Assessing the proposed amendments to the LRA

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The Minister of Manpower has introduced a draft Bill to amend the Labour Relations Act No 28 of 1956 (The Act). For those whose work and rights are regulated by the Act, the need to amend the act is pressing, but are the proposed amendments satisfactory? What follows is a comment on some of the proposed changes to the existing law relating to unfair dismissal, unfair labour practice, conciliation procedures and restrictions on the right to strike.

UNFAIR DISMISSAL AND UNFAIR LABOUR PRACTICE

The Bill introduces a distinction between unfair dismissals and unfair labour practices, by defining them separately and making them mutually exclusive concepts, ie. an unfair dismissal cannot be regarded as an unfair labour practice. It is undesirable and impractical to draw this distinction since disputes involving dismissal are often closely linked to, and indivisible from, underlying unfair labour practices.

The criticism of the distinction is not merely theoretical because the Bill provides different channels for relief in respect of unfair dismissals and unfair labour practices. This means that where the conduct complained of is both an unfair dismissal and an unfair labour practice, the aggrieved party would have to follow two different procedures to obtain final relief: unfair dismissals must proceed in terms of section 45 of the Act which provides for arbitration by the Industrial Court (dealt with more fully below); and unfair labour practices are channeled through s46(9) of the Act for determination by the Industrial Court. In addition, problems of categorising the dispute correctly, and the raising of complex technical points will result, whereas a speedy and simple procedure for the resolution of disputes through the courts is essential. The Bill defines <u>unfair dismissal</u> in four subsections as follows:-

> "unfair dismissal" any dismissal if -
>
> (a) an employee's employment is terminated without a valid

and fair reason;

(b) reasonable notice has not been given before-hand by the employer to employees of the fact that the number of employees in the employ of the employer is to be retrenched and consultation with the employees or their trade union has not taken place and the selection of the employees to be dismissed is not reasonable;

(c) the employer has not given the employee a fair oppor tunity to state his case prior to dismissal: Provided that the non-compliance with this requirement only shall not be deemed to be an unfair dismissal unless the In dustrial Court has ex post facto established that, not withstanding the fact that the provisions of paragraphs (a) or (b) had been complied with, that in the cir cumstances it was necessary that the employee should have been given the opportunity to state his case; or

(d) a procedure agreed upon has not been followed at termina tion of employment;

The codification of the definition removes the flexibility of application that the court presently enjoys and fails to allow for the dynamic development of labour laws. Moreover, statutory definition will result in complex, technical arguments of interpretation and lead to protracted and costly litigation. Frustration and hostility to the court process by organised labour is a potential result that cannot be ignored.

The formulation of the four grounds on which a dismissal can be regarded as unfair is not entirely satisfactory: the definitions give rise to uncertainty and in particular, sub paragraph (b) of the definition is rigid and incompatible with conventional principles of fair retrenchment. It is also more restrictive than the principles already laid down by the industrial court.

The definition requires notice of retrenchment to be given to employees and not to their representative. Consultation prior to retrenchment may be with employees or their representative. As a result the proposed legislation permits employees to go behind the back of recognised representatives. This is contrary to established principles of fair retrenchment and desirable principles of collective bargaining. In addition, the definition does not satisfy the demand for full negotiation of retrenchment issues since the use of the word "consult" may be narrowly interpreted.

The definition requires that the selection of employees for retrenchment must be reasonable, as opposed to fair. If any real protection is to be afforded to workers faced with loss of employment through retrenchment, the selection must be fair, - otherwise an employer will be permitted to make his selection on a basis that is reasonable, but not necessarily fair.

The above comments illustrate the unsatisfactory result of an attempt to capture, in a concise definition, the complex principles of fair retrenchment established through the courts and collective bargaining arrangements.

The new procedure for unfair dismissal cases is contained in section 45A, an entirely new section that the Bill proposes to insert into the Act.

There are three stages to the procedure:

Stage 1

In terms of the new procedure the Industrial Court will not be able to hear an unfair dismissal case unless the chairman of the industrial council or conciliation board to which the dispute was referred, is of the opinion that the dispute has not been resolved.

Stage2

If the chairman decides that the dispute has not been resolved, then a party to the dispute can refer it to the Industrial Court within 7 days of the date on which the final meeting of the council was held, or if a conciliation board is involved, within 7 days of the expiry of the board. The referral of the dispute must be accompanied by a report from the chairman of the industrial council or conciliation board.

Stage 3

On the basis of the report, the Industrial Court will decide whether to arbitrate the dispute, to refer the dispute back to the industrial council or conciliation board or refuse to arbitrate.

