

# Legal Notes

*Legal Notes is written by the Centre for Applied Legal Studies (CALs)*

## Strikes under the new Labour Relations Act

*Part three of a worker's guide to the Labour Relations Act*

The next series of legal notes will look at the question of industrial action under the new labour law. In this issue of *Labour Bulletin* we describe how the Labour Relations Act (LRA) defines a strike. Different types of strike-actions are covered. In the next edition we will look at legal strikes and illegal strikes, and the consequences of an illegal strike. In the third part of the series on industrial action, we will look at what the new labour law says about fairness in strikes.

### Definition of a strike in the LRA

Whereas the procedure for going on a strike have been drastically al-

tered by the 1988 Amendments, and while the Amendments seek to ban certain kinds of strikes, the actual definition of a strike has not been changed by the Amendments. The definition of a strike thus remains so wide as to cover virtually every form of action associated with industrial disputes.

Three requirements must be satisfied before any industrial action can be classified as a strike. There must be:

- a withdrawal of labour by a number of workers,
- in combination with each other,
- in pursuit of an industrial demand.

What does all this mean?

## 1) Withdrawal of labour

The normal strike happens when the whole workforce stops work or all the workers in a particular section of the plant, or all the members of a particular union with which the employer is in dispute, stop work. It is usually easy to recognise that this general withdrawal of labour is a strike as defined in the LRA. But what about those actions which workers have over the years designed and developed in order to pressurise employers where they are most vulnerable? Such actions include overtime bans, work-to-rule, partial strikes, go-slows and intermittent strikes. Do these actions qualify as strikes in terms of the LRA?

### a) Overtime bans

A refusal by workers to work overtime is called an overtime ban. Whether or not an overtime ban is defined as a strike by LRA will depend on the terms of the employment contract of the individual employees. If the contract states that a worker must work a specified number of hours overtime per week, then a refusal to work overtime does amount to a strike. However, if the contract does not state that the worker must work overtime, the issue is more difficult. First of all the law does not cover this situation; different courts have made different decisions on this question. The Supreme Court in the Eastern Cape and Durban, as well as the Industrial Court, have held that if workers

do refuse to work voluntary overtime (i.e. overtime which is not in the contract) they are indeed taking strike action as defined in the LRA. On the other hand the Supreme Court in the Witwatersrand and a judge in the Supreme Court in Durban, have found that the refusal to perform voluntary overtime is not a strike.

Despite the uncertainty, however several points are clear:

1) If the workers have normally and habitually worked overtime so that it is normal practice, then even if it is voluntary overtime, an overtime ban is classified as a strike.

2) If workers refuse to work overtime in a plant where overtime is not normally worked, and if they do not accompany the action with an industrial demand, then the action is not classified as a strike.

3) If workers refuse to continue to perform overtime which is illegal, either in terms of section 8 of the Basic Conditions of Employment Act, or in terms of a relevant Wage Determination or Industrial Council Agreement, then their action is not a strike. The fact that in the past the workers might have worked overtime as part of the normal practice does not help the employer. It is illegal for the employer to demand, allow or force workers to work overtime in excess of the maximum hours laid down by law.

### b) Work-to-rule

Work-to-rule happens when workers perform their jobs strictly in accordance with the terms of their em-



Strike at CNA - what does it mean under the LRA

Photo: Cedric Nunn/Afrapix

ployment contracts. They do no more than their contracts specify. This type of concerted action, if it is not coupled with an industrial demand, is not a strike. The truth is, workers may indeed refuse to do more than what they are contractually required to do. But if the work-to-rule is in pursuit of an industrial demand, and if in effect a work-to-rule amounts to an "obstruction ..... of work" or "the retardation ... of the progress of work", then it may be classified as a strike.

Whether a work-to-rule is classified as a strike or not, may be very important to workers in the essential services. In this sector if a work-to-rule amounts to a strike, it may not only be interdicted pending the outcome of the procedure laid down in the LRA, but may be outrightly illegal.

