

**GOVERNING BODY
CONSEIL D'ADMINISTRATION
CONSEJO DE ADMINISTRACION**

Geneva,
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Fifteenth item on the agenda

REPORT OF THE DIRECTOR-GENERAL

First Supplementary Report

Report of the Fact-Finding and Conciliation Commission
on Freedom of Association concerning
the Republic of South Africa

1. Appended to this paper is the report of the Fact-Finding and Conciliation Commission on Freedom of Association appointed by the Governing Body to examine the complaint of infringements of trade union rights in the Republic of South Africa, presented to the ILO by the Congress of South African Trade Unions in a communication dated 11 May 1988.

2. The Republic of South Africa ceased on 11 March 1966 to be a member State of the ILO although it remained a member of the United Nations. This necessitated referral of the complaint to the Economic and Social Council of the United Nations (ECOSOC) in terms of the procedure agreed upon between the United Nations and the ILO and approved by ECOSOC in resolution 277(X) adopted on 17 February 1950.

3. In accordance with this procedure the Secretary-General of the United Nations, in a note dated 21 July 1988, sought the consent of the Government of the Republic of South Africa to the complaint being referred to the Fact-Finding and Conciliation Commission. The Government's consent was notified in a communication dated 19 February 1991, and at its session held in May 1991 ECOSOC decided to refer the allegations to the ILO Fact-Finding and Conciliation Commission.

CHAPTER 9

THE RIGHT TO STRIKE

303. While in international law the right to strike is explicitly recognised in certain texts adopted at the international and regional levels, the ILO instruments do not make such a specific reference. Article 3 of Convention No. 87, providing as it does for the right of workers' organisations "to organise their administration and activities and to formulate their programmes", has been the basis on which the supervisory bodies have developed a vast jurisprudence relating to industrial action. In particular they have stated as the basic principle that the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. The exercise of this right without hindrance by legislative or other measures has been consistently protected by the ILO principles. At the same time certain restrictions have been seen as acceptable in the circumstances of modern industrial relations.¹

304. In its complaint of 11 May 1988, COSATU alleged that proposed amendments to the Labour Relations Act (LRA) would abridge the right to strike in four ways: (1) the prerequisites to section 65 for a legal strike (completion of statutory conciliation and a ballot of all union members) would be hard to respect since the previously enforced 60-day cooling-off period could be extended for such further periods as an administrative officer - an inspector of the Department of Manpower - considered appropriate; (2) the section 65 ban on strikes in essential services would be broadened to include strikes in which the strikers were not directly involved in the dispute (sympathy and secondary strikes); (3) likewise it was proposed to include a further section 65 ban on strikes over a dispute which was the same or virtually the same as a dispute which during the previous 12 months gave rise to a strike (intermittent strikes); and (4) strike action would expose participants and their unions to employer claims for damages.

305. Because of the reaction against these amendments, explained in greater detail in Chapter 6, changes were made to the proposed draft both before it was tabled and during its passage through Parliament. The Labour Relations (Amendment) Act (LRAA) which came into force on 1 September 1988 however retained the provisions restricting sympathy and intermittent strikes (defined as unfair labour practices in section 1(1)(h), (l) and (m), respectively), and that enabling employers to claim damages from a union in respect of unlawful strike action unless the union could prove that it had not authorised the strike (section 79(1)). The amendment to the cooling-off provisions was amended prior to enactment so as to allow any extension of the 30-day period only by agreement between the parties to the dispute.

306. The Amendment Act which came into force on 1 May 1991 removed the provisions banning sympathy and intermittent strikes and reverted to a definition of unfair labour practice similar to that existing prior to the 1988 amendment (section 1(1) and (4)). The latter subsection specifically stated that a strike and lockout shall not be regarded as an unfair labour practice. The 1991 changes also removed the ground for objecting to civil liability for strike action: in terms of the amendment, strikes which were preceded by the conciliation procedures in the Act may not form the subject of a temporary restraining order (interim interdict) and the presumption of union authorisation of and thus liability for a strike was removed from section 79(2).

