



PROGRAM : NATIONAL DIPLOMA IN HUMAN RESOURCES

SUBJECT : LABOUR LAW 1A

CODE : BAH11A1

MEMORANDUM

QUESTION 1

(a) List the sources of labour law. (7)

Common law (1); the contract of employment (1); legislation (1); collective agreements (1); international labour standards (1); custom and practice (1); provisions of the Constitution (1).

(b) Mention the main distinguishing features between a contract of employment (contract of services) and a contract of service (piece of work) (5)

In the case of the contract of employment, the person employed is an employee (1) and he places or surrenders his labour to another person, the employer (1) who, in turn, supervises how the employee renders his services (1). In the case of the contract of service, a person, an independent contractor (1), is employed to perform a piece of work (1) within a specified or reasonable time (1) for a reward (1). The independent contractor is not part of the employer's enterprise or organisation (1), and therefore, not subject to the employer's control (1). He is also not entitled to any employment benefits such as medical aid or pension (1).

[12]

QUESTION 2

F, a general worker at ABC (Pty) Ltd, a printing company, is allowed 10 days' vacation leave, and 2 months of maternity leave in terms of the employment contract with the company. The Basic Conditions of Employment Act 75 of 1997 allows all workers in her position 21 days of vacation leave, and 4 months' maternity leave. However, recent bargaining council collective agreement fixes vacation leave at two weeks per year. Explain which specific provisions are applicable to F's situation. [6]

The applicable principle is that "common law applies as a default option where no other rule applies to a particular situation" (1). With regard to F's situation, there are three competing provisions: the common law, the employment contract, and the Basic Conditions of Employment Act (1). In such a situation it is important to follow the lexical order of sources and rules which indicates which specific law or rule should be applied (1). In this case there is a contract of employment, which offers better conditions than the common law would have given its "no work, no pay" rule (1). It would also seem as if the BCEA and the collective agreement provide better benefits than the contract of employment itself (1). Therefore, from now onwards, F will have four months of maternity leave in terms of the BCEA. However, when it comes to the annual vacation leave, the bargaining council collective agreement applies, and F will have two weeks of it (1). This is because a collective agreement that has been entered into in a bargaining council takes precedence over all the other provisions (1), except the Constitution of South Africa Act 108 of 1996 (1). [6]

QUESTION 3

S has recently been appointed as a warehouse supervisor at Cotton Candy (Pty) Ltd. He works from Monday to Friday, and earns R12000 a month plus medical and pension benefits. He started working for Cotton Candy on 1 June 2005. Using the facts given, explain the following to C:

(a) overtime (6)

S can only be required to work overtime if there is an agreement to that effect between himself and Cotton Candy (1). He will be entitled to 1.5 times his hourly rate; and if he should be required to work on a Sunday, he would be entitled twice his hourly rate (1). S cannot be required to work more than 10 hours of overtime per week (1), or more than 12 ordinary hours and overtime a day (1). The parties may, by collective agreement, increase overtime by 15 hour a week (1), but only for a maximum of 2 months in a 12-months cycle (1)

(b) sick leave (4)

Sick leave is paid leave (1), and is regulated by section 24 to 26 of the BCEA (1). Since S works a five-day week, he is entitled to 30 days of sick leave in a three-year

cycle (1). This is an equivalent of the number of days that S would have worked in a period of six weeks (1). However, if has not completed the cycle, but has worked for a period of six months, he would be entitled to one day of sick leave for every 26 days worked (1). There is no need for a medical certificate S is just absent one day due to illness. However, Cotton Candy will demand it if S is absent for two consecutive days (1), or for two days in a period of eight days (1).

(c) regular night work

(5)

Night work on a regular basis refers to work that S would be required to do for more than one hour between 23H00 and 6H00 (1). Cotton Candy is required to do night work on a regular basis on only 5 occasions a month or 50 occasions a year (1) Cotton Candy is required to inform S about the health or safety hazards that are associated With night work (1). At his request Candy Cotton should enable S to undergo a medical examination in relation to those hazards (1), or where applicable, transfer him to day work if the health and safety hazards are associated with the performance of night work on a regular basis (1).

