Strikes in essential services

Urgent changes needed

The recent public sector strike highlighted the need for a better way of managing these disputes. **John Brand** explores how the LRA's Essential Services Committee is seldom used to forge minimum service agreements or settle disputes over essential service designations. He also suggests the formation of appropriate bargaining units and a move towards modern problem-solving negotiations.

The recent public service strike highlighted the frequency of strikes in South Africa's essential services, often accompanied by violence. This article explores the legality of these strikes and suggests how the law could manage them better.

RIGHT TO STRIKE

The right to strike for the purposes of collective bargaining is a constitutional right and the Labour Relations Act (LRA) recognises this. However, it limits the right by, among other things, stipulating that no person may strike if they are engaged in an essential service.

The Constitution permits the limitation of rights in the Bill of Rights to the extent that the limitation is reasonable and justifiable in a democratic society based on human dignity, equality and freedom. There is, thus, a need to balance the strike right against other fundamental rights, such as those to health care, food, water and social security.

To achieve an appropriate balance, essential service workers are conventionally excluded from the right to strike in open democracies and this is sanctioned by the International Labour Organization.

INTEREST ARBITRATION

Instead of strike action, essential service workers are conventionally given the powerful weapon of compulsory arbitration, which allows one party to refer a dispute to arbitration with or without the agreement of others. An arbitrator must then determine the dispute as if strike action was allowed.

The LRA and the disputes procedures of public sector bargaining councils provide that in essential services any party may refer the dispute to conciliation, and if it remains unresolved, to arbitration. With some exceptions, the arbitration award becomes binding 14 days after a government minister tables it in parliament.

If a dispute about wages and working conditions is referred to arbitration, the arbitrator must determine new rights for the parties according to standards of fairness and equity.

The common law of arbitration has developed the following core principles to guide arbitrators:

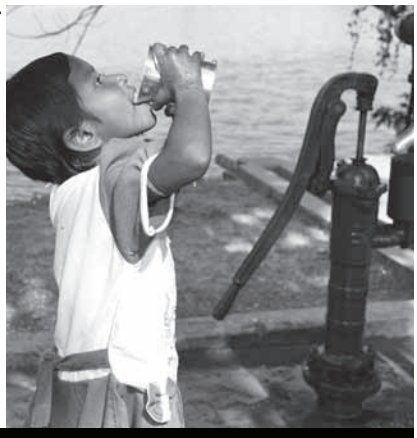
- replication of a negotiated outcome;
- demonstrated need for the change proposed;
- total compensation – the overall cost to the employer of the deal; and
- appropriate comparison with employees doing similar work in similar sectors.

An important principle is that public sector employees should not be expected to subsidise public services. If the reasonable wages they should receive prevents the public authority from continuing to provide the service, that is a political problem, and should not be reflected in an award.

The arbitrator must take serious account of the parties' arguments during collective bargaining, including ability to pay, industry practice, cost of living indices, previous practice, competition, productivity, public interest, supply and demand, internal and external comparisons and equity. Arbitrators generally apply a combination of these standards.


red crescent


1 fire safety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Some essential services designated by the Essential Services Committee.

With a good body of arbitrators, outcomes become predictable and parties are discouraged from taking unreasonable negotiating positions which in turn encourages negotiated settlements.

UNPROTECTED STRIKES

The LRA does not protect parties that engage in unprotected strikes. This means that any person who suffers harm from the strike may claim damages from a union and/or strikers under the common law or the LRA. This empowers the Labour Court to order the payment of just compensation. Such actions are uncommon, however, because employers are reluctant to rock the boat after a strike is settled, while the cost and delay of court action deters the average person.

The LRA also empowers the Labour Court to grant an interdict or order restraining anyone from participating in a strike that violates the LRA. The court may take account of non-compliance with this in ordering just compensation. The court often grants interdicts and unions sometimes contemptuously flout them yet the court seldom summonses them to explain their contempt.

An employer can also suspend or cancel a collective agreement such as a recognition agreement if a union or its members take unprotected strike action. Employers could, for example, stop deducting union subscriptions. Again, fear of aggravating an already troubled relationship discourages this.

DESIGNATION OF ESSENTIAL SERVICES

The LRA provides for the setting up of an Essential Services Committee (ESC). The ESC must conduct investigations into whether all or part of a service is essential and decide whether to designate it as such. It must also settle disputes about whether services are essential, and investigate this issue at the request of a bargaining council.

The ESC must give notice of an investigation and invite interested parties to submit written representations. Having decided to designate an essential service, it must publish a notice in the Government Gazette. No investigation is required for the police and parliamentary services because the LRA designates these as essential.