The requirement that an absolute majority of workers should be obtained for the calling of a strike may be difficult to fulfil especially in the case of unions which group together a larger number of members. A provision requiring an absolute majority may, therefore, involve the risk of seriously limiting the right to strike.

and

A provision requiring the agreement of the absolute majority of the workers of the undertaking concerned for the calling of a strike may constitute a serious limitation on the activities of trade union organisations.²¹

644. The Commission considers that the Government should take steps to remove the inconsistency existing between these principles on freedom of association and section 65(2)(b) of the LRA.

(ii) Aims and exercise of the right to strike

645. COSATU submitted that the LRA's restrictions on strikes beyond shop-floor issues, in particular the ban on strikes over social and economic aspects of government policy and the courts' gloss on this to restrict strikes to issues capable of being met by employers, go too far and should be confined to purely political strikes.

646. The Government attempted to justify this prohibition by reference to the state of transition the country was going through and expressed the view that it is not conducive to good order nor in the public interest to allow strikes to be called over any issue. While recognising that the present provisions may have to be extended regarding some of the objects and purposes of a strike, it considered that some limitation would have to be maintained.

647. The principles of the ILO on this subject are clearly stated by the Committee of Experts on the Application of Conventions and Recommendations:

The Committee considers that trade union organisations ought to have the possibility of recourse to protest strikes, in particular where aimed at criticising a government's economic and social policies. However, strikes that are purely political in character do not fall within the scope of the principles of freedom of association.²²

and by other supervisory bodies:

The right to strike should not be limited solely to industrial disputes that are likely to be solved by the signing of a collective agreement; workers and their organisations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their interests.²³

648. The Commission accordingly concludes that the regulation of "strikes" in section 1(1) and section 65(1A) should be amended so as to safeguard the legality of strikes over social and economic issues affecting workers' and trade union rights.

649. COSATU complained about the LRA's restrictions on strike activity during the currency of agreements, awards or determinations or during the first year of a wage determination.

650. The Government pointed out that these restrictions amounted to mere postponements of permissible strikes. For example, as far as wage determinations were concerned, strikes could take place after the expiry of the 12 month period.

651. The Commission does not believe that these merely temporary restrictions infringe ILO principles.²⁴

(iii) Essential services

652. COSATU first called for the narrowing of the list of services contained in section 46 of the LRA where compulsory arbitration is substituted for strike action. Secondly, it submitted that, in those services correctly recognised as essential where the right to strike may be restricted, there were nevertheless certain employees such as support staff whose tasks were not part of the essential service provided and who should therefore be allowed to strike. Thirdly, it requested that, in genuinely essential services, some form of compensatory mechanism such as conciliation, mediation and arbitration be introduced, or, where it already existed, be strengthened.

653. The Government maintained that the essential service employees deprived of the right to strike under the LRA did have an adequate form of disputes resolution procedure through compulsory arbitration, although it admitted that such compensatory machinery was not available to certain "essential" employees banned from striking under other legislation.

654. The Government cited the relevant ILO principles on the right to strike in essential services and the public service.²⁵ It was thus aware of the fact that essential services in the strict sense of the term should be limited to those where an interruption would endanger the life, personal safety or health of the whole or part of the population, and that the public service should not be defined too broadly in the context of industrial action.

655. COSATU referred correctly to examples of services listed in the LRA which, according to freedom of association principles, are not "essential" in the strict sense of the term. In particular, this is the case for the following: local authorities except when they provide essential services in the strict sense of the term, passenger transportation, the handling of perishable foodstuffs and petrol or other fuels for use by public utilities.²⁶

656. The Commission is of the view that section 46 should be amended so that strike action is restricted only in those services which are genuinely essential in terms of the ILO definition mentioned above.

