The law and minimum service agreements

An issue that arose in this year's public sector strike was minimum service agreements. *Bulletin* asked **Anton Roskam** to explain the law on minimum agreements and their pros and cons.

Essential service is defined in the Labour Relations Act (LRA) as "a service the interruption of which endangers the life, personal safety or health of the whole or part of the population".

The Essential Services Committee (ESC) determines which services are essential after hearing representations from interested parties. It has made a number of designations, including nurses and fire fighters.

Workers who are classified as essential service workers may not strike by virtue of the provisions of Section 65(1)(d)(i) of the LRA. The LRA provides that their interest disputes, like wage increases, are determined through interest arbitration.

Section 72 of the LRA introduces the concept of a minimum service agreement. Basically, the employer and trade unions negotiate an agreement in which they work out who is actually necessary to remain at work when there is a strike. The necessary workers then constitute the minimum service and the rest, even though they were previously classified essential, may go out on strike.

But such an agreement is not valid until it has been ratified by the ESC. The reason for this is that the ESC must make sure that the interests of the public are catered for, as we are dealing with services where the life, safety or health of people are potentially threatened.

Therefore, once the employer and the union(s) agree to a minimum service agreement and it is ratified by the ESC, the number of essential service workers who cannot strike 'shrinks' to the number of workers designated in the minimum service agreement. This means that more workers can strike in support of their demands. The fact that more workers can go out on strike is an advantage; although it obviously depends on how many more can strike. There are, however, a number of disadvantages.

The unions often complain that the employer refuses to negotiate a minimum service agreement. This can be resolved by referring a dispute about the conclusion of a minimum service agreement to interest arbitration or by using the pressure of a strike by non-essential service workers to conclude such an agreement. But before this is done a sober analysis of what can be realistically achieved should be made.

The important question is whether it is tactically advantageous for a union to conclude such an agreement. The acid test is whether the union will be stronger at the bargaining table with such an agreement or not. This is not only a question of the numbers that can strike, but also relates to the legal implications of concluding such an agreement.

One big disadvantage is that once a minimum service agreement is concluded and ratified, the minimum service workers depend upon the other workers to resolve their interest disputes. In other words, they cannot strike and they cannot refer their interest disputes to arbitration. This is what is meant in Section 72 (b) of the LRA when it says that the provisions of Section 74, which deal with the resolution of disputes of essential service workers through arbitration, do not apply.

Arguably, this section of the LRA is unconstitutional, as it leaves many workers without a way of resolving their disputes except to hope that their comrades will go on strike for them. But this argument has not been tested in the courts.

The next disadvantage is that the workers who can go on strike are subject to 'no work, no pay', while the minimum service workers are paid for being at work during the strike. This can cause great unhappiness amongst members of the union.

One way to resolve this is to include a clause in the minimum service agreement that minimum service workers' pay will be paid pro rata to all the workers, including all on strike. In this way all workers suffer equally.

The other big difficulty is defining which workers fall into the minimum service and which do not. The experience at Eskom is an example. Both NUM and Numsa cancelled their minimum service agreement because so many disputes arose out of the interpretation of the agreement. When a strike took place, Eskom argued that many of the workers that struck were part of the minimum service as defined in the agreement and then disciplined those workers. The agreement thus threatened the job security of many workers. LB

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