NEGOTIATIONS BULLETIN
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Focus on the LRA

A NEW ERA IN LABOUR RELATIONS

Cosatu general secretary SAM SHILOWA looks back on the LRA negotiations and assesses the extent to which labour's demands were met

IN FEBRUARY 1995, Comrade Tito Mboweni published for comment and negotiations, a draft Labour Relations Bill, prepared by the Ministerial Task Team led by Halton Cheadle. The initial reactions of both business and labour were generally favourable to the Bill. We indicated that, at a glance, the Bill represented a major shift in industrial relations, an advance in our struggle and that its basic structure had many positive elements. We also indicated that some areas needed reworking and radical changes.

By the end of April, labour was ready with its positions. These had been agreed upon by Cosatu's Central Executive Committee (CEC) and in further discussions with Fedsal and Nactu. These positions were published on May Day and presented to business and the government on 4 May. Business was either not ready by then, or had made a decision to delay the process.

Throughout the negotiations process, they did not table any constructive proposals. Instead they labeled ours as unworkable and unreasonable. The same approach was adopted by most of the commercial media.

By the end of May it was clear to all of us that, short of a massive programme of mass action, mobilisation of the international trade union movement and a new approach to the negotiations, we were not going to have the Bill ready by this year. The result was massive marches and stayaways on 6 and 19 June. Business responded with an advertisement in all major newspapers claiming to have accepted the Bill. They even misrepresented Tito's speech at the launch of the Bill. This was a sign of desperation on their part.

A new round of negotiations started again on 21 June 1995 with a series of trilateral negotiations culminating in the Nedlac Agreement of 19 July. While labour was satisfied with most of the issues, we had reservations on the way some of the issues were resolved or captured. We nonetheless agreed that the process of drafting the agreements into law should begin, to ensure that the bill went through parliament before the end of the 1995 sitting, which was scheduled to rise on 15 September.

We now have a new law, which, as I have indicated earlier, represents a victory for labour and brings in a new era of industrial relations. Most of the issues on which we had reservations, have been resolved either through drafting or the parliamentary process.

What then were our positions, and what has become of them?

1. Inclusion of the police and intelligence services

The police are now part of the Act, while our demand on the intelligence services was dropped on the understanding that mechanisms that protect their

• ***continued on page 2***

A victory for labour!

The new LRA protects the right to strike

• ***from page 1***

constitutional rights will be put in place.

2. Basis for trade union rights
These were agreed without attachments to thresholds. The CCMA, in determining representivity (in case of deadlock), will take into account the history and nature of organising in the sector, the need to promote majoritarianism and/or stable trade unionism. A representative trade union refers to a majority union.

3. The duty to bargain
This was dropped by labour, taking into account the need to promote and protect industry-wide bargaining.

4. Closed shops
Our proposals were accepted with modification on the percentages necessary to institute the closed shop or to call for a ballot. The number of years were also changed from five to three.

5. Provisions of trade union rights
The issue of paid time off was largely resolved, even though it will in certain measure be subject to negotiations, arbitration or strike on the number of paid days. The 5% collection fee has been deleted, as we suggested. The clause on disclosure of information has been substantially reworked in a way which will make it difficult for employers to hide information from us.

6. Industry bargaining
While there was no agreement on compulsory centralised bargaining, labour accepted and jointly reworked the government's proposal on statutory councils. These can be set up once unions have at least 30% membership. Some agenda items are compulsory, while the rest are an issue of power.

7. Right to strike
The right to strike is properly protected and is not criminalised. We will also be able to engage in sympathy strikes. Strikes on socio-economic issues are protected, provided procedures have been followed. Our position that picketing and assembly should not be undermined by municipal by-laws is intact. We can, subject to necessary provision, even picket at the workplace. We did not win an outright victory on the lock-out and scab labour. But we also did not give anything away.

- Labour reconsidered its position on the defensive lock-out only, based on legal advice, but on the proviso that employers cannot employ scab labour in an offensive lock-out. The employers cannot employ scab labour where maintenance services have been agreed upon. Labour will have to continue to struggle for a ban on scab labour, either in total or for a limited period. In meetings with the alliance, the debate has never been whether we should allow scabbing, but how we remove it.
- The right to strike over dispute of right, while our preference, was dropped by labour. We remain convinced that it is better to go to mediation and arbitration by agreement, but the impact on the less organised sectors could be more than we bargained for. This should not be interpreted to negate the need for worker solidarity.

8. Workplace forums
There was no agreement on our proposal on the composition of the workplace forum. What was finally agreed is a combination of what was in the Bill and new proposals by the government and ourselves. These are that all workers and/or occupations should be represented, that the

Discuss implementation of the LRA in your union!

WPF is triggered and dissolved by the union (by means of a ballot). The agenda for the WPF can be altered by agreement. Those matters that are the subject of collective bargaining are excluded, unless otherwise agreed.

9. Other issues

There was agreement on LIFO being the primary criteria. This is, however, not in the Bill, but will be included once Nedlac has drafted a code of conduct on retrenchments. Severance pay was settled at a minimum of one week. This does not affect any agreement or ability to negotiate more. The confidentiality clause has been substantially reworked to reflect, in the main, our proposals. It was also agreed that agriculture will not be classified as an essential service, but be dealt with in the same way as other industries.

The new law represents a victory for labour and brings in a new era of industrial relations

10. From the above it should be clear that our assertion of victory is not self congratulation, but a fact. This does not undermine the fact that we could have done better or done it differently. It does however outline the fact that those who are alleged to think that we settled for a "miserable compromise" have not read the law, are engaged in malicious propaganda or opportunism of the worst kind.

11. The following issues require finalisation in Nedlac:

- Demarcation of industries
- Appointment of the CCMA governing body
- Code of conduct on picketing
- Code of conduct for retrenchments
- Appointment of judges to the Labour Court.

On all of these issues, we need to develop a labour position, particularly on those areas that relate to codes and demarcation of industries. ❍

Organisational challenges

The new LRA opens up many new opportunities but also has some pitfalls. EBRAHIM PATEL looks at some of the organisational challenges posed by the new law

The sound of thousands of workers singing about worker struggles filled the air of Johannesburg in June 1995. They marched behind union banners, many carrying hand drawn placards on the living wage, scab labour and the right to centralised bargaining. A quarter million workers in all marched in different cities in support of the labour campaign for a worker-friendly Labour Relations Act.

