MEDIA SUMMARY OF MEC'S DECISION ON APPEAL IN THE CASE OF MR W NEUMANN ("NEUMANN")

Media Summary

1. The following explanatory note is provided to assist the media in reporting this case and is not binding on the MEC.

2. The MEC does not in the usual course of events publicly release the findings of internal employment appeals but aspects of this case have already received wide - and at times factually inaccurate - publicity in the media. In the circumstances the MEC has decided to provide a media summary of the decision on appeal.

BACKGROUND

3. The appellant is Wesley Neumann, the principal of Heathfield High School ("HHS"). On 11 October 2021 he was found guilty on six charges of misconduct. The sanction of dismissal was imposed by the presiding officer in respect of 5 of the 6 charges.

4. The presiding officer was Mrs R Raubenheimer ("the PO").

5. The parties were legally represented.

6. The PO's report and finding ("the finding') on the charges is 360 pages.

7. The written finding on sanction is dated 27 October 2021. The presiding officer decided that Mr Newman should be dismissed.

8. He was afforded the right to appeal. He filed a notice of appeal on 4 November 2021. As a matter of law the appeal is decided by the MEC of Education in the Western Cape, Debbie Schäfer.

9. If the appellant is dissatisfied with the outcome of the appeal, he may refer the case to external arbitration.

10. The charges on which he was found guilty were:

Charge 1 - Misconduct in terms of s18(1)(r) of the Employment of Educators Act 76 of 1998 ("the EEA"), in that in February 2020, he assaulted or threatened to assault a learner by pointing his finger in his face and/or smacking him in his face.

Charge 2 - Failure to carry out a lawful order without just or reasonable cause.

Charge 3 - Disrespect in the form of abusive or insolent behaviour.

Charge 4 - Second alternative - bringing the WCED into disrepute by including "all media houses" in an email addressed to the HOD.

Charge 5 - Second alternative – misconduct in terms of s18(1)(g) of the EEA, in that in from May to July 2020, he misused his position, including his

position as representative of the HOD on the SGB, by inciting personnel and/or learners and/or the community on social media platforms not to attend school or to report for duty during the Covid-19 pandemic.

Charge 6 – Alternative charge – breach of the employer's social media policies by inter alia distributing pictures and/or posting videos on Facebook or posting statements and/or commentary which irresponsibly criticised government policies.

11. Neumann argued on appeal that the PO's findings should be set aside, on grounds of procedural and substantive unfairness.

APPEAL ON PROCEDURAL UNFAIRNESS

Bias

12. Neumann argued that, during the process, the Presiding Officer ("PO") made a series of interlocutory findings that were wrong, and that she was biased, as she made rulings that were so out of kilter with the facts and the law, that bias provides the only explanation for the conclusions reached. This includes the finding of guilt.

13. He brought a substantive recusal application against the PO, which she dismissed. Neumann said he was going to urgently approach the Labour Court to set aside those decisions which he claimed evidenced bias. That case was however not pursued.

14. MEC's appeal finding discussed the cited examples of decision which Neumann argued could only be explained by bias.

Selective Discipline

15. Neumann argued that selective discipline was applied, as "many principals" were opposed to the reopening of schools, but he was the only one charged.

16. Given that no other employee was found guilty of similar misconduct, the point relates to alleged unfairness in deciding which principals should be charged in the first place. Neumann does not raise this in respect of the insubordination and insolence charges, but in respect of the social media charges, given that other principals also publicly mobilised against schools reopening.

17. Neuman alleged that the decision to charge him was "politically motivated" because he is a SADTU member, a union more aligned to the opposition ANC than the Western Cape Government.

18. The PO conducted a detailed examination of the material differences between the misconduct allegedly committed by him and other principals, and concluded that there were no comparable breaches of social media policies by other principals. She found that:

18.1.1. No principals were disciplined for letters distributed during the period prior to 1 June when there had been "confusion" as to whether schools were starting on 1 or 8 June.

