Unlocking labour laws

I am a trade union leader and would like to know if and when my union must be consulted in cases dealing with transfers of employees from one employer or authority to another? What are the union's rights and remedies in cases where we are bypassed during the consultation process?

A recent Labour Court case will provide a good framework for addressing these questions.

In 2002, it was decided that the MEC for Health, Western Cape (the Department) should be responsible for delivering primary health-care services. Before this, it was a service provided by municipalities. This meant that workers had to be transferred.

The Department and municipalities affected by the decision accepted that the transfer should fall under s 197 of the Labour Relations Act (LRA). They were of the view that it was not practical to implement an automatic transfer. S 197(1)(a) defines a 'business' to include *'the whole or a part of any business, trade, undertaking or service...'* Paragraph (b) defines a transfer as *'the transfer of a business by one employer...to another employer...as a going concern.'*

S 197(6) of the LRA establishes how any variation in the job of the transferred employee can be effected. Any changes must be in writing, and concluded between the transferring employer (transferor – in this case the municipality) and transferee employer (transferee – the province) who is receiving the employee.

S 189(1) establishes a hierarchy of parties that must be consulted prior to any dismissal of a person because of an employer's operational requirements. The parties are entitled to be consulted in the following order: consultation of a person in terms of a collective agreement, a workplace forum, and a registered trade union whose members are likely to be affected by the proposed dismissals, and the employees likely to be affected.

When it was announced in 2005 that the Department would take responsibility for the primary health-care services then provided by municipalities, the unions (South African Municipal & Allied Workers Union (Samwu) and Independent Municipal and Allied Trade Union (Imatu) objected to the transfer and indicated that it could only occur in terms of s 197(2). S 197(2) provides that if a transfer of a business takes place, the transferee (Department) is automatically substituted for the transferor (municipality) in respect of all contracts of employment in existence immediately prior to the transfer.

In the course of the negotiations to conclude a s 197(6) agreement, the unions refused to agree to a transfer on changed or varied terms. Almost two years passed without any progress, when the Department issued a circular indicating that the transfer of primary health care staff should be dealt with on an 'individual basis'. In other words, that negotiations should be conducted directly with individual employees (and not with unions) to conclude agreements in terms of s 197(6).

A number of 'transfer agreements' were concluded between the Department, the municipality and the affected employees, providing for the transfer of employees' contracts to the Department with effect from 1 July 2007.

In *Samwu vs SA Local Government Association* (3 March 2010) Samwu and Imatu sought an order declaring these written agreements entered into between

their members or former members and the Department, which resulted in their transfer from the municipalities to the Department, be declared null and void.

The unions (applicants) contended that they qualified, to the exclusion of others, as the negotiating party for the purposes of any agreement in terms of s 197(6) and that, as a result, the agreements between the Department and the employees were of no force and effect.

The Department's view was that s 197(2) could not be implemented as it was not possible to take over the existing collective agreements, since the terms and conditions of employment were not consistent with the 'equitable and uniform standards' which applied to the public service. As a result, it believed that it had no option but to conclude agreements with the unions under s 197(6). In the face of the unions' refusal to negotiate the terms of a s 197(6) variation agreement, the Department felt entitled to negotiate with union members directly and the majority of the affected employees had already been transferred with their consent.

Judge van Niekerk concluded that the transfer of primary health service workers from the affected municipalities to the provincial government triggered the application of s 197.

The unions were parties to collective agreements with the municipalities and this entitled them to be consulted in the event of a proposed retrenchment. That being so, the respondent (the Department) was obliged to seek the agreement of the unions. In the absence of the unions' agreement, the agreements concluded by the Department with affected employees did not comply with s 197(6).

In the absence of an agreement with the unions, the Department became the employer of the employees on the date that the business was transferred. The Department simultaneously became bound by all collective agreements and arbitration awards that bound the municipalities immediately prior to the transfer.

Despite these findings, the judge found that the over 500 employees who had been transferred to the Department did not appear to be materially less well off than under the municipality The application from the unions was accordingly dismissed but, because the unions had largely succeeded on the merits of their claim that they should have been consulted, the judge made no costs order.

I would like to know if there are any recent cases which illustrate a good justification for assault in the workplace?

There is a recent case which dealt with an arbitration award by the Commission for Conciliation, Mediation and Arbitration (CCMA) concerning a woman who had been dismissed for assault and violent behaviour by Cashbuild, her employer, for hitting out at a person who had touched her breast in the workplace. The CCMA commissioner who heard the matter originally found the dismissal to be substantively unfair and the company was ordered to reinstate the employee retrospectively. *Cashbuild (Pty) Ltd v Ramotshela NO* was an unopposed review application brought by the company to set aside this arbitration award.

The CCMA commissioner who originally heard the unfair dismissal case held that once the woman employee had admitted the act of hitting but pleaded that she was justified, the burden of proving her innocence was on her.

The key question was whether she had enough proof to substantiate her allegation that she had been responding to unacceptable conduct by another employee. The evidence indicated that she had responded to the touch spontaneously and had not intended to cause any harm.

The Commissioner found that the injury sustained by the male employee was accidental and that Cashbuild had failed to prove that the woman had committed any misconduct. The woman's version of events, in all the circumstances, was more plausible than that of the other employee involved in the incident, who had submitted that he had only touched her on the shoulder while laughing at a joke.

The Labour Court agreed with the findings of the Commissioner but noted that the position might have been different had the facts of the matter indicated that the woman had assaulted the other employee for no reason or had she waited some time before assaulting the other employee. LB

This column is jointly contributed by Professor Avinash Govindjee who works in the Faculty of Law, Nelson Mandela Metropolitan University and is a part-time senior commissioner at the CCMA; Debbie Collier deputy director of the Institute of Development and Labour Law at the University of Cape Town; and Professor Marius Olivier, director of the Institute for Social Law and Policy.

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