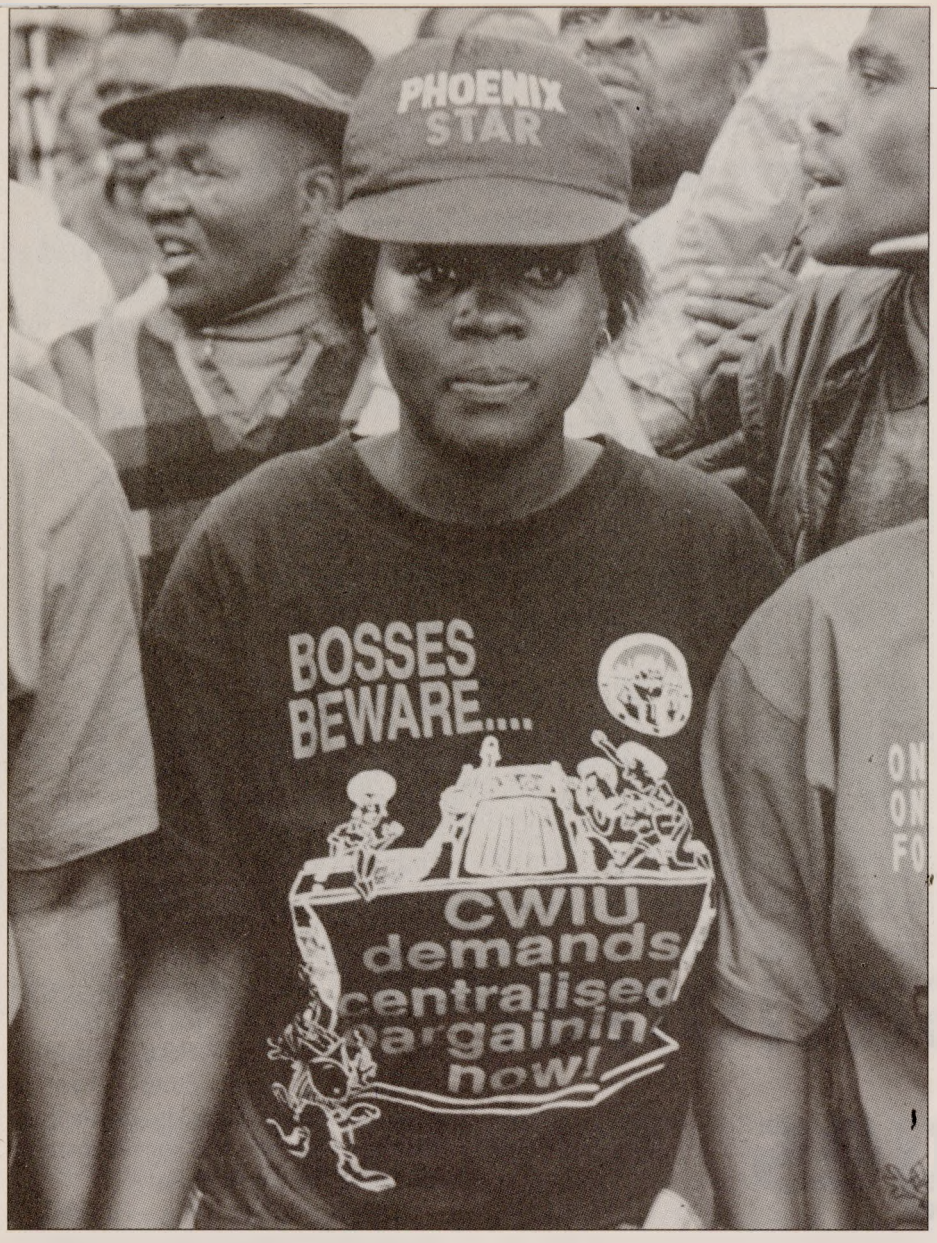
Did the march result in a victory for worker rights? Through our preparedness to act in defence of our goals, we won new rights and avoided changes demanded by employers to make the new law suit them. The new law strengthened centralised bargaining, improved union rights and made provision for union-based workplace forums. Employer demands for the right to dismiss more easily, to weaken the right to strike and to promote splinter unions were resisted.

Should we take off our campaign clothes, dust them off, and pack them away at the back of the cupboard? Hey, slowly, chiefs! There is a saying you can win the battle and lose the war, win the soccer match and lose the tournament.

Law is a funny thing — it does not always work in the way those who drew it up intend it to work. Take the Wiehahn reforms fifteen years ago. The government thought the legalisation of African unions would lead to unions forgetting about political rights, and make them focus instead on bread and butter issues only. But we used the legal space differently and built a movement which challenged apartheid. So, a lot depends on how we use the new LRA.

The new labour law offers a number of benefits for the trade union movement. But it holds clear dangers too. The challenge is for us to use the law and the new opportunities it offers in a way which builds organisation. In this article, I would like to suggest a few organisational issues for us to consider.

Use the new LRA to build organisation!



The new LRA gives us better opportunities in the struggle for centralised bargaining

Centralised bargaining

The LRA provides for bargaining councils (the new name for industrial councils) and for statutory councils (a new body for industries where no bargaining council exists). It is intended to make it easier for unions to:

- set up centralised bargaining forums, and
- have agreements extended to cover all workplaces in an industry.

On centralised bargaining, the new law is not a solution, but an opportunity. It gives us a stronger capacity to win our demand. We face three challenges:

- The first challenge is to win the struggle for centralised bargaining, using the new opportunities. We should avoid one of two extremes. The one extreme is to claim a victory, sit back and do nothing in the hope that the law will get us centralised bargaining. It will not. The other extreme is to be disappointed and do nothing, because we feel let down that centralised bargaining is not made compulsory in the law. We should in fact intensify the struggles, and combine it with the new legal opportunities.
- The second challenge is to avoid some of the bitter fruits of victory. If we win centralised bargaining forums in all industries, and we are not careful, we can weaken ourselves. Centralised bargaining can lead to lazy unionism. Union head offices, and a small clique of stewards, can dominate the process. It can weaken worker participation. It can allow settlements to be bulldozed onto the membership. None of this needs to happen. But it will need a leadership, on the shopfloor, and in union structures, that is vigilant. We should put resources into internal democracy and wage campaigns. Big shopsteward meetings, and regional mass meetings of members will need to be called. Clear mandating structures must be agreed on. In this way, the new rights will not weaken us, but strengthen the cause of worker democracy.
- The third challenge is to use centralised bargaining to deal with labour's wider social agenda. We fought for national bargaining, not only because it is convenient for unions to have one, instead of many negotiations. Centralised bargaining provides us with an important way of combining wage struggle with the overall struggle, to restructure our industries, to promote greater equity in society and to ensure access to decent housing, health care and education. It provides an opportunity to reshape relationships between labour and business. We now need to seize the opportunities that centralised bargaining in all industries will give the entire movement. Remaining true to that vision will prove to be more difficult that winning the forum in each industry.

