

## Chapter 7

# Industrial action

The Act regulates strikes, lock-outs and picketing and it provides certain protections for employers and employees who embark on a lawful strike or lock-out.

## Strikes and lockouts

The Act gives effect to employees' constitutional right to strike. It also grants employers recourse to lock out employees.

### Issues over which employees can strike and employers can lock out

Strikes and lock-outs may be held over disputes which relate to a matter of mutual interest between employees and their employer. However a strike or lock-out may not be held if the Act provides that the dispute may be resolved by way of arbitration or adjudication. Some of the issues over which a strike or lock-out may be held are:

- wage increases;
- a demand to establish or join a bargaining council;
- a demand to recognise a union as a collective bargaining agent;
- a demand for organisational rights;
- a demand to suspend or negotiate unilateral changes to working conditions;  
and
- an unprotected lock-out or unprotected strike by the other party.

Changes introduced by the 2002 Amendment Act permit workers to stage protected strikes over retrenchments in certain circumstances. These are discussed in chapter 9 of this Guide.

# Strikes

The following elements constitute a strike.

## Who can strike?

A strike must involve two or more employees. (Thus a single domestic worker in a household cannot strike.) Striking employees may work for the same or different employers.

## What type of action can the employees take?

Employees must act with a common work-related purpose. For example, industrial action over the removal of a provincial premier is not a strike.

The action can be a partial or complete refusal to work or the retardation or obstruction of work, for example: go-slows, work-to-rule, intermittent strikes (where employees stop and start the same strike over a period of time) and overtime bans. An overtime ban initiated by employees concerning voluntary or compulsory overtime constitutes a strike.

## What must the reason for the action be?

The reason must be to solve a grievance or dispute about a matter of mutual interest that concerns employees and employers. (A dispute between two unions does not constitute a strike nor does a non-work-related grievance.)

## Protected strikes

Strike action can be protected or unprotected. Employees involved in protected strikes enjoy certain benefits which are denied employees who engage in unprotected strikes.

### *What are the effects of a protected strike?*

- Employees may not be dismissed for going on strike. Employees may, however, be dismissed for misconduct during a strike, such as intimidation or violence.

Employees may also be dismissed for operational reasons, although the retrenchment procedures will first have to be followed. (See chapter 9 on dismissals.)

- Employers may not get a court interdict to stop the strike. However, the employer can apply for a court interdict to prevent unlawful action, such as damage to machinery.
- Employees do not commit a breach of contract or a delict by going on strike.
- Employers may not institute civil legal proceedings against employees on strike. For example, the employer may not claim damages for lost production during the strike.
- An employer does not have to pay an employee participating in a protected strike. If the employer provides food or housing as part of the employees' wages, then the employees can ask the employer to continue to provide these during the strike. The employer may not refuse this request. However, the employer may reclaim the money for this food and housing from the employees after the strike has ended, by going to the Labour Court.

### *Procedures for a protected strike*

The Act sets out certain procedures that must be followed for a strike to be protected:

- the issue in dispute must be referred in writing to the CCMA or to a bargaining or statutory council;
- the CCMA or council must try to settle the dispute by conciliation within 30 days;
- if this fails, the CCMA or council must issue a certificate saying that the dispute has not been resolved; and
- at least 48 hours notice in writing of the proposed strike must be given to the employer, or seven days if the state is the employer.

The employees may then strike.

It is not necessary to hold a ballot to make the strike protected, but union members may force a registered union to hold a ballot.

## Situations when procedures in the LRA for a protected strike do not have to be followed

A strike will still be protected even if the procedures in the LRA have not been followed, if:

- the parties to the dispute are members of a council and the dispute has been dealt with by that council in accordance with its constitution;
- the strike conforms with the procedures in a collective agreement;
- the strike is in response to an unprocedural lock-out; or
- the employer intends unilaterally to change the employees' employment conditions, or has changed them, and refuses to change them back again within 48 hours of a written request to do so.

The Labour Appeal Court has held that if there is a collective agreement containing a dispute resolution procedure, compliance with either the procedure in the agreement or the procedures set out in the Act will render the strike a protected strike.<sup>9</sup> (The same principle would apply where there is a dispute resolution procedure in a council constitution and it would apply in a lock-out situation.) It is important to note, however, that if employees choose to follow the procedures in the Act rather than the procedures in a collective agreement, they may be in breach of that agreement which may enable the employer to cancel the agreement or even claim damages from the employees or their union, depending on the wording of the agreement.

## Special procedure concerning a refusal to bargain

The Act sets out a special procedure to be followed where the dispute concerns a refusal to bargain. An advisory award must be obtained before a strike can take place over such a dispute. This award cannot force a party to bargain.

