**3. Proposal 2: Analysis of Bill (Suzanne Broodryk and Elmien van Wyk)**

**3.1 Introduction**

Section 2 of the Basic Conditions of Employment Act, 75 of 1997 (SA, 1997), emphasises that it focuses on the importance of economic development and social justice in promoting the primary objectives of this Act:

“(*a*)

to give effect to and regulate the right to fair labour practices conferred by section 23 (1) of the Constitution—

1. by establishing and enforcing basic conditions of employment;

(ii) by regulating the variation of basic conditions of employment;

(*b*)

to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation.” (SA, 1997 & Rossouw, 2015:64)

The abovementioned Act (SA: 1997) is and needs to be focussed like all other

legislation on the provisions and democratic values of the Constitution of South

Africa (SA, 1996) as set out in section 1 (SA, 1996): “(1)(a) dignity

the achievement of equality and the extension of human rights and freedoms.”

Rossouw (2015:64) further emphasises that this Basic Conditions of

Employment Act (SA, 1997) sets out minimum conditions in respect of labour practice,

namely:

* Hours of work
* Leave
* Overtime payment of employees.

**3.2 Types of leave**

This analysis wil focus on the Bill concerning the leave of parents in the following

categories:

**3.2.1 Parental leave**

Briefly, parental leave may be seen as the period during which parents are give time to

take care of their children. Section 25(1) of the Basic Conditions of Employment Act

(SA, 1997) stipulates that female employees are entitled to at least four consecutive

months’ maternity leave. In contrast to this section, fathers currently do not get the same

leave benefits as the mother of a newborn infant is able to enjoy. Nel (2014) emphasises

that South Africa has one of the best developed legal systems in the world, but that the

concept of paternity leave is not yet as advanced. The father currently needs to take family

responsibility leave (SA, 1997: sec 27) instead of paternity leave, which should form part

of parental leave (Nel, 2014). Leave in respect of family responsibility 27(2) therefore

comprises employees’ annually obtaining three days’ paid leave for 27(2)(a) the birth of a

child, 27(2)(b) when an employee’s child is ill or 27(2)(c) upon the death of a close

family member (SA, 19997: sec 27 & Nel, 2014). From the abovementioned sections

concerning parental leave it is therefore apparent that inequality may arise. Equality is

one of the fundamental values of the South African Constitution (SA, 1996) and this is

emphasised in section 9 (SA, 1996), which stipulates that 9(1) everyone is equal before

the law and has the right to to equal protection and benefit of the law; 9(2) “equality

includes the full enjoyment of all rights and freedoms”.

**Why could these sections concerning parental leave indicate inequality?**

FromSection 27(2)(a-c) of the listed events in the Basic Conditions of Employment Act

(SA, 1997) it may be generally observed that these occur daily. If an employee therefore

has used up the three days’ paid leave, he or she cannot take any more leave for family

responsibility. What should then be done if a man’s wife has given birth to a child and is

dependent on him – as regards his physical and financial support? This inequality

advantage may also point to discrimination, and section 9(3) of the South African

Constitution (SA, 1996) stipulates that “the state may not unfairly discriminate directly or

Indirectly against anyone on one or more grounds, including race, gender and sex”.

Consequently there is an indicative gap between the equality of maternity leave for

women and the family responsibility leave that men have to take in the case of a newborn

baby.

**The following may be questioned regarding this type of leave:**

* Should the man also get four months’ leave when the woman takes it?
* Will this leave be paid leave in the case of both sexes?
* How should an employer (e.g. head/department/governing body) manage such a

situation if the husband and wife are at the same place of work (e.g. both are

teachers at the same school)?

* How much time should a man then be entitled to in terms of the law regarding this

concept of “paternity leave”?

- If this paternity leave is implemented and it is regarded as unpaid leave, will it be

to the advantage or disadvantage of the family?

**Recommendations/Opinions**

It is evident that there is a clear level of inequality between the entitlement of the

various sexes at the time of the birth of a newcomer. It would be more effective to

draw a distinction between parental leave (*inter alia* paternity leave) and family

responsibility leave as outlined in section 27 of the Basic Conditions of Employment

Act (SA, 1997).

In our opinion a man should be entitled to more than three days’ paid leave, as

stipulated for family responsibility leave, at the birth of a child. Therefore this does

not have to comprise four months of paid leave as for the woman during maternity

leave, but we are of the opinion that two weeks would be sufficient. The two weeks’

parternity leave may consequently comprise one week of paid leave and a second

week of unpaid leave, during which the man may decide to return to work or to use

this time as an unpaid week’s leave.