Organisational rights

The law will now set out the right of unions to:

- access to the workplace,
- stop order deductions,
- shopsteward elections,
- shopsteward time off for meetings and
- disclosure of information.

We can use this to open the workplaces to the unions, in cases where backward employers have frustrated union organisation. This is good news for the movement. But there are dangers. One danger is the

Intensify the struggle for centralised bargaining!

splintering of unions, with tiny unions gaining a statutory foothold at smaller workplaces, and then, with all these organisational rights, building permanent division among workers. We can overcome this, through the provisions in the law to negotiate through collective bargaining, the thresholds of representation and so get clear guidelines for majority unionism in each industry.

Another danger is that we run weak membership recruitment campaigns, winning over just the minimum number of people, because the law will then force the employer to grant us all these rights. Currently we are forced to build our power early in the process, so that we can fight reluctant employers.

The disclosure of information clause can be a help in collective bargaining and in campaigning. It holds open a further opportunity to change old relationships on the shopfloor, of advancing to greater worker participation in economic decision-making, on the basis of an informed, confident working class. But let us not avoid organisation, member meetings, flexing our power when necessary, and instead slide into becoming technicists, analysing balance sheets only. Collective bargaining is not a technical exercise based on a set of books of accounts. Yes, we need to know the financial position of a company, and yes, it does influence the settlement. Our gains in the disclosure of information area are significant, and can be of real help for the movement. But the union movement has always said that collective bargaining is about redistribution of income. That's not a technical matter — it is a profoundly political matter in a society with such unequal incomes, with so much poverty.

The new law grants more rights, and with fewer qualifications, than some plant-based recognition agreements. A challenge for us is to cancel such agreements, and seek instead to improve on the law, rather than let plant agreements rob workers of the statutory rights they have won. We should rethink the need to spend so many hours negotiating thick, detailed recognition agreements. They may now be unnecessary.

Industrial action

The new law gives statutory protection against dismissal for the first time. An important basis of our struggle for the right to strike is the belief that strikes are powerful and necessary weapons, but weapons of the last resort. If the union movement collapses into adventurism, striking for the excitement, the quick popularity, the easy alternative to the hard job of building an organisation, we will blunt the weapon. Courts will increasingly search for reasons to narrowly interpret the protection we have, and will justify dismissals. Our organisation itself will weaken, for strikes do not always build organisation.

The new law does not permit strikes in essential services. It gives arbitration as the alternative. Unions will need to be strong to ensure that wildcat strikes in essential services do not become the norm, with the resulting loss of support in the community.

With the new protection for the right to strike, the movement should campaign strongly and openly against violence during strikes. The killing of people or burning of homes are not the weapons of organised workers. It is not true to our beliefs. It does not lead to a united movement. It does not win over the genuine support of our people. It does not challenge the power of employers. It is an escape from the real work we need to put in to win a strike.

We did not win our demand that scab labour be outlawed. Unions need to have the energy and appetite to continue this fight. Scab labour leads to violence. It prolongs strikes because employers have an alternative to seeking a settlement.

We should now negotiate agreements which prohibit scab labour. We should call on government to use public resources to encourage this

It is completely unacceptable to the union movement.

We should now negotiate agreements which prohibit such scab labour. We should call on government to use public resources to encourage this. Companies which receive government contracts, or regional and export incentives, should be asked to sign an anti-scabbing code. Scabbing should not be allowed in the public sector, particularly since essential service workers are not allowed to strike. To win all of this, will require campaigns. So, an important organisational challenge is to take forward the fight on scab labour.

Workplace forums

We fought for union-based workplace forums. The new law provides for such a forum where the unions represent all categories of "employees". The drive to extend our support among white-collar workers, and the junior supervisory layers, must be strengthened. Perhaps this should be a Cosatu campaign, not one left to affiliates to deal with.

The employee-based workplace forums can become a site of anti-union activity, particularly where a union is divided at a factory, and one faction working through the shopsteward committee, and the other one through the workplace forum. Unions will thus need to

Continue the fight against scab labour!

beef up our servicing, our organisation and our union education campaigns. We should not need the threats of workplace forums to do it — our members deserve proper organisation — but under new conditions, we have an extra reason for doing the right thing! And, of course, we should make sure we set up union-based workplace forums.

Workplace forums can help to democratise the shop floor — so we need to put energy and resources into them. Organisers should have this as part of their duties. Cosatu should develop a programme of work on the agenda of workplace forums which gives them a focus, and avoids them dealing with collective bargaining issues. In some countries, the unions arrange all the elections in all workplaces at the same time — turning workplace forum elections into a general election for workers. In South Africa, a common programme, or platform of activity could turn these forums into organs of worker participation and power, not into weak structures of co-option and division.

Building organisation

An urgent need is for thorough shopsteward, organiser and member training on the new LRA. We should do it now, before the new law comes into effect. We should do it at workplace level, in union training programmes and on radio and television. Without such a programme, many of the opportunities in the law will not be realised, and some of the pitfalls will not be avoided.

The new law is intended to make part of our union work easier. Dismissal procedures and rights are simplified, organisational rights are given legal backing. When things are easier, you can either relax more, or use the time to do more things. If organisers are released from the duty of negotiating separate recognition and wage agreements at each workplace, let us use their skills and energy to improve the organisation and not relax.

In this, our key organisational challenge under the new LRA, therefore, is not to forget the basics of trade unionism. Our job, the mission of our movement is not completed with the passing of a law!

The New Labour Relations Statute and the Public Sector: *Implications for labour*

The recent strike wave by nurses and municipal workers are examples of the challenges that a new labour relations dispensation in the public sector would have to contend with. In the past, dynamic worker and employer relationships did not really exist in the public sector, mainly because of the political patronage that characterised the relationship between the white staff associations and the state. With the new Labour Relations Statute, the new state clearly intends to provide for industrial relations in the public sector that are vibrant and robust but, more importantly, in step with international norms and standards, particularly International Labour Organisation (ILO) conventions on the Public Sector. This however raises an important question: what are the implications of this for labour?

VISHWAS SATGAR argues that the new LRA offers great opportunities for public sector unions. But meeting the challenges needs a "super union" that forges solidarity between public sector workers

One Law

"Public Sector" is normally defined to include workers in the civil service, service delivery departments, parastatals, police and armed forces. "Public Service", on the other hand, is defined more narrowly and excludes workers in parastatals and local government. The 1956 LRA did not bring public sector workers into its ambit.

Separate laws like the Public Service Act of 1984, the Public Service Staff Code, recognition agreements negotiated at parastatal or local government level, and to a limited extent administrative law, governed employment relationships in the public sector. Later the Public Service Labour Relations Act (PSLRA) and Education Labour Relations Act (ELRA) structured and informed public service and more generally public sector employment relationships.

