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TO ALL HEADS OF NATIONAL AND PROVINCIAL DEPARTMENTS AND GOVERNMENT COMPONENTS

APPOINTMENT OF TEMPORARY EMPLOYEES IN THE PUBLIC SERVICE

During July 2016 the DPSA advised departments that, in terms of section 198B(2)(c) of the Labour Relations Act and having regard to the intention of the drafters, section 198B of the Labour Relations Act did not apply to employees employed in terms of the Public Service Act on a fixed term contract. In June 2017 the Labour Court handed down judgment in the case of *Nowalaza and Others v Office of the Chief Justice and Another (J1177/2017) [2017] ZALCJHB 234*.

Given the various issues around the employment of temporary employees, departments have expressed confusion in this regard. The DPSA has been approached to provide assistance and guidance to departments in understanding the prescripts surrounding temporary appointments.

The Public Service Act, 1994

1. Section 8(1) of the Public Service Act, 1994 provides that employees may be appointed in a post on the department's establishment or additional to the establishment.

Staatsdiens en Administrasie . Ditirelo tsa Puso le Tsamaiso . Ditshebeltso tsa Mmuso le Tsamaiso . uMnyango wemiSebenzi kaHulumeni nokuPhata

Muhasho wa Tshumelo ya Muvuso na Vhulanguli . Kgoro ya Ditirelo tša Mmušo . Ndzawulo ya Vutirela-Mfumo na Valawuri

LiTiko le Tebasebenti baHulumende nekuPhatsa . ISebe leNkonzo kaRhulumente noLawulo . UmNyango wemiSebenzi kaRhumende nokuPhata

2. Section 8(2) of the Public Service Act provides that, subject to any prescribed (i.e. prescribed by regulation) conditions, any person so appointed in terms of section 8(1) of the Public Service Act may be employed permanently or temporarily and in a full-time or part-time capacity.
3. Section 8(3) of the Public Service Act, 1994 provides that for purposes of the Public Service Act the words “permanently” or “permanent, in respect of an employee, means an employee to whom a retirement age referred to in section 16 applies and the words “temporarily” or “temporary”, in respect of an employee, means not permanently appointed.
4. Section 12(2)(a) of the Public Service Act provides that heads of department may be appointed on for such term, not exceeding five years, as the relevant executive authority may approve.
5. Section 41 of the Public Service Act further provides that the Minister may make regulations on, amongst others, the employment additional to the establishment and restrictions on the employment of persons, other than permanently or for fixed periods or specific tasks, in the public service as a whole.

The Public Service Regulations, 2016

6. In pursuance of the aforementioned provisions of the Public Service Act, the Minister enacted regulations to specifically deal with persons employed on a temporary basis.
7. Regulation 57(2) of the Public Service Regulations provides that persons may be employed additional to the establishment in the following circumstances-
 - (a) the incumbent of a post is expected to be absent for such a period that his or her duties cannot be performed by other employees;
 - (b) a temporary increase in work occurs or it is necessary for any other reason to temporarily increase the staff of the department;
 - (c) an employee’s post has been abolished and he or she cannot be transferred into another post; or
 - (d) an employee is part of a development programme as contemplated in regulation 58.
8. Regulation 57(4) of the Public Service Regulations provides that the employment of a person additional to the establishment in terms of subregulation (2)(a) or (b) shall not exceed 12 consecutive calendar months unless otherwise directed by the Minister.

9. With respect to appointments made under regulation 57(2)(c) of the Public Service Regulations, employees who are employed in posts, either permanently or temporarily, and who are affected by the abolishment of the post he or she occupies and who cannot be placed into another post may be held additional to the establishment. No limitation on the period of such employment is prescribed as the period of employment will be dependent on the terms and conditions of employment prevailing prior to the abolishing of the post, noting that the employer cannot unilaterally change terms and conditions of employment.

10. With respect to appointments made pursuant to regulation 57(2)(d) of the Public Service Regulations, the period of employment will be determined by the Minister in terms of regulation 58 depending on the nature of the developmental programme.

11. Regulation 57(1)(e) of the Public Service Regulations provides that an executive authority shall not, with due regard to section 10(a) of the Act, appoint a temporary employee permanently or vice versa without complying with regulations 65 and 67.

