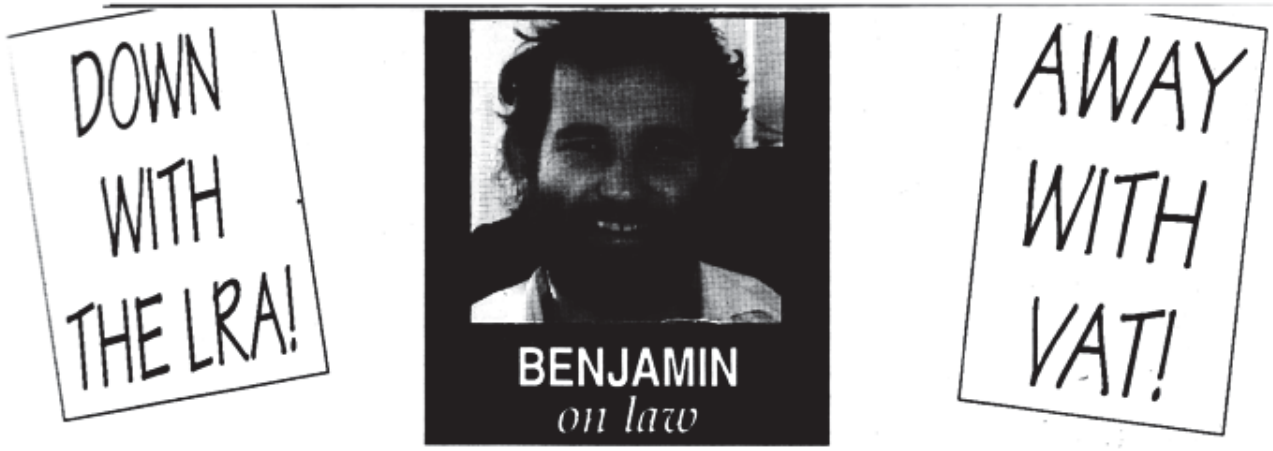

UNIONS AND STAYAWAYS

Legal Notes is written by PAUL BENJAMIN of the Centre for Applied Legal Studies

Stay-aways have been an important tactic of trade unions in South Africa in recent years. Many workers have been dismissed for participating in stay-aways and a large number of cases have gone to the industrial court challenging the fairness of these dismissals. This note summarises the rulings in some of these cases and looks at the implications for the trade union movement.

Different types of stay-aways

As far as the law is concerned there are different types of stay-aways. They can be separated into those in which a demand is made and those containing no demand. An example of a stay-away with a demand was the protest against the Labour Relations Amendment Act of 1988. A demand was made that the government change the law. In contrast, where workers do not go to work on 16 June they are usually not making a demand.

A stay-away containing a demand is an illegal strike in terms of the Labour Relations Act and participation in it is a criminal offence. A stay-away not involving the making of a demand, on the other hand, is not a strike. Therefore the VAT protest, which contained demands addressed to the state, was an illegal strike.

The attitude to stay-aways adopted by members of the industrial court and judges of the labour appeal court vary greatly. The majority of them are extremely critical of stay-aways. They point out that stay-aways carry an enormous cost to the country's economy. The one exception to this approach is found in a judgment in the industrial court by Mr Bulbulia, the Deputy President of the court. He said that a one-day stay-away called by a national grouping such as a trade union federation in protest against an issue affecting workers' immediate interests (such as the Labour Relations Amendment Act) could be considered to be a legitimate action. The dismissal of participants would therefore be unfair.

This approach is in line with the standards of the International Labour Organisation which has said that workers should not engage in political strikes aimed, for example, at the overthrow of the government. However the ILO accepts that it is legitimate for workers to stage industrial action aimed at the protection of their socio-economic interests. This would include protests

against labour legislation or the introduction of a new tax. Unfortunately, the rest of the industrial court has not accepted this view.

The dismissal of workers for stay-aways

Employers generally do not want to dismiss all workers who have participated in a stay-away. This would be extremely expensive and require them to replace their entire workforce. On the other hand, many employers want to take some disciplinary action to prevent further stay-aways.

For this reason some employers have dismissed those workers on final warnings who participated in the stay-away. Sometimes this approach is applied to all workers with final warnings. In other cases it has been limited to those with final warnings for time-related offenses such as absence from work, and late coming.

The unions challenged the fairness of this type of dismissal. They said that this allowed employers to selectively dismiss some of the workers involved in a stay-away. Initially, the unions had some success with this argument in the industrial court.

But now the argument has been rejected by the labour appeal court. In a case arising out of the September 1989 protest against the LRA amendment (*NUM v Amcoal*), it accepted that it was fair to dismiss some of the participants by taking account of employees' disciplinary records. That judgment was given before the VAT strike and many employers took advantage of the decision to dismiss all workers on final warnings.

In another case arising out of the September 1989 stayaways, the union, again NUM, lead evidence that COSATU had followed every possible avenue to change the law and it had no option but to call the stay-away. Therefore the stay-away was legitimate and all dismissals were unfair. The court rejected this.

It was critical of the fact that the stay-away was in breach of the recognition agreement, that the employer had been given no notice and that it lasted two days. It therefore ruled that as the stayaway was not legitimate, and selective dismissals were not fair. This case is now on appeal.

Individual circumstances

The court has been much more sympathetic to employees who state that they were unable to come to work because they feared violence or could not get transport. However, the court will not accept this type of justification unless the employee leads concrete evidence to establish his/her fears or transport difficulties. In addition, the court is not sympathetic unless the employee has raised these issues at any disciplinary hearing.

Dismissal hearings

The court has accepted that an employer who wishes to dismiss some workers for participating in a stay-away must give them the normal hearings and appeals. This is because they are being dismissed for their individual misconduct. A collective hearing is not good enough. The employee must be given the same procedures as if he or she was being dismissed for any other offence such as theft or late coming.

Responses for the unions

In future many employers will, as they did in the VAT stay-away, dismiss workers with final warnings. How can the unions respond to the court's approach in the *NUM v Amcoal* case? One way would be to say that workers on final warnings should not take part in any future stay-aways. While this advice might ensure that no one gets dismissed, it is probably impractical. Another approach would be for those on final warnings to apply for paid or unpaid leave on the day in question.

It is clear that the unions need to think strategically about current employer responses to stay-aways. Many employers do not dismiss. But the labour appeal court has, through its judgment, allowed employers who wish to, to use stay-aways as an opportunity to effect dismissals. ☆