The new Labour Relations Statute not only repeals the PSLRA and the ELRA but also brings all public sector workers, except for soldiers and national intelligence

Train workers to use the new LRA!

The day the LRA was passed in parliament: Representatives from Cosatu, Nedlac, the parliamentary labour committee and the Department of Labour

gents, into the rights framework created by the new Labour Relations Statute. This also implies the realisation of a historical demand by Cosatu unions for one labour law to govern both the private and public sectors. Workers in the public and private sectors are now placed on the same footing.

Organisational rights

The new Labour Relations Statute provides organisational rights: the right to trade union representatives, trade union access to the workplace, deduction of trade union subscriptions or levies, leave for trade union activities and disclosure of information for collective bargaining purposes. Most unions or staff associations in the public service or public sector have acquired these rights. These rights, in terms of the transitional arrangements contained in Schedule 7, are secured for workers organisations in the public sector. In other words, unions or staff associations having obtained organisational rights through recognition in a bargaining arrangement will continue to have these rights.

Collective bargaining

Bargaining arrangements in the public sector are unwieldy and uncoordinated. Civil service workers, including health sector workers, bargain in the Central Chamber of the Public Service Bargaining Council and even in provincial or departmental chambers. Education workers bargain in the Education Labour Relations Council; police in the newly established Negotiating Forum; municipal workers bargain through provincially based industrial councils as well as city-based industrial councils or forums, at local government level. Workers in parastatals have set up company level fora like Telkom and Transnet.

The new LRA provides a framework that encourages greater centralisation through a Public Service Coordinating Bargaining Council. This structure would streamline and consolidate bargaining arrangements. It must be established through agreement between public service workers, education workers and police involved in bargaining. With its establishment, the central Public Service Chamber will fall away and, at the same time, the Education Labour Relations Council and the SAPS Negotiating Forum would become substructures underpinning the Coordinating Council.

Basically, Public Service bargaining structures at departmental level and provincial level, together with the Education and Police bargaining structures would become, under the "umbrella" Coordinating Council, sectoral bargaining councils. The new Labour Relations Statute also defines a role for the state president to create sectoral bargaining councils. This power could be utilized to create sectoral councils for municipal workers, health workers and even parastatal workers. An implication of this could be a redefinition of public service to include other public sector workers.

The new law also makes provision for a dispute resolution committee that would resolve jurisdictional disputes between the Coordinating Council and any sectoral bargaining council. Given that the state is in a process of transformation with the definition of powers, functions and tiers of authority between the center, provinces and even local government being in flux, the dispute resolution committee would definitely become the center of jurisdictional crises. Added to this are other decentralising factors like allocations made by the Fiscal Commission to Provinces, the disjuncture between the Public Service Commission and Provincial Service Commissions in appointing staff and also administrative fiat and decentralising policy frameworks of different Ministries.

Different decentralising pres-

Build solidarity between public sector unions!

Workplace forums in the public sector create potential to transform and democratise the state

sures will be at play within the public sector. If the union movement does not have the proper organisational formations to deal with it, forces from the old order can use this to create problems. The conclusion is that a "super union" which forges solidarity between public sector workers would stem fragmentation in the bargaining system in the public sector and also safeguard the gains provided by the new law. Other complications relate to a lack of clarity on where minimums and actuals would be set and whether private sector employees like health workers in private hospitals would be accommodated. Demarcation issues will also be problematic. Should parastatals be defined as part of the public sector or should the public sector be defined in terms of ownership or function ?

These are some of the questions that are bound to come up. Finally, who is the employer in the public sector may also require clarity before the new law is operationalised. The dividing line between management and workers in the public sector is not too clear. It is possible that state managerial staff may join unions, and this could create a conflict of interests.

Industrial Action

Workers have a right to strike in the new Labour Relations Statute. In the public sector, workers deemed to be engaged in essential services cannot strike but have to resolve disputes through arbitration. Unlike the PSLRA, essential services are not prescribed by the new labour law. Instead, provision is made for a special committee to define part or an entire sector as an "essential service". This committee will hold hearings and get submissions from affected parties before designating an essential service. It can also vary or cancel a sector or part of a sector as an essential service.

The special committee on essential services will ratify any collective agreement that provides for the maintenance of minimum services in a service designated as an essential service. In addition, the South African Police Services and the parliamentary service are to be essential services in the new labour law.

Workplace Forums

Workplace forums, the new co-determination institution in the new law, can be set up in the public sector. It would have to be triggered by the majority union/s and in a workplace with 100 workers. It can be created through agreement or through guidelines stipulated in Schedule 2. The new law also provides for the Minister of Administration and Public Affairs to amend the Schedule in order to provide for a "workplace forum" that is suitable for the public sector. If workplace forums are established in the public sector, immense potential exists to transform and democratise the state. It is likely that workplace forums with powers or rights to information, consultation and joint decision making, could speed up affirmative action in the state, for example.

Workplace forums at local government level, together with community-based RDP forums, could open up immense opportunities to radically transform local social and power relations that could best advance the interests of workers and the poor.

Conclusion

The new Labour Relations Statute provides immense opportunities for public sector unions and workers. It can be used as an industrial relations framework to have both a dynamic bargaining and co-determination culture in the state. Besides enabling transformation of the state, it also holds out the need for public sector unionism to be changed. Essentially, if the Cosatu-aligned public sector unions do not rise to this challenge and form a "super union", things are bound to fall apart in the public sector. ❍

Forward to one giant public sector union!

THE NEW LABOUR RELATIONS ACT

A short summary of important features

How does the Act help unions and workers?

by Rob le Grange — Centre for Applied Legal Studies

When the draft law was published in February it already was much more favourable to workers and unions than the present LRA. If it is properly implemented it should make a positive difference to the position of workers and unions.

The new LRA tries to:

- Simplify dispute procedures and reduce technical legal obstacles.
- Make it clear when a dismissal will be unfair
- Provide mechanisms for building worker participation in the workplace
- Improve protection for strikers who strike legally
- Improve rights of workers supporting a legal strike.
- Make it easier for unions to recruit membership and obtain recognition
- Encourage the growth of large financially stable unions.
- Make it easier to achieve centralised bargaining in industries ("sectors").
- Give private collective agreements the same status as the Act.
- Improve rights to information.
- Reduce differences in rights between workers in different sectors.
- Encourage the use of professional dispute solving methods.

