



**AAN / TO: SAOU WERKPLEKVERTEENWOORDIGERS / SAOU SHOP STEWARDS**

**AANDAG: ATTENTION: ALLE SAOU LEDE / ALL SAOU MEMBERS**

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**The Burning Question Is:**

***My Principal says that I can take leave for a day or two if I pay the replacement from my own pocket. May I do this?***

**No**, the educator has **NO** legal right to appoint a replacement to take over his / her work for a period of time. Only the DoE or Governing Body can make appointments at schools and only those two parties can compensate a replacement. The Principal may under no circumstance force an educator to remunerate a replacement. If the leave is rejected on this principle, the educator may declare an official grievance.

**To summarise:**

1. *The South African legislation does not have the authority or the legal capacity to qualify a Legal contract between one educator with another person to occupy a specific post for even a fraction of the day or longer.*
2. *The rule regarding a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, does not qualify any Educator to render the service or to delegate their responsibilities of another educator at a public school.*
3. *This Contract of employment does not fall under the legislation and will not be legal or lawful.*
4. *No educator has the right to delegate their responsibilities. (The rule states that the person who alleges to be an employee is obliged to render his service personally and is NOT allowed to DELEGATE this obligation;)*
5. *Only the Department of Education (The State) and the SGB of the said institution, could through the said stipulations of the EEA, SASA, LRA and BCE create posts at a public school.*
6. *Only the DoE and the said SGB of a public School can be an Employer of an educator or non-educator at a public school according to the EEA, SASA, LRA and BCE.*
7. *There are specific obligations that an Employer should adhere to according to the BCE and LRA as well as other relevant legislation.*
8. *As a rule, an employer is liable to third parties for delicts committed by its EMPLOYEES, provided the delict was committed in the scope of the employee's employment. If an Educator appoints another Educator or person to take over their responsibilities or delegate their responsibilities at a public school, this contract of employment shall be illegal and unlawful and the liability of a third-party delicts committed by the OTHER person will fall on the Educator, in their personal capacity.*
9. *No Educator according to any law in South Africa has the right to appoint any person to take over their responsibilities, their contract of employment with the DoE or the SGB or are entitled to numerate another person for this said service delivered. This appointment and numeration of the other person via the educator, will be illegal and an unlawful act.*
10. *Only the SGB and the DoE (The State) are legally mandated to appoint and numerate educators or non-educators at a public school in South Africa.*
11. *No Educator has the right to appoint an Independent Contractor for the same purpose as already indicated. This appointment and numeration will also be illegal and unlawful.*

**The above-mentioned summary, as contained in legislation pertaining the relationship between employer and employee, see below:**

**A. The Labour Relations Act: (*LRA, section 200A*), (*Presumption as to who is employee*) states the following regarding who is an employee:**

- (1) *Until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:*
- (a) *the manner in which the person works is subject to the control or direction of another person;*
  - (b) *the person's hours of work are subject to the control or direction of another person;*
  - (c) *in the case of a person who works for an organisation, the person forms part of that organisation;*
  - (d) *the person has worked for that other person for an average of at least 40 hours per month over the last three months;*
  - (e) *the person is economically dependent on the other person for whom he or she works or renders services;*
  - (f) *the person is provided with tools of trade or work equipment by the other person; or*
  - (g) *the person only works for or renders services to one person.*

**B. Furthermore: The Basic Conditions of Employment (*BCA, section 83A*) state the following:**

#### **PRESUMPTION AS TO WHO IS AN EMPLOYEE:**

1. A person who works for, or provides services to, another person is presumed to be an employee if –
  - (a) his or her manner or hours of work are subject to control or direction;
  - (b) he or she forms part of the employer's organisation;
  - (c) he or she has worked for the other person for at least 40 hours per month over the previous three months;
  - (d) he or she is economically dependent on the other person;
  - (e) he or she is provided with his or her tools or work equipment; or
  - (f) he or she only works for, or renders service to, one person.
2. If one of these factors is present, the person is presumed to be an employee until the employer proves that he or she is not.

**C. What is the difference between an employee and an independent contractor?**

#### **Types of Contracts:**

1. The **ordinary contract** of employment (*Locatio conductio operarum*) may be defined as a reciprocal contract in terms of which an employee places his **SERVICE** at the disposal of another person or organisation – the employer – at a determined or determinable remuneration in such a way that the employer is clothed with authority over the employee and exercises supervision regarding the rendering of employee's services.
2. On the other hand, in contrast, (*Locatio conductio operis*) or the **contract of letting and hiring of (piece) work** is concluded between an employer and an **INDEPENDENT CONTRACTOR** and may be described as a reciprocal contract between these parties in terms of which the independent contractor undertakes to build, manufacture, repair or alter a corporeal thing within a certain period and in return the employer undertakes to pay the contractor a reward. The contractor is an independent third party and does not form part of the employer's enterprise.

