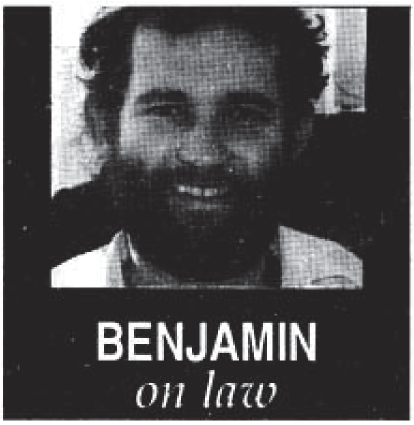

Collective bargaining *and the law*

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Trade unions and employers have made frequent use of the industrial court to complain of conduct by the other side during collective bargaining. The decisions of the court (as well as the Labour Appeal Court and Appellate Division in Bloemfontein) in these cases has led to the development of a complex and sometimes confusing set of legal principles governing collective bargaining. It is important that trade unionists involved in collective bargaining know these principles. This note sets them out and also tries to explain the often confusing terms used by the court in its judgments.

The duty to bargain

It is now accepted by the industrial court that employers are under a "duty to bargain" with trade unions. This duty is legally enforceable; in other words, the court will order an employer or trade union to comply with the duty. The existence of this duty is relevant if an employer refuses to recognise or deal with a trade union. It is also relevant during the collective bargaining process, even where negotiations have led to deadlock and industrial action.

We start off by looking at the position of the employer who refuses to recognise a trade union. If a union takes the dispute to the industrial court, the court will do no more than order the employer to bargain with the union or commence negotiations on the contents of a recognition agreement. It will not impose a recognition agreement or order the employer to agree on a particular recognition agreement. The most the court has done is to direct that the employer is under a duty to negotiate over the introduction of stop order facilities.

The court will generally only order an employer to bargain with a representative (majority) trade union. The court has said that it is not necessary for the union to be registered or for its membership to be fully paid up. However, it must be able to prove its membership by an acceptable method such as membership forms.

What should unions do when faced with anti-union employers who do not wish to recognise them? There are a number of options. Firstly, workers can stage a legal strike over recognition. The Labour Appeal Court has in one case reinstated workers dismissed for striking to force the employer to recognise their union. But not all workers would wish to strike over recognition and the industrial court is very unpredictable in its approach to strike dismissal cases. In addition, even where the court reinstates dismissed strikers they will have been out of work for a lengthy period and have lost considerable wages.

Another option is to proceed to court to force the employer to recognise a union. There are two major problems with this approach: using the industrial court can be very time-consuming as the court does not regard recognition issues as being urgent and the court order eventually obtained may only serve to start recognition talks.

An alternative approach is for the union to submit demands for wages and conditions of employment even though it is not recognised. If the employer agrees to negotiate on them, the union has in effect won recognition. If it refuses (which is more likely to be the case with this type of employer), the union can refer the dispute to a conciliation board (or industrial council if there is one). If the employer still refuses to meet the union, workers could after a ballot stage a lawful strike which would in reality be over both wages and recognition. (This strategy could be adopted at the same time as bringing a case challenging the employer's refusal to recognise as an unfair labour practice.)

Photo: William Matlala

The problem of the anti-union employer raises questions as to the importance of recognition agreements. In the early days of union development, unions often spent many years in negotiations over the wording of a recognition agreement. This delayed the start of substantive negotiations over wages and conditions of employment. Many employers still use this trick and insist that they will not commence negotiations until a formal recognition agreement has been signed. Unions often sign agreements that they are far from happy with because their members, understandably, pressure them to begin wage negotiations. This problem can be avoided by using the strategy discussed in the previous paragraph.

It is important for trade unions to think critically about recognition agreements. From a union viewpoint, the most important features of agreements are those that create rights for the union and its members. Most agreements contain three basic rights: recognition of shopstewards; access to employer premises by union officials to conduct union business; and stop order deductions. Many current agreements contain a range of additional rights won at well-organised factories, such as time off for training for shopstewards, compulsory arbitration for dismissal cases or protection against dismissal in the case of legal strikes.

Bargaining levels

The law does not say anything about what level bargaining should take place at - plant, industry, regional, national or group level, or any other. Providing an employer is willing to bargain about wages and conditions of employment at one level, the court is unlikely to force it to bargain at another level desired by the union. In particular, the court will not force an employer to participate in a multi-employer bargaining forum. For this reason many people argue that the effect of a legal duty to bargain is to promote plant level bargaining at the expense of other levels of bargaining. Unions wishing to create multi-employer bargaining forums will therefore have to use their economic power to win these demands.

The position is slightly more complex in the case of industrial councils. The industrial court has held that an employer who participates on an industrial council where minimum wages and conditions of employment are negotiated can be forced to bargain at plant level over actual wages and conditions of employment. (The Labour Appeal Court on the other hand did not seem to understand the significance of the distinction between minimum and actual wages and refused to order an employer in these circumstances to bargain at plant level.)

Bargaining units

Bargaining unit is the term used to refer to a group of workers represented in the same set of negotiations. Among the most common bargaining units that have developed in South Africa are "unskilled and semi-skilled work" or, in companies that use the Paterson grading systems, the "A and B bands". Here again the court has developed the approach that it will not intervene in a disagreement between a company and union as to the composition of a bargaining unit. It is a dispute in which generally there is no right or wrong and the parties will have to resolve it themselves.

The bargaining regime

It was said earlier that a trade union has to have majority membership before the court will order an employer to bargain with it. Generally, this is the case but there are exceptions.

In practice a number of different approaches to union recognition have developed in South Africa. The most common bargaining regime is majoritarianism where only a union with majority membership in a bargaining unit can be recognised. The effect is that only one union can be recognised in a particular bargaining unit. Another system is one in which companies recognise and negotiate with all trade unions who have substantial membership, say 30%. This can lead to a situation where more than one trade union negotiates in a particular bargaining unit. The final system which is not common in South Africa is the "all comers" system in which an employer bargains with any trade union having membership among its workforce.

The court will not intervene in the choice of bargaining regime unless an employer is being unfair by, for instance, acting inconsistently and placing more stringent criteria for recognising one trade union than another. However, between 1988 and 1991, some industrial court members expressed a hostility to the majoritarian system on the basis that it was an unfair labour practice to prevent minority unions bargaining with the employer. This has led to some employers being ordered to negotiate with minority unions although there have been no judgments like this under the present unfair labour practice definition. ✩