12. Regulation 66(1) of the Public Service Regulations further provides that *an executive authority may only fill vacancies in the Office of an executive authority or a Deputy Minister by means of:*

(a) an appointment in terms of section 9 of the Act for—

(i) the term of office of the incumbent executive authority or Deputy Minister which will terminate at the end of the first month after the month in which the term of that executive authority or Deputy Minister terminates for any reason;
or

(ii) a period not exceeding three years;

(b) a transfer in terms of section 14 of the Act, provided that the employment status of the transferred employees as permanent or temporary, as the case may be, shall remain unaffected by the transfer.

13. Regulation 25(2) of the Public Service Regulations provides *that based on the strategic plan of the department, an executive authority shall—*

(a) determine the department's organisational structure in terms of its core mandated and support functions—

(i) in the case of a national department or national government component, after consultation with the Minister and National Treasury; and

(ii) in the case of a provincial department or provincial government component, after consultation with the relevant Premier, the Minister and the relevant provincial treasury;

- (b) *define and create the posts necessary to perform the relevant functions of the department while remaining within—*
- (i) *the current budget;*
 - (ii) *the Medium-Term Expenditure Framework of the department; and*
 - (iii) *the norms and standards determined by the Minister for post provisioning for occupations or categories of employees;*
- and the posts so defined and created shall constitute the department's approved establishment;*

The Labour Relations Act, 1995

14. The Labour Relations Act, 1995 through an amendment effected on 1 January 2015, introduced section 198B. In terms of section 198B (1) of the Labour Relations Act and for purposes of section 198B-

"a fixed term contract means a contract of employment that terminates on-

- (a) the occurrence of a specific event;
- (b) the completion of a specified task or project; or
- (c) a fixed date, other than an employee's normal or agreed retirement age, subject to subsection (3)."

15. Section 198B(3) of the Labour Relations Act provides that employers may in limited circumstances employ persons on fixed term contracts and these circumstances include-

- (a) the nature of the work for which the *employee* is employed is of a limited or definite duration; or
- (b) the employer can demonstrate any other justifiable reason for fixing the term of the contract.

16. Section 198B(4) of the Labour Relations Act provides that "*Without limiting the generality of subsection (3), the conclusion of a fixed-term contract will be justified if the employee-*

- (a) *is replacing another employee who is temporarily absent from work;*
- (b) *is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months;*
- (c) *is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession;*

- (d) *is employed to work exclusively on a specific project that has a limited or defined duration;*
- (e) *is a non-citizen who has been granted a work permit for a defined period;*
- (f) *is employed to perform seasonal work;*
- (g) *is employed for the purpose of an official public works scheme or similar public job creation scheme;*
- (h) *is employed in a position which is funded by an external source for a limited period; or*
- (i) *has reached the normal or agreed retirement age applicable in the employer's business.*

17. Section 198B(5) of the Labour Relations Act provides that “(e)mployment in terms of a fixed term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration.”

18. Section 198B(2) of the Labour Relations Act provides that section 198B would not apply to, amongst others, “an employee employed in terms of a fixed contract which is permitted by any statute, sectoral determination or collective agreement.”

19. Section 186(1)(b) of the Labour Relations Act defines “dismissal” to include that-
“an employee employed in terms of a fixed-term contract of employment reasonably expected the employer-

- (i) *to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or*
- (ii) *to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed-term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee; “.*

20. Section 210 of the Labour Relations Act provides that *“If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail.”*

Analysis

21. The Public Service Act and its regulations provide for persons to be appointed in a department on a temporary basis, whether in a post or additional to the establishment. It is

also clear that a temporary appointment includes an appointment on a fixed term contract wherein the employee's termination is not dependent on the age of retirement contemplated in section 16 of the Public Service Act.

22. The Public Service Act read with the Public Service Regulations allows for executive authorities to create posts that support the mandate and functions of the relevant department. This therefore allows departments to create posts for a fixed period should the job so required be of a temporary nature and the person appointed into such post will therefore occupy the post for a limited period.

