New management

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In the 1970s and the 1980s the public sectors of Europe, Canada and Australia were swept up in the general economic restructuring of those countries

The restructuring of the state has taken two forms

- the redefinition of what services government should provide,
- the restructuring of the way in which the public service is managed

The introduction of 'market related management' has transformed labour relations, particularly collective bargaining and dispute resolution Management power has been devolved to the local level Managers are required to develop styles and practices in accordance with particular markets They have greater power and flexibility to manage collective bargaining and to resolve disputes

This transformation mania only reached South Africa in 1994 Government faced overwhelming service backlogs It concluded that, in order to deliver, it would have to play the same game as its European and American counterparts It has set about creating a more flexible public service labour market and introduced sweeping changes to the way in which management operates

Management

The public service of the past was characterised by centralised management structures, which operated according to rigid rules, rather than a goal-oriented culture. Management has tended to be relatively unskilled and unproductive

The White Paper on the Transformation of the Public Service, which was released in 1995, has already lead to significant changes in the operation of the public service.

The Public Service Management Bill makes proposals for the development of new public service legislation Rather than being a series of rules, it is a set of procedures that set out how power or authority is to be devolved in the public service

It is enabling, rather than regulatory Departments must produce business plans setting targets and clear operational directives about how they intend to deliver services and manage their human resources in order to achieve targets Departments and provincial administrations will have a relative autonomy to determine their own management systems, collective bargaining practices and, in the statutory bargaining councils, their own dispute resolution mechanisms

Labour legislation

In 1995 public services workers were included within the ambit of the new LRA. The enactment of the LRA removes the necessity for detailed provisions concerning employment For example, provisions relating to dismissal and retrenchment no longer need to remain in the Public Service Act. Security of employment will also be protected under the LRA The public service can now afford to grant greater autonomy to departments in the regulation of employment and the exercise of discipline.

Tensions soon become apparent between the archaic, prescriptive and inflexible public service legislative framework and the LRA's emphasis on equity and self-regulation.This is particularly true for the way in which disputes are resolved in this sector.There are, however, few concrete proposals, in any legislation, as to how to transform public service collective bargaining.This is because the LRA is structured in the same way as the Public Service Management Bill. it is an enabling statute, which sets up the structures for dispute resolution and collective bargaining. If the LRA is to have any meaning in the public service, the structures for collective bargaining and dispute resolution must be used effectively.

Dispute resolution

The labour relations culture in the public service is adversarial.There is a marked lack of appropriate dispute resolution mechanisms. Government and its employees, hampered by a history of confrontation, constantly clash with each other on what are either perceived or real incidents of unfairness

The Public Service Labour Relations Act (PSLRA), which came into effect in 1993, sought to address these problems. It introduced collective bargaining and dispute resolution of both interest and rights disputes. However, the legislation was seriously flawed, making labour relations highly regulated and legalistic. Dispute resolution procedures were either not used at all, or used very little by trade unions and their members.

The LRA repealed many sections of the PSLRA It recognises that, for collective bargaining to function effectively, sophisticated and legitimate systems and structures for dispute resolution needed to be created

Prior to the new LRA, two parallel systems of dispute resolution had emerged:

- a statutory system characterised generally by conciliation boards;
- the Industrial Court and a voluntary non-statutory system of mediation and arbitration.

Conciliation boards had a poor record of settling matters, whilst the Industrial Court had a long waiting list. Neither structure enjoyed the trust of the parties who used them, nor did they assist collective bargaining.

Non-statutory and voluntary dispute resolution, however, proved to be an effective method of resolving labour disputes. Well-trained mediators were able to resolve many collective bargaining disputes. Arbitrations were generally convened shortly after the dispute was referred and were held with few legal formalities.The system enjoyed greater legitimacy than the statutory one, but, given its cost, was only available to a few.

The new LRA sought to incorporate many of the features of non-statutory dispute resolution.At the same time it recognised that parties should have the flexibility to fashion their own dispute resolution processes and gives legal validity to these agreements.

The LRA created a centralised collective bargaining structure for the public service the Public Service Co-ordinating Bargaining Council (PSCBC)

The PSCBC must perform all the functions of a bargaining council, including dispute resolution It is unfortunate that, in so doing, core provisions of the old PSLRA were retained The old system of dispute resolution, many of which contradict the new LRA, continue to apply in many cases

A new framework for dispute resolution is at the top of the agenda for the 1998 negotiations in the PSCBC The immediate challenge is to develop and adopt a procedure that brings the PSCBC in line with the LRA At the same time, the particular circumstances in the public service, such as its norms, practices and existing regulations, will have to be taken into account

A dispute resolution procedure, which has been designed by both the state and the public sector trade unions, is likely to be adopted soon It will apply to all disputes that arise within the PSCBC's area of jurisdiction and to disputes that arise in a bargaining council that cannot be resolved by that bargaining council It is anticipated that the procedure will serve as a model for other bargaining councils in the public service to adopt

