Unlocking labour laws

Is it legal to place someone on special leave indefinitely in the civil service on full pay pending an investigation for misconduct?

A good case to look at concerning your question is *Heyneke v Umhlatuze Municipality (2010)*.

At the request of some council members, a Mr Heyneke accepted to go on special leave. According to his contract special leave could only be given for matters like writing exams and not for investigating misconduct. When his leave continued indefinitely he told the council he wanted to come back to work. The Council refused to allow him so he approached the Labour Court (LC) for reinstatement.

The LC had to decide whether the decision to place Mr Heyneke on special leave was lawful.

The LC established that the purpose of the special leave was to suspend Mr Heyneke pending a misconduct investigation. The Council had used a mechanism aimed at benefiting employees as a weapon against him.

In terms of his contract, the special leave granted to him by the Council should always be at his request or consent. It could not be imposed on him. He had agreed to special leave for a short time but when his request to return to work was refused, he no longer consented to the leave and so his employment contract had been breached.

The judge further ruled that no municipality or public sector employer, acting in a reasonable way in the public interest, can put an employee on special leave on full pay for a long time, not even if the employee agrees.

The court argued that putting people on indefinite leave was a sign of weak, indecisive management. It was against the public interest because it could never be a policy to waste public resources and pay for services that an employee did not deliver.

Putting an employee on special leave for a long time on full pay pending investigation was especially unreasonable when suspension in terms of the regulations and codes pending misconduct investigation is restricted to a specified period of 60 days.

The LC found that the decision to place Mr Heyneke on special leave was motivated by ulterior motives and was done without his consent. The Council had not properly applied its mind to the matter.

Further, the court directed the Council to investigate recovering the costs of the special leave, R400 000, from the officials responsible for the illegal action. The court warned that if the Council was reluctant to recover the costs it was still publicly accountable for its decision and if it did not act as directed by the judge it could be ruled in contempt of court.

What happens when a post in the public service cannot be filled by a person from an under-represented group? Does the post remain open until someone from that group can be found?

The Solidarity case *Bernard v SAPS (2010)* which was heard in the Labour Court held that numerical targets cannot determine everything. Where a post cannot be filled by an applicant from an under-represented group because a suitable candidate cannot be found, promotion of a suitable applicant from another group should not be denied without a satisfactory explanation.

The Labour Court argued that it was important that the efficient operation of the public service was given proper consideration.

Recently a worker in the municipality sent in a letter of resignation and then very soon after she changed her mind but the municipal manager wanted to hold her to the resignation. Is this legal?

There is a good case which clarifies this, the *ANC v Municipal Manager, George Local Municipality and Others (2010).*

The issue was whether a Mr Jones, a councillor, had resigned. He delivered a notice of resignation to the municipal manager, but before the manager had become aware of it and read it, Jones sent a letter withdrawing his resignation.

The Supreme Court of Appeal (SCA) noted that Section 27 of the Local Government: Municipal Structures Act of 1998 provides that a notice of resignation must be communicated in writing. Also in order for the resignation to be effective, it must be 'unequivocally' communicated to the intended person. This meant that the mere delivery of a resignation letter was not sufficient to effect the resignation.

Jones's decision to resign had to be conveyed 'to the mind' of the municipal manager in order to become effective. The manager must have read the letter before the withdrawal of the resignation letter in order for the resignation to become effective.

This meant that Jones had not submitted an actual resignation.

If the employer's requirement had simply been that an employee must 'resign in writing' and not that the notice of resignation 'must be communicated to the employer in writing', there may have been a different outcome.

I am confused because in the public sector sometimes PAJA (Promotion of Administrative Justice Act which rests on constitutional rights and the right to fair procedures and reasons for administrative action) is invoked in labour law cases and sometimes the LRA. Can you give me some examples of what to use when?

Here are a couple of examples of decisions made recently by courts.

The first concerns a public manager's power and duty to set aside wrongful acts and is illustrated by the case *MEC, Department of Education, KZN v Khumalo & Another*.

Two employees were unlawfully promoted: one by a selection panel and the other via a settlement agreement. The MEC brought an application to review this and to set aside the 'acts' of the officials who had promoted the employees.

The Labour Court held that although it had the power to review any decision taken by the state in its capacity as employer, there was no need for the MEC to bring such an application.

The MEC, as head of the department, ought, *at her own instance*, to have revoked the unlawful promotions as soon as she became aware of them. Uncovering and correcting irregularities is typically a managerial function, performed in the ordinary course of management. Many government departments have reversed irregular decisions without applying to courts for assistance.

In this dispute the Constitution and PAJA were not relevant because, like dismissal, promotion in the public sector is not an administrative act but an employment related act. Employment related matters are decided through the structures and procedures of the LRA. Although promotions in the public sector are effected in terms of the Public Servants Act, the PSA relies on the LRA for the machinery to test the fairness of appointments and promotions.

In another case *Gcaba v Minister for Safety and Security (2009)* Constitutional Court (CC), a police officer pursued a dispute relating to promotion to the High Court relying on a right to fair administrative action in terms of PAJA.

The CC held that a promotion decision in the public sector does not constitute an administrative act for the purposes of PAJA. This means that the promotion dispute should have been processed under the LRA.

A more complicated case concerns the question of work transfers. Transfers by an omission are not included in the scope of Unfair Labour Practices (ULPs) listed in s 186(2) of the LRA. This means the Commission for Mediation Conciliation and Arbitration (CCMA)/Bargaining Councils do not have jurisdiction to arbitrate transfer disputes.

In *Nxele v Chief Deputy Commissioner, Corporate Services, Dept of Correctional Services (2006)* the Labour Court (LC) ruled that transfers are reviewable by the LC because the legislature could not have intended to take away the right of public service employees to challenge their transfers. LB

This information was supplied by Benita Whitcher a lecturer in the Faculty of Law at the University of KwaZulu-Natal at the 23rd Annual Labour Law Conference in August this year.