657. Employees in certain essential services have no dispute settlement machinery available to compensate for the removal of their right to take industrial action. Prison officers and nurses are examples. This is not acceptable. Measures should be taken promptly to allow such workers access to adequate machinery so that their occupational grievances can be heard.

658. The Commission has no comment on the situation of the police and members of the armed forces referred to by COSATU, as they may be excluded from the ILO's freedom of association principles. The position of armaments workers, however, should not, in the Commission's opinion, differ from that of other workers since, in periods of peacetime, they are not carrying out essential services. They are clearly not members of the armed forces covered by the Defence Act.²⁷

659. The Commission notes from the many examples presented to it in evidence that the system of arbitration established to replace the right to strike in the services listed in section 46 of the LRA is not working satisfactorily. As described elsewhere in these conclusions, technical objections might invalidate the establishment of industrial councils or conciliation boards. Awards won there might not be promulgated. The Industrial Court and Labour Appeal Court structures are overloaded, poorly resourced and their decisions have given rise to complaints of inconsistency. This no doubt explains the relative success of private mediation which has sprung up outside the statute. The Government has recognised that these shortcomings have resulted, on occasion, in grave injustices being committed. The Government should actively pursue improvements to the procedures with a view to affording to the workers concerned adequate, impartial and speedy conciliation, mediation or arbitration procedures, in which the parties can take part at every stage and in which the awards are in all cases binding on both parties and are fully and rapidly implemented.

(iv) Pickets

660. COSATU alleged that the security legislation, the Trespass Act and municipal by-laws have had the effect of outlawing strike pickets and of exposing strikers involved in such activities, even if doing so peacefully, to criminal and civil actions.

661. The Government's submission was that workers and their organisations should respect the law of the land. The Government nevertheless conceded that there was a need to examine the effects which the statutory provisions and common law had on picketing.

662. The ILO supervisory bodies have stated that pickets organised in accordance with the law should not be subject to interference by the public authorities and that the prohibition of strike pickets is justified only if the strike ceases to be peaceful.²⁸ They accept that there may be some statutory duty on pickets not to disturb public order or intimidate workers who continue to work and that picket violence and coercion of non-strikers can constitute criminal offences.²⁹

663. Peaceful picketing should be protected by law. The use of criminal and civil sanctions against workers involved in picketing should be confined to situations of violence. In this way the principles of freedom of association would be respected: both the right of workers and their organisations to carry out their protest actions, and their duty to respect the law of the land.

(v) Sanctions for striking

664. Amongst COSATU's principal complaints about the present South African labour law was the liability of strikers and their unions to prosecution under criminal provisions; interdicts (injunctions); damages claims through civil actions; and dismissal. Protection against unfair reprisals for strike action at the hands of employers is, according to COSATU, erratic and uncertain even when the strike has been called in conformity with all the requirements of the LRA. The delays occasioned by the operation of the legal system are sometimes very considerable.

665. The Government considered that it was impossible to legislate rules in this regard and that the unfair labour practice procedure, which applied the rules of fairness and equity, should be adequate to deal with this

difficulty. It recognised, however, the fundamental importance of clarifying the uncertainty and addressing the inadequacy of protection under the LRA and asked for advice on how to improve the present Industrial Court system and streamline its operations. It considered that this would largely solve the problem.

666. The Commission concludes that legislative or common law provisions which expose workers and their unions to actions for damages and/or interdicts in respect of the legitimate exercise of the right to strike may effectively deprive workers of their right to take action to promote and defend their economic and social interests. It is therefore most important that some measure of protection against civil liability be maintained and that the immunities available under section 79 of the LRA are not weakened or completely avoided because of technical irregularities in the calling or conduct of strikes.

667. Similarly, the Commission considers that the imposition of criminal sanctions on strikes declared solely for the promotion or defence of workers' occupational interests is contrary to the principle of the right to strike.³⁰ Such sanctions should be imposed only where there have been violations of strike prohibitions which are themselves in conformity with the principles of freedom of association.³¹ It is clear from the Commission's conclusions (see paras. 639 to 659 above) that several of the strike prohibitions are not in conformity with the principles.