All three stages of the proposed procedure present problems. At the first stage, the fact that the decision lies with the

chairman is unsatisfactory. He may be of the opinion that the dispute has been resolved. A party to the dispute may not share this opinion and that party will be deprived of taking the dispute up with the Industrial Court. In addition, the meaning of the word "resolved" is not clear. What is to happen where the parties to the industrial council "resolve" the dispute, but the dispute remains unresolved between the actual parties? The way to ensure that this situation does not arise is for the legislation to state clearly that the dispute must be resolved as between the parties to the dispute.

The first criticism to be levelled at Stage 2 of the proposed procedure is that the time periods allowed are not clearly fixed. The section requires a party to refer the dispute to the court within 7 days of the final meeting of the industrial council. If the council does not call a final meeting, a party to the dispute will be blocked from reaching the industrial court. Alternatively, technical arguments as to whether a meeting is a final meeting in terms of the section will swamp the Industrial Court and the councils. The time period in respect of conciliation boards is even less certain, because the proposed amendment to section 36(1) of the Act allows the local labour inspector to extend the intial 30 day period at the request of one party (see below). These factors will lead to indeterminate delays and unscrupulous unions and employers blocking disputes from reaching the court.

The court's decision on whether to arbitrate will depend upon the report of the chairman. This is undesirable for two reasons: first, parties are denied automatic access to the court in respect of unfair dismissal cases and secondly, it is undesirable to give the chairman the role of defining and motivating the dispute. As a person not directly interested in the dispute he may not feel inclined to submit his report with any haste and his formulation of the dispute may be slanted.

The court will decide on whether it will arbitrate on the basis of the chairman's report and a number of other factors listed in the section. These include the existence of wage regulating measures, whether the dispute arises solely out of a question of law and whether the parties have taken all reasonable steps to settle the dispute. These criteria have been adopted from the present requirements for the establishment of a conciliation board and are in many instances not appropriate to disputes over dismissal. In addition, if the court wants to satisfy itself of the existence of

these criteria, the parties will feel obliged to place this information before the court and this will lead to a resurrection of the old conciliation board procedures which the legislation specifically abolishes (see the proposed amendments to section 35 of the Act discussed below.)

The draft Bill replaces the present definition of "unfair labour practice" with the following definition:

> "unfair labour practice" -
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> (a) any labour practice where -
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> (i) a trade union or employer's organisation makes use of unconstitutional, unfair or misleading methods of canvassing members;
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> (ii) an employer, an employee, a trade union or an employers' organisation has not complied with or has failed to observe any prohibition in terms of this Act;
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> (iii) an employee is replaced by another employee on conditions of employment which are or may be less favourable than those which were applicable to the replaced employee;
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> (iv) an employee, trade union or federation directly or indirectly boycotts any product or in any way supports such a boycott or participates therein, where such product is manufactured, sold or distributed by an employer who is not involved in a dispute with the employee or members of the trade union or federation concerned;
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> (v) an employee or employer is on the grounds of race, sex or religion unfairly discriminated against;
>
> (vi) an employer unreasonably fails or refuses to negotiate, on an industrial council or otherwise, with a trade union which is representative of the employees employed by such employer or a group of employees who represent a specific interest;
>
> (vii) a trade union unreasonably fails or refuses to negotiate, on an Industrial Council or otherwise, with an employer or employers' organisation where the trade union is representative of the employees employed by such employer or a group of employees who represent a specific interest;
>
> (viii) a trade union directly or indirectly hinders an

employer to negotiate with employees employed by him or some of them, who are not members of such a trade union;

(ix) an employer's organisation or trade union takes action or concludes an agreement with regard to the relationship between employer and employee without the prior authorisation of its members;

(x) an employer, an employers' organisation, an employee or a trade union fails or refuses to comply with an enforceable collective agreement; and

(b) any other labour practice which has the effect that-

(i) any employee's or class of employee's employment opportunities or work security is prejudiced or jeopardized thereby;

(ii) the business of any employer or class of employer is unfairly affected or disrupted;

(iii) labour unrest is created or promoted;

(iv) the relationship between employer and employee is detrimentally affected:

Provided that the following labour practices shall not be deemed to be unfair labour practices:

(i) A strike or lock-out which is not prohibited in terms of section 65;

(ii) any practice which has been agreed upon: Provided that the agreement is not in force for longer than three years;

(iii) the re-employment of dismissed workers: Provided that such re-employment is done by means of objective criteria and that the criteria is fairly applied;

(iv) an unfair dismissal.

