

Contributer's Name

Unknown

Notes Overview

Exam Preparation LLW2602

Email

info@gimmenotes.co.z

a

School

University of South
Africa (UNISA)

AA Union a representative union at UNISA approached management about a 10% increase in the wages of its members. UNISA management offers the union only 7.5%. The parties fail to reach an agreement and the dispute is referred to the CCMA for conciliation. Within two weeks of the referral on a Monday morning the union informs the University management that because the University is not prepares to meet their demand its members will embark on a strike as from Tuesday morning.

Discuss whether the strike by members of AA Union will be protected.

- In order for a strike to be protected, the action itself must be in line with the definition of a strike in terms of section 213 of the LRA.
- A dispute must exist between the parties and this dispute must be referred to a council or CCMA for conciliation, and a certificate stating that the dispute remains unresolved must be issued or a period of 30 days must have elapsed since referral.
- Thereafter, 48 hours' written notice must have been given before the commencement of the strike.
- In the scenario, AA Union went on strike after two weeks' referral, which is not in line with the requirements. No certificate was issued and 30 days had not passed.
- The notice given is also not sufficient. Not all procedural requirements were complied with and the strike will therefore be unprotected.

Assuming that the strike was unprotected, discuss the procedural requirements which must be met before employees who are engaged in such a strike may be dismissed.

- The employer must contact the trade union at the earliest possible opportunity to discuss the course of action it proposes to take.
- The purpose is to give the union an opportunity to persuade the employer not to dismiss the strikers.
- The employer must also issue an ultimatum before dismissing strikers. The purpose of the ultimatum is to convince strikers to return to work.
- The ultimatum must comply with the following requirements:

- The ultimatum must be communicated to the strikers in a medium they understand and, if necessary, in their own language.
- The ultimatum must be clear and unambiguous, leaving no doubt as to what is expected of them.
- The time set in the ultimatum should be reasonable.
- This means that there must be sufficient time from the moment the ultimatum is issued to enable the workers to receive and digest the ultimatum, as well as for them to hold meaningful discussions with their union and to take rational decisions.

Section 64 of the LRA provides for exceptions wherein the requirements discussed above will not have to be complied with; discuss these exceptions.

There following are exceptions where the parties need not follow the procedures prescribed by the LRA:

- where the parties to the dispute are members of a bargaining council and the dispute followed the procedure set by that council's constitution
- where the parties concluded a collective agreement with prescribed procedures to be followed before they strike or lock-out, and they have complied with that agreement
- where an employer implements an unprotected lock-out and the employees strike in response to that
- where a strike takes place after the employer unilaterally changed the terms and conditions of employment, and the employer fails to rectify this despite prior warning
- where an employer refuses to bargain with a union, in which case the dispute must first be referred for conciliation, and then for advisory arbitration before notice of a strike can be given

What are the legal consequences of participating in an unprotected strike?

- The Labour Court may grant an interdict or an order restraining any person from participating in an unprotected strike.
- The Labour Court may also order the payment of just and equitable compensation to the employer who suffered any loss caused by an unprotected strike.
- Strikers who participated in an unprotected strike may also be dismissed for participating in such action.

Name two issues which may be considered as matters of mutual interest between employees and an employer.

Examples of matters of mutual interest are terms and conditions of employment, health and safety issues, negotiations on disciplinary procedures and wage increases.

Define a collective agreement (4)

- A collective agreement regulates the rights and duties of parties as well as the terms and conditions of employment of workers.
- 'Collective agreement' is defined in the LRA as a written agreement concerning terms and condition of employment or any other matter of mutual matters interest concluded between one or more registered trade union(s) on the one hand and one or more employers' organizations on the other hand.