Main achievements of the negotiations were:

- Securing the right to establish statutory Councils as a starting point for centralised bargaining
- Achieving flexible thresholds for organisational rights
- Reinforcing the importance of majority unions when organisational rights are awarded.
- Getting greater union control over agency shop moneys
- Retaining and democratising the closed shop
- Providing organisational rights to union members of a council.
- Achieving the presence of pickets on an employer's property and the right to effective picketing.
- Getting the SA Police Services covered by the Act.
- Removing the ban on farm workers striking.
- Achieving a minimum severance pay
- Reducing possibilities for interference in protest action
- Improving the codes of good practise on dismissals
- Creating a bigger union role in workplace forums
- Improving the dispute procedures for disputes over information disclosure.
- Allowing majority unions to control the relationship between collective bargaining arrangements and workplace forum issues.
- Making it possible to have a union nominated workplace forum.
- Obtaining more influence over the choice of arbitrators under compulsory arbitration.
- Limiting the power of the court to decide the legitimacy of sympathy action

Below, we summarise how the new LRA tries to do these things . Remember the LRA is nearly 300 pages long, so not every detail can be included in this guideline and we are only looking at major issues for unions and members.

Who's who in the new LRA

- The industrial court and conciliation boards are NOT part of the new Act.

The industrial court function will be replaced partly with arbitration by the Commission for Conciliataion, Mediation and Arbitration (CCMA) or a Council (Bargaining or Statutory Council), and partly by a new Labour Court.

The conciliation board will be replaced by the intervention of a trained mediator appointed by the CCMA or Council.

- The Labour Court & Labour Appeal Court

The judges of the Labour Court will be chosen by the President after proper consultation with NEDLAC.

They must have extensive labour law experience.

Three judges of the Labour Court will make up the Labour Appeal Court that hears appeals from the Labour Court.

The Labour Court is supposed to be regarded as the Supreme Court on Labour matters.

- Industrial Councils will become Bargaining councils.

Certain private dispute resolution bodies can become Accredited Agencies which can perform the compulsory conciliation (mediation) and arbitration roles of Councils.

• Registered unions will have more rights than un-registered ones, but the requirements of registration will be easy to meet.

Who is covered by the Act?

All workers are covered by the Act, except:

• Military personnel
• Intelligence and Secret Service personnel.

For the first time, farm workers, government workers and domestic workers are now all covered by the same Act. With some difficulty government agreed to include the Police under the Act.

However, the conditions of employment of government employees are still affected by other Acts, and changes to those terms and conditions will require negotiation by unions in those sectors.

Simplified Dispute Procedures

There are three basic principles of dispute resolution under the new Act.

• Disputes fall into three categories:
— matters that you can legally strike over (e.g. unilateral changes to conditions of employment)
— matters that must go to arbitration (e.g. dismissals)
— matters where you have a choice of arbitration or striking (e.g. organisational rights)
• If there is a dispute procedure contained in a collective agreement, you should follow it until:
a) the dispute remains unresolved under the CA procedure, or
b) the CA contains a procedure that covers stike activity and that procedure is exhausted. Then you can strike legally

You can give up your right to go to arbitration or to strike in your private procedure by agreement. However, if your private procedure does not give you a final solution on a dispute over a matter that can be sent to arbitration then you can still follow the procedures in the Act. If your private procedure contains a strike procedure you simply need to follow that to have a legal strike.

For the first time, farm workers, government workers and domestic workers are now all covered by the same act

• The dispute procedures in the Act consist of two phases like the old Act

STAGE ONE
Conciliation (mediation) by a trained mediator of the CCMA or a Council.

STAGE TWO
Arbitration by CCMA or Council arbitrators OR
A decision by the Labour CourtOR
Industrial Action (Strike or Lockout)
(See Diagram A for a general outline of the new dispute procedures)

• Even if they can take industrial action ,the parties might both choose to go to arbitration . They can then request the CCMA or the Council to provide the arbitrator. The parties might even go to private arbitration. In this case, they choose the arbitrator themselves and must pay for the arbitration themselves.

NOTE:
— There are no special forms needed to follow the above procedures.
— The union does not have to draw up legal papers in order to go to arbitration.
— If the matter goes to arbitration, lawyers should generally not be allowed to represent parties at the arbitration hearing.

Organisational rights

Organisational rights are rights that make it possible for a union to operate more freely in a workplace and build up it's support amongst workers.

There are two ways to achieve organisational rights under the Act:

• The union can organise a legal strike to pressurise the employer to agree to demands on organisational rightsOR
• The dispute can be sent to the CCMA for an arbitrator's decision, after the employer has refused to grant the rights demanded, if the CCMA has tried to mediate the dispute and reach an agreement with the union and the employer*.

What organisational rights can the CCMA award to a union ?