### c) Partial and intermittent strikes

A partial strike normally involves a complete but temporary withdrawal of labour. The withdrawal of labour may either involve the whole of the workforce, or all of the union members, or only a portion of the workforce. Intermittent strikes are also sometimes called grasshopper or rollover strikes. An intermittent strike involves a series of work stoppages one after the other, either by the same group of workers going out more than once, or by different groups of workers going out one after the other over the same issue. In a "go-slow" workers simply work slower than normal, thereby causing production to drop. Go slows have been specifically ca-

tered for in the definition of a strike under "retardation ... of the progress of work".

Unions often resort to these types of industrial action in order to protect their members from employer counter-action, and to retain claim to at least some wages. These actions are clearly defined as strikes. Different legal

questions may arise as to whether such tactics are fair or not. We will deal with this in a later *Labour Bulletin*.

## 2) Combined action

A single employee cannot go on strike. The definition refers to action

### How the LRA defines "strike"

**A "strike" is defined in section 1 of the Act as follows:**

"strike" means any one or more of the following acts or omissions by any body or number of persons who are or have been employed either by the same employer or by different employers -

a) the refusal or failure by them to continue to work (whether the discontinuance is complete or partial) or to resume their work or to accept re-employment or to comply with the terms or conditions of employment applicable to them, or the retardation by

them of the progress of work; or

b) the breach or termination by them of their contracts of employment, if -

i) that refusal, failure, retardation, obstruction, breach of termination is in pursuance of any combination, agreement or understanding between them, whether expressed or not; and

ii) the purpose of that refusal, failure, retardation, obstruction, breach of termination is to induce or compel any person by whom they or any other person who are or have been employed -

aa) to agree to

or to comply with any demands or proposals concerning terms and conditions of employment or other matters by or on behalf of them or any of them or any other person who are or have been employed; or

bb) to refrain from giving effect to any intention to change terms or conditions of employment, or if such a change has been made, to restore the terms or conditions to those which existed before the change was made; or

cc) to employ or to suspend or terminate the employment of any person.

## LEGAL NOTES

taken by "any body or number of persons". The action can only be defined as a strike when there is a combination,\* agreement or understanding "between them" i.e. the employees. This means that there must be a common understanding between the workers:

(1) that they are taking industrial action

(2) that the industrial action is in pursuit of a particular industrial demand.

Thus, if a body of employees stops work to force an industrial demand, but they do not do this as a result of a common understanding between them, but because of an order issued by a third party, it would seem that no strike takes place.

### 3) Industrial demand

In order for withdrawal of labour to constitute a strike, it must be done with the purpose of pursuing or forcing an employer to comply with an industrial demand. If for example, a trade union wishes to gain May Day each year as a paid holiday for its members, a withdrawal of labour in support of the May Day demand would clearly be defined as a strike. On the other hand, if the union concerned simply advises its members not to work on that day but to attend a rally, no strike would take place because of the lack of an associated demand.

In terms of the definition in the

LRA it is possible for workers to strike in support of a demand addressed by themselves:

(1) to their own employer

(2) if dismissed, to their ex-employer,

(3) to an employer other than their own,

(4) to an employer who has employed, but since dismissed, other workers.

The demand must be an industrial one. That is to say, it must concern the terms and conditions of the employment relationship. These include changes to terms and conditions of employment, suspensions, terminations, etc.

### Conclusion

Strikes may be legal or illegal. In any event, a strike occurs only after one party to the dispute refuses to negotiate, or where negotiation has taken place and the parties were not able to resolve the dispute between them. In order for industrial action to be lawful, it is necessary for a union to comply with the various steps set out in "The New Conciliation Procedure" (see previous issue of *Labour Bulletin*). If the conciliation procedure fails, the union may within 30 days ballot the workforce, and go out on strike. Tactical considerations will typically decide the type of strike i.e. whether it is going to be partial, intermittent, go-slow, overtime ban, work-to-rule, or full scale strike. ☆

\* The word "combination" as used here means conspiracy: thus it has the same meaning as the words "agreement" or "understanding".