

# LABOUR RELATIONS NEWSLETTER: JANUARY 2009

In this edition:

- GREETINGS
- LABOUR RELATIONS CONTACT SESSIONS
- AGREEMENTS: PSCBC & GPSSBC: 2008
- PUBLIC SERVICE ACT AMENDMENTS
- DISPUTE ISSUES
- LABOUR LAW CASES AFFECTING THE PUBLIC SERVICE

## GREETINGS

We trust you all had a joyous festive season and wish you all of the best for 2009.

## LABOUR RELATIONS CONTACT SESSIONS

In addition to the Labour Relations Forum meetings which take place on a quarterly basis, representatives from the Labour Relations Directorate will be visiting selected departments and provinces from September 2007. This is in an effort to promote the exchange of information and to be able to assist departments and provinces on a more individual level. We will request of provinces to arrange meetings of their Provincial Labour Relations Forums for this purpose. Please feel free to submit any labour relations issues you wish to discuss, for the agendas of such meetings and the Forum meetings. Letters will soon be issued to your department and/ or province in this regard.

## AGREEMENTS: PSCBC & GPSSBC: 2008

To recap, the following resolutions were concluded in the above-mentioned councils during the past year:

### *PSCBC Agreements*

- *Resolution 1/2008*  
  
"Revised Foreign Service Dispensation for Employees Serving in the Republic of South Africa Missions Abroad" – this issue arises from the Foreign Service Dispensation as contained in Resolution 8/2003. The agreement addresses the Cost of Living Allowance (COLA), the Child Allowance, Schooling Expenses, the Clothing Allowance and Medical Assistance.

- **Resolutions 2/2008, 3/2008 and 4/2008**

All these resolutions dealt with the extension of time-frames pertaining to matters emanating from PSCBC Resolution 1/2007.

- ***Resolution 5/2008***

The resolution provided for the substitution of the word "Secretary" in the constitution of the Council with the word "General Secretary". This amendment has been accepted by the Registrar of Labour Relations. Other amendments to the constitution are currently under consideration.

- ***Resolutions 6/2008 and 7/2008***

These resolutions further extended time-frames in respect of Resolution 1/2007.

- ***Resolution 8/2008***

The resolution provides for the appointment of a panel of conciliators and arbitrators.

- ***Resolutions 9/2008 and 10/2008***

These resolutions allowed for further extensions to time-frames in respect of Resolution 1/2007.

## ***GPSSBC Agreements***

- ***Resolution 1/2008***

"Occupational Specific Dispensation (OSD) for Legally Qualified Categories of Employees". The following occupational categories fall within the scope of the agreement:

- State Attorney
- Family Advocate
- State Law Advisor
- Legal Administration Officer
- Master
- Registrar
- Maintenance Officer
- Estate Controller

(NOTE: The agreement has been misinterpreted in some quarters to mean that the dispensation is applicable to any person with a legal qualification, irrespective of the nature of their work. Only those employees that perform the functions

prescribed for each of the above-mentioned categories qualify for translation to the OSD. Job title alone does not qualify an employee for entry into the OSD).

*The above-mentioned agreements are available on our website and can be perused in more detail.*

## **DEVELOPMENTS IN THE PSCBC AND GPSSBC**

- Both the GPSSBC and PSCBC are reviewing their constitutions, including the dispute resolution procedures.
- The PSCBC is involved in the negotiation of a minimum service level agreement.
- The GPSSBC is currently involved in negotiations on the OSD for Correctional Officers.

## **PUBLIC SERVICE ACT AMENDMENTS**

Based on the number of requests for information sessions on the amendments to the Public Service Act your attention is once again drawn to the provisions of the Amendment Act that are relevant to labour relations:

### ***COLLECTIVE BARGAINING***

Collective agreements are to be regarded as Ministerial determinations in order to enhance implementation and compliance.

### ***PROMOTIONS***

Before the amendments, if an existing employee applied for a higher post in the public service and was successful, this was regarded as a promotion. The definition of unfair labour practices in the Labour Relations Act includes unfair conduct relating to promotion. The reference to the term "promotion" has now been omitted in the Public Service Act, because all positions are filled through open competition and are therefore appointments.

### ***TRANSFERS***

Previously the Act allowed a transfer in the public interest without consent or due process. As amended, transfers are allowed either with the employee's consent OR without the employee's consent but subject to due process (consideration of the employee's representations) and if it is in the public interest. Before employees can be transferred as a result of the transfer of a function, the relevant bargaining council must also be consulted.

### ***COMPLIANCE WITH THE PROVISIONS OF THE PUBLIC SERVICE ACT***

Executive authorities are to discipline HOD's who transgress with regard to the provisions of the Act, and HOD's must discipline employees who commit such transgressions. These transgressions are to be reported to the Minister for Public Service and Administration who must then report on this at least annually to the relevant committees of Parliament.

***IMPLEMENTING DISCIPLINARY SANCTIONS***

Previously, in terms of the Act, the HOD had the power to dismiss an employee for misconduct while the disciplinary code provides that the chair of a hearing pronounces the sanction. The Act has been changed so that the sanction of the chair of a hearing must, subject to the internal appeal (if any), be implemented by the HOD.

***CONTINUATION OF DISCIPLINARY HEARINGS IN A NEW DEPARTMENT***

Provision has been made for the continuation/ institution of a disciplinary hearing by a new department in respect of alleged misconduct by an employee at his/ her former department. Departments are also compelled to co-operate with each other in this regard, e.g. by exchanging documents, and furnishing written and oral evidence.

***SUMMONING WITNESSES***

The Minister for Public Service and Administration is empowered to make regulations on:

- Powers for chairs of disciplinary hearings to summon employees and other persons
- Travel, subsistence and other costs for witnesses at disciplinary hearings.

