Comments on the proposed act ON THE AMMENDMENT ON THE BASIC CONDITIONS aCT [PW5-2015]

# **To the Portfolio Committee of Labour for consideration on the proposed act.**

## Background

I hereby submit a submission on the proposed act on behalf of four of my B.Ed. Honours students in Education Law of North-West University (Potchefstroom Campus). The submission consist of two proposals and is based on an assignment done on the practical application of legislation in schools in the module on Labour Relations and school governance. My students submitted the proposal to the Portfolio Committee in their individual capacity because they are eager to take part in the democratic process of voicing their opinions on the topics parenthood leave and mandated leave and how it will affect school governance. The authors of the proposals will not submit an oral presentation, but hope that some of their suggestions will contribute to the drafting of the proposed act.

#  **Proposal 1:** **Proposal for the Amendment on Labour Acts [PW-5-2015] (Francisca De Almeida and Valdez Variawa)**

## Introduction

In the following proposal we will be discussing whether it is fair and just to treat male, female, homosexual couples and adoptive parents, including single parents as different bodies on the grounds of leave as found in Chapter 3 of the Basic Conditions of Employment Act 75 of 1997 as well as chapter J of the Personnel Administrative Measures (-Further mentioned as PAM).

## 2.2 Argument

 Fairness? How do we define fair? Fair labour practices? What is fair? According to section 2 (a) of the Basic Conditions of Employment Act, the right to fair labour practice is conferred by section 23(1) of the Constitution.

This leads us to ask how we know whether a practice is fair, because what is fair for one is not necessarily fair for another, if we are to look on the grounds of equality as stated by the Constitution.

In Section 23(1) of the Constitution the right to fair labour practices is emphasised for everyone. We find that the word “fair” is important in this context because to be fair is defined in Merriam Webster’s online dictionary, as the act of agreeing with what is thought to be right or acceptable. Thus we can say that treating people equal and on a non-discriminating way ensures that there is fairness in the labour practice.

The constitution and legislation both refer to leave of the employee but these policies are both slightly vague and not specific enough as to which parties should be granted leave. Parenthood leave, adoption leave as well as mandated leave need to be emphasised more specifically in these policies because in not doing so, the employee’s right to parenthood leave, adoption leave or mandated leave is limited.

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## 2.3 Aim

To make legislation based on leave of parents, more specific. To ensure that leave is granted more fairly and equally and doesn’t discriminate against any gender or sexuality, or marital status.

## Knowledge of the Constitution

### Equality

According to section 9(1) and (2) of the Constitution, everyone is equal before the law and has the right to equal protection and benefit of the law.

Section 9(3) of the Constitution states that the state may not unfairly discriminate on one or more grounds including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

### Labour relations

Section 23 of the Constitution states that everyone has the right to fair labour practices. Fairness means to agree with what is seen as lawful and acceptable. Section 13 of the Constitution states that no one may be subjected to forced labour. Thus implying that when a parent needs to be with the child in cases of emergencies, the employer may not force the employee to work. This would seem unfair towards the employee and the family.

We find that section 13 and section 23 of the Constitution go hand in hand as they both touch of being fair in the labour practice.

## 2.4.3 Limitation of rights

Section 36 of the Constitution states that the rights in the Bill of Rights may only be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

We also feel that in the case where a child is involved, that child’s best interest should be of utmost importance as stated in section 28(2) of the Constitution.

## Knowledge of the legislation

### Prohibition of unfair discrimination

According to Section 6 of the Employment Equity Act, no person may unfairly discriminate, directly or indirectly against an employee, in any employment policy or practice, on one or more grounds including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth. The above stated emphasises that on not discriminating any employee on the above stated ground, this also mean that no one should be discriminated against those grounds. For the purpose of the probably amendment, we find this applies towards not treating anyone differently in a discriminatory manor according to the their marital status, whether they are single, married, life partners or whatever their sexual orientation may be, or gender, be it male or female and also but not least, pregnancy.

Having said this, we can tell that the above status also links to constitution.

### Collective agreements

Section 213 of the Labour Relations Act refers to collective agreement as a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on one hand, on the other hand – one or more employers; one or more registered employers’ organizations; or one or more employers and one or more registered employers.

The responsibility lies on both parties to be willing to negotiate in a peaceful way, to cooperate and act in good faith (Rossouw, 2010:110). Thus we note that the trade unions can also negotiate in a calm and peaceful manner with the employer when the employee seeks to take parenthood leave, adoption leave, or mandated leave.