18.1.2. His own union colleagues did not even follow the same course of action, and

18.1.3. No other High School showed zero attendance of matric learners for a solid block of three weeks.

19. The MEC accepted the PO's reasoning and was thus satisfied that there had been no breach of the consistency principle.

<u>PO's ruling against employee on the argument relating to a drug-related expulsion of a learner being "mysteriously overturned".</u>

20. The overturning of the expulsion was argued to be proof of a "conspiracy theory" to target Neumann.

21. This was rejected by the PO, as the HOD who was supposedly targeting Neumann in fact upheld the decision of the SGB to expel the learner.

22. The MEC found that this argument appears to be implausible and far-fetched. This learner's evidence is in either event not relied on as proof of any charge in this appeal.

PO's ruling against the employee in relation to access to the hearing by the media and the SGB

23. The PO found that she had no authority to permit such access, in terms of the rules governing these proceedings. In addition, the appellant was not the applicant in these matters so any alleged bias could not have been against him. He failed to show how this ruling is wrong in law or so unreasonable as to be explained by bias only.

PO's ruling in favour of the employer which objected to evidence being led by the employee relating to "certain nefarious activities of certain WCED officials directly linked to the case".

24. Neumann could not show how the evidence of a certain person would have been relevant to the charges or the ultimate finding, so the PO's refusal to admit his evidence cannot be faulted.

25. The appellant has still not shown how he has been prejudiced in presenting his defence, nor how the PO's finding was so unreasonable that it can only be explained by bias.

Finding on unreasonable delay and vagueness in the charge sheets

26. The MEC was not persuaded that the employee was materially prejudiced in presenting his defence because of delay or because he did not know what the charges were that he had to meet.

27. If the PO is to be criticised, it is more likely for allowing over-elaborate legalistic procedures and for entertaining a plethora of procedural challenges by appellant's attorney that may be more suited to a criminal case in the High Court than an internal disciplinary hearing. Her detailed examination of all the arguments and evidence is indeed suggestive of a diligent PO wanting to afford the employee every opportunity to state his case and take every point.

28. Whilst the MEC was concerned at the length of time the employer took to charge the employee on the first charge, she accepted Covid may have played a role, and that the employee put up no evidence of any waiver or substantial prejudice suffered by him as a result of the delay.

29. In any event, in the light of the outcome of the appeal on the assault charge, nothing turns on this finding.

30. The substantive grounds of appeal are now discussed in respect of each charge.

APPEAL ON SUBSTANTIVE UNFAIRNESS

Charge 1

31. Extensive lengthy evidence was presented on this charge from both sides. It was common cause that there was an altercation between the learner and Neumann, but there were differences as to details.

32. The name of the learner is not disclosed for legal reasons.

33. The crux of the MEC's finding on appeal was this:

33.1. Appellant admitted to pointing a finger. The common cause evidence reveals an unseemly physical altercation between a learner and a principal. The principal had the right to tell the learner not to get on the bus until the issue of possible alcohol consumption was resolved. [Learner L's] strong resistance appears to partially be explained by a history of issues and friction between the principal and the learner. When (on the appellant's version) the learner started acting out the principal should have withdrawn from the situation. If [Learner L] was unruly the appellant should have attempted to not have become involved in a public spat or confrontation with him. There were security guards in attendance and one can see from the video that they became involved to lead [Learner L] away after the altercation.

33.2. The events seemed to have more in common with a pub brawl than an exchange between a principal and the learner. If force was indeed used then the principal would not be entitled to defend himself on the basis of saying; `oh well, the learner started this all by being rude and obnoxious.'

33.3. The evidence on appellant having slapped [Learner L] is however inconclusive and as the employer bore the evidential burden the MEC found that appellant must be given the benefit of the doubt. She was

concerned that the other possible witnesses were not called on an issue as potentially critical as this piece of evidence. In the end result the PO concluded that the learner was slapped in consequence of her view that the learner was a more credible witness than Neumann. If there was better eyewitness evidence potentially available and then having to rely on credibility as the basis for this finding seems unsatisfactory. In the MEC's view therefore the evidence was not sufficiently strong to justify a conclusion that the appellant slapped the learner.