Draw a distinction between a closed shop agreement and an agency shop agreement. (4)

- The aim of an agency shop is to ensure that non-union employees, who nevertheless benefit from the union's bargaining efforts, make a contribution towards those efforts.
- Closed shop agreements have a similar aim to agency shop agreements, but compel non-union members to join the union or face dismissal.
- The right of employees to join trade unions of their choice is an integral part of the general right to freedom of association. These rights are guaranteed in the South African Constitution and Labour Relations Act of 1995 (as amended).
- Majority unions are now vigorously applying these agreements (especially agency shop) to apply to members of minority unions who may be sufficiently representative. Minority unions are thus prejudiced to the extent that their existence in certain workplaces or sectors is being threatened.

Discuss the procedure that must be followed for a strike to be protected. (7)

- ABC Union can follow the procedure envisaged in Section 21 of the Labour Relations Act in order for the strike to be protected.
- This process entails that the registered trade union (ABC Union) must notify the employer (GG Manufacturers) in writing that it seeks to exercise organizational rights.
- The notice must contain the following information:
 - The work place in which the union the seeks to exercise the rights
 - The representivity of the trade union in that workplace
 - The rights that the trade unions wants to exercise
 - The manner in which the trade union wants to exercise those rights
 - The notice must also be accompanied by a certified copy of the trade union registration certificate.
 - The employer must meet with the union the parties within 30 days of receipt of the notice, and must try to reach a collective agreement to regulate the matter.
- If the parties fail to conclude a collective agreement, either of the parties can refer the dispute in writing to the CCMA for conciliation, and if the conciliation fails, either party can request that the dispute arbitrated.
- In making the award in terms of section 21, the Commissioner:
 - Must seek to minimize the proliferation of trade union representation in a single workplace, and where possible, to encourage a system of representative trade union in the work place
 - Seek to minimize the financial and administrative burden of requiring an employer to grant organization rights to more than one registered union
- Must consider the following:
 - Nature of the workplace
 - The nature of the one or more organizational rights that the registered trade union seeks to exercise
 - The nature of the sector in which the workplace is situated
 - The organizational history at the workplace or any other workplace of the employer
 - May withdraw any of the organizational rights once conferred which are exercised by any other registered trade union in respect of that workplace, if that other union has ceased to be a representative union.

- In order to determine the membership or support of the registered trade union, the Commissioner may:
 - Make any necessary inquiries
 - Where appropriate, conduct a ballot of the relevant employees, and
 - Take into account any other relevant information.
- The employer must co-operate with the Commissioner and make available any information and facilities that are reasonable or necessary for this purpose.
- An employer who alleges that a union is no longer a representative trade union may apply to the CCMA to withdraw any of the organizational rights previously granted.

Name five instances in which the Labour Relations Act, 1995, prohibits strike action. (5)

- If the strike or lock-out is prohibited in a collective agreement.
- If there is an agreement between the parties that the matter must be resolved by arbitration
- If the LRA states that the issue must be referred to arbitration or the Labour Court for resolution (a 'rights' dispute)
- If employees are working in essential or maintenance services
- If an award, agreement or determination by the Minister has already dealt with the issue.

Bert works for MM Construction and has just been promoted to a manager's position. Bert has been a member and shop steward of the Construction Workers' Union for many years. After his promotion Bert was told that, now that he was a manager, he had to resign from the union.

Discuss whether MMC Construction can force Bert to terminate his membership of the union. (6)

- Section 4(1) of the LRA provides that every employee has the right to form and join a trade union, and this includes senior managerial employees.
- Furthermore, in terms of section 4(2) members of trade unions are granted the right to participate in the affairs of the union, and this includes the right to stand for election and be eligible for appointment as an office bearer or official, and to hold office.
- Bert is therefore entitled to be a member of the trade union, even if he is the manager.
- However, Bert may not disclose information to the union that he acquired by virtue of being a manager.
- In *Independent Municipal & Allied Trade Union v Rustenburg Transitional Council* the court pointed out that, in terms of common law principles, an employee owed an employer a duty of fidelity, that is, that is a duty to act in good faith.
- In the case of managerial employees, this duty can be breached if the employee joins a union and participates in its affairs.

