Legal Notes

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

The overtime ban

Part six of a worker's guide to the Labour Relations Act

When is an overtime ban a strike? This question has caused much debate recently. Judges have been giving conflicting decisions as to when the collective refusal by workers to work overtime will be a strike. The confusion caused by all these judgments is now over. A case about this issue was referred to the highest court in the country, the Appeal Court in Bloemfontein, and the court has now given its decision. All other courts in the country will now have to follow the judgment of the Appeal Court. In this article, we will discuss this decision and its implications for trade unions and workers. But first let's look at why the case is so important.

The partial strike

An overtime ban is one of a number of actions through which workers can pressure their employer to agree to a demand without completely refusing to work. Such actions are known as partial strikes and include a go slow and a work-to-rule.

A partial strike (like a strike) has three aspects. It occurs when workers collectively act by, for example, refusing to work overtime, the aim being to force the employer to meet their demands. Therefore if ten workers happen to refuse to work overtime on the same day because of their individual personal circumstances, it is not an overtime ban. They did not decide together (i.e. collectively) and they have no demand that they are directing to the employer.

It is a criminal offence for workers to stage a strike before the dispute causing the strike has been referred to a conciliation board or industrial council and the workers have voted by ballot in favour of striking. This applies equally to strikes and partial strikes. When procedures are not followed, the employer may apply to the Supreme Court to interdict workers from striking because the strike will

be illegal.

This is exactly what happened in the case that went to the Appeal Court. Workers belonging to FAWU went on an overtime ban at a number of plants owned by SA Breweries. At the time of the overtime ban the company and the union were negotiating on wages and working conditions. Although deadlock had been reached the dispute had not been referred to a Conciliation Board. The workers were not obliged to work overtime in terms of their contracts of employment, but had regularly worked overtime in the past. The company argued in court that the refusal by the workers to work overtime was an illegal strike.

The union denied this. It said that because the workers had not signed contracts requiring them to work compulsory overtime. Therefore the refusal to work overtime could not be a strike. The Supreme Court in Johannesburg ruled that the workers' overtime ban did not amount to a strike. It therefore refused to order the workers to stop the overtime ban. The company was not satisfied with the decision and took the case on appeal. The Appeal Court also ruled that that the overtime ban was not a strike as defined in the Labour Relations Act.

Some contracts make overtime a condition of employment

In the case that went to the Appellate Division, the workers were not required by their contracts of employment to work overtime. This is what is called voluntary overtime. An employer may however require employees to agree that they will work overtime when requested to do so. If the employee agrees, or if a trade union agrees on behalf of a workforce, the employee will be required to work overtime when requested to do so by the employer.

As a result of the decision of the Appelate Division, many employers will now attempt to get workers to agree to systems of compulsory overtime either by including a provision in their contracts of employment or by raising the issue in negotiations. Employers who are particularly serious about introducing compulsory overtime may even lock employees out to obtain their agreement.

Law limits overtime hours.

The Basic Conditions of Employment Act provides that no worker may be asked to work more than 10 hours overtime per week or 3 hours overtime per day. It is illegal for an employer to require a worker to work more overtime than this and the refusal to work excessive overtime can never be a strike.

The Act reinforces the position that employees who have not agreed to compulsory overtime cannot be compelled to work overtime against their will. Industrial Council Agreements and wage determinations may also regulate overtime. For instance, the agreement for the metal industry provides that all overtime in the industry is voluntary. An employer may only

introduce a system of compulsory overtime if it has obtained an exemption from the provisions of the Industrial Council Agreement.

Can an overtime ban be an unfair labour practice?

The Supreme Court can only order workers to stop striking if they are acting illegally. The industrial court however has a wider power to stop an unfair labour practice. Therefore it is possible that even when the refusal to work overtime is not a strike, the industrial court may find that the ban is unfair and order that it stop. The court has often interdicted overtime bans in the past on the basis that they are unfair. Will it continue to do so after the decision of the Appellate Division? This question has not been clearly answered yet. However, there are indications in the judgment of the Appellate Division that the refusal to work overtime should never be seen as being unfair to the employers.

The court says workers can refuse to do non-contractual overtime and may do so even during the course of negotiations with employers. On the other hand, employers will argue that the purpose of collective bargaining is to ensure that there is no industrial action until there has been full negotiation between the parties. They will say that a refusal to do voluntary overtime that has been worked regularly in the past, is against the spirit of collective bargaining, and against the purpose of the Labour Relations Act. They will say that therefore the overtime ban before or during negotiations will be an unfair labour practice. Who will win this argument in the court remains to be seen.

The anti-LRA overtime ban

Many workers have recently refused to do overtime in protest against the LRA. Will this be a strike? Obviously if overtime is not compulsory in a particular company, it will not be a strike. If the overtime is compulsory and workers decide collectively to ban overtime, it will be a strike if it aims to force the employer to do something. This is true even if the ban is a political action aimed at forcing the emplyer to take a particular political position.

If however the refusal is staged as an act of protest it will not be a strike. If, for instance, all workers refuse to work overtime so as to attend a political gathering or funeral, that is not a strike because the employer is not being pressured to do anything. But the industrial court is not sympathetic to workers making political gestures at work and it is likely to view such action as an unfair labour practice.

Lock-outs

Does the SAB judgment have any effect on an employers' right to lock workers out? Yes, if an employer now refuses to allow workers to do overtime that they have regularly done in the past, it will not be a lockout. Of course, this situation seldom occurs in practice. ☆