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<sup>9</sup> *County Fair Foods (Pty) Ltd v Food and Allied Workers Union & Others* (2001) 22 ILJ 1103(LAC)

## Limitations on strikes

A strike will not be protected if:

- a collective agreement prohibits a strike in respect of the issue in dispute;
- an agreement requires that the issue in dispute be referred to arbitration;
- the issue in dispute is one that the Act says may be referred to arbitration or to the Labour Court;
- the parties are bound by an arbitration award or collective agreement that regulates the issue in dispute;
- the parties are bound by a sectoral determination that regulates the issue in dispute and the determination is less than one year old;
- the parties are engaged in an essential service (see below); or
- the parties are engaged in a maintenance service (see below).

## Lock-outs

The following elements constitute a lock-out.

### Who can lock out?

Employers can lock out employees.

### What kind of action must employers take?

The employer must physically exclude employees from the workplace.

### What must the reason for the action be?

The action must be to force employees to accept a demand of the employer about a matter that concerns the employer and the employees.

## Protected lock-outs

### *What are the effects of a protected lock-out?*

- Employees cannot apply to court to interdict the action.
- An employer does not commit a delict or breach of contract.
- Employees may not bring civil legal proceedings against an employer, for example, for loss of wages.
- An employer may not dismiss employees who have been locked out.
- The employer may use replacement labour only if the lock-out is in response to a strike. But the employer may only do so until the lock-out ends; striking employees must then get their old jobs back.
- An employer does not have to pay wages to an employee participating in a protected lock-out. The same provisions apply with regard to food and housing as in the case of strikes (see above).

### *Procedures for a protected lock-out*

The Act sets out certain procedures that must be followed for a lock-out to be protected. These procedures are the same procedures that must be followed for a strike to be protected. They are as follows:

- the issue in dispute must be referred in writing to the CCMA or to a bargaining or statutory council;
- the CCMA or council has up to 30 days to try to settle the dispute through conciliation;
- if this fails, the CCMA or council must issue a certificate saying that the dispute has not been resolved; and
- the employer must then give at least 48 hours notice in writing of the proposed lock-out to the trade union, or employees if there is no union, or seven days notice, where the state is the employer.

The employer may then lock out the employees.

## Situations when procedures in the LRA for a protected lock-out do not have to be followed

A lock-out will still be protected even if the procedures in the LRA are not followed by the employer, if:

- the parties to the dispute are members of a council and the dispute has been dealt with by that council in accordance with its constitution;
- the lock-out conforms with the procedures in a collective agreement; or
- the lock-out is in response to an unprocedural strike.

## Limitations on lock-outs

The same limitations apply to lock-outs as to strikes (see above).

# Compensation for loss attributable to a strike or lock-out

An employer or employees can claim compensation from the Labour Court if they suffer any loss as a result of an unprotected strike or lock-out or as a result of any conduct connected to the strike or lock-out that does not comply with the Act. The Labour Court will consider:

- what attempts were made by the parties to comply with the provisions of the LRA;
- whether the strike or lock-out was premeditated;
- whether the strike or lock-out was in response to unjustified conduct by another party to the dispute;
- the duration of the strike or lock-out; and
- the financial position of the employer, trade union or employees.

The Labour Court has held that an employer suing for damages must satisfy three requirements:<sup>10</sup>

- it must prove that the strike was unprocedural;
- it must prove that it sustained loss as a consequence of the strike; and
- it must prove that the party or parties from which it seeks compensation participated in the strike or committed acts in contemplation or furtherance of the strike.

If a union wants to avoid being sued when its members engage in unprocedural strike action ie. wild cat strikes, the union must inform the employer at the earliest possible opportunity that it disapproves of the strike and must take steps to try and persuade its members to return to work.

## Essential services

Employees in essential services may not strike and employers may not lock-out such employees. This is in line with generally accepted international principles.

### Definition

The Act defines an essential service as:

- a service, the interruption of which endangers the life, personal safety or health of the whole or any part of the population;
- the parliamentary service; and
- the South African Police Service.

Essential services are determined by the essential services committee. The essential services committee is a body consisting of equal representatives of employers, trade unions and government set up in terms of the Act. Its function is to declare services as essential and to hear disputes over whether or not a service is essential.

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<sup>10</sup> *Rustenburg Platinum Mines Limited vs The Mouthpiece Workers Union* [2002] 1 BLLR 84 (LC)

If there is a collective agreement in an essential service that provides for a minimum service in that service, then employees engaged in the minimum service may not strike but the rest of the employees may.

## How are disputes in essential services settled?

Disputes in essential services go to arbitration if conciliation has failed.