The contractor undertakes to do a certain piece of work against payment BUT, as opposed to the EMPLOYEE in terms of the ordinary contract of employment, he is not subject to the control of the employer.

3. A **THIRD type** of contract in terms of which one person renders services to another is the rendering of PROFESSIONAL services. This includes services rendered by an attorney, advocate, auditor or doctor. In this instance a contract of mandate is concluded between the parties. It differs from the ordinary contract of employment in that the person who is rendering the services is not subjected himself to the authority of the other person and he is performing professional services, whereas the ordinary employee normally performs tasks of more general nature.
4. A **contract of MANDATE** may be defined as follows. A contract of mandate is a contract in terms of which the mandatory undertakes to perform a MANDATE for the mandator, for example a mandate given to a doctor to treat the mandator or a mandate to an attorney to act on behalf of the mandator in a court case. In the contract of mandate the mandatory therefore performs a specific mandate given to him by the mandator. He must perform the mandated acts, BUT is not subject to the authority of the mandator.

### **The Rights of an Employee:**

- a. Only an **EMPLOYEE** enjoys **legislative protection** and has access to the dispute resolution mechanisms created under the Labour Relation Act (LRA – Act 66 of 1996), such as the CCMA and the Labour Court.
- b. Only EMPLOYEES enjoy the **freedom of association** to join trade unions and the protection afforded by the Basic Conditions of Employment Act (BCE – Act 75 of 1997).
- c. Only EMPLOYEES are entitled to **social security benefits** in terms of the Unemployment Insurance Act (UIA for UIF benefits – Act 63 of 2001) and the Compensation for Occupational Injuries and Diseases Act (Act 130 of 1993)

### **Under the Authority and Supervision of the Employer:**

An important feature of the ordinary contract of employment is that the employee is subject to the **AUTHORITY and SUPERVISION of the EMPLOYER**. The control test proved inadequate to distinguish conclusively between employees and independent contractors. The test that finally found favour with both the courts and academics is the “dominant impression” or “mixed” test.

### **The Existence of the Employment Relationship:**

While no list can be exhaustive, the following factors tend to indicate the existence of an employment relationship:

- d. **That the person who alleges to be an employee is obliged to render his service personally and is NOT allowed to DELEGATE this obligation;**
- e. **That he has to keep fixed hours and is paid a regular wage or salary;**
- f. **That he is subject to the alleged employer’s disciplinary code;**
- g. **That he is entitled to benefits, such as membership of a pension fund or medical aid scheme; and**
- h. **That he is subject to a degree of control by the employer.**

None of these factors is conclusive in itself, but collectively they assist in determining whether a person is, in fact, an employee.

## D. The Employer's delictual liability:

### Delict Definition:

**A civil law term which imposes liability on a person who causes injury to another, or for injury caused by a person or thing under his custody.**

As a rule, an **EMPLOYER** is liable to third parties for delicts committed by its **EMPLOYEES**, provided the delict was committed in the scope of the employee's employment.

In order to hold the employer liable for the delicts of his employee, the following requirements must be proved:

- there must be an employer / employee relationship and
- the delict must have been committed by the employee in the course of the performance of his duties, that is, "in the scope of employment".

Before the employer can be held liable for delicts committed by an employee, the existence of a contract of employment (**Locatio Conductio Operarum**) – must be proved.

It also follows then that the employer's liability is dependent upon the employee having committed the delict in the course of the performance of his duties.

The following is examples of circumstances the courts have held as falling within the scope of an employee's employment, thereby rendering the employer liable.

- If the delict is committed while the employee is actually working-that is, while he is occupied with the execution of his duties – he obeying the orders of his employer and doing his work.
- If the delict is committed while the employee is acting within the scope of his employment, whether during or after working hours, his employer is liable.
- When an employee performs an illegal act while acting in the course of his duties, the employer is liable for the delict committed. Therefore, the employer is liable when the employee commits an illegal act, if compliance with the employer's orders requires that act.
- If an employee performing an act which has been prohibited by the employer, but which nevertheless promotes the employer's interests, the employer is liable for the delict committed by the employee.
- When an employee commits a delict while partly promoting the interests of his employer and partly his own, the employer will be liable.
- When the employee totally abandons his work in order to promote his own interests, he is acting outside the scope of his employment – he is "on a frolic of his own" – and his employer will not be held liable for any delict committed by him; the employee is personally liable.

Before the employer will be held liable, the commission of a delict by the employee must be proven. This means that the employee must have caused harm to another by his unlawful act or omission. The employer will be liable only for a delict which could be claimed from the employee. The employer and his employee are liable as co-defendants (**in solidum**). Should the employer pay the full amount of damages of the third party, he will be able to claim this amount from the employee.