### Gender specification

Legislation specific towards leave does not clarify which genders are granted specific leave. Section 25 and 27 of the Basic Conditions of Employment Act both refer to the term “employee” is granted leave for specific terms. This is not specific enough, and arises confusions towards genders. Thus being said, even if it was stated as to which gender is which, it could be taken up as possible gender inequality and discrimination.

## Adoption

In terms of adoption, the Children’s Act 38 of 2005, Section 231 states that adopting a child is not limited to only husband and wife. Therefore, we argue that the provisions for leave under the Basic Conditions of Employment Act should also be specific in terms of who is granted leave as it is not clearly stated specific towards the adoption leave. Therefor the provisions for leave should include the following:

* Single parents
* Adoption and parents who make use of a surrogate
* Homosexual and heterosexual couples

According to Chapter J, item 14 of the PAM an educator who adopts a child that is younger than two years, qualifies for adoption leave to a maximum of 45 working combined days where both spouses and life partners are employed in the Public Service. This is not deemed as fair towards both partners and especially the child being born because the child needs to have a parent around as much as the child of a mother who gave birth to her own child. This can be further justified by section 28 (2) Constitution, where the child’s best interest is of paramount importance.

## Mandated parenthood leave

Mandated leave can be seen as forced leave due to unpreventable circumstances. For example in section 25(2) (b) of the Basic Conditions of Employment Act an employee may commence maternity leave on a date from which a medical practitioner or midwife certifies that it is necessary for the employees heals or that of her unborn child. This means that the employee needs to take leave for the safety of both herself and her unborn child.

## Knowledge of the Labour law principles

### The rules of natural justice

Rossouw (2010:29) explains the rules of natural justice as respecting the rights of individuals and the public. Oosthuizen (2015:133) states that the aim of the rule of natural justice is to ensure that justice prevails between two subjects, subjects and the state. This shapes or influence education by an employer/ principal acting as a representative of the school over an employee, there should be clear evidence of justice and fairness.

### Audi alteram partem – hear the other side with regards to being fair

Having said this, we can also note from Rossouw (2010:30) that is known as a relationship between authority and subordinate – principal and employee. The authority figure may treat the subordinate unfairly and this will be seen as ignorance of the rules of natural justice.

## Recommendations - Application of legal concepts within educational environment

### Parenthood leave

Concerning the birth of a born child we disagree with the present legal leave recommendations and feel that either parents or life partners should be included in the maternity leave. But on the other hand we feel that the male parent’s leave may be limited according to section 36 of the Constitution due to the fact that he does not give birth and his physical health is not affected. The male parent does not have get equal leave days as the woman does but may be excused from extra-curricular activities in order to support his family.

This could be suited for the employer, because it will ensure that his employee still does their duties as an educator during working hours and at the same time, the male employee is able to be there for his family at that time of need, especially since the mother is often weak after giving birth.

### Adoption leave

We do not agree with what chapter J, item 14 of the PAM states regarding adoption leave, because 45 combined days seems a bit too short, particularly for the new-born baby. We feel that adoption leave should be on the same scale as maternity leave for the adoption of a new-born baby, but however, it can be restricted in the same way as parenthood leave for the male parent. Thus we feel it would be fair to grant one parent the same days leave as the maternity leave for the sake of the new-born child.

When the child is older than 1 year, but smaller than 3 years, one parent or life partner could be granted the full 45 days leave and the other parent could be granted the same non-extra-curricular leave as the male parent as stated above.

When adoption of a child over 3 years occurs, we agree with legislation that it is suitable for both parents to have 45 days leave combined.

### 2.7.3 Mandated leave

Section 33 of the Constitution is of importance when mandated leave is handled. Mandated leave should be handled fairly by the employer, meaning that it should be balanced out by fairness and non-discrimination in a lawful manor. This means that the employer should hear the other side (*audi alteram partem*) and consider all relevant factors in order to ensure the action granted is fair and lawful in a non-discriminating way.

The management team and the principal has a big role in the decision process, because it is their duty to grant such leave or not if it is deemed unnecessary. The collective agreement should not limit a parent’s mandated leave in the necessary circumstances.

## 2.8 Conclusion

From the above, we conclude that there needs to be an amendment on the Basic Conditions of Employment Act because not all parties are treated equally and fairly. Also certain provisions may be further amended to ensure fairness and equality with reasonable limitation in an open and democratic society to affirm democratic values of human dignity, equality and freedom.