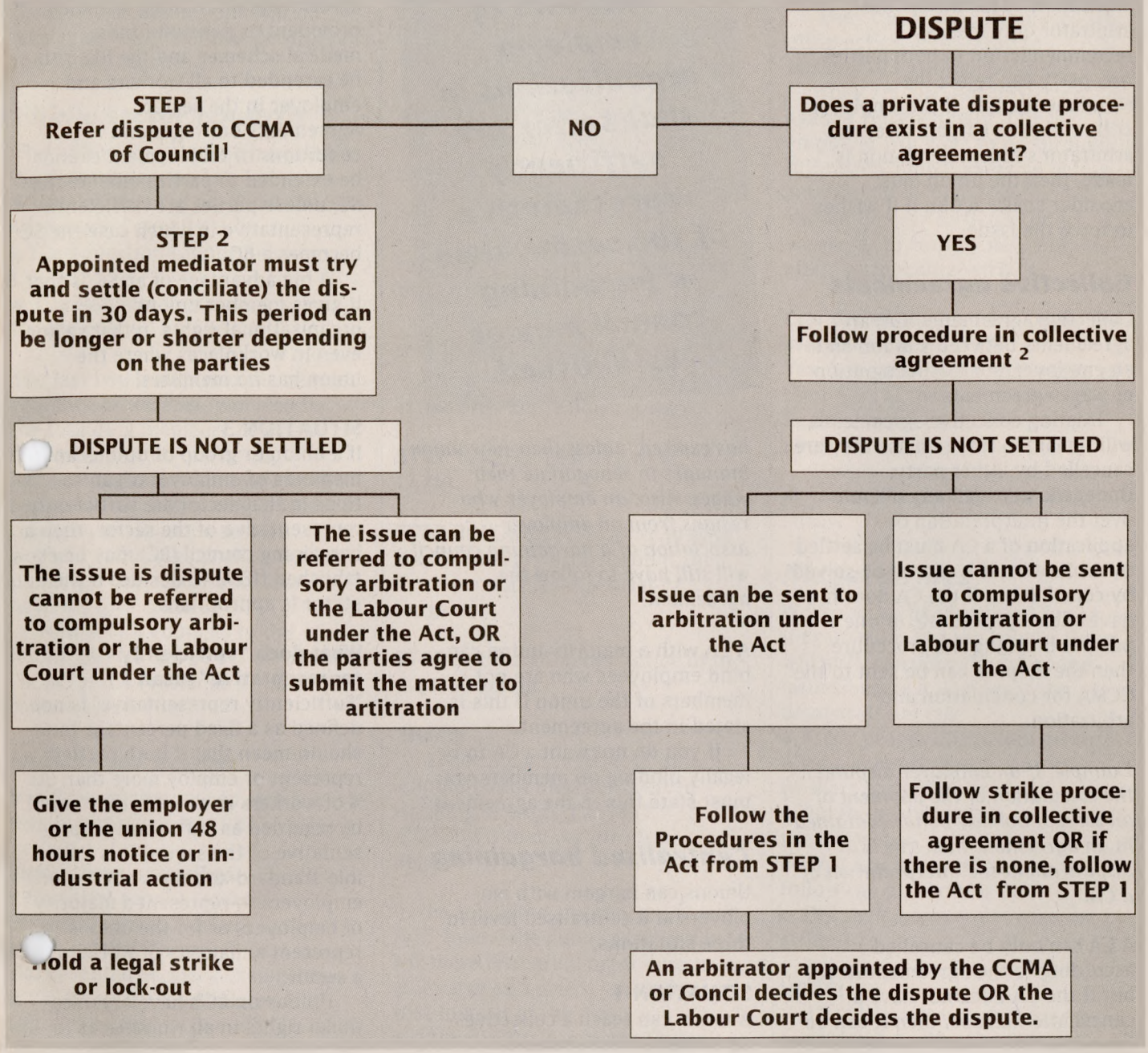
• Access to the workplace for union organisers
• Holding meetings and ballots with workers at the workplace.
• The right to stop-order deductions to collect union subscriptions.
• A majority union in a workplace is also entitled to shop stewards at the workplace and disclosure of information by the employer.
• These shop-stewards have the right to represent workers in grievance and disciplinary hearings; to check that the employer is complying with employment laws and any collective agreement**,: and to do anything else that is agreed with the employer. They are also allowed "reasonable" time off on pay to perform union duties and to attend shop steward training programmes.

How many members must a union recruit to qualify for the rights awarded by the CCMA ?

The Act is deliberately unclear on this, except that union must represent a majority in the workplace if shop steward and information disclosure rights are demanded.

When the CCMA arbitrator

GENERAL OUTLINE OF DISPUTE PROCEDURES IN THE NEW LRA



considers if the union is representative, s/he must consider the type of workplace and the industry into which the workplace falls, the organisational history of that workplace or other workplace of that employer; and, the type of rights they are seeking.

Example: This should allow the difficulties of recruiting workers in the farming sector to be recognised. In such a case the CCMA arbitrator might grant an organiser access to a farm even when the union only has a few members.

Can these rights be used against established unions by smaller unions?

Despite the CCMA , a majority union can agree with the employer on the membership that will be required for a new union to get access, meeting and stop-order rights.

Example: A majority union may agree with an employer that a union must be a majority union (50% +1) in the workplace to get stop-order rights , even if the CCMA said that 30 % membership was enough.

A bargaining council can also set membership requirements for bargaining rights.

What about the duty to bargain with a union ?

A union will not be able to get a court order forcing an employer to bargain with it.

If an employer refuses to

bargain with a union then the dispute must go to "advisory arbitration". This means the arbitrator only makes a recommendation to both parties. Any party can reject the recommendation. If the employer still refuses to bargain after the arbitrator's recommendation is made, then the union must consider strike action if it wishes to force the issue.

Collective agreements

Collective agreements (CA) are agreements between a union and an employer, such as recognition or wage agreements.

Existing collective agreements will remain in force unless they are cancelled by either party.
Under the new Act, any dispute over the interpretation or application of a CA must be settled by arbitration if it cannot be solved by conciliation. If the CA does not have such a procedure, or one party is blocking the procedure, then the dispute can be sent to the CCMA for conciliation and arbitration.

Example: If an employer disputes the calculation of the payment of an annual holiday bonus contained in an agreement then this is a dispute about the interpretation of a CA.

A CA can only be cancelled according to the agreement itself, but if the CA does not have a cancellation clause, then it can be cancelled on reasonable notice.

What is the legal effect of a CA?
A CA binds the parties and members of the parties as long as it is still in force.

It binds members who leave one of the parties to the agreement even after they leave.

It also binds new members of a party while the agreement is in force.

Example: If workers resign and join another union while an agreement on wages is still in force they are bound by that agreement until it has expired, unless their new union manages to renogotiate their wages. Also, an employer who resigns from an employer association at a bargaining council will still have to follow the agreement.

If a union or group of unions and members of employer organisations in that sector are sufficiently representative of the sector, then a bargaining council may be established

A CA with a majority union can bind employees who are not members of the union if this is stated in the agreement.

If you do not want a CA to be legally binding on members you must state this in the agreement.

Centralised bargaining

Unions can bargain with employers at a centralised level in three situations.

SITUATION 1
A union can reach a collective agreement with a group of employers to hold centralised negotiations. This agreement will be binding just like any other CA.

SITUATION 2
If the union has organised 30 % of the workers in a sector, it can apply to the Dept. of Labour to have a Statutory Council established.

NEDLAC decides if the sector is appropriate.

The Minister must attempt to get all registered unions and employer organisations in that sector to join such a council.

A Statutory Council (SC) does not have many powers. Only it's agreements on training schemes, provident or pension funds, medical schemes and the like can be extended to all workers and employer in the sector.
Agreements on wages and conditions of employment cannot be extended to parties outside the SC, unless parties are sufficiently representative in which case the SC becomes a BC.

A big advantage of an SC is that it gives member unions organisational rights in that sector even in workplaces where the union has no members.

SITUATION 3
If a union or group of unions and members of employer organisations in that sector are sufficiently representative of the sector, then a bargaining council (BC) may be established.NEDLAC decides if the sector is appropriate

What does "sufficiently representative" mean ?
"Sufficiently representative" is not defined as a fixed percentage but should mean that if both parties represent or employ more than 30 % of workers in a sector they could be regarded as sufficiently representative of the sector. It is a flexible standard and does not require employers to represent a majority of employers or for the unions to represent a majority of workers in a sector.

Unions on BC's have organisational rights in all workplaces in the sector.

Unlike SC's, wage agreements of BC's can be extended by the minister to all employers and employees in the sector provided:
- the BC parties employ and represent the majority of employees covered by the council.OR
- the parties are at least sufficiently representative of the sector and if an extension is necessary to stop collective bargaining being undermined.