## Maintenance services

Employees in maintenance services may not strike. The Act defines a maintenance service as one where the interruption of that service will lead to the material physical destruction of the working area, plant or machinery. Parties can agree in a collective agreement that a service is a maintenance service. Alternatively, an employer may apply to the essential services committee for a determination that all or part of the service is a maintenance service.

Where a service has been declared a maintenance service, employers may not employ replacement labour if non-maintenance service employees go on strike. In other words, the employer gives up his or her right to employ replacement labour in exchange for having a maintenance service in which employees may not strike.

## Other forms of industrial action

### Picketing

The Act recognises the right to picket.

- Only a registered trade union may authorise a picket.
- A picket may be held at any place to which the public has access outside the premises of an employer. Unions need the employer's permission to picket inside the workplace. If an employer refuses permission for a picket to take place inside the premises, the CCMA may overrule the employer if the refusal to grant permission is unreasonable taking into account the conduct of the picketers, the duration of the picket, the number of employees taking part, etc.

- The picket must be peaceful.
- The parties must take account of any picketing rules to which they have agreed and must take into account the code of good practice on picketing issued by NEDLAC (see below).

### *Code of Good Practice on Picketing*

The code of good practice on picketing provides practical guidance on picketing in support of a protected strike or in opposition to a lock-out. It is a guide to those who take part in the picket and for employers, other employees or members of the public who may be affected by the picket.

The code does not impose any legal obligations and a failure to observe it does not in itself render anyone liable.

The code only applies to pickets that are authorised by a registered trade union and where only members and supporters of the trade union may participate.

A registered trade union must authorise the picket. This means that there must be either a resolution authorising the picket or a resolution permitting a trade union official to authorise the picket.

The authorisation must be in writing and must be served on the employer before the commencement of the picket.

The union and employer should attempt to agree on picketing rules. This would include an agreement on the number of picketers, the duration of the picket, the location of the picket, communication between marshals and employers, and access to the employer's premises for purposes other than picketing eg. access to toilets or telephones.

A registered trade union must appoint a convenor to oversee the picket who must be a member or an official of the trade union. That person should at all times have:

- a copy of section 69 of the Act which deals with pickets;
- a copy of the code of good practice on picketing;

- any collective agreement or rules regulating pickets; and
- a copy of the resolution from the trade union.

The picketers must conduct themselves in a peaceful, unarmed and lawful manner and may carry placards, chant slogans and sing and dance. They may not physically prevent members of the public from gaining access to or leaving the employer's premises and they may not commit any action which may be unlawful or which may be perceived to be violent.

The police may not take a view on the merits of the dispute that gave rise to the strike or lock-out. However, they have a general duty to uphold the law and may take reasonable measures to keep the peace. An employer cannot require the police to help identify picketers. The police have a responsibility to enforce the criminal law. They may arrest picketers for participation in violent conduct or attending a picket armed with dangerous weapons.

## Secondary action

The Act makes specific provision for secondary action. Secondary action happens when employees strike in support of a strike by other employees. It does not include a strike over a demand which has been referred to a council if the strikers are employed within the registered scope of the council, and they have a material interest in the demand of the main strikers.

### *When will secondary action be protected?*

Secondary action will be protected if:

- the main strike is a protected strike;
- the secondary strikers give seven days notice to their employer or the relevant employers' organisation; and
- the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect it may have on the business of the primary employer. In other words, if dockworkers strike in support of striking mineworkers, their strike is unlikely to have any effect on the business of the mine owner who is the primary employer. If it has no effect, it will not be reasonable, and the dockworkers will be prohibited from holding their secondary strike.

If the secondary employer believes the secondary strike does not meet the Act's requirements, that employer may apply to the Labour Court for an interdict to prohibit the strike. The court can ask the CCMA to investigate and report to it whether there is a reasonable connection between the strike and its possible effect on the primary employer. The court must take account of the CCMA's report before it makes an order.

## Protest action to defend the socio-economic interests of employees

The Act also makes provision for protected stayaways in support of socio-economic issues. The issue must be raised at NEDLAC or a similar forum and the action must be authorised by a registered union or federation. Even if these requirements are met, the Labour Court can remove protection against dismissal if participants do not comply with any order it issues to regulate the stayaway.

### Further information

#### Relevant sections in the Act

Sections 64 - 77: Strikes and lockouts

Section 213: Definition of strikes and lockouts

Code of Good Practice on Picketing

#### Forms to fill in

LRA Form 4.1 Request to assist parties reach agreement on picketing rules

LRA Form 4.2 Referral of dispute for essential services determination

LRA Form 4.3 Employer applies for maintenance service determination

LRA Form 4.4 Notice to NEDLAC about possible protest action

LRA Form 4.5 Notice to NEDLAC of intention to proceed with protest action