- The Constitution and the LRA provide every employee with the right to form and join a trade union, irrespective of his/her job position.
- Bert must therefore tread carefully when conducting union business and ensure that no information is disclosed. Bert cannot be forced to terminate his union membership

What information may the employer not disclose to trade union representative even though that information is clearly relevant to the collective bargaining process? (4)

The employer is not obliged to disclose information:

- That is legally privileged
- That the employer may not disclose without contravening a law or court order
- That is confidential and, if disclosed, may cause substantial harm to the employee or the employer, and
- Private personal information relating to an employee (unless the employee has consented to the disclosure).

Name four different ways in which trade unions may acquire organisational rights. (4)

- Through collective agreement
- Through membership of a bargaining council
- Through strike action
- Through the section 21 procedure

Draw a distinction between a strike, a picket and protest action. (6)

- Strikes serve the purpose to remedy a grievance or resolve any matter of mutual interest between employees and employers
- Pickets are aimed at the peaceful demonstration of support for any protected strike or opposition against any lock-out
- Protest action seeks to promote or defend the socio-economic interests of workers.

Name five organisational rights and the level of representation required in order for a trade union to acquire each of them, as provided by the LRA of 1995. (10)

Organisational rights are granted to unions by the LRA to enable them to function more effectively and to build support at the workplace

Organisational rights are granted only to registered trade unions.

The LRA provides for five organisational rights

- The right of access to the premises of the employer
- The right to have trade union membership fees deducted by way of stop order.
- The right to elect shop stewards
- The right of shop stewards to get time off for trade union activities
- The right to disclosure of information.

Discuss the right of trade unions to conclude closed shop an agency shop agreements and the right of employees to freedom of association (6)

- Freedom of association means that people have the right to associate with others in order to defend and protect their common interest.
- In the workplace, freedom of association entails the right of workers to form and join trade unions of their choice and to participate in these unions lawful activities.
- The aim of an agency shop is to ensure that non-union employees, who nevertheless benefit from the union's bargaining efforts, make a contribution towards those efforts.
- Closed shop agreements have a similar aim to agency shop agreements, but compel non-union members to join the union or face dismissal.
- The right of employees to join trade unions of their choice is an integral part of the general right to freedom of association. These rights are guaranteed in the South African Constitution and Labour Relations Act of 1995 (as amended).
- Majority unions are now vigorously applying these agreements (especially agency shop) to apply to members of minority unions who may be sufficiently representative. Minority unions are thus prejudiced to the extent that their existence in certain workplaces or sectors is being threatened.

What are the requirements that must be met for a secondary strike to be protected? (5)

In order for a secondary strike to be protected, the LRA sets the following requirements:

- The primary strike must be protected (the secondary strike will only be protected if the primary strike is protected)
- Strikers must give their employer seven days" written notice of the commencement of the strike (secondary employer must be given seven days written notice before the commencement of the secondary strike. This is to give the secondary employer an opportunity to put some pressure on the primary employer to accept the demands of the primary strikers)

The harm done to the second employer must not be more than what is required to make an impact on the primary employer (the nature and extent of the secondary strike must be reasonable in relation to the possible direct or indirect effect that it may have on the business of the primary employer)

What is the distinction between "consultation and Joint decision making "as functions of a workplace forum? (4)

What is consultation?

Consultation entails that the employer:

- allows the forum to make representations and to advance alternative proposals, and
- considers and responds to these and, if the employer disagrees with them, that it must state the reasons for disagreeing.

Consultation must take place before the employer implements any proposal.

What is joint decision making?

Joint decision making requires the employer to consult and reach consensus with a forum.

ABC Workers Union is a registered union which represents some of the employees by UU Manufacturers. The union would like to acquire organisational rights within the workplace. What are the different ways through which ABC Workers can acquire organisational rights with UU Manufacturers (4)

- Through collective agreement
- Through membership of a bargaining council
- Through strike action
- Through the section 21 procedure

The inclusion of the right to engage in collective bargaining in the Constitution, 1996 does not create a duty for either of the parties to bargain with the other. Name five examples of refusal to bargain by the employer. (5)

- the employer's refusal to recognise a trade union as a bargaining agent,
- the employer's refusal to establish a bargaining council,
- the employer's withdrawal of recognition of a collective bargaining agent,
- the employer's resignation as a party to a bargaining council, and
- the employer disputing appropriate bargaining units, levels and topics.