[15]

QUESTION 4

W, works for XYZ (Pty) a small business enterprises with its main place of business in Pimville, Soweto. He is asked by his manager, M, to remove M's car from the pavement adjacent to the premises and park it in one of the parking bays. Instead of parking the car as asked, W decides drive to Sandton to pick up his girlfriend for some shopping. Whilst on his way there, he gets involved in a collision with a sedan. The other car is severely damaged.

(a) Is XYZ (Pty) Ltd liable for the damage caused to the other? Discuss with particular reference to relevant principles and case law. (8)

Yes (1) XYZ (Pty) Ltd will be liable for damage (1). However, the liability will depend on whether there was an employer-employee relationship between XYZ (Pty) Ltd and the W (1); and whether W was acting in the course and scope of his employment with XYZ (Pty) Ltd (1). W must also have been promoting his employer's interests (1), and must not have acted beyond his authority (1), or been "on a frolic of his own" (1), *Mkhize v Martens* 1914 AD 382; *Feldman v Hall* 1945 AD 743 (1).

(b) If W were an independent contractor, on what basis would XYZ (Pty) Ltd be held liable for the damage caused? (5)

If XYZ gave incomplete instructions to W (1); if they gave instructions to W to do something that they themselves were not allowed to do (1); if they gave unlawful instructions to W (1) or ratified his unlawful conduct (1); or instructed W to perform potentially dangerous acts, but failed to take precautionary measures (1).

[13]

QUESTION 5

In 2010 M a mechanic, entered into an employment contract with Auto-Electrical (Pty) Ltd. The contract included a clause in terms of which he was prevented from setting up a business in completion with Auto-Electrical on termination of employment. It also prevented him from joining any of its competitors for a period of five years within a radius of 25km from its premises. In 2016 M who had obtained a Diploma in panel-beating and spray-painting in the meantime, terminated his employment contract with Auto-Electrical and started his own auto-electrical repairs and panel-beating business. Using the facts provided, answer the following questions:

(a) What is the clause referred to in the facts called? (1)

It is called a “restraint of trade” clause.

(b) What legal remedy, if any, does Auto-Electrical (Pty) Ltd have against M? (2)

Auto-Electrical can apply to court for an interdict (1) to preventing M from setting up his business in competition with them or with a competitor (1).

(c) What factors are likely to influence the court in making its decision in this regard? (7)

The court will examine whether the clause is valid and enforceable (1). The process will involve determining whether the clause is reasonable in the circumstances of the case (1). The reasonableness of the clause will, in turn, depend on the geographical area it covers (1) and the period for which it is supposed to last (1). The court will not grant the order if the clause is intended to prevent lawful competition (1) or if it is intended to prevent M from using his skills, experience and expertise to earn a living (1). It is also in the public interest that there be competition among business persons (1). The provisions of the Constitution will also be considered in determining the reasonableness of the clause (1). In this case, M will be conducting a business which slightly different from that of Auto-Electrical, panel-beating and spray-painting (1). Except for that aspect, the clause seems reasonable (1).

[10]

QUESTION 6

A, your 45 year-old aunt, has just started working at Iron & Steel Mining Company Ltd as a general worker. She does not know whether to join a union or not. She would like to know what rights she has in terms of the Labour Relations Act 66 of 1995. Advise A with particular reference to the following concepts:

(a) Organisational rights of unions in South Africa, and the circumstances in which they may be exercised (10)

