard to performing my professional mandate and was an *unexpected mitigating factor in the uncovering of the unprofessional conduct of Mr. (Principal).*

26. My inability to 'work with' thugs in the school is directly linked to a breakdown of moral accountability within the staff that had become demoralized with the internal chaos of the school and had succumbed to prevailing pressures. *This point was not contested in this hearing.*

27. When asked of a staff member for a possible way forward with regard to the problems in the school, I was told to 'work with' the disruptive pupils as a way of gaining control of my situation. I found this notion reprehensible and morally unsound. *This point was not contested in this hearing.*

28. The unsatisfactory explanation of Mr. (Arbitrator 1st ARB) (as to the release of his awards) and the subsequent admission of guilt by Ms. (Ed. Dept. Lawyer) in an affidavit to me in a desperate attempt to have the case D593/10 thrown out of court CANNOT BE REGARDED AS A NON EVENT as it

throws serious doubt on the integrity of the ELRC and the arbitration process via Mr. (Arbitrator 1st ARB), as well as the integrity of Mr. (Respondent 1st ARB) and the Ed. Dept. This affidavit was a PUBLIC DOCUMENT and was NOT 'without prejudice' as suggested by Mr. (Arbitrator) as he *seemed reluctant to allow me to lead this evidence for obvious reasons.* The admission of guilt proves that Mr. (Arbitrator 1st ARB) submitted his 'award' to Mr. (Respondent 1st ARB) for 'approval'. This is highly irregular and constitutes corruption. This brings the legal profession into disrepute and throws further doubt on the professionalism of the ELRC. *I am not aware that there have been any internal investigations of these events.*

29. It was uncontested that my refusal to return to Brettonwood High School was based on a lack of assurances from any of the stakeholders that the situation within the school would, or could, change.

30. It was uncontested that my refusal to return to Brettonwood High School was an act of self-preservation/defence, not an act of defiance.

31. It was uncontested that my application for a transfer or resignation from BHS would have constituted a pressurized *attempt at a constructive solution*.

32. It was not contested that Mr. (Ed. Dept. Official) from the Finance Office stated that the reason for there being 000000 (i.e. NO PERSAL NO.) next to the GEPF deductions on my SALARY ADVICE SLIP was NORMAL PROCEDURE during a time of **PROBATION** of an EDUCATOR. I had requested why no PERSAL number appeared next to my GEPF deductions. Mr. (Respondent) response was that he had ***never heard*** of Mr. (Ed. Dept. Official)! (Shocking)

33. The Ed. Dept., as represented by Mr. (Respondent) (and Mr. (Respondent 1st ARB) before him in case PSES627-09-10) has not proven a single legal fact as to their claim that I was on a fixed term contract as required BY LAW. This is the basis upon which they 'terminated' my contract and is therefore not some 'arbitrary' event but a specific event that MUST BE SUBSTANTIATED in LAW and that law requires proof, not a 'balance of opinion'. It is completely unconstitutional to claim anything else and constitutes an unfair legal/labour practice to try and circumvent or deny and is a violation of the Constitution. This fact alone concludes that I was fired under the pretext of being employed in a fixed term capacity. This has devastated my life. This would constitute AUTOMATICALLY UNFAIR DISMISSAL with the attendant financial compensation including loss of income plus damages sustained these 5 ½ year plus compounded interest. Failure to acknowledge this point deems this Arbitration hearing to be in contempt of ELRC codes of fairness and accountability, in contempt of fair legal practice, in contempt of our constitution, and in contempt of a policy of Human Rights application. I would be forced to declare a dispute and seek justice via the Magistrates Court. Mr. (Headmaster) act has been indefensible and has not been contested successfully.

COMPENSATION (the details of my request has been deleted)

(For the effect this "closing argument" has had on the ruling (award) of the commissioner, I may as well not have written it. This further underlines the UTTER FARCE of the second hearing where the Ed. Dept. and the ELRC are obviously playing 'silly buggers' with the Legal System. The Arbitrator closed

his award by offering me four months compensation for 'unfair dismissal'. While I realise that the amount I requested for compensation (Automatically Unfair Dismissal) carries a two year salary penalty and is outside of the *parameters of this court case, (plus damages)* surely the Ed. Dept. could have been approached (via the ELRC) on the basis of an 'out of court' settlement to facilitate justice?

AM I EXPECTING TOO MUCH FROM THE JUDICIAL SYSTEM?

This four month compensation (which was not even BACKDATED to 04.01.10 and which was below what I had been offered in the first Arbitration award and which had been blocked) comes as a slap in the face of Justice. Seven months later, after being sent back to Arbitration by the Labour Court Judge Cele case D593/10 I am once more forced back to the Labour Courts to seek justice.

So this is not relief: this is a further sentencing to court procedure.

SIGNED: _____

on the 29th day of May, 2015.

NEXT: The THIRD AWARD i.e. the award issued after this hearing!