Can employers still apply for exemptions from agreements ?
Yes. BC's will now have to establish

independent exemption committees to consider these applications. In other words exemptions will no longer be under the sole control of the council parties.

Public sector councils

The following will all be bargaining councils under the Act:
- The chambers of the Public Sector Bargaining Council;
- The Education Labour Relations Council; and
- The National Negotiating Forum for the police.

The last two bodies and the central chamber of the PSBC will also be the founding members of a new Public Service Co-ordinating Bargaining Council that will be responsible for negotiating issues common to all public service workers and issues dealing with a public service sector that does not have it's own council.

New sector councils in the public service can be set up by the PSCBC or the President if the PSCBC cannot agree.

Industrial action

It will be much easier to strike legally under the new LRA.

Limitations on strikes

- Essential service workers— Essential service workers may not strike legally. There will be a special Essential Services Committee (ESC) set up by the Minister of Labour in consultation with NEDLAC and the Minister for the Public Service and Administration to decide which workers are essential service workers.

Workers can also agree with the employer which workers will be regarded as essential service workers.

Example: The union might agree with a hospital that only nurses in the intensive care unit will be considered essential service workers. If the ESC accepts this agreement then other workers at the hospital will be able to strike legally.

If life and health will be endangered when a worker stops work, then that work could be an essential service. This is according to the ILO definition.

- Issues that can be referred to the Labour Court or for compulsory arbitration

A legal strike over an individual dismissal is not permissible because unfair dismissals can be referred to compulsory arbitration by the CCMA or a Council.

Strike procedure

You will be able to hold a legal strike after the following steps:

STEP 1: REFER DISPUTE to BC or CCMA

STEP 2: CONCILIATE up to 30 days [Go to advisory arbitration if the dispute concerns a refusal to bargain]

STEP 3: Give 48 hours notice of industrial action.

NOTE:
— Even though registered unions should ballot members before striking, a BALLOT is NOT REQUIRED to make the strike legal.

In the following situations you will NOT follow the above procedure:
- If there is a strike procedure in collective agreement you follow that instead of the Act.
- If the dispute arose at a Council between council parties then it is not necessary to make a separate referral to the Council.
- If an employer decides to impose a change in working conditions on workers. Provided you refer the dispute to the CCMA or Council and give the employer 48 hours notice, you can strike legally if the employer does not withdraw the change in 48 hours.

Strike rights

Can workers be dismissed for striking?
If the procedure above has been followed, workers cannot be dismissed for striking.

They can still be dismissed for other action amounting to misconduct during the strike.

They are also not protected against retrenchment, but the employer will have to go through a full retrenchment exercise before anyone can be dismissed and it should be very difficult for an employer to employ new workers after "retrenching" strikers.

Can the employer hire scabs (replacement workers)?
Yes, but strikers can still return to their jobs at the end of the strike. Replacements cannot be permanent.

However, if an employer initiates a lock-out, s/he cannot hire scabs.

Illegal strikes

Workers can be dismissed for an illegal strike. But the Labour Court will still consider the following issues before it decides if the dismissals are fair:
- Was a proper ultimatum given ?
- Was enough time given to workers to consider it ?
- Did the employer try and contact the union ?
- What attempts were made to follow the procedures ?
- Did the employer provoke the strike ?

NOTE:
— The Labour Court may take a harder line on illegal strikers in future because the procedure for holding a legal strike has been simplified.

Picketting rights

Members of a registered union may participate in a picket in support of a legal strike or against a lock-out, provided the union authorises the picket.

Picketing is protected from legal action provided picketting rules are followed.

How are picketting rules established?

Under the new Act, workers cannot be dismissed for participating in a legal strike

They can be negotiated with the employer.

If no agreement can be reached the CCMA can be approached to try and achieve an agreement on picketting.

If this fails the CCMA must estblish rules for the picket taking into account the nature of the workplace and any codes of good practise on picketing.

Where can the picket take place?

The picket can take place:

- outside the employer's property where the public has access to the premisses; and,
- on the employer's property with the employer's permission.

The employer is not allowed to refuse permission unreasonably and the CCMA can overrule the employer if it thinks the employer.

What if the picketting rules are broken or the right to picket is undermined by the employer?

The purpose of a picket is to publicise workers' grievances to the general public, the employer, and persons who work for or trade with the employer. It is particularly important to persuade scabs not to work for the employer. If the picket is confined to an area far away from the public or scab workers then this could undermine the right to picket.

In this case the union can complain to the CCMA. The CCMA will try and conciliate the dispute and refer the matter to the Labour Court for a decision if it is unsuccesful in settling the dispute.

Sympathy strikes

(Secondary Strikes)

Workers are protected against dismissal or disciplinary action if they participate in industrial action in support of other workers who are on a legal strike.

To enjoy protection, the workers must give their own employer 7 days written notice of the sympathy action.

The action they take against their own employer should not be more severe than what is required to make an impact on the main employer's business.

Example: Workers at an ice cream factory (the primary employer) go on strike and workers at a steel company next door (the secondary employer) want to support them. If the steel workers take it in turns to participate in the picket outside the ice cream factory this can have more impact on the ice cream factory than if they go on a full strike at the steel company. In other words, a full strike at the steel company could be regarded as excessive sympathy action, because it causes much more damage to the secondary employer without any greater impact on the business of the ice cream company than the picketing had. So the method of secodary action should not be more than is necessary to make the impact on the primary employer.

If an employer wishes to stop a sympathy strike because it is too severe, s/he can ask the Labour Court to interdict the sympathy action. However, before the court can take the decision, the union can request a special investigation into the strike to see if the employer's claim is justified. The court cannot make a decision before this investigation is complete and must take the report into account when making it's decision on the strike.

NOTE:

— It is up to the union to request an investigation.

Stay-aways

(Protest Action)

Stay-away action in support of workers' socio-economic interests enjoys limited protection.

To qualify as protected action the following conditions apply:

- The socio-economic issue has been discussed at NEDLAC or some other forum on which employers, government, labour and the community are represented.
- The action has been authorised by a registered union or federation.
- NEDLAC has 14 days notice from the union or federation of the action.

The Labour Court may interdict action which does not comply with these steps and if workers do not comply with such an order, they can lose the protection against dismissal.

NOTE:
— A protest strike that has a purely political aim — e.g. to secure the resignation of a municipal councillor or to demand the closure of a political parties' branch office - cannot qualify for the protection of socio-economic protest action.

Agency and closed shop agreements

The New LRA makes it possible for unions to become financially strong and stable but still remain democratic. The agency shop and closed shop are important instruments for achieving this.

