The new Labour Relations Bill

PAUL BENJAMIN analyses the draft Bill and concludes that it opens up possibilities for a new era in South African labour relations.

1995 is set to become one of the three most significant dates in the history of labour law in South Africa. If Minister of Labour, Tito Mboweni, is able to turn the Bill published in February into law, the achievement will rank in importance alongside the original Industrial Conciliation Act of 1924 and the reforms of 1979 that extended that Act (now the LRA) to black workers.

But this year's reforms will also be very different from those in the past. It is the first time that labour legislation will be enacted by a democratic government and the first time that trade unions representing the majority of South African workers will take part in shaping a new labour relations statute. During the next six months the trade union movement will be able to influence the final form of the Bill. This opportunity will not come again for many years.

The Bill is described as a "draft negotiating document in bill form". Organised labour and business are expected to use March to May to try to reach agreement on the content of the law in negotiations at NEDLAC. In addition, the public will be able to make comments. The Bill, together with any changes agreed upon by the principle negotiating parties, will be placed before Parliament, probably in June. It will be considered by the Standing Committee on Labour and then debated by Parliament as a whole. Although Parliament has the final say, it is unlikely that it will make major changes on issues where organised labour and business are in agreement. It is expected that the Parliamentary process should be concluded by about September and that the new law will take effect at the beginning of 1996.

This article examines the principle features of the Bill, compares the Bill with the current labour law and includes some brief comments on significant proposals. The Bill was published together with an explanatory

memorandum and readers wishing to make a closer study should obtain copies of both documents.

One labour law for all sectors

The new Act will replace the LRA as well as the legislation for the public sector, teachers and farmworkers. It is proposed that the new Act cover all employees except for members of the defence force, the police and the national intelligence services. These employees are not prevented from joining trade unions and it is expected that these services will have separate labour laws and regulations. The exclusion of these categories of workers is a common feature in other countries. The new Act will apply to employees previously excluded from the LRA, such as domestic workers.

Freedom of association

Discussion of freedom of association is an appropriate point to mention one more way in which the Bill differs from previous labour laws. It is the first labour statute that must comply with the provisions of the interim constitution, which is now the supreme law of the land. The interim constitution upholds the right to freedom of association of every South African. It is also the first labour law that makes a serious attempt to give effect to the basic principles of the International Labour Organisation (ILO). This is reflected in the approach to freedom of association — employees have the right to form, join and hold office in trade unions and their right to freedom of association is protected from interference from the state, employers and trade unions. Changes are also proposed to the registration system (discussed later) to comply with ILO standards on freedom of association.

The closed shop

Freedom of association raises one of labour law's perpetual controversies — the closed shop. There is no doubt that closed shops violate freedom of association. But this does not automatically make a law permitting closed shops unconstitutional. The interim constitution says rights can be limited if this is done in a way that is reasonable and can be justified in a free and open society. Will closed shops meet this test? There is no easy answer to this question and approaches differ from country to country. However, there is agreement on one issue: it is a violation of freedom of association to use funds contributed by employees who are members of a trade union because of a closed shop for purposes other than collective bargaining (such as political activities).

The Bill proposes that existing closed shops established under the LRA should continue to have force. In addition, agency shops may be established in terms of which non-union employees who benefit from collective bargaining by a union contribute to a collective bargaining fund which can be used to meet collective bargaining costs. This is an attempt to deal with the "free rider" problem (that non-union employees benefit from union bargaining without contributing to the union) without violating freedom of association. An agency shop arrangement must comply with the Act's provision to be binding.

This debate is likely to be one of the most controversial of the year, as there is not even a common position amongst trade unions.

Collective bargaining

Some of the Bill's most wide-ranging reform proposals deal with collective bargaining. Presently the LRA does not expressly require employers to bargain with trade unions. However, the industrial court has said that it is an unfair labour practice for employers to refuse to negotiate with trade unions. The court's decisions on the issues have been inconsistent, often favouring small unions at the expense of majority unions. In addition, the court's activities have been limited to plant-level disputes and it has refused to order employers to bargain at group or industry level.

The Bill suggests a new approach. All of the basic organisational rights over which the unions have fought recognition disputes in the past are now included in the Act. These are:

Halton Cheadle, Tito Mboweni and Mac Maharaj at the launch of the draft Bill

- access to employer premises for union purposes
- the right to hold meetings
- the right to conduct ballots
- stop-order facilities
- time off for union activities
- the right to elect union representatives
- the right to information for collective bargaining purposes.