33.4. The appellant was accordingly acquitted on appeal on the first charge. The finding of guilt was reversed. As he was in either event not dismissed on this charge by the PO this finding does not affect the outcome of this appeal on the question of sanction."

Charge 2

34. The PO found that the evidence showed that the instruction from the HOD was reasonable, lawful and was not a decision for the SGB or principal to make.

35. Neumann argued that it is indisputable that there was substantive compliance with the three instructions that were given to him, in that:

35.1 He issued letters to parents ensuring that learners attend school from 3 August.

35.2 He ensured that teachers teaching Grade 12 were on duty and teaching every day, and

35.3 He informed the SGB in writing of these instructions and that their "instructions" fell outside of their functions of governance and oversight".

36. He argued further that it was not he who prevented the Matrics from attending school, and that there is no evidence of "wilfulness" on his part, which is required for a finding of insubordination.

37. The PO found that Neumann's argument that he had essentially complied was not an attempt on his part to comply but was "entirely defiant". His behaviour indicated that he was not prepared to submit to the authority of the HOD. She found further that the employee's non-compliance showed disrespect towards the employer. His attitude was "arrogant and insolent" and he "deliberately challenged the employer's authority by undermining it in a serious manner". This, she found, amounted to gross insubordination.

38. The instruction was merely the final step in response to a sustained and ongoing campaign of challenging the employer's authority. The MEC found Appellant set out to challenge his employer's authority. He was a vocal and highly active participant in a campaign to resist the reopening of schools. There can be no doubt that opponents of reopening would have

been encouraged by the fact that an authority figure employed by the Department was openly with them.

39. As regards the duty to obey instructions, the case of Head of Department, Department of Education, Free State Province v Welkom High School, the Constitutional Court in 2013 emphasised that section 16A(3)(a) of the South African Schools Act instructs a principal how to act when faced with conflicting instructions from a governing body and the HOD. The principal MUST comply with the HOD's instruction. The case makes it clear that the principal has no scope whatsoever to neglect, fail or refuse to comply with an instruction from the HOD because the SGB may have a different view of the matter.

40. At the heart of the employment contract is the concept of subordination. Employees are subordinates and are required to obey instructions. Much of the appellant's defence at the hearing puts forward the idea that a principal of a public school, when faced with implementing a controversial decision by the education authorities, is someone who must juggle between possible conflicting duties and obligations.

41. The legal position is that he faced no such choices. He was required to implement the HOD's instructions. The SGB and trade unions could challenge the decision, but an employee, who is under a duty to obey instructions, could not.

42. The pandemic was presented as a factor that might excuse his conduct. In the opinion of the MEC, it made his conduct even more serious. For schools to be able to deliver education in such extraordinary circumstances, the HOD needed to be able to rely on the support of his representative on the SGB (the principal). However, appellant sought to actively undermine and resist that which his employer sought to achieve in dealing with the extreme challenges posed by the epidemic. This was indeed a time when extraordinary levels of service were expected.

43. The MEC found the PO's reasoning to be well motivated and the appeal on this charge is dismissed.

Charge 3

44. The appellant in the email to his HOD of 26 July 2020 made the follow accusations:

44.1. that the conduct of his employer in issuing him with these instructions is comparable to historical example of politicians and bureaucrats "who have fought battles to the last drop of somebody else's blood, in this case, it is the blood of our children." In other words, in the pursuit of political and bureaucratic goals his employer was prepared to sacrifice "the blood of our children."

44.2. decision makers returning children to school are “unintelligent and reckless.”

44.3. the HOD’s decisions repetitively defy cabinet decisions

44.4. when issuing instructions, the HOD resorts to “pre 1994 methods of issuing instructions in a Baasskap manner.” In other words, he acts like the white bosses who were in charge under apartheid.