Amamdla Employees Union (AEU) represents employees with in the Together Municipality falling under the supply and distribution of water services. AEU approaches the Municipality for an across-the-board wage increase of 15%. The municipality is adamant that it can only afford 5%. The members of AEU are unhappy about the offer made by the employer.

Discuss whether members of AEU can go on strike to force their employer to accept their demand (7)

What organisational rights can a sufficiently representative trade union acquire? (3)

- the right of access to the premises of the employer,
- The right to have trade union membership fees deducted by way of stop order.
- the right to elect shop stewards,
- the right of shop stewards to get time off for trade union activities,
- The right to disclosure of information.

Discuss the collective bargaining process. (5)

- The process of collective bargaining entails negotiations between the two parties, namely a union on the one hand, and an employer or an employers' organisation on the other hand.
- Unlike mere consultation, collective bargaining presumes a willingness by each party, not only to listen to and consider the representations of the other party, but also to abandon its own fixed positions where possible, in order to find common ground.
- The word 'collective' refers to the fact that employees join together in trade unions to increase their

power in bargaining with employers over wages, working conditions and any other matters of mutual interest between them.

- It is important to note that only trade unions can engage in collective bargaining. Although a single employer can engage in collective bargaining, an individual employee cannot engage in collective bargaining.

Discuss the common law rule of “no work no pay “in the context of strikes and lock outs. (6)

- The common-law rule of 'no work, no pay' applies to strikes and lock-outs.
- This rule is based on the fact that the contract of employment is reciprocal in nature, that is, performance by the employer (payment of salaries) depends on performance by the employee (making his/her services available).
- The position is retained by the LRA, which provides that an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or lock-out.
- There is, however, one exception to this rule. If the employees' remuneration includes payment in kind in the form of accommodation, the provision of food and other basic amenities of life, the employer may not withhold such payment in kind during a strike or lock-out.
- However, the employees must request that payment in kind continues.
- The employer may recover the monetary value of the payment in kind from the employees after the end of the strike or lock-out by way of civil proceedings instituted in the Labour Court.

2012 Lawn Mowers (2012LM) is a company that manufactures lawn mowers in Benoni and distributes them. ZZ Motors (ZZM) is a company in Brits that manufactures and distribute electric motors and that supplies 2012LM with electric motors in the employ of both 20LM and ZZM MWU is employed by ZZM want to go on strike in support of the demand by employees of 2012LM

What is the type of action called on which the MWU members employed by ZZM wish to embark and what requirements have to be met for this type of action to be protected.(6)

In order for a secondary strike to be protected, the LRA sets the following requirements:

- the *primary strike must be protected*,
- strikers must give their employer seven days' *written notice* of the commencement of the strike, and
- the *harm to the secondary employer must not be more than what is required to make an impact on the primary employer*.

These requirements need more explanation.

- Protection
Firstly, the secondary strike will be protected only if the primary strike is protected. In other words, the primary strike must have successfully crossed all three hurdles discussed above.
- Notice
Secondly, the secondary employer must be given seven days written notice before the commencement of the secondary strike.⁵⁰ This is to give the secondary employer an opportunity to put pressure on the primary employer to accept the demands of the primary strikers. If the secondary strike is part of a strike about dismissals for operational reasons, 14 days' written notice must be given to the secondary employer before the strike can commence.
- Proportionality
Thirdly, the nature and extent of the secondary strike must be reasonable in relation to the possible direct or indirect effect that it may have on the business of the primary employer. This requirement protects the secondary employer and ensures that the secondary strike does not cause significant

harm to the secondary employer without having any effect on the primary employer. In the example above, the secondary strike would, for example, not have a proportional effect on A if B supplied only two per cent of A's raw wood. While in such instance the secondary strike may bring great financial loss for B, it will have very little impact on A.

