MEMORANDUM ON COLLECTIVE AGREEMENT ON CONVERSION OF EDUCATORS ON CONTRACT INTO EMPLOYMENT ON A PERMANENT BASIS IN PUBLIC EDUCATION

1. Introduction

1.1. This memo seeks to explain the rationale to the above resolution.

1.2. The Labour Relations Amendment Act of 2014, which came into effect on 1 January 2015, introduced two fundamental changes to temporary employment.

1.3. The first change was brought about through Section 186(1)(b) which now includes as part of a dismissal a case where an employee who was on a fixed term contract reasonably expected the employer to retain him/her on an indefinite basis but the employer did not offer to retain such employee.

1.4. The second change is the introduction of Section 198A and B, which in this context ensures that temporal employees who work for an employer beyond three months and are below the threshold are treated the same as employees employed on indefinite contracts.

1.5. Recent Labour Court judgements have interpreted the application of the above two sections to provide protection to temporal employees.

1.6. Collective Agreement … of 2017, has been introduced to ensure that the employment of temporal educators in the education sector is in line with the above changes in law and with how the Labour Court has interpreted the above changes.

2. The Labour Courts Interpretation

2.1. In ***Nowalaza and Others v Office of the Chief Justice and Another (J1177/2017) [2017] ZALCJHB 234 (15 June 2017)***, the Labour Court dealt with the status of temporal employees. In this matter, the employees in question were judges' secretaries employed by the Office of the Chief Justice ("**OCJ**"). For a number of years, the practice had been that the employees had been employed by the Department of Justice, and later by the OCJ, in terms of yearly fixed-term contracts that expired at the end of March of each year. Subsequent to this, the Auditor-General submitted a report in terms of which it advised the OCJ that the automatic renewal of fixed-term contracts of employment was in contravention of the Public Service Act, 1994 ("**PSA**") and its regulations.

It must be noted that the said employees were in vacant substantive posts. Vacant positions had to be advertised and a competitive process followed in filling these posts. The OCJ, therefore, decided not to appoint the judges' secretaries on a permanent basis and adopted the stance that, in order to comply with the PSA and its regulations, the posts of the judges' secretaries would have to be advertised and that the applicants would have to apply for the positions they occupied in terms of their fixed-term contracts. As the applicants' remuneration exceeded the ministerially determined threshold, section 198B did not apply. The applicants therefore relied on section 186(1)(*b*) of the LRA. They based their case on their view that they had a reasonable expectation of indefinite or permanent employment.

2.2. The OCJ's counter-argument was that the employees could not have had a reasonable expectation of permanent employment if this was in conflict with the provisions of the PSA and its regulations.

2.3. The court rejected the OCJ's arguments, its most important finding being that reliance on the PSA and its regulations had serious consequences; it meant that a temporary employee in the public service could never rely on the protection of section 186(1)(*b*). There was a clear conflict between the provisions of the LRA and the PSA and its regulations. Section 210 of the LRA resolved this conflict. It provides that if any conflict arises between the LRA and any other law, the provisions of the LRA will apply unless the other law expressly amends the LRA.

2.4. The court granted a declaratory order to the effect that the applicants were permanent employees employed on the same terms and conditions of employment as were agreed between the applicants and the OCJ in the three month fixed-term contracts that they entered into.

2.5. In ***NUMSA v Assign Services and Others (JA96/15) [2017] ZALAC 44 (10 July 2017)*** the Labour Appeal Court dealt with the protection on temporal employees. The Court emphasized the protections provided for by Section 198A&B in this regard. The Court commented that the purpose of the protection is to ensure that the deemed employees are fully integrated into the employer's business. Further that it would make no sense to retain employees on a temporal basis if the employer has assumed all the responsibilities on the temporal employees after the expiration of the three months period.

2.6. In this judgement the Labour Appeal Court found that, for the purposes of the Labour Relations Act, No 66 of 1995 (LRA), once the deeming provision kicks in, the temporal nature of an employee's employment falls out of the picture and the employee assumes permanent status. The LAC rejected the dual or parallel employer interpretation. It found that the protection against unfair dismissal and unfair discrimination in the context of s198A of the LRA did not support this interpretation but rather that this protection is a measure to ensure that the placed employees are not treated differently from the employees employed permanently.

2.7. The LAC found that the sole employer interpretation did not ban temporal employment. It, however, regulated it by restricting it to genuine temporary employment arrangements in line with the purpose of the amendments to the LRA.

2.8. The court concluded that the intention of the amendment was to upgrade temporary service to standard employment and free vulnerable workers from atypical employment.

3. Applicability in the Education Sector

3.1. Section 186(1)(b) and Section 198A&B cannot be read separately. Any sector that has temporary employees needs to be mindful of the application of these two sections and how the Courts in the Nowalaza and NUMSA judgements have interpreted them. In the Education Sector, temporal employees are used for various reasons.

3.2. Put simply, the implications of Section 186(1)(b) and the Nowalaza judgement are that temporal educators whose employment is in substantive vacant posts may claim to have a reasonable expectation of permanent employment and may therefore claim that they status be converted to permanency.

3.3. Section 6B of the Employment of Educators Act deals with the conversion of temporary employment to permanent employment and provides that: “the Head of Department may, after consultation with the governing body of a public school, convert the temporary appointment of an educator appointed to a post on the educator establishment of the public school into a permanent appointment in that post without the recommendation of the governing body.

3.4. In line with the Labour Appeal Court’s judgement in the NUMSA case, the employment of temporal employees in education cannot be completely banned but needs to be regulated and limited as far as possible it. The Resolution ensures that the conversion is limited to a temporal employees who are employed on post level 1 vacant substantive posts identified for filling by the provincial education department for conversion which also reflect in the approved educator staff establishment of the school.

3.5. The Resolution excludes temporary employed educators:

3.5.1. Appointed to vacant substantive promotion posts in an acting capacity, or to substitutes for permanently employed educators who are absent from duty, for whatever reason;

3.5.2. Who have already had the opportunity of an extensive career in education, for example those who have early retirement (in any category), been discharged because of ill-health or taken a

severance package of whatever nature are excluded from the measures contained in this collective agreement;

3.5.3. Who resigned from the education profession (national or provincial). Subject to 8.2. of the Resolution; and

3.5.4. Excluded from the measures contained in this agreement in accordance with Section 10 of the Public Service Act, i.e. Foreign educators who do not have a SA citizenship or who are not permanent residents of South Africa as defined in the Immigration Act No. 13 of 2002; and Foreign educators who are not fit and proper persons as intended in Section 10 of the Public Service Act.