Reasonable conditions may be imposed upon the exercise of these rights. Unions will obtain these rights once they reach certain levels of representation in a workplace. The threshold levels are not set out in the Bill, but if this approach is adopted, these will be the subject of negotiations in NEDLAC. The unfair labour practice will no longer apply to collective bargaining and the only legal dispute will be whether a trade union satisfies the threshold limit. It is likely that different thresholds could be set for different rights (for example, 10% for stop-order facilities but 50% for rights to information). These levels may be varied by agreement between an employer and a majority trade union or by the parties to a bargaining council. Trade unions may demand additional organisational rights and include these in collective agreements.

A union with enough members will be able to obtain these rights and then should be able to force an employer to negotiate with it over wages and conditions of employment. If the employer refuses, the union will be entitled (after using the conciliation procedures) to strike (with protection against dismissal) on this issue. While a court may not order an employer to bargain, the Bill proposes that all disputes concerning the recognition or de-recognition of a trade union must go to advisory arbitration (in which a non-binding decision is made) before industrial action. This should increase the pressure on employers to recognise a union without the necessity of a strike.

The new rules are likely to have the least impact in organised workplaces where unions and employers have established bargaining relationships although they could come into play where, for instance, an employer seeks to remove union rights because of declining membership. A major consideration is how they will impact upon collective bargaining in sectors with low union density such as agriculture where the

basic battles over recognition are still being fought. Will farmworkers even with all the rights contained in the Act be able to force a hostile employer to negotiate with their union? Even if the answer to that question is no, that is not in itself a criticism of the Bill's approach — it may be that no labour relations system could promote collective bargaining where inequalities are so great and that institutions such as the Wage Board are designed to protect workers in this position.

Collective agreements

The Act deals with the legal status of collective bargaining agreements. These can be enforced legally and may incorporate dispute resolution procedures. Employers and trade unions will be able to use agreements to regulate virtually all aspects of their relationship.

Bargaining councils

Industrial councils are transformed into bargaining councils. Important changes are:

- a bargaining council can comprise parties drawn from the private and the public sector
- the interests of small employers must be represented on the council
- whether a bargaining council is representative of its industry must be reviewed annually
- the Minister retains the power to extend agreements to non-parties. (He must do so if the agreement does not discriminate against non-parties and the failure to do so would undermine sectoral bargaining. Previously, he could refuse to do so.)
- there must be a speedy procedure for exemptions to be granted by an independent body
- the Act encourages industrial councils to improve their dispute resolution capacity through developing mediation and arbitration procedures.

Comment: The Bill does not deal with the controversial question of sectoral bargaining. COSATU has demanded compulsory sectoral bargaining, with the economy being divided into a number of sectors. However, the Bill does hint at a process that may lead to a more rational structure of industry-level bargaining. Every application for the registration of a bargaining council must be considered by NEDLAC, who may make proposals on the area and sector for which it is to register. The demand for compulsory sectoral bargaining is unlikely to win the support of state or employers. An approach that could lead to orderly sectoral bargaining would be to build sufficient inducements in the bargaining council system to encourage employer participation.

The Public Service Bargaining Council and the Education Labour Relations Council will be transformed into bargaining councils.

Workplace forums

Closely linked to its approach to collective bargaining is the idea of the workplace forum (see p 31). This is a structure for regular meetings between elected representatives of the workforce and management. They are designed to lay the basis for co-operative workplace relations between employers and workers and create a climate for greater worker participation in decision-making. The explanatory memorandum describes their purpose as being "the joint solution of problems and the resolution of conflicts over production". It lists "restructuring, the introduction of new technologies and work methods and changes in the organisation of work" as examples of the types of issues that will be dealt with in the workplace forum. Features of the proposed system are:

- A workplace forum can only be initiated by a majority trade union or a group of trade unions who together represent more than half the workers in a workplace. This is important as it means that a workplace forum cannot be imposed upon unions against their will and they cannot be used at non-unionised workplaces as a way of avoiding unionisation.
- Representatives on the workplace forum will be elected by the whole workforce and not merely by trade union members.