The objections to satutory codification and the criticism of distinguishing between unfair dismissals and unfair labour practice have been dealt with already.

Sub-paragraph (a)(i) of the definition makes it an unfair labour practice for a union or employer's organisation to adopt "unconstitutional, unfair or misleading methods of canvassing

members". A union's methods of canvassing members, provided the methods are legal, is a matter which should properly be regulated by its constitution and between it and its members. In any event, the present definition of unfair labour practice is sufficiently wide to cover the situation of malpractices in recruitment of members.

Sub-paragraph (a)(ii) makes it an unfair labour practice for anyone or any body to fail to comply with an act or omission prohibited by the Labour Relations Act. As things stand at present, the Act makes it a criminal offence to do, or fail to do, something prohibited by the Act, so this definition does not appear to add anything essential to the current legislation.

Sub-paragraph (a) (iii). Rumour has it that this clause was inserted into the Bill to appease certain white workers who fear that they may be edged out of their jobs by lesser paid black workers. The clause, however, is sufficiently wide to apply to attempts to exploit lesser-paid women and the replacement of black workers by blacks and may prove to be a useful tool for progressive unions.

Sub-paragraph (a) (iv) This clause seeks to limit secondary industrial action, an increasingly powerful weapon in the battle for social justice in South Africa. The language used is unclear and open to various interpretations.

Sub-paragraph (a)(v) Insofar as this clause expressly restricts discrimination on the basis of race, sex or religion, it must be welcomed, but protection from discrimination on the basis of ethnicity, marital status, sexual orientation, disablement and political convictions remains lacking. The definition deals only with "unfair discrimination" on grounds of race, sex or religion, implying that there may be instances where such discrimination is fair. Clearly this cannot be.

Sub-paragraph (a)(vi) The move to establish a statutory duty to bargain in good faith is to be welcomed, but the formulation of the provision is problematic. It can be interpreted in such a way as to require an employer to negotiate with a representative trade union or a group of employees who represent a specific interest. Allowing this option opens the door to abuse and deliberate frustration by recalcitrant employers and minority trade unions. In short it constitutes an unacceptable infringement

on collective bargaining. However, the wording used in sub-paragraph (a)(vii) suggests that this interpretaion is not correct and that employers have a duty to negotiate with a trade union which is either representative of the majority of its workers or a group of workers who represent a specific interest. A positive result of the provision is that it does not allow for plant level negotiations to be dispensed with in situations where negotiations are being conducted at Industrial Council level (as the Industrial Court has done).

Sub-paragraph (a)(viii) undermines the principle of the majoritarian model of collective bargaining and allows for all comers. This will lead to a proliferation of unions at the workplace and an unacceptable infringement of a union's legitimate right to acquire exclusive bargaining rights in respect of a unit of workers, the majority of whom it represents. Representative unions will lose the right, (fundamental to collective bargaining) to exert pressure on an employer to deal only with itself: to insist on this will amount to an unfair labour practice.

The absence of a reference to practices that detrimentally effect the physical, economic, moral or social welfare of employees in sub-paragraph (b) means that the Industrial Court cannot enquire into and redress unfair labour practices in the area of health and safety and sexual harassment of workers. This is a backward step from the present defintion which incorporates these areas.

In terms of clause (i) of the exclusions, legal strikes are not regarded as unfair labour practices. Whilst this is a positive development, the inference that all illegal strikes will be unfair labour practices is unsatisfactory since considerations of the reasonableness and justification for the strike action are ignored.

Clause (iii) allows for selective re-employment of workers provided employers use objective criteria for the selection (and apply these criteria fairly). This is most undesirable because criteria that are "objective" (eg. union affiliation, religious convictions) may be manifestly unfair, and the fair application of such criteria does not cure the injustice. A guarantee for dismissed workers against arbitrariness, victimisation and prejudice in re-employment is essential. It is suggested that this will be achieved if employers are required to adopt fair selection criteria for re-employment and to apply such criteria in a fair

manner. The shortcomings of the proposed clause are all the more disheartening in view of its failure to incorporate the principles of fair re-employment adopted by the Industrial Court in past cases.

The exclusion of unfair dismissal from the definition of unfair labour practice has been dealt with already.

The exclusion of certain practices from the definition of unfair labour practice is subject to the criticisms of codification set out above.

