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Government Notice

MINISTRY OF LABOUR AND SOCIAL WELFARE

No. 208

2009

CODES OF GOOD PRACTICE ON INDUSTRIAL ACTIONS AND PICKETING LABOUR ACT, 2007

In terms of section 137(1)(a) of the Labour Act, 2007 (Act No. 11 of 2007) I have, after consulting the Labour Advisory Council, issued codes of good practice on industrial actions and picketing as set out in the Schedule.

SCHEDULE

CODE OF GOOD PRACTICE ON INDUSTRIAL ACTIONS

(STRIKES AND LOCKOUTS)

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CODE OF GOOD PRACTICE ON INDUSTRIAL ACTIONS (STRIKES AND LOCKOUTS)

1. Introduction

This Code applies to all employees, employers, trade unions and employers' organisations. It must be taken into account in any proceedings by conciliators, arbitrators and judges.

The Code is intended to provide practical guidance on strikes and lockouts. The Code should be followed. It may be departed from only if there is good reason for doing so.

To the extent that this Code advances an interpretation of the law, that interpretation is the policy of the Labour Commissioner and will be applied by conciliators and arbitrators unless that interpretation is reversed by a decision of the Labour Court.

2. Role of strikes and lockouts in collective bargaining

- a) The Act promotes free collective bargaining as the core mechanism for employers and employees to resolve matters of mutual interest between and amongst themselves without outside interference. The only exception is in respect of essential services. In these services compulsory arbitration resolves disputes after negotiations have failed.
- b) Although a measure of last resort, strikes and lockouts are forms of lawfully sanctioned economic pressure in order to resolve disputes of interest between employers and their employees. A strike or lockout is temporary application of pressure in the collective bargaining process. The main purpose is not to unnecessarily damage the employer's business or undermine the legitimate demands of the employees.
- c) The objective of an industrial action is to settle a dispute. Accordingly a strike or a lockout comes to an end if the dispute that gave rise to it is settled. It may be settled by an agreed compromise or a return to work. If an employer withdraws a lockout, the employees return on the employers' terms. If employees abandon the strike or the strike is called off by the trade union, the employees return on the employer's terms. Either way, the dispute is settled.

3. Matters in respect of which a strike or lockout is permissible

- a) The subject matter of a protected strike or lockout is limited to disputes of interest only. Note that it is not permissible to strike or lockout in respect of dispute in an essential service. Those disputes must be referred to arbitration. See section 78 of the Act.
- b) A dispute of interest is defined in the Act. It is a dispute between an employer or an employers' organisation on the one hand and an employee or trade union on the other concerning a labour matter but excluding any dispute that the Act requires to be resolved by adjudication or arbitration. In other words a labour matter contemplates two types of dispute: a dispute of interest and a dispute of right.
- c) A dispute of right may be described as a dispute arising from the breach or contravention of a law, contract of employment or collective agreement. A dispute of interest on the other hand is a dispute over a labour matter which the employee

does not have the right to. The distinction can be demonstrated by an example. If an employer pays an employee less than the agreed rate, a dispute over that underpayment is a dispute of right which may be referred to arbitration. If an employer refuses to give an increase on the agreed rate, a dispute over that refusal is a dispute of interest and may only be resolved through a collective bargain or by industrial action. There is an exception to this approach to interest disputes i.e. disputes of interest that are referred to arbitration in essential services or by agreement.

- d) The following are examples of a dispute of interest.
- i) a dispute over what next year's wages are going to be;
 - ii) a dispute over a new collective agreement or the renewal of an agreement;
 - iii) a dispute over shorter working hours or higher overtime rates;
 - iv) a dispute over a new retrenchment procedure or recruitment policy;
 - v) a dispute over compulsory deductions of trade union dues from non-members; and
 - vi) a dispute over recognition by an employer or from an employers' organization.

The above list is not exhaustive. It is illustrative only.

