SUBMISSION TO THE DEPARTMENT OF LABOUR'S ESSENTIAL SERVICES COMMITTEE (ESC) ON WHETHER EDUCATION SHOULD BE DECLARED AN ESSENTIAL SERVICE

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Teaching is Essential, but it is not an Essential Service!

Position paper:

An analysis of the law relating to education as an 'essential service'

Introduction

There is a recurring debate on whether teaching should be declared an essential service in South Africa. In a Notice published by the Department of Labour's Essential Services Committee (ESC) on 15 June 2018, and following a recent, protracted strike by bus drivers in the public transport sector, government is once again exploring the possibility of amending its list of essential services, under the Labour Relations Act.[1]

The Notice states that, "... the ESC is in the process of conducting an investigation as to whether the following services are essential:

1. Public Transport Services
2. Services rendered by educators and support staff in basic education including Early Childhood Development."[2]

The release of this Notice follows a five-year hiatus by the government on this issue. At its national conference held in Mangaung during December 2013, the ANC formally noted that there is "general agreement that education has to be protected from disruptions". More specifically, it noted that: "Disruption of schooling through industrial action and service delivery protests impact negatively on the stability of schools and the quality of education."

Prior to this, in February 2013, erstwhile ANC Secretary-General, Gwede Mantashe reported, after an ANC lekgotla, that education would be declared an "essential service". Several weeks later, in his State of the Nation Address on 15 February 2013, former President, Jacob Zuma said:

> "By saying education is an essential service we are not taking away the Constitutional rights of teachers as workers, such as the right to strike."

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[1] 'Teachers and public transport could soon become "essential services"' 18 June 2018. Business Tech. Available at: https://businesstech.co.za/news/business/252141/teachers-and-public-transport-could-soon-become-essential-services/2

[2] Government Gazette, 15 June 2018. Department of Labour, Notice 338 of 2018. Notice published by the Essential Services Committee (ESC) in terms of Section 71 read with Section 70(2)(a) of the Labour Relations Act, 1995 (Act No. 66 of 1995 as amended). Available at: https://www.gov.za/sites/default/files/41704_gen338.pdf

However, speaking to journalists on 26 February 2013, following a post-State of the Nation debate at Parliament, Minister of Basic Education Angie Motshekga did not rule out the possibility that government may officially declare education an essential service in future.

> "We may need to look at making education an essential service [in future]. For now, we must cease hostilities and make it a priority.
>
> So I don't know what will happen in the future, for now we are using the word 'essential' to show it is critical and must be worked on accordingly."

It is Equal Education's (EE) position that the education sector should not be declared an essential service. The focus of this document is primarily legal and fairly narrow, but it makes clear that education cannot legally be declared an essential service. It must be noted that the subject of 'minimum services' presented in the case studies contained in this submission have been included as an illustration of alternative solutions, and is not necessarily the views of EE.

Context

EE has always recognised the critical role teachers play in the South African education system. Teachers are often expected to facilitate learning under extremely difficult circumstances, and to support learners in ways that extend far beyond curriculum delivery.

We have consistently put pressure on the State to ensure that conditions of employment for teachers are just, and conducive to teaching and learning. Teachers and principals must be fairly remunerated; they must work in safe and dignified environments; and they must have access to resources such as learner-teacher support materials, including textbooks. Where the State is failing to provide these necessities, measures must be available to teachers to hold the State accountable.

At the same time teachers carry a tremendous responsibility towards learners. In 2013, EE emphasised the importance of addressing teacher absenteeism and maintaining teacher professionalism. The same still holds true.

While the Constitution protects both a teacher's right to strike and a child's right to a basic education, these two rights are sometimes in conflict. We need to interrogate and address the causes that leave teachers dissatisfied with their income, their work environment, and often with the Department of Basic Education to the detriment of children.

It cannot be government's default position that when workers - such as teachers and bus drivers - embark on strikes and engage in collective bargaining processes to ensure fair remuneration and labour conditions, the 'solution' is then to declare these sectors (education and transport) essential services. In any context, such a response would be seen as an attempt by an employer to avoid engaging with their employees about pressing workplace matters.

Discussion and hard work, both within and outside the sector, is needed in order to improve academic outcomes in South Africa. We must strive for an education system that ensures that all learners in public schools receive quality education, and that teachers as the facilitators of this process, are treated with fairness, dignity and respect. Declaring basic education an "essential service" is not a viable way of achieving what we envision.

What is the significance of declaring a sector an "essential service"?

An essential service refers, in law, to an economic activity in regard to which it is permissible for a government to prohibit strikes totally. Section 65 of the Labour Relations Act (LRA) states that: "No person may take part in a strike or lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if - ... that person is engaged in an essential service..." Section 213 of the LRA defines an essential service as "a service the interruption of which endanger the life, personal safety or health of the whole or any part of the population." It is therefore very important to know which services may be declared essential, and which may not. The remainder of this submission discusses essential services with reference to South African and international law.

The South African Constitution

Section 18 of South Africa's Constitution proclaims that everyone has the right to freedom of association. Section 23(2)(c) of the Constitution states that every worker has the right to strike.