***GROUNDINGS FOR DISMISSAL, AND ABSCONDMENT***

Grounds for dismissal were aligned with those in the Labour Relations Act, viz: misconduct, incapacity and operational requirements. The provision for a deemed dismissal if an employee is absent for a calendar month (abscondment), has been retained.

***PROHIBITION ON RE-EMPLOYMENT IF DISMISSED FOR MISCONDUCT***

There will be prohibition on re-employment in the public service for a prescribed period of employees dismissed for prescribed categories of misconduct. Different periods are to be prescribed in regulations for different categories of misconduct. This will not necessarily apply to all categories of misconduct.

***GRIEVANCES***

If a head of department has a grievance, he/she may submit such a grievance directly to the PSC. Employees, except heads of department, first have to exhaust the grievance procedure, before referring a matter to the relevant bargaining council as an unfair labour practice dispute. **(The provision pertaining to heads of department will only be implemented once PSCBC Resolution 14/2002 has been amended accordingly – it is envisaged that amendments to the grievance procedure will be tabled in the PSCBC early in 2009).**

**DISPUTE ISSUES**

2007 saw a decline in the number of cases relating to temporary incapacity leave. Since the beginning of 2008 there has been, however, a marked increase in the number of these cases. The cases all relate to the fact that the employer failed to adhere to the time-frame within which it has to take a decision whether or not to grant this leave. The argument is that the failure of the employer to adhere to its own prescripts nullifies its ability to decline the leave applied for by the employee.

Blame for the delay has been laid at the door of the health risk manager. An analysis of the situation has, however, revealed that departments themselves are the main culprits in this regard. Departments fail to timeously submit the applications to the health risk manager which results in the latter responding beyond the set time-frame. Labour relations officers are requested to ensure that the human resource sections improve the management of temporary incapacity leave cases. By doing this we can clearly identify when the problem lies with the health risk manager which could then be dealt with through the contract between the department and the health risk manager.

Grievance disputes remain high. As long as this is the case the issue needs to be raised. Labour relations officers must continue to make the relevant authorities that need to address grievances, aware of the time-frames. Labour relations officers must seek extensions from the aggrieved employee when it is clear that the employer will not be able to adhere to the time-frame. The relevant authorities must be guided to understand that addressing a grievance does not mean that the outcome must be positive. The important factor is that the aggrieved employee must be given a response within the time-frame, be it positive or negative.

## LABOUR LAW CASES AFFECTING THE PUBLIC SERVICE

Your attention is drawn to the following cases:

- ***ON THE ISSUE OF ACCESS TO COURTS OTHER THAN THE SPECIALISED LABOUR COURTS ON EMPLOYMENT RELATED ISSUES:***

In the case of **CHIRWA v TRANSNET LTD** in the **CONSTITUTIONAL COURT**, the court decided that employees in the public sector cannot use administrative law principles to challenge unfair or unlawful actions of their employers. The issue of whether or not a dismissal constitutes administrative action as defined in the Promotion of Administrative Justice Act (PAJA) was also specifically dealt with and it was found that this does not constitute administrative action.

**Administrative action in respect of organs of the state, is defined as follows in PAJA:**

“administrative action means any decision taken, or any failure to take a decision, by –

- (a) an organ of the state, when –
  - (i) exercising a power in terms of the Constitution or a provincial constitution; or
  - (ii) exercising a public power or performing a public function in terms of any legislation;”

However, as explained during the Current Labour Law Conference, the case of **MURRAY v MINISTER OF DEFENCE** in the **SUPREME COURT OF APPEAL** has introduced the concept of fair dealing into the common law. So, although, on the basis of **CHIRWA**, employees in the public service cannot approach the High Court with regard to employment-related matters, it seems they may now be able to do so on the basis of the common law (in fact, this decision

extends this option to employees in the private sector as well). The issue dealt with in this case, was the issue of constructive dismissal.

- ***ON THE ISSUE OF DOUBLE JEOPARDY/ WHETHER THE EMPLOYER CAN OVERTURN THE SANCTION OF THE CHAIRPERSON OF A DISCIPLINARY HEARING***

The well-known cases on this issue are the cases of **BMW(South Africa)(Pty) Ltd v Van der Walt**, and **Branford v Metrorail Services Durban and others**, both decided by the Labour Appeal Court. The court found that-

- (a) **it would probably not be considered fair to hold more than one disciplinary hearing in the absence of *exceptional circumstances*; and**
- (b) **the concept of fairness applies to both the employer and the employee. It involved the balancing of the competing and sometimes conflicting interests of the employer on the one hand and the employee on the other. The weight to be attached to these respective interests depends largely on the overall circumstances of each case."**

In the case of **MEC for Finance, KwaZulu-Natal & another v Dorkin NO & another**, the employer applied to the court to review and set aside the sanction of the chairperson of the disciplinary hearing. The Court held that it was highly desirable that the courts should be able to review decisions which affected public funds, and that it was therefore in the public interest that the State be permitted to review its own decisions.

Departments should not see this judgement as the answer to all disciplinary cases, the outcome of which they are not satisfied with. It is important to note that this judgement was given before the Public Service Act was amended (and will in any event only apply to *exceptional circumstances*). As you know the provisions of section 16(B)(1) of the Public Service Act now determines that the relevant head of department **SHALL** give effect to the sanction pronounced by the chairperson of a disciplinary hearing. The amendment to the Act might therefore have a bearing on the Court's position in future.

This case again highlights the importance of ensuring that-

- Chairpersons are properly trained;
- Chairpersons know the employer's position with regard to certain types of misconduct (i. e. those areas of zero tolerance);
- Cases are properly presented to chairpersons – it is unfair to expect a chairperson to find in the employer's favour if a case is not properly presented.