4. Procedural requirements for a protected strike or lockout

- a) The Act contemplates the following procedure before an employer may embark on a protected lockout or employees may embark on a protected strike:
- i) the dispute must be referred to the Labour Commissioner;
 - ii) the Labour Commissioner will appoint a conciliator and determine the date, time and place for the first conciliation meeting as soon as possible but within 30 days of the referral.
- b) The conciliator will try and conciliate the dispute and if-
- i) there are prospects of settlement, the conciliator will settle it at that meeting or arrange further meetings if necessary;
 - ii) there are no prospects of settlement, will seek to reach agreement on rules to regulate the strike or lockout; and
 - iii) if the parties do not agree on rules to regulate the strike or lockout, the conciliator must determine the rules in accordance with this Code.
- c) The 30 day conciliation period has expired from the date of the referral. This period may be lengthened by 30 days if the party referring the dispute fails to attend a conciliation meeting. The period may be shortened to the date of the conciliation meeting if the other party fails to attend. See section 74(3)(a) and (b) of the Act.
- d) At least 48 hours notice of the commencement of the strike or lockout has been given. See section 74(1)(d).

- e) The notice of commencement of the strike or lockout must state the date and time of the action. The object of the notice is to ensure that the other party has the opportunity to prepare for the intended action without unnecessary harm being done to it. Accordingly, the action must commence at the stated time and date. If the action does not commence at the stated time and date, a fresh notice may be given.
- f) Once a dispute has been referred and the procedural requirements of section 75 have been complied with, either party to the dispute may commence industrial action. In other words a trade union may strike in respect of a dispute referred by the employer and an employer may lockout in respect of a dispute referred by the employees.
- g) It is possible to have a strike and a lockout at the same time. If the employees engage in a partial stoppage, the employer may institute a total lockout in response.
- h) The conciliator retains jurisdiction over the dispute until the dispute is settled and must continue to try and settle the dispute by conciliation throughout.
- i) If the intended strike or lockout is to be intermittent, the notice of the commencement of such action may include the dates and times of each stoppage.
- j) If a strike or lockout is suspended and the employees return to work, a fresh notice must be given if the strike or lockout is to be resumed. That notice must state the date and time of the resumption of the strike.
- k) The notice of the commencement of the strike or lockout may be given before the conciliation period has expired provided that the action commences after the expiry of the conciliation period.

5. Rules regulating the conduct of strikes and lockouts

- a) The conciliator is charged with the duty to try and reach agreement on rules to regulate the conduct of a strike and lockout. If no agreement is reached, the conciliator must make the rules. An action in breach of those rules lifts the protection from a strike or lockout.
- b) The rules should address the following matters:
 - i) the conduct of strike ballot;
 - ii) the actual notice of the commencement of the strike or lockout;
 - iii) notice of the form or change in form of strike or lockout;
 - iv) picketing and line of demarcation thereof;
 - v) places, times and conditions for strikers or locked out employees to assemble on the premises during the strike or lockout;
 - (vi) an expedited procedure for dealing with disputes arising from the conduct of the parties during the strike or lockout;
 - (vii) appointment of representatives responsible for ensuring compliance with the rules;
 - (viii) security of the employer's premises and property, protection of members of the public and customers/clients during the strike or lockout;

- ix) commitment to take steps to ensure compliance with the provisions of the Act and the rules; and
 - x) conciliation process during strike or lockout.
- c) If no agreement is reached on the rules, the conciliator must determine the rules but in so doing may not -
- i) restrict the rights and protections given in the Act. For example, the conciliator may not prescribe the form that a strike may take (ie a go slow) but may require notice of any change in form (from a go slow to a total stoppage) or discriminatory lockout; and
 - ii) deviate from what the parties themselves have agreed during the conciliation or in a collective agreement.
- d) If no agreement is reached, the conciliator must take the following into account in determining the rules:
- i) any agreement between the parties on any of the matters contemplated in the rules. The conciliator must give effect to those provisions in the rules and may not amend them;
 - ii) this Code of Good Practice and the Code on Picketing;
 - iii) in deciding on the actual notice that must be given, the rule is 48 hours unless there are compelling reasons relating to damage to property or risk to the safety of any person but in either case, the period may never be less than 48 hours;
 - iv) in determining a place for strikers to meet on the premises of the employer, the conciliator may only determine a place on the premises if the following conditions have been met:
 - aa) that the employees have no reasonable alternative place to meet during the strike;
 - bb) that there is a place on the premises where the strikers can meet without interfering with continuance of the business. It is to be specifically noted that this facility is not part of the right to picket but to assist the union and the strikers by making a place available for meetings; and
 - cc) that the employer's refusal to grant a place to meet is unreasonable.