Panellists

The PSCBC considered whether or not it should appoint an accredited agency to perform these functions or whether the PSCBC should appoint its own panel of conciliators and arbitrators

In the light of the fact that disputes need to be managed by individuals who are knowledgeable about the practices, legislation and regulations in the public service the PSCBC decided on the latter option

The annual general meeting of the PSCBC will appoint a panel to conciliate and arbitrate disputes that fall within the jurisdiction of the PSCBC

This panel will service all bargaining councils in the public service, including sectoral, provincial and departmental councils Panellists must be skilled and experienced in labour relations, have knowledge about the public service and its regulations and experience in conciliation or arbitration.

The panel must be broadly representative of South African society

Disputes

The system for resolving rights disputes was cumbersome, bureaucratic, time consuming, and biased towards the employer. The obligation to establish a conciliation board rested with the employer, the very party that was being challenged by the employee Individuals skilled in conciliation or dispute resolution did not staff the conciliation board The Industrial Court, where unfair labour practice disputes were required to be referred, lacked legitimacy and was not reliable

Aggrieved employees generally preferred to go to the High Court This was, however, an expensive, time consuming option

Matters of mutual interest were negotiated in the Public Service Bargaining Council The PSLRA anticipated that interest disputes that could not be settled by way of negotiation would be resolved by way of strike or lockout, except in those cases where the employees concerned rendered an essential service

Lawful strikes were effectively prohibited The definition of an essential service was so wide that it covered most employees Strike action was prohibited if the majority in the bargaining chamber had concluded an agreement.

Mechanisms

The LRA created a number of institutions or mechanisms by which parties may regulate and manage dispute resolution.

- *The Commission for Conciliation Mediation and Arbitration (CCMA)*, an independent statutory body modelled on the non-statutory dispute resolution agencies that developed in response to the inadequacies of the old LRA. Its core functions are to conciliate and arbitrate disputes referred to it
- *Bargaining Councils and Statutory Councils* will play an important role in collective bargaining, regulating industrial relations in sectors and preventing and resolving labour disputes.
- *Accredited agencies.* These are institutions which have received accreditation from the Governing Body of the CCMA to perform certain dispute resolution functions.
- *Collective agreements.* The LRA recognises that parties may wish to enter into collective agreements to regulate their relationships and mode of dispute resolution.

and be drawn from each of the nine provinces.

If the parties to a dispute agree upon a particular member of the conciliation and arbitration panel to hear their dispute, the secretary of the PSCBC must appoint that person. This should ensure the legitimacy of the proceedings. In the absence of agreement on a particular panellist the secretary can appoint another person from the panel.

A code of conduct, which is the same as that adopted by the CCMA, will apply to all conciliators and arbitrators.

Procedure

The dispute procedure mirrors the LRA in many respects. The procedures are simple and clear. All disputes follow a fairly uniform route.

Disputes that will be referred to the PSCBC will go from conciliation to industrial action or adjudication, either by arbitration or the Labour Court, depending on the nature of the dispute. However, there are significant departures from the LRA in respect of the negotiating procedure for parties on matters of mutual interest and in the conciliation and arbitration procedure of disputes of right.

Disputes of interest

In the past, negotiated agreements in the public service have been reached after months of delay and adversarial bargaining. The negotiation procedure provides for collective bargaining based on the principle of joint problem solving. All parties should benefit from these procedures. If they jointly identify the problems they face, they can try to resolve problems in a co-operative manner. This should reduce the number of disputes that arise in the PSCBC.

The procedure on matters of mutual interest provides as follows:

- Any party to the PSCBC who wants to negotiate an issue must submit the proposal to the secretary of the Council, who will forward copies of the proposal to all other parties to the PSCBC within seven days.
- The Executive Committee of the PSCBC sets the agenda for Council meetings. It must consider the issue that a party has submitted for negotiation within ten days of the secretary receiving the request. The procedure does not automatically guarantee that every issue submitted will be negotiated in the PSCBC. It gives the PSCBC the power to refer the

Moutse residents protest against lack of services, 1992.

issue to an appropriate forum This will limit the issues that are bargained over in the PSCBC, thereby ensuring that there are few delays