STREAMLINING THE CONCILIATION PROCESS

The proposed amendments to section 35 of the Act will significantly simplify the procedure for applying for the establishment of a conciliation board. Most of the onerous requirements contained in the present Act have been deleted by the Bill and the local labor inspector, to whom the application is submitted, is oblidged to establish the board. This is an important advance on the present position where the Minister of Manpower has a wide discretion to appoint or refuse a Conciliation Board. The principle of simplifying and streamlining the procedures is supported, but the time periods fixed by the Bill for the bringing of the application [within 30 days of the dispute and where the dispute concerns an unfair dismissal, 14 days] is impractical, especially given the size of the country, the difficulty of communication and access to legal advisers. In addition, the proposed time limits will undermine dispute settling procedures contained in recognition agreements where these procedures take longer than 30 days to exhaust, and discourage negotiation between the parties prior to bringing applications. The present requirement that the application be made within a reasonable time is preferable.

The proposed amendment to section 37 of the Act specifies that a minimum of three, and a maximum of seven representatives may attend a conciliation board. This will create difficulties for individuals who apply for a conciliation board by requiring them to find two more representatives to attend the board, and unions seeking to have larger negotiating teams at the meetings of the conciliation board. If proper conciliation is to be achieved, the number of representatives allowed to attend conciliation boards should not be fixed by the statute.

THE RIGHT TO STRIKE

The freedom to strike is further curtailed by the proposed amendments to section 65 of the Act. Strikes embarked upon before the expiry of the conciliation procedures provided by the Act are illegal. The present position is worsened since the local labour inspector can extend the 30 day period for conciliation boards to resolve disputes at the request of one party to the dispute (see the proposed amendment to section 36 of the Act). This will lead to indeterminate delays and abuse by a recalcitrant party, which, in turn, could lead to the abrogation of conciliation procedures and an increase in wild-cat industrial action.

Further restrictions on the right to strike are introduced by making strikes illegal where disputes over unfair dismissal have been referred back to a conciliation board or Industrial Council in terms of section 45A of the proposed act. In other words, workers can no longer engage in legal strike action in respect of a matter referred to the Industrial Court for determiniation. An obstructive employer can delay legal strike action by setting into motion the new machinery provided for in s45A of the Bill.

The proposed amendments make secondary strike action illegal. This removes an indispensable element of a union's power and alters the existing balance of power in favour of employers. Apart from the objections in principle to the proposed amendment, the wording is very wide and may lead to problems of interpretation and reliance on the restriction in situations not intended by the legislature.

In terms of the proposed amendments, intermittent strikes on the same dispute within a 15 month period, will also be illegal. The introduction of this restriction is obviously intended to deal with the situation where short strikes (with a threat of future strike action) are called, thus maximising the effect of disrupting production. It is often the very threat of the resumption of the strike that forces an employer to negotiate. By making this type of threat illegal, the result will be that striking workers will not return to work pending a settlement of the dispute (by the conclusion of an agreement or otherwise) and the settlement of disputes will be less likely since positions will be entrenched to safeguard the legality of the strike. Once again, the actual wording is very confusing and open to various interpretations.

Restricting the right to strike is unlikely to reduce the number

of strikes and some of the provisions proposed may well have the opposite effect. Bearing in mind that illegal strike action is a criminal offence, the proposed further restrictions on legal strike action are quite unacceptable. Criminal prosecutions and police intervention will never promote industrial peace.

One can weigh up the good and the bad in the proposed amendments to the Act, but until more careful thought has been given to its effects, the Bill in its present form should not be made law.

"Factory vrouens"

REVIEW: Factory Vrouens - Die Waarlike Lewe van die Werkendeklas Vrou, a play presented at the History Workshop Conference, University of the Witwatersrand, 10 - 13 Februaury 1987; compiled from the writings and documents of the garment workers by Elsabe Brink and directed by Alwyn Swart.

In the 1930s and 40s the Garment Workers' Union was one of the strongest trade unions in South Africa. Its members were mainly white Afrikaner women who worked as machinists in the clothing factories on the Witwatersrand. Under the leadership of its general secretary Solly Sachs the union was forged into a militant organisation which challenged the exploitative practices of clothing bosses. Arising out of their experience in the union and in the factories the women of the Garment Workers' Union began to express themselves in plays, poems and short stories. It is these writings which Elsabe Brink has brought together to form the script of Factory Vrouens.

For the purposes of the play Brink has divided the writings of the garment workers into four distinct areas. Firstly the play looks at the life of the garment workers before they left the land and the pressures that forced them to go and seek work in the clothing factories. It then moves onto the life in the slums of Johannesburg and Germiston where many of them lived upon arrival in the city. The play then portrays the forms of extreme exploitation in the clothing factories which the workers had to endure - speeding up, low wages, long hours of work, filthy and noisy factories.