

## Employment relationship under lockdown – rights and duties of the school governing body



For a brief overview of the opinion: [CLICK HERE](#)

### Introduction

There is no doubt that the national lock-down has caused serious consternation to both employers and employees and chief amongst these are the financial difficulties caused for both employees and employers in the education sector. The Covid-19 pandemic has caused many employees (educators and non-educators) to question whether or not they will be paid during the national lock-down period. Similarly, employers (school governing bodies) are placed in a legal conundrum as to whether an obligation exists in law for them to pay salaries/wages in circumstances where employees have not or will not render any services during the course of the lock-down period.

### What is the legal position?

The basis of an employment relationship is the employment contract entered into between the employee and the employer in terms of which the employee would render services to the employer and the employer would remunerate the employee for the services rendered. In terms of the directive issued by the Minister of Employment and Labor, the employment relationship subsists irrespective of the parties being unable to fulfill their contractual

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obligations due to lock-down. The known principle of “supervening impossibility”<sup>1</sup> will not terminate the contract. What is the governing body to do now?

### **Options available and to be considered by School Governing body:**

1. **Continuum payment of salaries:** School Governing Bodies are encouraged, to the extent that it is possible, to continue payment of the salaries/wages.
2. **Reduction of working hours / partial payment of salaries:** In the circumstances where employees can work remotely from home, the School Governing Body can consider the reduction of the hours the employee is required to work in a day. The employee’s wages are reduced accordingly.
3. **Annual leave:** The School Governing Body may instruct the employees to take their annual leave including accumulated annual leave for the period of lock-down. Section 20(10)(b) of the Basic Conditions of Employment Act provides that “*Annual leave must be taken (a) in accordance with an agreement between the employer and employee; or (b) if there is no agreement in terms of paragraph (a) at a time determined by the employer in accordance with this section.*” Accordingly, nothing prohibits an employer from placing an employee on paid annual leave during the lock-down period.
4. **Temporary lay-off:** The last remaining option would be the temporary lay-off of staff. In terms of the directive, “temporary lay-off” means “a reduction in work

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<sup>1</sup> A supervening impossibility means that the employer is unable to perform his contractual obligations (payment of the employee’s salary/wages) due to factors beyond its control and on the other hand the employee is also unable to perform his obligations (rendering of his services) in terms of the employment contract due to factors beyond his/her control.

following temporary closure of business operations, whether total or partial, due to the Covid-19 pandemic for the period of the National Disaster.”

It must however be remembered that the School Governing Body cannot unilaterally reduce the working hours/salary or institute a temporary lay-off without consulting with the employee. Should an employer not afford the employee the right to be heard, it could amount to an unfair labor practice with the employer being liable to the employee for either reinstatement or compensation.

### **What does consultation entail?**

The School Governing Body and the other consulting parties must, in the consultation, engage in a meaningful joint consensus-seeking process and attempt to reach consensus on the appropriate measures as set out above to avoid a dismissal. The School Governing Body manages the consultation process and is expected to play a proactive in:

- making the proposal;
- explaining the commercial rationale for the proposed measures;
- providing all relevant information including alternatives already considered.

The consultation can be held electronically, via e.g. Skype, Hangout, Zoom, WhatsApp call or a simple phone call. Once the parties have agreed upon the proposed measures a confirmation letter must be send setting out what was agreed upon. (See attached hereto as annexure “A”.)

## **What relief options are available to employers and employees?**

### **1. TERS benefit (Temporary Employer/Employee Relief Scheme)**

TERS may be claimed where an employer has implemented temporary lay-offs as defined in the directives. Since TERS is administered through the UIF, the employer must have been contributing to the UIF on behalf of its employees. The employer makes the application on behalf of the employees in terms of the application procedure and guidelines as provided in the directive.

### **2. Normal UIF benefit**

In the case where the employees working hours are reduced or the employee is temporary laid-off as a result of the COVID-19 pandemic, the employee can claim for the UIF benefit themselves.

The TERS and UIF manuals and the relevant forms and documents can be downloaded from the Feddas [Covid-19 information and resources](#) page.



www.fedsas.org.za

**Annexure “A”**

**NOTICE OF ALTERNATIVE TERS OF SERVICE AGREED UPON ON THE SCHOOL’S LETTERHEAD**

To:.....

(Name of employee)

**Notice of alternative terms of service agreed upon**

You are hereby referred to the recent consultation held on [insert date] in order to discuss alternative terms of service in an attempt to avoid termination of employment.

We confirm that that the following alternative measures was as agreed upon and will be instituted from (insert date):

.....

Please note that you may be eligible for unemployment insurance.... (which claim will be instituted on your behalf by the SGB / which claim you can institute at the Unemployment insurance fund.

We thank you for your understanding and co-operation during this difficult time.

Yours faithfully

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SGB Chairperson

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