These are not employee rights (1); they only inhere in a registered unions, and A will only be able to exercise and enjoy them when she becomes a member of a union at her workplace (1). The union must be representative of the majority of the employees at a particular workplace, to enjoy all the six organisational rights (1); or where there is no outright majority, only if the union is the only one that is most representative of the employees in the workplace (1). The union will therefore have the following rights: (a) right of access to the workplace (1); (b) the right to deduct subscriptions and levies from employee's wages(1); (c) the right to paid leave for trade union activities for office-bearer (1); (d) the right to elect union representatives (shop stewards) in the workplace (1); (e) the right to paid time off for union representatives (1); and the right to disclosure of information(1). A union that is sufficiently representative may enjoy only three of these rights, the right to access, the right to deduct subscriptions, and paid leave for office-bearers(1). However, such a union may, on application to the CCMA, and by arbitral award, be granted the right to appoint representatives (1), and paid leave for union representatives (1). And, if a union has the five organisational right, may apply to the CCMA, in order to be granted the right to disclosure of information (1). Nothing prevents an employer from negotiating, and concluding a collective agreement in terms of which organisational rights are granted to a union that is not sufficiently representative (1). **[MAX 10]**

(b) The check list of requirements in terms of Item 7 of the Code of Good Practice: Dismissal that Iron & Steel needs to consider before dismissing A. (7)

Is there a disciplinary rule in existence that governs the conduct complained of? (1); is the rule reasonable? (1); was the employee aware of the rule or should he reasonably have been aware of it? (1); was the rule breached? (1); was the employee aware of the consequence of a breach of the rule? (1); has the disciplinary code been consistently enforced? (1); is dismissal an appropriate sanction in the circumstances (of the case)? (1).

[17]

QUESTION 7

P, a 40 year-old white male pilot with considerable experience applied for a position of "Senior Pilot" at Flywell Airways. During the interview he informed the prospective

employers that he was infected with the HIV-virus about 10 years ago. He also told them that he was in a same-sex relationship. Flywell did not appoint him to the post. Instead they appointed N, a 24 year black female from Malawi, with 200 hours or one and half years' flying experience. Advise P on the following aspects:

(a) The legality and constitutionality of pre-appointment medical and psychometric tests that he had to undergo. (10)

Section 6 of the Employment Equity Act 45 of 1998 prohibits direct or indirect discrimination on several specified grounds including HIV (1). An employee or applicant may not be subjected to any medical testing, unless it is permitted or required by legislation (1) or it is justifiable on medical facts (1), employment conditions (1), social policy (1), and the fair distribution of employee benefits (1) or inherent requirements of the job (1). It was, therefore, not unfair, in the circumstances of P's work, for him to be subjected to the said medical test (1) because the test was intended to ensure that he is medically capable of performing the arduous task of flying aircraft (1). If Flywell applied for, and obtained, an order from the Labour Court, then testing for HIV, also, could be done(1).

(b) Would your answer be different if Flywell were a fishing and food-processing and packaging company? (4)

No, it would be different (1). This is because P's work would have involved the processing and packaging of food (1); and the testing, for HIV, was justifiable on medical facts (1) and the requirements of his work (1). An employer who seeks to test its employees for HIV, it has to approach the Labour Court for an appropriate order (1).

(c) Whether, by appointing N, Flywell unfairly discriminated against him (P), in the circumstances of the case. (13)

N does not seem to be covered by the provisions of the EEA (1). The fact that she is black does not bring her within the provisions of that Act (1). She is not a South African (by birth, descent or naturalisation) (1), and is therefore, not part of the designated groups (1). And, in addition to meeting the requirements of the EEA of being suitably qualified (1); N would have to meet all the requirements of the work of a pilot (1). Members of the designated group, for whom affirmative action was originally intended, may not be disqualified only on account of a lack of experience (1). However, formal qualifications (1), prior learning (1); relevant experience (1) and the capacity to acquire, within a reasonable time, the ability to do the job must be considered in determining whether such persons are qualified (1). And, a designated employer cannot implement its employment practices and policies in such a way as to exclude, completely, those employees, like P, who are not part of the designated groups (1). If Flywell were to employ N in the circumstances as set out, they would be acting contrary to the letter and spirit of the EEA (1). [MAX 10].

[27]

TOTAL: [100]