Over the past 15 years, the ESC has designated many essential services. These include supply of water; generation; transmission and distribution of power; firefighting; services for the functioning of the courts; correctional services; blood transfusion services; nursing; medical and paramedical services; services provided by old age and children's homes; pension distribution; weather bureau; electrical, safety and security services at airports; maintenance and operation of waterborne sewerage and purification works; and the collection and disposal of certain types of refuse.

If a party disputes if a service is essential, or if an employee or employer is engaged in an essential service, the ESC must settle the dispute as soon as possible. Regrettably, this procedure is seldom used and parties tend to wait until a strike erupts to contest which employees may participate.

MINIMUM SERVICE AGREEMENTS

Under the LRA, employers and unions can agree to maintain less than the entire essential service, or the entire essential service with reduced staff, but the ESC must ratify such an agreement for it to be effective. In such a case the minimum services become the essential services and the remaining services are no longer considered essential. When this happens, only minimum service workers may not strike.

However, more than 14 years after the LRA took effect, the ESC has not ratified a single minimum service agreement.

One reason is that very few have been negotiated. Unions appear

unenthusiastic about endorsing strikes that divide members who must continue working and earning from those who must suffer under the 'no work, no pay' principle. Because in South Africa essential and non-essential service workers are included in the same bargaining unit, unions have pursued strike action across the whole unit. They are no doubt aware that although unprotected, strikes by essential service workers significantly increase the pressure on the employer.

Employers on their part are reluctant to distinguish between minimum service workers and others because they find it is problematic enough to distinguish essential from non-essential workers. Since public sector employers have a constitutional duty to provide essential services, they prefer to bar all workers within the designated essential service from striking.

In addition, in the few agreements presented to it, the ESC has not been satisfied that workers will maintain an essential service during a strike. Concluding an agreement that ensures no disruption is not easy. Simply stipulating the number or percentage of workers that must continue working is unlikely to be effective.

If either party really wants a minimum service agreement, it can propose it to the other side, and if negotiations fail, the LRA and bargaining council constitutions require the referral of the dispute to conciliation, and failing that, to arbitration. The ESC then has to ratify the arbitrator's award before it comes into effect. Despite some unions' complaints about the lack of minimum service agreements, none have used the legal procedures available to force them into being.

STRUCTURAL PROBLEMS

There is a serious structural problem in public sector collective bargaining caused by the absence of appropriately designated bargaining units where there is a proper community of interests among employees. For example, doctors, prosecutors and cleaners have distinct communities of interest and should negotiate separately.

The drafters of the LRA chose not to impose a duty to negotiate in appropriate bargaining units with representative unions. They believed that with organisational rights and the right to strike, the duty to bargain, with whom, on what and in which bargaining units, would be determined by voluntary collective bargaining with, ultimately, a resort to power to force agreement.

In the recent public sector strike, the dispute was over what pay increase and housing allowance public sector workers from surgeons to labourers in one bargaining unit should get. This ignored, for example, the different housing needs of different groups. This would not happen if appropriate bargaining units were regulated by law, as in other sectors.

Another consequence of failing to distinguish between divergent interests is that many workers believe their needs are not recognised and addressed. This may partly explain worker anger during the recent public sector strike.

NEED FOR CHANGE

To prevent a repetition of events in the strikes of 2007 and 2010 in essential services, major change is needed. Parties must move away from outdated adversarial negotiations towards modern problem-solving and mutual gain negotiations. This negotiation process is characterised by joint training in modern negotiation theory and practice; use of independent and trusted expert facilitators; meticulous preparation for negotiations; adoption of a creative problem-solving methodology; exploration of causes, interests, needs, fears and concerns and a credible exchange of information amongst other things.

In addition, it is vital that section 186 of the LRA reflects the intentions of the Constitution, particularly in relation to fair labour practices. The Labour Court should have a flexible unfair labour practice jurisdiction. This could be similar to that of the former Industrial Court, enabling it, perhaps within legislative guidelines, to fashion a dynamic body of unfair labour practice law. It could do this in areas such as the duty to recognise a representative union for collective bargaining; to negotiate in appropriate bargaining units; to negotiate in good faith; to comply with agreed dispute procedures; to act democratically, and to conduct ballots when appropriate; to picket peacefully; to strike non-violently; and to respect essential services and interest arbitration in such services.

CONCLUSION

There is much that South Africans can learn from the employment law of other democracies such as in the Nordic countries, Australia and Canada. South African politicians, employers and unions may not have the expertise to conduct a proper analysis and generate appropriate solutions to the present problems.

There is also a risk that sensible proposals by any of them will be shot down by others. It may be best for government to appoint a committee of experts, perhaps chaired by an eminent international person, to analyse the problems and make recommendations for the way forward. LB

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This is a shortened version of his 'Strikes in essential services' paper presented at the SA Labour Law Conference in August 2010.