

Summary of the ELRC dispute - Collective Agreement 1 of 2011 (Remuneration of Markers)

1. On 7 April 2011, the Department of Basic Education and teacher unions signed collective agreement no 1 of 2011. In terms of the collective agreement the parties agreed to increase the remuneration of markers by 100%.
2. On or about 7 March 2011 Government Gazette number 34079 was published which set out the tariffs for examination related work for the year 2011.
3. In November 2011 the employer issued briefing notes to the unions. In terms of the briefing notes, the employer alleged that tariffs in the collective agreement were incorrect as they did not reflect the spirit of the collective agreement, which according to the department, 2011 tariffs would be based on 2010 tariffs plus CPI.
4. The parties agreed that in order to amicably resolve the matter, the department of basic education should refer the matter to the ELRC for interpretation of the collective agreement.
5. The purpose of the interpretation was to request the ELRC to decide whether the intention of the parties when signing the Collective Agreement 1 of 2011 was to increase the tariffs by 100% or was to increase the tariffs as stipulated in the Government Gazette.
6. In order to ensure the smooth running of examinations, the parties agreed that the 2011 markers should be paid according to the 2010 tariffs plus the 6.8% adjustment.
7. An addendum dated 18 December 2011 was signed in order to allow the department of basic education to subject the Collective Agreement for interpretation and application in terms of the of the ELRC dispute resolution procedures. A copy of an addendum is attached marked "B".
8. It has been and will always be our contention that the language used in the Collective Agreement is clear and unambiguous. The agreement expressly stipulates that the

remuneration of makers will be increased by 100%. However, in order to maintain labour peace, teacher unions agreed that the parties should seek an independent third party to interpret the provisions of the agreement.

Department's delaying tactics

9. The department referred the dispute to the ELRC on 11 May 2012 after it was reminded by SADTU by way of a letter dated 18 April 2012 to refer such dispute to the ELRC. The letter required the department to refer the dispute within 5 days from the date of the letter, but the dispute was referred after 22 days from the date of the letter.
10. After the referral of the dispute to the ELRC, the parties agreed that the parties should seek legal opinion and decide whether they want to continue with arbitration or not;
11. The department submitted its legal opinion dated 4 May 2012.
12. The department's contentions as to the status of the collective agreement are captured as follows:
 - 12.1.1 The department submitted that in terms of section 4 of the Employment of Educators Act (EEA) it is the Minister who shall determine salaries and other conditions of service, the minister must have full regard to any applicable collective agreement which have been concluded in the ELRC and the concurrence of the Minister of Finance is a prerequisite for a determination that involves expenditure from the National Revenue Fund.
 - 12.1.2 The department submitted that any change of tariffs that is not compliant with section 4 of the EEA will be unlawful and vulnerable to be declared *void ab initio*.
 - 12.1.3 The department argued that the DG did not have mandate to enter into a commitment of increasing remuneration of markers by 100%.

- 12.1.4 When the DG signed a collective agreement, he did so in the mistaken belief that it was in line with the determination promulgated on 7 March 2011, which he has given his endorsement on 9 February 2011 as part of the internal mandating procedures.
- 12.1.5 Certain mandatory procedures were not complied with by the Department prior to concluding an agreement, namely, the procedure which operates at national level, required by section 2(2A) of the Public Service Act, 1994 involving the mandating committee, as well the departmental mandating process.
- 12.1.6 The department's opinion concludes that the collective agreement is null and *void ab initio*.
- 12.2 The unions also submitted their legal opinion to the ELRC and the employer. The unions' contentions as to the status of the Collective Agreement are captured as follows:
- 12.2.1 The power given to the Minister of Basic Education in terms of section 4 of the EEA is subordinate to any collective agreement concluded by the ELRC. This means that, in relation to the Labour Relations Act, the power and duty conferred and imposed on the Minister of Basic Education does not detract from the right of the Department and the trade unions to conclude collective agreements that deal with terms and conditions of employment, including salaries and other terms and conditions of service. This is contrary to the Department's view that only the Minister through a determination is empowered to determine terms and conditions of employment of educators.
- 12.2.2 A collective agreement has statutory authority and can change, for example by improving, terms and conditions of employment determine by the Minister of Basic Education by way of a determination, including salaries and other conditions of service.

- 12.2.3 The legislation does not always intend non-compliance with a statutory prohibition to result in nullity.
- 12.2.4 Our view is that that present case does not concern non-compliance with the requirements of section 4 of the EEA. It concerns a Collective Agreement, which is not made subject to compliance with section 4 of the EEA.
- 12.2.5 We hold the same views with respect to the effect of section 2(2A) on the validity of collective agreement as the section refers to the determination and not Collective Agreement.
- 12.2.6 On the issue of excessive increase, we submitted that the Minister had previously increased by 100% the tariffs payable for examiners, moderators and translators. Therefore we are unable to accept that 100% increase is excessive and unenforceable.
13. The matter was conciliated on 16 October 2012 and the conciliation hearing was extended to 22 October 2012. However, the parties could not reach any agreement at conciliation and the matter remained unresolved.
14. The arbitration hearing was scheduled to take place on 8 November 2012 at the ELRC offices.
15. The parties agreed that given the nature of the dispute, a senior arbitrator should be appointed.
16. On 26 October 2012 both parties received a correspondence from the ELRC wherein they were required to submit the name of their preferred arbitrator before the 01st November 2012.
17. On 29 October 2012 Teacher Unions proposed Advocate Hans Van Der Riet SC as their preferred arbitrator, and same was forwarded to the Department on the following day, 30 October 2012.
18. The department failed to forward the name of their preferred arbitrator, despite the ELRC's attempt to obtain such from them.

19. Given the urgency and the sensitivity of the matter, the arbitration was then subsequently set down for the 8 November 2012.
20. The department only objected to the appointment of Adv Van Der Riet SC on 6 November 2012, two days before the scheduled arbitration date but did not forward the name of their preferred arbitrator. They have also failed to furnish us with reasons for their objection.
21. The arbitration hearing could not take place on 8 November 2012 as a result of the objection by department.
22. We are disappointed by the manner in which the department of basic education is handling this matter.
23. We have addressed a letter dated 11 October 2012 to the Minister of Basic Education, recording our disappointment and requesting her intervention. However, the Minister failed to respond to our letter.
24. We have received another arbitration date and the matter is set down for 29 November 2012.

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