668. Dismissal of trade unionists for exercising the right to strike is contrary to the principle of freedom of association:

When trade unionists are dismissed for having exercised the right to strike, [it] can only [be] concluded that they have been punished for their trade union activities and have been discriminated against contrary to Article 1 of Convention No. 98.³²

669. COSATU alleged that, although possible in the course of unfair labour practice proceedings, reinstatement of unjustly dismissed strikers almost never occurred. The ILO supervisory bodies have stated:

The use of extremely serious measures, such as dismissal of workers for having participated in a strike and refusal to re-employ them, implies a serious risk of abuse and constitutes a violation of freedom of association.

and

Industrial relations troubled by the collective dismissal of strikers can be greatly improved if the employers concerned give serious consideration to the possibility of reinstating the persons thus sanctioned.³³

670. The Commission is of the opinion that the unfair labour practice provisions of the LRA should be amended to provide appropriate protection against dismissal:

- of strikers engaged in a legal strike; and
- of strikers where the strike, although technically illegal, was in all other respects legitimately called for the promotion and defence of the workers' economic and social interests.

it should either be modified or the amendment to section 2(3)(b) of the LRA allowing the registration of mixed unions should be brought into force.

728. COSATU has referred to provisions in the various statutes governing different branches of the public service which define misconduct to include attempts by an employee to secure the intervention of any person "not in the employ of the department" in relation to his or her position or conditions of service. It has submitted that such provisions interfere with the right of employees to elect their representatives freely. If, as COSATU contends, they are interpreted as meaning that staff association representatives must belong to the occupation in which the association functions and that such representatives from outside the occupation may not put forward claims on the members' behalf, these provisions may jeopardise the right of organisations, guaranteed by Article 3 of Convention No. 87, to elect their representatives in full freedom.

729. In the absence of legal provisions governing strikes in the public service, they are covered by the common law, according to which strike action has conventionally constituted serious misconduct entitling the employer to dismiss public servants summarily.

730. The principles developed by the ILO organs concerning strikes in the public sector recognise that the right to strike may be restricted or even prohibited in the civil service - civil servants being those who act on behalf of public authorities.⁴⁹ This principle was set out more fully by the Committee of Experts on the Application of Conventions and Recommendations in the following passage:

... [T]he principle whereby the right to strike may be limited or prohibited in the public service or in essential services, whether public, semi-public or private, would become meaningless if the legislation defined the public service or essential services too broadly. As the Committee has already mentioned in previous general surveys, the prohibition should be confined to public servants acting in their capacity as agents of the public authority or to services whose interruption would endanger the life, personal safety or health of the whole or part of the population. Moreover, if strikes are restricted or prohibited in the public service or in essential services, appropriate guarantees must be afforded to protect workers who are thus denied one of the essential means of defending their occupational interests. Restrictions should be offset by adequate impartial and speedy conciliation and arbitration procedures, in which the parties concerned can take part at every stage and in which the awards should in all cases be binding on both parties. Such awards, once rendered, should be rapidly and fully implemented.⁵⁰

731. Applying these principles to the various branches of the public service in South Africa, it would seem that, at the very least, the possibility of strike action should be opened up for members of the teaching profession and post office personnel, subject to the possible need to ensure the maintenance of a minimum service which should be defined in consultation with the organisations of the workers concerned.⁵¹ Where prohibitions or restrictions on strike action are maintained, these should be offset, as indicated by the Committee of Experts, by adequate, impartial and speedy conciliation and arbitration procedures.

732. The provisions of the LRA governing collective bargaining and the settlement of disputes do not apply to the public service. In the absence of collective bargaining procedures, staff associations - which may or may not be recognised by the employing authority - are in most cases given the