- ❑ Negotiations over wages and conditions of employment will not take place in the workplace forum.
- ❑ Workplace forums will have extensive rights to information.
- ❑ Workplace forums will have rights of consultation on some issues and joint decision-making over others. Which issues fall into which category is not spelt out. If agreement cannot be reached on a joint decision-making issue it will be resolved by arbitration and no striking will be permitted.

Comment: What impact will these structures have? One criticism that has been advanced (by a prominent management consultant) is that it is artificial to separate collective bargaining from consultation over issues such as levels of employment and restructuring. This separation may be achieved more easily in industries with industry-level wage bargaining, but may be more difficult where wages remain a matter for plant-level bargaining. A practical issue for unions is whether they will have the resources to retain a presence in both forums simultaneously. Will activities in the workplace forum not take second place when wage negotiations hot up? Much will depend upon whether the final Act gives workplace forums any joint decision-making powers. If this is done in respect of a significant aspect of industrial relations (for example, retrenchments) these structures would have the potential to create a more co-operative pattern of industrial relations in South Africa.

Industrial action

Workers have the right to strike if

- ❑ there has been mediation over the dispute or 30 days have elapsed
- ❑ 48 hours written notice is given of the strike.

These rules also apply to employers implementing a lock-out.

Employees may not be dismissed for participating in a strike in conformity with the Bill's procedures. Holding a ballot is no longer a requirement for a procedural strike although ballots are not entirely irrelevant. (An employee may not be expelled or disciplined by a trade union for refusing to take part in a strike unless a majority of members have voted in favour of the strike).

Where workers (or an employer) embark on unprocedural industrial action, the other party is not obliged to follow agreed or statutory procedures before calling a strike or lock-out. An important provision related to the conduct of industrial action is that a union can prevent (or require an employer to reverse) any unilateral implementation in conditions of employment (such as a wage increase) during the processing of a dispute.

Registered trade unions will have the right to stage peaceful pickets on public property outside an employer's premises. Pickets may only be held on an employer's property with the employer's consent. The Mediation and Arbitration Commission has the power to resolve disputes over picketing. The inclusion of picketing in the Bill does not improve the rights that workers already have in terms of the constitution and the common law.

Strikes are prohibited if the issue giving rise to the strike

- ❑ is regulated by a collective agreement or wage determination or prohibited by a collective agreement
- ❑ is one that can be referred to arbitration or the labour court (this means that strikes over dismissals will not be permitted).

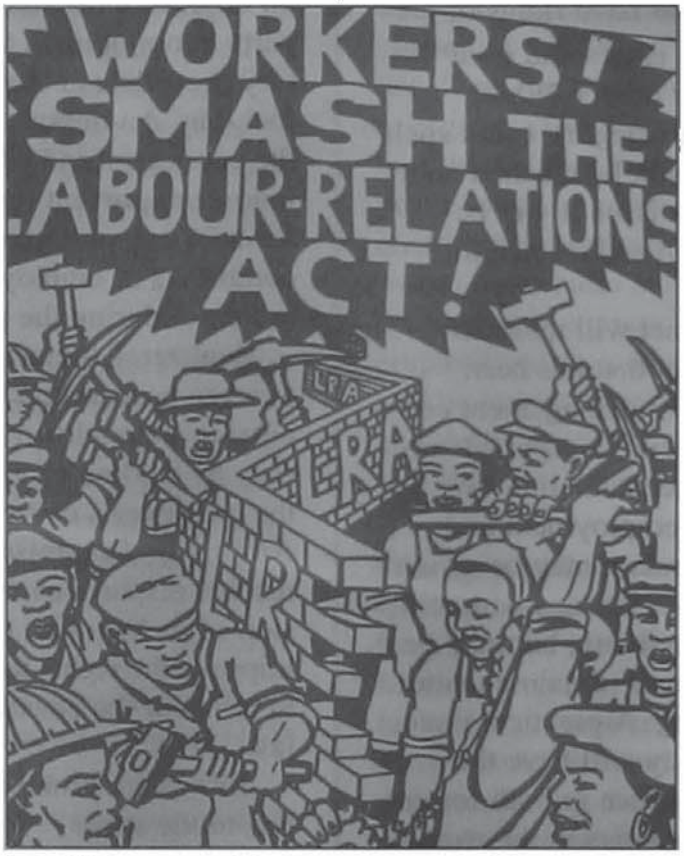
Essential services

Strikes are also prohibited in essential services. These are defined as "any service, the interruption of which threatens the health, safety or life of the population or a part thereof". An Essential Service Commission will determine which services are essential and resolve disputes over this issue. This approach differs from the LRA which listed a number of sectors in which strikes were prohibited.