45. With reference to the letter sent by Neumann to the HOD on 26 July 2020, the HOD testified that he found the letter “disrespectful and insulting” and found it “astonishing that a state employee could write such a letter to his employer”. He found it particularly insulting to be told that he did not have the children’s interests at heart. He was insinuating that the HOD was responsible for the deaths of children, which was untrue.

46. Neumann submits that, if taken in their totality, the comments made in his letter did not warrant a conclusion of insolence or disrespect.

47. The evidence supports a conclusion that the appellant defined his role as a lobbyist for a group that sought to prove that re-opening schools would fail and threaten the lives of children. He sowed discord and fear in the school community and depicted his employer as deliberately seeking to harm children.

48. His written response to the HOD depicts the HOD as a White racist with no interest in the well-being of working class children. He himself clearly adopted the view that the employment relationship was broken down, by propagating an argument that he was being employed by a fundamentally immoral educational entity prepared to spill the blood of the children placed in its care. If this was indeed his view, then it is surprising that he wished to remain in its employ.

49. The PO noted that Neumann although invited by his own legal representative to apologise for the tone in his letter. He refused.

50. The PO found that the sharing of these remarks to a wider audience was an aggravating factor. The MEC agreed. This had the effect of bringing the employer into disrepute.

51. It is one thing to decline to obey instructions, but it goes one step further if, when instructed to do so and reminded of your duties, you choose to vilify and publicly denigrate your employer.

52. What Neumann wrote to the HOD constitutes an extreme example of gross insolence and in the circumstances, this ground of appeal is dismissed.

Charge 4

53. Neumann denied that he intended for his correspondence to be shared with the media, and said that he cannot be held accountable for what the media

publishes. The PO found that, by marking the correspondence for media consumption, he "must have reasonably foreseen that it would be published and reconciled himself to that eventuality". Indeed, it contained a bold invitation to publish.

54. Neumann argued that the employer had to prove prejudice, and as it failed to lead any evidence to prove the prejudice or harm the department suffered because of the letter being published, the PO "simply engaged in an interpretation that suits her finding".

55. The PO found that the media articles depicted appellant as a heroic figure who did not shy away from retaliating against an employer whom he accused of using "baaskap" methodology to issue instructions. As stated above, the perception was created that the HOD and the Department were trying to force children to go to school in circumstances that were not safe.

56. The PO also found that making the letter to his employer was a separate form of misconduct to the content of the letter itself.

57. The prejudice or harm that the Department suffered is self-evident. This ground of appeal was also dismissed.

Charge 5

58. In terms of relevant legislation, the school principal represents the HOD on the governing body when acting in an official capacity. In performing his

role of assisting the SGB, he may not in so doing, act, *inter alia*, in conflict with the instructions of the HOD.

59. When government decided to reopen schools, Neumann became a vocal opponent , called for pickets, posted links and opinions from groups opposed to the reopening of schools, one of which called for education authorities to take responsibility for "state sanctioned murder" or sending children into a "death trap".

60. In responding to Neumann's defence, the PO found that, far from distancing himself from protests and pickets against the reopening of schools, he went further than simply associating himself with that campaign, and was in fact at the forefront of the protests.

61. He was reminded on 5 July that the SGB decision had to be withdrawn, that he had to provide direction on this, "despite your personal views" and that parents who wish to keep their children home have options to do so.

62. He undertook to write the required letter to the SGB, but never did so.

63. The exemption forms were handed to parents, but when 87 completed forms were returned by parents, they were not sent to head office for processing. This resulted in parents unlawfully keeping their children home, and not even being aware that they were doing so.

64. The PO found that Neumann abused his position by stirring up and provoking learners' parents and the community to keep children home without applying for exemption.

65. Appellant argues he was not aware of the social media policy, that other principals also advertised campaigns and protests, and there was no evidence of incitement.

66. The evidence of incitement is clearly set out in the finding and the appellant can hardly argue that he should not reasonably have been aware that his employer had a social media policy forbidding the use of social media by its officials to incite personnel and/or learners and/or the community on social media platforms not to attend school or report for duty during the Covid-19 pandemic.