**3. Proposal 2: Wetsontwerp-ontleding (Suzanne Broodryk en Elmien Van Wyk)**

**3.1 Inleiding**

Artikel 2 van die wet op Basiese Diensvoorwaardes, 75 van 1997 (SA, 1997), beklemtoon dat dit fokus op die belangrikheid van ekonomiese ontwikkeling en maatskaplike geregtigheid ter bevordering van die primêre oogmerke van hierdie wet te bereik, deur:

1. “Uitvoering te gee aan die reg op billike arbeidspraktyke wat by artikel 23 (1) van die Grondwet verleen is en daardie reg te reël,
2. Deur basiese diensvoorwaardes in te stel en af te dwing;
3. Deur die verandering van basiese diensvoorwaardes te reël;
4. Om uitvoering te gee aan die verpligtinge wat deur die Republiek as lidland van die Internasionale Arbeidsorganisasie opgeloop is.” (SA, 1997 & Rossouw, 2015:64)

Bogenoemde wet (SA: 1997) is en moet soos alle ander wetgewing gefokus wees op die Suid-Afrikaanse Grondwet (SA: 1996) se bepalings en demokratiese waardes soos uiteengesit in artikel 1 (SA, 1996): “(1)(a) Menswaardigheid, die bereiking van gelykheid en die uitbou van menseregte en vryhede.” Rossouw (2015:64) beklemtoon verder dat hierdie Basiese Diensvoorwaardes wet (SA, 1997) minimum voorwaardes binne die arbeidspraktyk uitlê, naamlik:

* Werksure
* Verlof
* Oortydbetaling vir werkgewers.

**3.2 Tipes verlof**

Hierdie ontleding sal fokus op die wetsontwerp van die verlof van ouers in die volgende kategorieë:

### 3.2.1 Ouerskapverlof:

In kort kan ouerskapverlof gesien word as die tydperk waar ouers tyd gegun word om na hulle kinders om te sien. Artikel 25(1) van die wet op Basiese Diensvoorwaardes (SA, 1997) stipuleer dat vroulike werknemers geregtig is op minstens vier opeenvolgende maande betaalde kraamverlof. Teenstrydend met laasgenoemde artikel, verkry vaders tans nie dieselfde verlofsvoordele as wat die moeder van ŉ pasgebore baba sal kan geniet nie. Nel (2014) beklemtoon dat Suid-Afrika een van die beste ontwikkelde regsstelsels ter wêreld het, maar die konsep van vaderskapverlof is nog nie in Suid-Afrika so gevorderd nie. Die vader moet tans gesinsverantwoordelikheidsverlof (SA, 1997: art 27) neem, in plaas van vaderskapverlof wat deel moet vorm van ouerskapverlof (Nel, 2014). Verlof van gesinsverantwoordelikheid 27(2) behels dus dat werknemers jaarliks drie dae betaalde verlof verkry vir 27(2)(a) die geboorte van ŉ kind, 27(2)(b)wanneer ŉ werknemer se kind siek is of (27(2)(c) met die dood van ŉ nabye familielid (SA, 1997: art 27 & Nel, 2014). Vanuit bogenoemde artikels oor ouerskapverlof blyk dit dat daar dus ongelykheid kan onstaan. Gelykheid is een van die fundamentele waardes van die Suid-Afrikaanse Grondwet (SA, 1996) en dit word beklemtoon in artikel 9 (SA, 1996) wat stipuleer dat 9(1) elkeen gelyk is voor die reg en oor die reg op gelyke beskerming en voordeel van die reg beskik; 9(2) “gelykheid sluit die volle genietinge van alle regte en vryhede in.”

**Hoekom kan hierdie artikels oor ouerskapverlof na ongelykheid dui?**

Artikel 27(2)(a-c) van wet op Basiese Diensvoorwaardes (SA, 1997) se gelyste gebeure kan as algemeen gesien word, deur dat dit daagliks gebeur. Indien ŉ werknemer wel die drie dae betaalde verlof op gebruik het, kan hy of sy nie meer verlof vir gesinsverantwoordelikheid neem nie. Hoe dan te make as ŉ man se vrou ŉ kind gebaar het en afhanklik is van hom – ten opsigte van sy fisiese en finansiële ondersteuning. Hierdie ongelykheidsvoordeel kan ook op diskriminasie dui en artikel 9(3) van Suid-Afrikaanse Grondwet (SA, 1996) stipuleer dat die “staat nie regstreeks of onregstreeks onbillik teen iemand diskrimineer op een of meer gronde nie, met inbegrip van onder andere geboorte, geslag en geslagtelikheid.” Dus, daar is ŉ aanduidende gaping tussen die gelykheid van kraamverlof van vroue en die gesinsverantwoordelikheidsverlof wat mans moet neem in die geval van ŉ pasgebore baba.

