The right to strike: essential services and minimum service agreements

By Sandile July, director and Bradley Workman-Davies, director

The Labour Relations Act, 66 of 1995, (“LRA”) has been in the spotlight recently in regard to the recent communications from government that it is considering designating the education sector as an essential service. This has created a source of tension between government and the education sector unions in regard to teachers’ right to strike.

The right to strike is a constitutional right afforded to all employees in terms of section 23(2)(c) of the Constitution of the Republic of South Africa, 108 of 1996 (“the Constitution”), however, the LRA does contemplate restrictions on the right to strike in respect of those employees who are engaged in essential services.

A service or industry or any part thereof may be designated as an essential service by the Essential Services Committee (“ESC”), established in terms of section 70 of the LRA. The ESC is tasked with designating a service, or any part of a service as an essential service, after conducting an investigation into whether or not such a designation should be made. It is critical to note that any parties who may be affected by the designation of a service as an essential service by the ESC, has the right in terms of section 71 of the LRA (which sets out the procedure in terms of which the ESC will designate a service as an essential service), to make representations to the ESC in regard to whether or not a service should be so designated.

Unions have argued that the designation of a sector or service as an essential service is unconstitutional, in that such a designation takes away the rights of employees working in that industry to strike. However, while this is correct in that section 74(1) of the LRA provides that employees working in a designated essential service may not strike, these provisions are not one sided and the LRA provides for additional mechanisms which ameliorate what seems to be a blanket restriction against striking.

Firstly, the employer in the essential service is similarly restricted from utilising its own bargaining power to lock employees out of the workplace to compel them to accept the employer’s terms and conditions, and the LRA goes on to provide for a mechanism in terms
of which essential service workers can legally and lawfully embark on strike action, provided that certain agreements are first put in place.

Section 72 of the LRA provides for parties in designated essential services to enter into a collective agreement, which can regulate the minimum services to be provided by workers in that essential service, in the event of a strike. If such a minimum service collective agreement is reached, it will have the effect that –

- the minimum service levels agreed in the minimum service agreement will become the essential service; and
- section 74 of the LRA – which prevents essential services workers from striking - will no longer apply.

This has the effect that the only employees who will be prevented from striking are that number of employees, or percentage of the workforce which is required to continue providing the minimum services. All other employees who are not required to provide the minimum service, even though they are employed in a sector or industry designated as an essential service, will be allowed to strike.

The minimum service agreement can contain the following detail:

- whether the service is essential in its entirety or only partially essential
- whether the service is essential at reduced service levels
- the minimum number of employees required to continue working during a strike, either expressed as a number or a percentage of the current workforce;
- the type of services which must be continued during strike action;
- minimum service levels associated with various functions and duties to be performed during strike action;
- waiver of a right to engage replacement labour to provide services in excess of the minimum services.

Conclusion

In light of the above, even though the LRA provides for a mechanism in terms of which sectors can be classified as an essential service, to the extent that this does not take place, the mechanism of concluding minimum service agreements through the collective bargaining process may be an alternative means of ensuring continued minimum service levels.
About the Authors

Sandile July
Title: Director
Office: Johannesburg
Direct line: +27 (0)11 535 8163
Fax: +27 (0) 11 535 8663
Switchboard: +27 (0)11 8000
Email: sjuly@werksmans.com

Sandile July has been a director of Werksmans Attorneys since 2006 and is currently a member of the firm’s Labour & Employment Practice. A labour law specialist, Sandile frequently acts as an arbitrator at bargaining councils and represents employers and employees at various tribunals. In addition to his experience in labour-related litigation and dispute resolution, he advises clients on the implementation of the Basic Conditions of Employment Act, Labour Relations Act, Employment Equity Act and Skills Development Act. Sandile also has experience in the restructuring of state assets. He has a BProc LLB and a Higher Diploma in Tax Law from the University of the Witwatersrand and a Diploma in Alternative Dispute Resolution from the University of Pretoria.

Bradley Workman-Davies
Title: Director
Office: Johannesburg
Direct line: +27 (0)11 535 8315
Fax: +27 (0)11 535 8615
Switchboard: +27 (0)11 535 8000
Email: bworkman@werksmans.com

Bradley Workman-Davies is a director in Werksmans Attorneys’ Labour & Employment Practice. He specialises in employment law, pension law, and health and safety law, and focuses on commercial employment matters. His knowledge has been honed by combining practical experience with ongoing study. In addition to a BA (Hons) LLB, Bradley has a Higher Diploma in Company Law and a Higher Diploma in Labour Law (both obtained cum laude at the University of the Witwatersrand). He also completed a certificate course in Pension Fund Law at that university. Bradley has published several articles on employment law.