6. Dismissal of striking employees

- a) It is not fair to dismiss an employee who has engaged in a protected strike. The protection against dismissal may not be extended to actions related to misconduct such as picket line violence, malicious damage to property etc. The ordinary rules relating to dismissal for misconduct will apply to an employee charged with this kind of misconduct.
- b) It may be fair to dismiss an employee who has engaged in an unprotected strike. The fairness of the dismissal depends on a number of factors. Those are specifically dealt with in the Code of Good Practice: Termination of Employment.

**CODE OF GOOD PRACTICE ON PICKETING
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CODE OF GOOD PRACTICE ON PICKETING

1. Introduction

- a) This Code is intended to provide practical guidance on picketing in support of any protected strike or in opposition to any lock-out. It is intended to be a guide to those who may be contemplating, organising or taking part in a picket and for those who as employers or employees or members of the general public that may be affected by it.
- b) Article 21 of the Constitution of Namibia recognises the right to peaceful assemble, to demonstrate, to picket and to present petitions. This constitutional right can only be exercised peacefully and unarmed. Section 76(2) of the Labour Act, 2007, seeks to give effect to this right in respect of a picket in support of a protected strike or a lock-out.
- c) This Code does not impose any legal obligations and the failure to observe it does not by itself render anyone liable in any proceedings. But section 137(3) of the Act provides that any person interpreting or applying the Act must take account of this Code of Good Practice when it establishes picketing rules. This is the effect of section 137(3) of the Act. This applies to conciliators, arbitrators, the Labour Court, and the Namibian Police Force.
- d) This Code does not apply to all pickets and demonstrations in which employees and trade unions may engage. It applies only to pickets held in terms of section 76 of the Act. In terms of that section-
 - i) only an employee, member, or official of a registered union may participate in the picket. Accordingly, any picket by other persons must comply with the ordinary laws and by laws relating to freedom of association;
 - ii) the purpose of the picket must be to peacefully demonstrate in support of any protected strike; and
 - iii) the picket may be held only in a public place outside the premises of the employer or, with the permission of the employer, inside its premises.
- e) If the picket complies with the above elements then the ordinary laws and bye laws regulating the right of assembly do not apply. These laws include the common law, municipal by-laws etc.
- f) A picket with purposes other than to demonstrate in support of a protected strike is not protected by the Act. The lawfulness of that picket or demonstration will depend on compliance with the ordinary laws and by laws.

2. Purpose of the picket

- a) The purpose of the picket is to peacefully encourage non-striking employees and members of the public to support strikers involved in a protected strike. The nature of that support can vary. It may be to encourage non-striking employees not to work during the strike. It may be to dissuade replacement or (temporary) labour from working. It may also be to persuade members of the public or other employers and their employees not to do business with the employer.
- b) The strike must be a protected strike. In normal cases, employees picket at their own place of work in support of their strike against their own employer. Cases do arise, however, where employees picket at their own place of work in support of a strike between another employer and its employees. This is what is contemplated in the definition of strike which states the object of a stoppage of work is to compel 'any other employer' to accept, modify or abandon demands that may form the subject matter of a dispute.
- c) A picket may only commence once the primary strike has commenced.
- d) If a picket is in support of an unprotected strike, the picket is not protected by section 76(2) of this Act.

3. Picketing rules

- a) The registered trade union and employer should seek to conclude a collective agreement to regulate picketing during strikes or lockouts. The following matters should be addressed:
 - i) authorisation of the picket by the trade union;
 - ii) the notice of the commencement of the picket including the place, time and the extent of the picket;
 - iii) the nature of the conduct in the picket (e.g. commitment not to engage in violence);
 - iv) the number of picketers and their location;
 - v) the modes of communication between employees' representatives and employers and any other relevant parties;
 - vi) access to the employers premises for purposes other than picketing e.g. access to toilets, the use of telephones, etc; and
 - vii) this Code of Good Practice.
- b) The matters listed in subparagraph a) apply to the determination of picketing rules by the conciliator.
- c) The following factors apply in the determination of the rules regulating picketing at or near the employer's premises or with the permission of the employer, on its premises:
 - i) the nature of the workplace eg. a shop, a factory, a mine etc;

- ii) the particular situation of the workplace eg. distance from place to which public has access, living accommodation situated on employer premises, etc;
- iii) the number of employees taking part in the picket inside the employer's premises;
- iv) the areas designated for the picket;
- v) time and duration of the picket;
- vi) the proposed movement of persons participating in the picket;
- vii) the proposals by the trade union to exercise control over the picket; and
- viii) the conduct of the picketers.