## E. Then: Who has the power and the legal right to appoint Educators or any other employees at a Public school?

- **South African Schools Act (SASA) (Act 84 of 1996 – Section. 20.4, 20.5, 20.6 & 20.7) states the legal obligation and rights of a School Governing Body (SGB) of a public school for the creation of educational and non-educational posts, additional to the establishment determined by the MEC of the province, at a public school:**

(4) Subject to this Act, the Labour Relations Act, 1995 (Act No. 66 of 1995), and any other applicable law, a public school may **establish posts for educators and employ educators additional to the establishment determined by the Member of the Executive Council in terms of section 3 (1) of the Educators' Employment Act, 1994. [Sub-s. (4) added by s. 6 of Act No. 100 of 1997.]**

(5) Subject to this Act, the Labour Relations Act, 1995 (Act No. 66 of 1995), and any other applicable law, a public school may **establish posts for non-educators and employ non-educator staff additional to the establishment determined in terms of the Public Service Act, 1994 (Proclamation No. 103 of 1994).** [Sub-s. (5) added by s. 6 of Act No. 100 of 1997.]

(6) An educator and a non-educator employed in a post established in terms of subsection (4) or (5) must comply with the requirements set for employment in public schools in terms of this Act, the Labour Relations Act, 1995 (Act No. 66 of 1995), and any other applicable law. [Sub-s. (6) added by s. 6 of Act No. 100 of 1997.]

(7) **A public school may only employ an educator in a post established in terms of subsection (4) if such educator is registered as an educator with the South African Council of Educators.** [Sub-s. (7) added by s. 6 of Act No. 100 of 1997.]

- **Then the Employment of Educators Act (EEA) (Act 76 of 1998 – Section. 3(1), 3(2), 3(3), 3(4) &3(5) states the following regarding the employment at a Public school and a further education and training institution:**

### **Employers of educators and other persons:**

3. (1) Save as is otherwise provided in this section –

(a) the **Director-General shall be the employer of educators in the service of the Department of Education in posts on the educator establishment of the said Department for all purposes of employment; and**

(b) the **Head of Department shall be the employer of educators in the service of the provincial department of education in posts on the educator establishment of that department for all purposes of employment.**

(2) For the **purposes of determining the salaries and other conditions of service of educators, the Minister shall be the employer of all educators.**

(3) For the **purposes of creating posts –**

(a) on the **educator establishment of the Department of Education, the Minister shall be the employer of educators in the service of the said Department; and**

(b) on the **educator establishment of a provincial department of education, the Member of the Executive Council shall be the employer of educators in the service of that department.**

(4) **A public school shall be the employer of persons in the service of the said school as contemplated in section 20(4) or (5) of the South African Schools Act, 1996 (Act No. 84 of 1996).**

(5) A further education and training institution shall be the employer of persons in the service of the said institution as contemplated in section 14(2) or (3) of the Further Education and Training Act, 1998.

## **F. The Power of delegation:**

**The Employment of Educators Act (EEA) [(Act 76 of 1998 – Section. 36(1) – (4)] stipulates the power of delegation and the assignment of functions as follow:**

### **Assignment of functions**

36. (1) **The Minister** may –

(a) delegate to the Director-General or any other person in the service of the Department of Education any power conferred upon the Minister by or under this Act, other than the power referred to in section 25 or 35, on such conditions as the Minister may determine; or

[Para. (a) substituted by s. 13(a) of Act No. 53 of 2000.]

(b) authorise the said Director-General or person to perform any duty assigned to the Minister by or under this Act.

(2) **The Director-General** may –

(a) delegate to any person in the service of the Department of Education any power conferred upon the Director-General by or under this Act, on such conditions as the Director-General may determine; or

(b) authorise the said person to perform any duty assigned to the Director-General by or under this Act.

(3) **The Member of the Executive Council** may –

(a) delegate to the Head of Department or any other person in the service of the provincial department of education any power conferred upon the Member of the Executive Council by or under this Act, other than the power referred to in section 25, on such conditions as the Member of the Executive Council may determine; or

[Para. (a) substituted by s. 13(b) of Act No. 53 of 2000.]

(b) authorise the said Head of Department or person to perform any duty assigned to the Member of the Executive Council by or under this Act.

(4) **The Head of Department** may –

(a) delegate to any person in the service of the provincial department of education any power conferred upon the Head of Department by or under this Act, on such conditions as the Head of Department may determine; or

(b) authorise the said person to perform any duty assigned to the Head of Department by or under this Act.

*(Credits: A practical guide to labour Law – JV du Plessis & MA Fouché)*