

# Legal Notes

*Legal Notes is written by the Centre for Applied Legal Studies (CALS)*

## Lock-outs: the bosses weapon against workers

*Part five of a workers' guide to the Labour Relations Act*

More and more employers use lock-outs in disputes. In this issue, we look at what lock-outs are and why they are becoming such a common feature of South African industrial relations.

### What is a lock-out?

**A** lock-out is an action by an employer aimed at forcing workers to agree to a particular demand. In the most common type of lock-out, an employer prevents its workforce from working in order to force them to accept the final offer on wages and other conditions of employment. The lock-out prevents the workers from earning wages and the employer hopes that the economic loss the workers suffer will force them to drop their own demands and return to work on the employer's conditions.

As we have discussed previously, workers do not have to stop work entirely in order to be on strike. A go-slow or overtime ban may be a

strike for the purposes of the Labour Relations Act. In the same way, a lock-out may be partial. An employer may attempt to force workers to accept particular conditions by means other than preventing them from working. An employer may effect a lock-out by reducing the number of hours that employees work or by acting in breach of their contracts of employment. An employer may do so by reducing wages or depriving them of some of the benefits they are entitled to in terms of their contract. However 'partial' lock-outs are extremely rare. Employers realise that a partial lock-out will probably provoke a full-scale strike. In the rest of this article, we concentrate on the full lock-out in which the workforce is



prevented from working until they have agreed to a particular demand made by the employer.

### **The purpose of a lock-out**

A lock-out must have a purpose. The refusal to allow employees to work, will not be a lock-out if no demand is attached. If workers arrive at work one day and find that the gates are locked and they cannot get to their work-stations it is not automatically a lock-out. It only becomes a lock-out once the employer makes a demand. (ie. that workers can return to work once they agree to a particular condition). Lock-outs are used to get workers to agree to the employer's final negotiating position. A lock out may also be used to introduce changes in conditions of employment. Many recent lock-outs have been aimed at forcing workers to accept new shift systems or overtime arrangements.

### **The legality of lock-outs**

A lock-out may be legal or illegal. A lock-out will only be legal if it is staged after compliance with the provisions in the Labour Relations Act (LRA). The dispute giving rise to the lock-out must be referred to either an industrial council or a conciliation board, and the time periods specified in the LRA must elapse (or the parties' failure to settle the dispute must have been reported to the Director-General). These time periods are discussed in previous notes on strikes (see *Labour Bulletin* 13.8).

An employer can lock-out legally at the same stage that a trade union can strike legally. However, it is easier for an employer to begin a lock-out than it is for workers to strike. This is because workers must vote in favour of strike action in a ballot held after the time periods for settling the dispute have expired. An individual employer does not have to ballot before introducing a lock-out. But where an employers' association such as SEIFSA or the Chamber of Mines calls for a lock-out, the individual members of the association must ballot before they can lock workers out.

### **Illegal lock-outs**

The legality of a lock-out has important consequences. Both the Supreme Court and the Industrial Court can interdict an employer from locking out employees illegally. In addition, an employer who locks out employees illegally will have to pay his employees if they have tendered to work during the lock-out (ie. they have told the employer that they will return to work as soon as he lifts the lock-out). Often locked out employees are also on strike and will not return to work until their own demands are met. In this case, they are not entitled to wages during an illegal lock-out.

It does not matter which party declared a dispute or referred it to a conciliation board or industrial council. An employer may lock-out where the dispute was referred by the trade union and the union can call a strike where the employer referred the dis-



pute. A lock-out is legal if it is on the same issues that were referred to conciliation. If the employer introduces a new issue, the lock-out becomes illegal.

### **The lock-out as an unfair labour practice**

Like the strike, the lock-out can now be an unfair labour practice. Under the LRA the Industrial Court can interdict a lawful lock-out if it believes the lock-out is unreasonable or unfair. Repeat lock-outs or sympathy lock-outs are also unfair on the same basis as repeat and sympathy strikes.

Interdicting legal lock-outs on grounds of unfairness is risky and can restrict the ability of employees to strike. This danger is illustrated by cases in the hotel industry last year. A trade union and a major hotel group were in dispute. Despite full conciliation and negotiation, no settlement could be reached. The hotel group, fearing the workers would strike during the holiday season, locked them out in an attempt to resolve the dispute before the holiday season when the hotels would be at their most vulnerable. The lock-out was legal but the union said it was unfair and asked the Industrial Court to interdict it. The Industrial Court agreed that the lock-out was unfair but added that it would be unfair for the union to strike over the issue while the company could not lock-out. It therefore gave an order stopping the hotels from locking their employees out and stopping the union from calling a strike until

March the following year when the matter would again be argued in court. The upshot was that the company got what it wanted - a trouble free Christmas. The union's court action ended up preventing its members from striking.

### **The story of a lock-out**

In the typical lock-out, employees arrive at work one day to discover the gates of their factory are locked. They receive notices saying something like:

"You are now excluded from your workplace. The purpose of this exclusion is to induce you to accept the company's final wage offer. You will not be allowed to start work until you accept the company's final wage offer".

This situation may last for anything from a few days to a few months. The employer may choose to hire workers as substitutes for the workers who have been locked out. At some stage, most South African employers get impatient and increase the pressure on their employees by dismissing them as part of the lock-out. The employees will be informed that the purpose of their dismissal is to persuade them to accept the employer's final offer. Any worker who gives in to this pressure and wishes to accept the employers final offer will be entitled to recommence work. At a later stage, the employer could announce that he is now hiring permanent replacements for the workers who have been locked out. The locked out workers are informed that



they can apply for re-employment but that their jobs are no longer guaranteed because they may have been replaced by permanent replacements.

This is the crucial stage of a lock-out. As with a strike, the ability of the employer to recruit a new workforce is critical. Employers with mechanised factories employing highly skilled workers may have extreme difficulty in finding a new workforce. On the other hand, employers with chiefly unskilled work-forces are more easily able to do so. A lock-out is an exercise of power. The ability of the employer to find a new workforce, the employer's financial resources, and the workers' capacity to survive, influence the outcome.

To date, not many lock-out dismissals have ended up in cases in the Industrial Court, and it is difficult to anticipate how the court will deal with these. It is likely that the court will be reluctant to reinstate workers dismissed in lock-outs implemented lawfully after full negotiations. A crucial issue will be whether the court will feel employers are under an obligation to employ temporary substitutes during lock-outs. If the employer can show that temporary substitutes were not a feasible alternative and it had to hire a new permanent work-force to remain in business, the dismissed employees will be left without a remedy.

### **The Post-strike lock-out**

Employees who are on strike may wish to return to work but without

abandoning their demands. A common employer response is to lock the employees out at this stage. The workers cannot return to work and persist with their demands. They have a choice: either they abandon their demands or they remain out. This tactic is used by employers to ensure that disputes do not linger on indefinitely.

### **Conclusion**

The lock-out is regarded as a tactic of aggressive managements. Managements feel that lock-outs enable them to take control of the dispute with their workers. A lock-out brings the dispute to a head, preventing a trade union from running a dispute over a period of time through the threat of escalating industrial action. The employer may find the go-slow and overtime bans so disruptive to production that it will choose to bring issues to a head by locking employees out.

But this tactic has its disadvantages. The implementation of a lock-out unifies workers. While they may have been undecided whether or not to strike, once a lock-out is implemented they have no choice. This effect has been shown in a number of the long lock-outs in South Africa. They have not led to worker capitulation, but to further negotiations where management, faced with a refusal to return to work, has increased its offer. The lock-out, like the strike, is a double-edged sword. It is here to stay and trade unions will have to work out their responses. ☆