- The dispute procedure recommends that, prior to commencing negotiations on an issue, the parties should endeavour to agree on a negotiating procedure. It suggests that this may include the submission of counter proposals, the establishment of a negotiating committee, the appointment of an outside conciliator or facilitator and a time table for the negotiations The procedure recognises that parties are more likely to agree how they will negotiate an issue before positions are adopted in respect of the issue in question It allows for a flexible approach in negotiating different issues
- If negotiations do not result in an agreement, any party may declare a dispute. The dispute must be declared within 30 days of the matter first appearing on the agenda of the PSCBC or such extended period as agreed to by the parties
- Once a dispute has been declared a conciliator will be appointed If the dispute is not settled at conciliation the conciliator should try to reach agreement on further conciliation, referring the dispute to voluntary arbitration, if the dispute is one concerning an essential service, the appointment of an arbitrator; the establishment of a minimum service, rules about the conduct of a threatened strike or lockout, or picketing rules
- The parties' right to embark upon industrial action is recognised The procedure directs attention to the rules that should govern such action prior to the industrial action commencing This is intended to ensure that industrial action takes place in an ordered and disciplined manner If agreement is not reached and once all the procedures have been exhausted, seven days notice must be given of a strike or lockout

Non-parties to the council may refer a mutual interest dispute to the council for resolution These disputes must first be refereed for conciliation and may proceed either to arbitration, in the case of essential services, or to industrial action. Again provision is made for seven days notice of any strike or lockout.

Disputes of right

This dispute procedure simplifies the process of resolving rights disputes. It is not anticipated that the PSCBC will determine individual rights disputes, such as disputes over dismissals or unfair labour practice disputes. It will, however, resolve collective rights disputes, such as retrenchments and the provision of benefits This procedure is also likely to be used by other bargaining councils in the public service.

Conciliation

This dispute procedure has sought to ensure that disputes are expeditiously finalised Innovations have been introduced in this regard.

The powers of the conciliator are similar to those granted under the LRA in that he/she "must determine the process to attempt to resolve the dispute".This may include mediating the dispute conducting a fact finding exercise or making an advisory award The conciliator is also given the power to arbitrate the dispute immediately if the parties so request.

In the case of matters that, in terms of the LRA, are only conciliated by the PSCBC the procedure requires that the conciliation be convened within 30 days of the referral of the dispute, unless the parties agree to extend the period.This should minimise the delays characteristic of the old public service.

The conciliation must take place no later than four days before the dispute is to be arbitrated, but within the 30 days after the date of referral of the dispute to the PSCBC. If the referring party does not attend the conciliation the conciliator is granted the power to dismiss or adjourn the matter or proceed with the conciliation.The arbitrator may award costs against a party who the arbitrator believes has unnecessarily referred the case to arbitration.

The innovation of holding the conciliation four days before the arbitration is due to commence is intended to ensure that the parties are properly prepared for the conciliation. Parties generally prepare for arbitration and are likely to be aware of the strengths and weaknesses of their case at this stage of things.They will attend the conciliation mindful of the fact that if they do not settle the dispute an arbitrator will impose a decision on them.This will encourage them to explore settlement in a meaningful manner.

The LRA does not penalize a party who refers a dispute for conciliation but who makes no attempt to conciliate the matter. This is prejudicial to the other party, who may make every attempt to settle the matter, but is nevertheless still compelled to prepare for and attend arbitration.The PSCBC procedure gives the conciliator the power to dismiss a matter if the referring party makes no attempt to conciliate the dispute.This means that the referring party would not be able to proceed with the dispute without re-referring the dispute, in which event, the time limits within which a dispute must be referred may have expired.

If at the conclusion of an arbitration the arbitrator is satisfied that the referral to arbitration was made vexatiously or without reasonable cause, the arbitrator may order costs against the referring party.

This provision is intended to limit parties pursuing a matter when there is no reasonable chance that they will be successful This will avoid unnecessary utilisation of the resources of the PSCBC

Management is being restructured.

Arbitration

The provisions on arbitration are similar to those in the LRA An innovation is that three arbitrators will be appointed by either the parties or the secretary to determine a matter As arbitrators may be asked to determine disputes that will have an impact on thousands of employees involving millions of rands, a panel of three will provide a safety mechanism to ensure that proper consideration of all the issues takes place

Administration and costs

The secretary of the PSCBC will manage the administration of dispute resolution He/she will screen any referral to make sure that the other party has been served with notice and that the dispute falls within the jurisdiction of the PSCBC The secretary will keep copies of all arbitration awards This will assist both the parties and other arbitrators to keep abreast of the jurisprudence that develops and will provide a uniform and consistent standard to measure conduct against Statistics will be kept of all cases referred to the PSCBC so that the efficiency of the dispute resolution process can be monitored and improved The cost of dispute resolution (including the cost of paying the conciliator and arbitrator) will be borne by the PSCBC. Dispute resolution will therefore be accessible to all parties

Public service management is in the process of being reshaped from a highly centralised, highly regulated and inflexible system to one that is modelled along the lines of private sector best practice, decentralised, market driven and flexible. The PSCBC dispute procedure is designed to resolve disputes that arise in this new kind of public service The procedure looks set to meet the needs of the new system by providing a framework for expeditious, flexible and efficient dispute resolution.

Neither the management Bill nor the new procedures have yet been implemented Once they are, a new public service should emerge which can fulfil the state's mandate of delivering services more democratically, efficiently and cost effectively ★

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