**Die volgende kan onder hierdie tipe verlof bevraagteken word:**

* Moet die man ook vier maande verlof kry wanneer die vrou daarop gaan?
* Sal hierdie verlof vir beide geslagte betaalde verlof wees?
* Hoe moet ŉ werkgewer (bv. hoof/ departement/ beheerliggaam) so situasie hanteer as beide man en vrou by die selfde werk is (bv. Albei is onderwysers by dieselfde skool)?
* Hoeveel tyd moet ŉ man dan volgens wet geregtig wees tot hierdie “vaderskapverlof” konsep?
* Indien hierdie vaderskapverlof geïmplementeer word en dit as onbetaalde verlof aanskou word, gaan dit tot voordeel of tot nadeel strek vir die huisgesin?

**Aanbevelings/ Mening:**

Dit blyk dat daar ŉ duidelike ongelykheidsvlak tussen die verskillende geslagte se geregtigheid tot verlof tydens die geboorte van ŉ nuweling is. Dit sal meer effektief wees om ŉ onderskeid te tref tussen ouerskapverlof (onder andere vaderskapverlof) en verlof vir gesinsverantwoordelikheid soos verkry in artikel 27 van die wet op Basiese Diensvoorwaardes (SA, 1997).

In ons mening behoort ŉ man geregtig te wees op meer as drie betaalde dae verlof, soos gestipuleer in gesinsverantwoordelikheidsverlof, tydens die geboorte van ŉ kind. Dit hoef dus nie vier maande betaalde verlof te wees soos met die vrou tydens kraamverlof nie, maar ons dink dat twee weke voldoende sal wees. Die twee weke vaderskapverlof kan dus bestaan uit een week betaalde verlof en die tweede week van onbetaalde verlof; waar hy die tweede week kan besluit om terug te keer werk toe of om hierdie onbetaalde week te gebruik.

**3.2.2 Aannemingsverlof**

Nel (2014) verduidelik dat daar geen statutêre verlof is vir die aanneem van ŉ kind nie, maar dat daar wel ŉ reg is op versekeringsvoordele vir verlof vir aanneem doeleindes, waarvan net een ouer daarvoor kan aansoek doen en die kind jonger as twee is. Rossouw (2015:67) voer verder aan dat ŉ opvoeder, wie ŉ kind aanneem van jonger as twee jaar, kwalifiseer om aannemingsverlof te neem vir ŉ tydperk van tot 45 werksdae. Volgens Paterson (2013) hoef werkgewers nie aannemingsverlof aan werknemers toe te staan nie, omdat dit nie tans in Suid-Afrikaanse wetgewing gestipuleer is nie. Hierdie tekortkoming van aannemingsverlof kan tot diskriminasie lui teenoor die ouers wat ŉ kind wil aanneem. Hier kom artikel 9 van die Suid-Afrikaanse Grondwet (SA, 1996) weer ter sprake, omdat artikel 9(3) beklemtoon dat daar teen niemand regstreeks of onregstreeks gediskrimineer mag word nie. Alhoewel artikel 27 van die Unemployment Insurance Fund Act (SA, 2001) voorsiening maak vir aannemings voordele, is dit eintlik ŉ individuele ooreenkoms wat tussen werkgewer en werknemer besluit kan word.

**Aanbevelings/ Menings**:

* Hierdie tipe verlof moet meer duidelik gestipuleer word in die wet op Basiese Diensvoorwaardes (SA, 1997).
* Daar moet meer duidelikheid met betrekking tot die verlof van beide ouers of slegs ŉ enkel ouer gestipuleer word.
* Daar moet ook ŉ vasgestelde maksimum dae wees, wat nie net afhang van die onderhandeling tussen die werkgewer en die werknemer nie.
* Hierdie aannemingsverlof bepaling moet ook die fundamentele waardes van die Suid-Afrikaanse Grondwet (SA, 1996) bevorder soos uiteengesit in artikel 1.
* Daar mag dus geen diskriminerende bepalings in hierdie beplande artikel voor kom nie.

**3.2.3 Opdraggewende ouerskapverlof:**

Dit wil voorkom of daar tans geen vorm van opdraggewende ouerskapverlof in Suid-Afrika is nie. Die doel van opdraggewende ouerskapverlof sal wees om aan die werknemer ŉ geleentheid te bied om na homself of haarself om te sien of na ŉ sieklike familielid om te sien. Hierdie tipe verlof word huidiglik hervat in artikel 27 van die wet op Basiese Diensvoorwaardes (SA, 1997) wat aan werknemers net drie dae betaalde verlof per jaar gee vir die 27(2)(b) siekte van ŉ kind. Laasgenoemde verlof vir gesinsverantwoordelikheid is uiters min as mens al die gebeure – naamlik die geboorte van ŉ kind, die siekte van ŉ kind en die dood van ŉ nabye familielid – wat dit bevat, in agneem.