They also are a way of ending the "free riders" who benefit from the wage struggles of union members without contributing.

Agency shops

A majority union (or unions) in a workplace or a sector can establish an agency shop by reaching an agency shop agreement with an employer or employer organisation.

All workers covered by the agreement can be forced to pay a deduction which cannot be higher than the highest deduction that worker could pay as a union member.

The money deducted must be paid to a separate account administered by the union.

The money in that account cannot be used to make contributions to political parties or political candidates or used to pay affiliation fees to political parties.

However, it can be used to advance or protect "the socio-economic" interests of workers. Since most union campaigns are about socio-economic issues it should not be difficult to use the money in practise.

By forcing non-members to pay subscriptions they are encouraged to join the union to enjoy all it's benefits.

Closed shops

Under the present LRA some unions have closed shop agreements. New closed shop agreements can be created under the new LRA.

Closed shop agreements have similar aims to an agency shop, but provide a union with a powerful way of strengthening its bargaining position with employers.

The main difference is that under a closed shop agreement non-members can be required to join the union or face dismissal. If a union expels a member for a good reason under a closed shop, then the employer will have to dismiss the member.

If the union abuses the power of a closed shop, to dismiss members for reasons related to irrelevant factors like their political beliefs, then the Labour Court can make the union pay damages to the dismissed worker.

A new closed shop can be set up if an employer agrees to a closed shop and 66 % of the workers at a workplace who vote support a closed shop.

A union representing a significant grouping of workers covered by the closed shop can apply to join the agreement and can appeal to the Labour Court if refused.

Participation in union activities, legal strike activity, pregnancy, race, religion, sex and disability are examples of invalid reasons for dismissal

Dismissal

The main changes to the law on dismissals are:

- No more industrial court cases — arbitration will replace this.
- Even with compulsory arbitration an attempt will be made to satisfy the choice of arbritrator the parties could agree on.
- Principles of fairness are set out in the form of Codes of Good Practise which should be followed by employers.
- Quick decisions because of quicker procedures
- Reinstatement should be more common than payment of compensation if a dismissal is unfair
- Lawyers and hopefully consultants will appear less often in individual dismissal cases.
- If the dismissal is unfair only because of a prodecural failure reinstatement will not be awarded, only compensation.

The Act uses international standards to group justifiable dismissals into three classes:

- Dismissal for misconduct
- Dismissal for incapacity (illness or poor work performance)
- Dismissal for operational reasons (retrenchment)

The principles from better decisions in the industrial court on unfair dismissal have been built into codes of good practise which can be changed by NEDLAC

A dismissal can never be fair if the reason is invalid

Some reasons for dismissal can never justify the dismissal. Such reasons are invalid reasons. If an employer dismisses a worker for an invalid reason the dismissal is automatically unfair.

Examples of invalid dismissals are: participation in union activities, legal strike activity, pregnancy, race, religion, sex, disability and the like.

Dismissal for misconduct will only be fair if —

- The worker broke a rule at work.
- The rule was a fair and valid rule.
- The worker knew of the rule or should have known of it
- The employer applied the rule consistently.
- Dismissal is an appropriate step for breaking the rule.

Dismissal for poor work

performance is not the same as misconduct.

Before dismissing a worker for incapacity an employer should have given the worker appropriate training and evaluation and must investigate whether the problem cannot be solved without dismissing the worker.

Incapacity for illness may be temporary or permanent

If illness causes temporary incapacity the employer must consider ways of avoiding a dismissal. If the incapacity is permanent, the employer should try and find alternative work for the worker or adapt the work situation to accomodate that worker's problem. More effort is expected of the employer if the worker was injured at work.

An employer must try and reach agreement with workers in retrenchment discussions

For the first time an employer is expected to try to reach agreement on:

- ways to avoid a retrenchment;
- reduce the number of retrenchees;
- limiting the harsh effects of retrenchment;
- ways of selecting workers; and,
- severance pay.

To make these discussions more meaningful an employer must provide unions with all relevant information relating to the proposed retrenchment.

Minimum severance pay is guaranteed.

Every employer must pay at least one week's wage for every year of completed service to retrenched workers.

This does not prevent uions negotiating for more than this.

What happens if an arbitrator finds a dismissal unfair?

The worker must be reinstated as far as possible.

However, if this is not possible, the court may order up to two year's wages for dismissal for invalid reasons. In the case of an employer not being able to justify the dismissal for valid reasons, up to one years' wage must be paid.

Majority unions can demand the establishment of a workplace forum under the LRA if there are at least 100 workers in a workplace. The WPF is elected by all workers, even non-members, but the union can nominate candidates

Workplace forums

Majority unions can demand the establishment of a workplace forum (WPF) under the Act, if there are 100 workers in a workplace.

The WPF is elected by all workers, even non-members, but the union can nominate candidates.

Union officials can attend meetings of the WPF.

In practise if the union is stable at a company, the shop stewards are likely to be elected to the WPF.

The forum provides workers a chance to limit unilateral decision making by management.

If there is a WPF the employer must give that forum financial information about the business.

The employer cannot take a decision on any of the following issues before trying to reach agreement on it with the WPF, if they are not dealt with in a collective agreement with the majority union:

- restructuring the workplace
- partial or total closures
- job grading
- exemptions from any law
- export promotion
- product development plans
- education and training
- mergers and transfers of the ownership of the business
- calculation of merit and discretionary bonusses

If there is no agreement on a decision on any of these issues, this does not stop the union calling a strike if the employer wants to go ahead with an unpopular decision.

In the case of joint decision making if the employer cannot get the agreement of the WF s/he must go to arbitration but cannot just implement what s/he intended to do:

- disciplinary codes and procedures
- workplace rules unrelated to work performance
- affirmative action measures
- appointments of pension and benefit fund trustees.

The majority union and employer may add or remove issues for joint decision making

The remains of the unfair labour practise

Most of the principles of fair labour practises have been included under the different rights in the new Act.

But there are still some unfair labour practises which have been spelled out separately in the Act. These are:

- unfair discrimination on grounds of race, sex, ethnicity, disability, religion, culture , marital status,etc.
- unfair promotion policies
- unfair disciplinary action short of dismissal
- a failure to reinstate or re-employ an employee under an agreement

These disputes will go to the Labour Court if necessary.

NOTES

1. If the dispute arose between parties to a Council then they must follow the procedures of the Council and do not have to comply with the procedures in the Act.

2. If the dispute concerns an unfair dismissal it has to be referred to arbitration in 30 days, so if the internal dispute procedure does not guarantee arbitration it is advisable to refer the dispute even while you are waiting for the internal procedures to be completed. ❍

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