23. Generally, appointments additional to the establishment are temporary and intended to assist a department to fill a temporary gap or identified need and due to the temporary nature of the work, the Public Service Regulations introduced limitations on the period of employment, taking into account the intention of the Labour Relations Act in this regard.

24. Legal opinions were sought on the applicability of section 198B of the Labour Relations Act to the public service. In terms of these opinions it was deduced that section 198B was not applicable to persons employed in terms of the Public Service Act. This being due to section 198B(2)(c) which created an exclusion that recognised that persons appointed on a fixed term contract which is permitted by any statute, in this case the Public Service Act, are not subject to section 198B of the Labour Relations Act. Therefore the non-applicability of section 198B to the public service is premised on the fact that employees appointed to the public service must have been appointed in terms of the provisions of the Public Service Act. However a fundamental factor in applying this departure from section 198B of the Labour Relations Act, is that where departments have made appointments that are not in accordance with the Public Service Act, Public Service Regulations, Determinations and Directives issued by the Minister, such appointments will fall outside of the protection of the exclusionary clause. If departments, as an example appoint persons additional to the establishment outside of those instances permitted in terms of the Public Service Regulations, then such non-compliant departments may find themselves in the position that section 198B of the Labour Relations Act, 1995 finds application.

25. In the event that departments have employed persons on a temporary basis in terms of the Public Service Act and where, in our view section 198B of the Labour Relations Act does not apply, departments are urged to take cognisance of section 186(1)(b) of the Labour Relations Act. Regardless of the non-applicability of section 198B of the Labour Relations Act to persons appointed in accordance with the Public Service Act, departments may be found wanting in that they may have created a legitimate expectation as contemplated in section 186(1)(b) of the Labour Relations Act. The Labour Court has recently reinforced its view on

the principle of legitimate expectation in the case of *Nowalaza and Others v Office of the Chief Justice and Another (J1177/2017) [2017] ZALCJHB 234*. The court had regard to the argument that the Public Service Act requires a prescribed process for appointments or any conversion of temporary status to a permanent status and hence no expectation of permanent appointment without going through a recruitment process, can be harboured. The court held that the argument that the expectation can never be reasonable if it is in conflict with a statutory requirement has a serious consequence, being that, in the public service no temporary employee can ever rely upon the protection of section 186(1) (b) (ii) of the Labour Relations Act. The court therefore found that there was a clear conflict between section 186(1) (b) (ii) and the Public Service Act and its regulations and that section 210 of the Labour Relations Act must be relied upon where such conflict occurs. The court further held that section 186 must therefore trump the provisions of the Public Service Act where employees rely upon a reasonable expectation of permanent employment (or a further fixed term contract). Therefore it is abundantly clear that where departments have created a legitimate expectation of permanent employment as contemplated in section 186(1)(b) of the Labour Relations Act, such departments cannot place reliance on the provisions of the Public Service Act to extricate themselves from such consequences.

Conclusion

26. Departments are advised as follows-

26.1 Section 198B of the Labour Relations Act does not apply to persons in so far as such persons are employed in terms of the Public Service Act and such appointments are made in absolute compliance with the provisions of the Public Service Act, its regulations, determinations, collective agreements (deemed determinations in terms of section 5(6) of the Public Service Act) and directives made in terms of the Public Service Act. Where departments transgress or flout such Public Service Act prescripts, section 198B of the Labour Relations Act may find application.

26.2 The obligations created in terms of section 186(1)(b) of the Labour Relations Act cannot be argued against by using the fact that section 198B of the Labour Relations Act, 1995 does not apply. Section 186(1)(b) and section 198B of the Labour Relations Act are distinct provisions designed to cater for different issues.

26.3 Any department which, in terms of section 186(1)(b) of the Labour Relations Act, acts in a manner that creates an expectation of permanent employment, will find itself being faced

with the prospect of permanently appointing such affected person/s. Departments cannot seek to rely on the provisions of the Public Service Act or Public Service Regulations to evade the obligations or consequences in terms of section 186(1) (b) (ii) of the Labour Relations Act.

Departments are requested to contact the DPSA should they require any further assistance in this regard.



PROF RICHARD LEVIN

DIRECTOR-GENERAL

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