In addition, strikes may not occur in what are termed "maintenance services". These are services requiring continuous maintenance to prevent the "material physical destruction of any working area, plant or

machinery". Two well-known examples of workplaces that may fall into this category are production processes that would be seriously damaged by a shut-down and areas in a mine that would be damaged or made unsafe if no maintenance work is performed.

Disputes in essential services can be resolved in two ways. Either all workers are prohibited from striking (and the employer from locking-out) and the dispute is resolved by compulsory arbitration. Alternatively, the employer and union can agree on a minimum level of services that will be maintained and employees falling outside this requirement will be permitted to strike and there will be no compulsory arbitration. The second approach also applies to maintenance services. In addition, an employer whose operations include activities declared to be maintenance services may not hire replacement labour during a strike.



Anti-LRA poster 1989: a new spirit this time around?

The Bill also regulates protest action staged by employees in defence of their socio-economic interests. This is protected if it is staged after compliance with the Act's procedures. Under the LRA any stay-away staged in support of a demand not directly related to employment issues is unlawful.

Unfair dismissal

All dismissal disputes may be referred to arbitration. Arbitration will not be subjected to appeal. Arbitration must be conducted in terms of agreed procedures or if there are no agreed procedures by the Conciliation, Mediation and Arbitration Commission.

The Bill lists a number of invalid reasons for dismissal. These include: participation in union activities, any form of unfair discrimination, pregnancy, participation in a procedural strike or protest action and refusing to perform a striker's job. Otherwise, the Bill restates the basic approach of the industrial court which has its origins in the approach of the ILO. An employee may be dismissed for reasons connected with his or her conduct or capacity to perform work or for economic or technological reasons (retrenchment) provided that a fair procedure is followed. The employer must prove that a dismissal is fair.

Perhaps the most important innovation is the Bill's promotion of reinstatement or re-employment as the primary remedy for dismissed workers. An order of reinstatement or re-employment must be given unless:

- the worker does not wish to be reinstated or re-employed
- it would not be reasonably practicable
- the circumstances of the dismissal make it inappropriate
- the procedural fairness of the dismissal only was challenged.

Only the first two criteria apply to retrenchment cases. The Bill's requirements for a fair retrenchment are similar to the guidelines that the industrial court developed but did not always apply. These include notice, consultation, disclosure of information, consideration of alternatives and the use of fair selection criteria. If a workplace forum is established, retrenchment consultations will be held in that forum. The Bill

proposes the inclusion of a minimum severance benefit in the Act although it does not suggest the level of that benefit.

Although employees may not be dismissed because of their participation in a procedural strike, strikers may be dismissed because of the economic consequences of a strike. In other words, strikers may be dismissed because the strike has damaged the employer economically. In such a case, the employer must comply with all the procedural requirements for a dismissal for economic or technological reasons and would have to re-employ dismissed workers when business improved.

Comment: The Bill's approach to dismissal has two aspects. The current law is codified and included in the Bill. This will bring greater certainty and deal with the problem that some members of the industrial court refused to follow the court's own guidelines (even where these had been approved by the Labour Appeal Court and the Appellate Division). More importantly, it accepts that the appropriate remedy for dismissal is reinstatement (a view shared by the Appellate Division). It also accepts that the major enemy of reinstatement is delay and proposes procedures to resolve dismissal cases quickly.

Dispute resolution

The Bill promotes arbitration and mediation. The industrial court and the Department of Labour's conciliation services will be replaced by a Commission for Conciliation, Mediation and Arbitration (the Commission). The Commission will have a governing body with equal numbers of representatives from the state, employers and unions. Its functions are to promote collective bargaining, prevent and resolve disputes and improve labour relations. The Commission will perform its functions through a number of full-time and part-time commissioners. In addition, it may accredit independent agencies to perform any of its functions.