4. Conduct in the picket

- a) The registered trade union must appoint an official to oversee the picket and notify the employers' representative. The official must be an office bearer or a member of the trade union. That person should have, at all times: –
 - i) a copy of sections 74, 75 & 76 of the Act;
 - ii) a copy of this Code, any collective agreement concluded and entered into by the registered trade union and that employer;
 - iii) a set of rules regulating pickets; and
 - iv) a copy of the resolution of the picket by the registered trade union. These documents are important for the purposes of persuading the persons participating in the picket to comply with the law. The documents may also be important to establish the lawfulness and the protected nature of the picket to the employer, the public and in particular to the Police.
- b) The employer must, on receipt of the notification, provide the trade union official with the name, address and telephone number of the person appointed by the employer to represent it in any dealings arising from the picket.
- c) The registered trade union should appoint picket representatives to monitor the picket, they should have the telephone numbers of the trade union official, the trade union office and any persons appointed to oversee the picket. The representatives should be readily identifiable as such. The trade union should inform its members on the law, any agreed picketing rules or where no agreed rules exist any picketing rules that have been stipulated by the conciliator, this Code and the steps to be taken to ensure that the picket is conducted peacefully.
- d) Although the picket may be held in any place to which the public has access, the picket may not interfere with the constitutional rights of other persons.
- e) The picketers must conduct themselves in a peaceful, unarmed and lawful manner. Subject to any agreement/rules in existence they may-
 - i) carry placards;

- ii) chant slogans; and
 - iii) sing and dance.
- f) Picketers may not -
- i) physically prevent members of the public, including customers, other employees and service providers, from gaining access to or leaving the employers premises; or
 - ii) commit any action which may be unlawful, including but not limited to any action which is, or may be perceived to be violent.

5. Role of the Police

- a) As a general rule, the Police should not be seen in an area where a picket is held. Police should only come in where there is a breach of the peace, law and order particularly where there is violence.
- b) It is not the function of the Police to take any view of the merits in particular the dispute giving rise to a strike or a lock-out. They have a general duty to uphold the law and order and may take reasonable measures to keep the peace whether on the picket line or elsewhere.
- c) The Police have no responsibility for enforcing the Labour Act save in terms of section 79(2) or 117(2)(b). An employer cannot require the Police to help in identifying picketers against whom it wishes to seek an order from the Labour Court. Nor is it the job of the Police to enforce the terms of an order of the Labour Court. Enforcement of an order on the application of an employer is a matter for the Labour Courts and its officers, although the Police may assist officers of the Court when there is a breach of the peace.
- d) The Police have the responsibility to enforce the criminal law. They may arrest picketers for participation in violent conduct or attending a picket armed with prohibited dangerous weapons. They may take steps to protect the public if they are of the view that the picket is not peaceful and is likely to lead to violence.

6. Role of private security personnel

- a) Private security personnel are employed to protect the property of the employer and to ensure the safety of people on the employer's premises.
- b) The private security personnel have no responsibility for enforcing the Labour Act or any order of the Labour Court. Enforcement of an order on the application of an employer is a matter for the Labour Courts and its officers.

7. General rights, obligations and immunity

- a) A person who takes part in a picket protected in terms of the Act does not commit a delict or a breach of contract. This means that the employer may not sue a person or a trade union for damages caused by a picket.
- b) The employer may not take disciplinary action against an employee for participating in a lawful picket. Where the employee's conduct during a picket constitutes misconduct the employer may take disciplinary action in accordance with the provisions of the Act and employers' Disciplinary Code.

8. Information and education

- a) The Ministry responsible for Labour should ensure that copies of this Code are accessible and available to those who may need it.
 - b) Employers and employers' organisations should include the issue of industrial action (including picketing) in their orientation, education and training programmes of employees.
 - c) Trade unions should include the issue of industrial action (and picketing) in their education and training programmes of shop stewards and employees.
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