67. This ground of appeal was dismissed.

Charge 6

68. Neumann claimed that he posted comments, videos, statements and/or commentary irresponsibly criticising government policies as an individual or as a union member, and that the employer was required to prove harm. The PO found that the public had no way of distinguishing the capacity in which he was posting, and he used his personal Facebook profile to communicate official communications on the school's Facebook page.

69. His comments were accordingly in conflict with his obligations as an employee.

70. If the employer's rules are flouted, it suffers harm.

71. The appeal on this ground was also dismissed.

Lack of Remorse

72. Instead of admitting that he had done anything wrong, appellant characterised these proceedings as a witch-hunt launched against an innocent person.

73. The essence of the defence put up by him was:

73.1 he did nothing wrong; and

73.2 for personal reasons, the former HOD, duly assisted by his officials, conspired to fabricate a case against him falsely depicting him as insubordinate and insolent.

74. The MEC found that it was proved that he was guilty of serious charges. These findings almost inevitably justify proof of an irretrievable breakdown in the employment relationship unless it can be shown that through remorse, the employee is able to desist from a confrontational attitude towards his employer and the trust relationship can be restored.

75. If, on the finding of guilt, the employee persists not only in maintaining his innocence, but goes further to argue that the employer is guilty of conspiring to bring false charges against him, what chance is there for a constructive working relationship in the future? If he says there was a plot hatched against him involving the HOD, Employee Relations Department and a biased presiding officer, it is difficult to see where scope exists for retaining or restoring an employment relationship. For good measure, he also adds that the political party in control of the province was also conspiring behind the scenes to have him dismissed.

76. He even declined to present evidence in mitigation, seemingly to emphasise his view that he had nothing to apologise for.

77. He thus took a calculated risk to set himself on a collision course with his employer. He was afforded several opportunities to step back from the brink, but he chose to ignore them, choosing instead the road of confrontation.

78. Subsequent to filing his appeal, Neumann on 29 November 2021 personally made further submissions to the MEC asking for mercy and compassion.

79. He still presented the situation as if he was confronted with options as to whether to obey the SGB or the employer. As was indicated in the finding under his contract a principal faces no such options. He was not called upon to decide whether the SGB or the HOD's decisions were more worthy. The

MEC was concerned that he still does not fully comprehend or acknowledge the duties and obligations of principal as a public servant employed within a chain of command.

80. The supplementary submission also contains no direct apology to the HOD for his insulting and offensive correspondence. However, he does make a number of points which were taken into account in coming to the ultimate finding:

80.1 He is passionate about education;

80.2 He is a young man, a father of three children;

80.3 The circumstances at the time were unprecedented, with extremely high levels of anxiety, even paranoia, because of Covid 19;

80.4 He says he is "deeply contrite and I should have approached matters quite differently", for the first time exhibiting remorse.

81. The conclusion the MEC reached in this matter has been an extremely difficult one to reach. Appellant has insulted and vilified his employer by way of a very public campaign. His actions have resulted in a large amount of money being spent on this hearing and all the court applications and points raised, to only exhibit contrition once the "writing was on the wall".

82. However, he has finally expressed some contrition. Neumann is young and seemingly talented, and clearly has prospects of serving a long and

rewarding career in education if he simply confines himself to complying with the terms of his employment contract.

83. Given the MEC's concerns that he still does not understand his role as principal in relation to the SGB, as well as the fact that the MEC is upholding the finding on the merits of all but one charge, it is untenable for appellant to continue in his position as principal. However he is afforded the opportunity to continue in employment in a lower post. As a matter of law he must however agree to take up that demotion for that decision to be of effect.

CONCLUSION

84. In the circumstances the order the MEC made is:

84.1 The finding on charge one is set aside on appeal;

84.2 the appeals against the findings of guilty on the further charges are dismissed;

84.3 the sanction of dismissal stands, unless the employee is prepared to accept a demotion to a Head of Department position at one of three schools, which have been given to him, by no later than Friday, 20 May 2022.