**Aanbevelings/ Menings:**

* As werknemers vooraf kan sien dat hierdie verlof benodig word, moet die werknemer die werkgewer in kennis stel oor die hoeveelheid dae wat benodig sal word – sodat die werkgewer reëlings kan tref.
* As die behoefte van hierdie verlof onvoorsienbaar is, moet die werknemer ŉ kennisgewing inhandig – so spoedig as moontlik.
* ŉ Familielid moet ook duidelik gedefinieer word in hierdie artikel as ŉ kind, ouer (of ŉ skoonouers), lewensmaat, groot ouers, kleinkind, broer of suster.

**3.3 Praktiese voorbeelde vanuit die onderwyspraktyk wat verband hou met ouerskapverlof**

* Wanneer ŉ onderwyseres aansoek doen vir kraamverlof, moet die hoof/ departement/ beheerliggaam (as werkgewer) seker maak dat daar ŉ tydelike plaasvervanger gevind word om hierdie onderwyseres se pos te vul.
* Indien ŉ man die vaderskapverlof toegestaan word, kan dit tot ŉ nadeel wees vir ŉ werkgewer, omdat daar ŉ tydelike plaasvervanger vir die onderwyser gekry moet word wat dan as nog ŉ ekstra uitgawe vir die skool beskou kan word.
* In die geval waar twee opvoeders by die selfde skool getroud is en ŉ nuweling kry, sal dit ŉ dubbele uitgawe vir die skool kan wees – waar twee plaasvervangers gekry moet word en twee opvoeders betaalde verlof moet kry.

**3.4** **Voor en nadele met betrekking tot die arbeidsverhoudinge van onderwysers en hul werkgewer in verband met ouerskapverlof**

|  |  |
| --- | --- |
| **Voordele** | **Nadele** |
| Gelykheid sal bevorder word ten opsigte van gelyke ouerskap. | Dubbele uitgawes vir die skool as organisasie. |
| Diskriminasie ten opsigte van geslag, geslagtelikheid en geboorte sal verminder word. | Aanpassings probleme in alle vlakke van die skool kan bevind word met die aanstelling van ŉ tydelike personeellid |
| Hulpverlening vanaf die lewensmaat deur die deel van ouerskapverpligtinge. | Werkgewer ervaar meer stres om onderwysers te vervang. |
| Moraal van onderwysers kan verbeter | As vaderskapverlof toegestaan word, maar dit is onbetaalde verlof, kan dit ŉ negatiewe finansiële impak hê op die gesin. |
| **Die verhouding tussen werkgewer en werknemer kan verbeter of verswak, afhangend van die aanvaarding van hierdie verlof.** |

**3.5 Gevolgtrekking:**

Wanneer dit by hierdie tipes verlof kom, is dit belangrik om te besef dat die meerderheid van hierdie tipe probleme nie net die regte van werknemers behels nie, maar dat dit intrinsieke en ekstrinsieke behoeftes is, wat konstant en regverdig gereguleer moet word in en deur wetgewing en nie net gekommunikeer word nie. As hierdie tipes ouerskapverlof nie in ag geneem word nie, lui dit tot diskriminasie en ongelukkigheid wat vanaf een party groei en wat dan in dispute kan eindig. Hierdie tipes ouerskapverlof kan dispute van diskriminasie na vore bring in die arbeidspraktyk, omdat byvoorbeeld:

* ŉ Besigheidsbeleid net voorsiening maak vir vroue en nie vir mans nie.
* ŉ Besigheidsbeleid net voorsiening maak vir heteroseksuele verhoudings en nie dieselfde geslag verhoudings nie.
* ŉ Besigheidsbeleid doen nie genoeg om die misbruik van hierdie tipes verlof te voorkom nie.

Dit is van kardinale belang dat daar dus onderskeid getref word tussen die verskillende ouerskapverlof wat mense kan gebruik, in plaas van die huidiglike bepalings wat in een artikel gevind is, naamlik artikel 27 van die wet op Basies Diensvoorwaardes (SA, 1997) wat net drie dae betaalde verlof aan ouers gee in gevolge van geboorte, siekte en dood.

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Thank you for the opportunity.

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