The commission will perform mediations and arbitrations. All disputes must be referred to mediation before either adjudication or industrial action. The Commission will provide arbitration in dismissal cases (due to an employee's misconduct or incapacity). Other dismissal cases must be referred to the Labour Court if mediation fails. The Commission will also provide compulsory arbitrations in essential service industries and, where the parties agree, voluntary arbitration. All disputes concerning the interpretation of a collective agreement must be referred to arbitration.

The Bill proposes to end the duplication that exists at the moment between agreed and statutory procedures (for example, currently a party wishing to take industrial action must refer the dispute to an industrial council or conciliation board even after extensive negotiations and mediation in terms of a recognition agreement). The Bill requires conciliation in terms of a bargaining council agreement or a binding collective agreement or under the auspices of the commission or an accredited agency. These agreements can also set up arbitration procedures.

The Commission's role is not confined to resolving disputes that are referred to it. It may, where it is in the public interest to do so, conciliate any dispute that has not been referred to it. In addition, the commission may at the request of parties advise or give assistance in disputes, give training and conduct research.

The Labour Court

Not all of the functions of the industrial court can be performed by the Commission. A national Labour Court will also be established. It will be the only court that can grant an order compelling compliance with any provision of the Act. It will also be able to deal with any breach of the Act's procedures and may make an award of damages or compensation. The court will hear all dismissal cases involving unprocedural strikes, dismissal for an invalid reason (such as discrimination) and for economic or technological reasons. It will also hear cases brought for damages as a result of unprocedural industrial action. In order to promote conciliation,

the court may refuse to hear a case unless there has been prior conciliation. An arbitrator's decision could be taken on review (but not appeal) to either the Labour Court or the Supreme Court (a review is a challenge to a legal decision because of irregularities).

The judges of the Labour Court will be appointed by the president in consultation with NEDLAC. They will have the same status as the Supreme Court judges and their decisions will not be subject to the Supreme Court except where they involve constitutional issues on which the final say must be with the Constitutional Court (a Labour Court decision may be appealed in the Labour Appeal Court which will consist of three Labour Court judges).

The Court's exclusive jurisdiction over the Bill and the role of NEDLAC in appointing the judges should ensure that a court engaging the confidence of labour and business has the primary responsibility for developing labour law.

The unfair labour practice

The Bill proposes to retain what it terms a "residual" unfair labour practice. This is designed to deal with unfair discrimination and unfair employer action short of dismissal such as warnings, demotion, suspension and the withdrawal of benefits. It will also allow a job applicant to bring a case arising out of discriminatory hiring practices.

Registration

The registration system will be simplified. Registration will not be compulsory and unregistered trade unions may operate although they will not have many of the benefits in the new Act.

All trade unions will have the right to be registered provided they meet a number of formal requirements. The registrar of trade unions must register a trade union if:

- ❑ its constitution complies with the Act
- ❑ it does not discriminate unfairly on grounds of race or gender
- ❑ its name is not the same or too similar to that of another trade union
- ❑ it is independent (in other words, it is not a sweet-heart union controlled or dominated by an employer)

Similar provisions exist for the registration of employer's organisations.

Among the advantages of registration are the right to participate in bargaining councils.

Comment: In theory, the new approach to registration represents a big change from the LRA which was initially designed to allow only one trade union to be registered for a particular interest (industry or craft) in a particular area. However, the courts and the Department of Labour no longer place that interpretation on the Act and the Bill represents a recognition of what is now to a large extent practice.

De-criminalisation

The Bill does not create any criminal offences. This does not mean that there would not be any legal consequences for not following its procedures. For instance, an employer could obtain an order from the Labour Court against an unprocedural strike. If workers do not comply with the order they would be in contempt of the order. The Court could impose a penalty upon them for not complying with the legal procedures as well as for not obeying its order. Another consequence is that bargaining councils will not be able to use criminal proceedings against employers who do not pay their contributions; instead they will have to bring proceedings in the Labour Court.

Making a better law

The draft Bill is a comprehensive plan for modernising and streamlining South African labour law. It offers concrete and imaginative proposals that deal with many of the criticisms that the unions have made of the LRA in recent years. The majority of these are likely to win the approval or organised labour and capital. That does not mean that there will not be tough debate and strong words in the months to come. The unions now have the opportunity to develop equally concrete alternatives to any shortcomings they identify in the Bill. This will ensure that a good bill becomes a better law. ☆