**3.2.2 Adoption leave**

Nel (2014) explains that there is no statutory leave indicated for the adoption of a

child but that there is indeed a right to insurance benefits regarding leave for the

purpose of adoption, for which only one parent may apply and provided the child

is younger than two. Rossouw(2015:67) further proposes that an educator who

adopts a child of younger than two, qualifies for adoption leave for a period of 45

working days. According to Paterson (2013) employers are not obliged to grant

adoption leave to employees, since this is currently not stipulated in South African

legislation. This shortcoming regarding adoption leave could lead to discrimation

against parents who wish to adopt a child. Here section 9 of the South African

Constitution (SA, 1996) comes into play, as section 9(3) emphasises that no direct

or indirect discrimination may be directed at anyone. Although section 27 of the

Unemployment Insurance Fund Act (SA, 2001) makes provision for adoption

benefits, it is actually an individual agreement that may be reached between an

employer and an employee.

**Recommendations/Opinions**

* + This type of leave needs to be stipulated more clearly in the Basic Conditions of Employment Act (SA, 1997).
  + More clarity regarding the leave for both parents or for only a single parent needs to be stipulated.
  + There should also be an established maximum number of days, which does not depend on the negotiations between the employer and the employee.
  + This adoption leave provision also needs to promote the fundamental values of the South African Constitution (SA, 1996) as set out in section 1.
  + Consequently no discriminatory provisions should be contained in this planned section.

**3.2.3 Mandatory parental leave**

It would appear that currently no form of mandatory parental leave exists in South

Africa. The purpose of mandatory parental leave would be to provide the employee

with an opportunity to take care of himself or herself or to take care of an ailing

family member. This type of leave is currently contained in section 27 of the Basic

Conditions of Employment Act (SA, 1997), which gives employees only three days’

paid leave a year for the 27(2)(b) illness of a child. This leave for family

responsibility is extremely little if one takes into account all the events – namely the

birth of a child, the illness of a child and the death of a close family member – that

it encapsulates.

**Recommendations/Opinions**

* + If an employee is able to see in advance that this leave is required, the employee should notify the employer regarding the number of days that will be required, so that he employer can make the relevant arrangements.
  + If the need for this leave cannot be anticipated, the employee should hand in a notice as speedily as possible.
  + A family member should also be clearly identified in this section as a child, parent (or parent-in-law), life partner, grandparent, grandchild, brother or sister.

**3.3 Practical examples from the education field that have a bearing on**

**parental leave**

* + When a female educatror applies for maternity leave, the principal/departement/ governing body (as employer) must ensure that a temporary substitute is found to fill this educator’s post.
  + If a man is granted paternity leave, this may be a disadvantage for an employer, as a temporary substitute needs to be found for the educator, which may then be regarded as an additional expense for the school.
  + In the case where two educators are employed at the same school and have a baby, this may constitute a double expense for the school, since two substitutes need to be found and two educators need to have paid leave.

**3.4 Advantages and disadvantages regarding the labour relations between**

**educators and their employer in respect of parental leave**

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| --- | --- |
| **Advantages** | **Disadvantages** |
| Equality will be promoted regarding equal parenthood. | Double expenses for the school as an organisation. |
| Discrimination in repsect of sex, gender and birth will be reduced. | Adaptation problems may be experienced at all levels of the school upon appointing temporary educator. |
| Assistance from the life partner by virtue of sharing parental duties. | The employer experiences more stress in replacing educators. |
| Morale of educators could improve. | If paternity leave is granted but is unpaid leave, this may have a negative financial impact on the family |

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| The relationship between employer and employee may be improved or weakened, depending on the acceptance of this leave. |

**3.5 Conclusion**

When these types of leave are at issue, it is important to realise that the majority of

these types of problems comprise not only the rights of employees, but that they

are intrinsic and extrinic needs that need to be regulated consistently and fairly and

cannot be communicated only by way of legislation. If these types of parental leave

are not taken into account, this leads to discirmination and unhappiness which

develops from one party and which may then end in disputes. These types of

parental leave may give rise to disputes of discrimination in the labour field,

because for instance:

* + A business policy makes provision only for women and not for men.
  + A business policy makes provision for only heterosexual relationships and not for same-sex relationships.
  + A business policy does not do enough to prevent the abuse of these types of leave.

It is critically important that a distinction should therefore be made between the

different forms of parental leave that people may use, instead of the current provisions

that are found in one section, namely section 27 of the Basic Conditions of

Employment Act (SA, 1997) which gives parents only three days’ paid leave in respect

of birth, illness and death.

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