Define collective labour law (4)

- Collective labour law is not discussed as a phase of employment because collective labour law influences all stages of the employment relationship.
- Collective labour law concerns employees acting together in trade unions and employers acting individually or as employer organisations when they bargain about matters relating to the workplace, for example wages and better working conditions.

Section 21 of the LRA empowers a registered trade union to notify the employer in writing that it (the union) seeks to exercise organisational rights. Name FOUR types of information that must be contained in the written notice. (4)

The notice must contain the following information:

- the workplace in which the union seeks to exercise the rights,
- the representivity of the trade union in that workplace,
- the rights that the trade union wants to exercise, and
- the manner in which the trade union wants to exercise those rights.

Name the document which must accompany the notice above. (1)

The notice must also be accompanied by a certified copy of the trade union registration certificate.

To which institution may disputes about disclosures be referred? (1)

- Entitlement to organisational rights have been discussed above. If there is a dispute about the interpretation of organisational rights, any party may refer the dispute in writing to the CCMA for conciliation and, if conciliation fails, for arbitration.
- Disputes about disclosure of information follow the same route. In determining the dispute, the Commissioner must strike a balance between the employer's right to privacy and the interests of sound collective bargaining. The Commissioner has a fairly wide discretion to make a suitable award to achieve this.

In a collective bargaining process, the LRA provides for strike action by the employees to convince the employer to bargain. Name five actions by the employer that constitute a refusal to bargain. (5)

A refusal to bargain includes:

- the employer's refusal to recognise a trade union as a bargaining agent,
- the employer's refusal to establish a bargaining council,
- the employer's withdrawal of recognition of a collective bargaining agent,
- the employer's resignation as a party to a bargaining council, and
- the employer disputing appropriate bargaining units, levels and topics.

Disputes regarding refusal to bargain must first be referred to the CCMA for an advisory award. An advisory award provides guidance only; it is *not* binding on the parties.

Gupta (PTY) (LTD) is a company rendering funeral services in Pretoria. Amandla trade union represents 70% of employees in Gupta (PTY) (LTDF). After failing to resolve a wage dispute between Gupta (PTY) (LTD) and its employees, Amandla trade union decides to consult you, a labour expert, for advice.

Define a strike (5)

'Strike' is defined as follows:¹

- the partial or complete concerted refusal to work, or the retardation or obstruction of work,
- by persons who are or have been employed by the same employer or by different employers,
- for the purposes of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee and
- every reference to work in this definition includes overtime work, whether it is voluntary or compulsory.

What are the THREE procedural requirements of a strike action? (3)

In order to qualify as strike action, the employees must comply with the following *three elements* contained in the definition:²

- there must be a refusal to work (a complete or partial retardation or obstruction of work),
- the refusal must be a concerted action by persons (employed by the same or different employers), and
- the refusal must be for the purpose of remedying a grievance or resolving a dispute in respect of any matter of *mutual interest* between an employer and employee.

Name five instances in which the LRA prohibits employees from embarking on a strike action (5)

- In accordance with the LRA's objective to promote orderly collective bargaining, parties to a dispute who have previously agreed that they will not resort to industrial action over certain issues, are not allowed to do so.
- If the parties carry on with industrial action, such action will be unprotected.
- The agreement must, however, be a collective agreement as defined in the LRA, and will bind the parties only for the duration of the collective agreement.
- The agreement must, however, be a collective agreement as defined in the LRA, and will bind the parties only for the duration of the collective agreement.
- The LRA also prohibits a strike or lock-out if parties are bound by a collective agreement that regulates the issue in dispute.
- The reason for this is that, once parties have settled a matter through a collective agreement, they are bound by the terms of that agreement.

List five examples of essential services. (5)

- the regulation and control of air traffic,
- municipal traffic policing,
- the supply and distribution of water,
- the generation, transmission and distribution of power,
- firefighting, and
- Correctional services.