Section 36(a) of the Constitution says that any of the rights in the Bill of Rights – which include the rights provided for in section 18 and 23 – can only be limited in a way that is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".

Such a limitation must take into account:
"(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose."

As discussed in fuller detail below, the right to strike bears significant prominence and enjoys protection in South Africa due to our social and political history. The Constitutional Court has repeatedly emphasised the right to strike as a component of a successful bargaining system. The right to strike is also described as leveraging the power imbalance against employers who exercise power against workers through various means such as dismissal, the employment of alternative or replacement labour, and lock-outs.

It is clear that without the right to strike, employees would be deprived of a very powerful weapon. They would be unable to influence the employer to listen and address their workplace grievances by withholding their labour.

In *South African Police Service (SAPS) v Police and Prisons Civil Rights Union and Another* [2011] ZACC 21, the Constitutional Court said that when deciding whether a profession is an essential service a restrictive (narrow) interpretation of essential service must, if possible, be followed. Although this case dealt with members of the SAPS, the Court found that even where a particular workforce has been labelled an "essential service", it does not mean that all members, irrespective of their position and appointment, are prohibited from striking. The Court went on to explain that if legislation defines "essential service" too widely and includes a host of professions, this would impermissibly limit the right to strike. This judgment suggests that even designated professions such as the SAPS, which perform an undoubtedly critical service, must still be afforded sufficient means of exercising their section 23 rights.

The right to strike in South Africa and essential services

The Constitutional Court in *NUMSA v Bader Bop (Pty) Ltd and Others* [1996] ZACC 26 stated that the right to strike is an important part of a successful collective bargaining system. In interpreting the rights in section 23, the importance of those rights in promoting a fair working environment must be understood.

The Labour Relations Act (LRA) was enacted to give effect to the constitutional labour rights contained inter alia in section 23 of the Constitution. Section 1 of the Act provides that: "the purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution; (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation."

These principles are relevant in considering the validity of substantive and procedural limitations on the right to strike. Procedural limitations are the notification and conciliation requirements that must occur before a strike is declared. These requirements should survive constitutional scrutiny as they are in line with the notion of strike action as a weapon of last resort. The notice period is short enough so as not to undermine the effectiveness of the action, while allowing the employer time to reconsider its position or to make provision for the action. A substantive limitation relates to the prohibition of strikes in certain instances.[3] Declaring a service essential is a substantive limitation.

What is essential and what is not?

Section 213 of the LRA explicitly defines an essential service. The definition mirrors the international understanding of essential services. The definition contained in the LRA is that an essential service is:

[3] Du Toit et al, Labour Relations Law: A comprehensive Guide (2015), Lexis Nexis 341.

"(a) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population;
(b) the parliamentary service; and
(c) the South African Police Service."

What constitutes an essential service was considered in *SAPS v POPCRU and Another*. In this matter, SAPS and two trade unions representing its members engaged in protracted and ultimately unsuccessful wage negotiations. A strike resulted and some of the participants were members of SAPS employed in terms of the SAPS Act, while others were employed in terms of the Public Service Act. The SAPS lodged an application for a strike interdict. SAPS took a wide interpretation of the term essential services and argued that both officers engaged in terms of the SAPS Act and those employed in terms of the Public Service Act were prohibited from striking as they discharge essential services. The Constitutional Court followed a narrow interpretation and held that not all employees of the SAPS are engaged in essential services, only 'personnel' employed in the SAPS who have been designated as members in terms of section 29 of the SAPS Act are covered by the essential services strike prohibition. The Court held that in order to ascertain the meaning of essential service, regard must be had to the purpose of the legislation and the context in which the phrase appears. An important purpose of the LRA is to give effect the right to strike entrenched in section 23(2)(c) of the Constitution. The interpretative process must give effect to this purpose within the other purposes of the LRA. The question must thus not be considered in isolation, but in the context of the other provisions in the LRA and the SAPS Act.

Based on the above, the South African Constitution would not likely allow for teacher strikes to be outlawed. The considerations – with reference to section 36 of the Constitution – are as follows:

(a) the nature of the right: A strike is the most powerful weapon of organised workers and thus cannot be lightly restricted particularly in light of the history of collective labour in South Africa as well as the power imbalance inherent in an employee- employer relationship.

(b) the importance of the purpose of the limitation: The purpose of the limitation is to prevent teachers from striking. This limitation goes against the internationally accepted definition of an "essential service" which is also reiterated in the LRA;

(c) the nature and extent of the limitation: If education is declared an "essential service" there could be a total limitation of the right to strike. This would be a drastic and invasive limitation of the right to strike.

(d) the relation between the limitation and its purpose: The limitation's purpose is ostensibly to safeguard learners' right to a basic education. This is an important purpose. Section 29 of the Constitution guarantees the right to a basic education and section 28 provides that "A child's best interests are of paramount importance in every matter concerning the child". Notwithstanding the importance of the purpose, the "relation between the limitation and its purpose" involves an inquiry into the empirical

relationship, or lack thereof, between curtailing the right to strike and improved education outcomes. It is not clear that declaring education an essential service effectively addresses prevailing problems in education and promotes the right to basic education.

(e) less restrictive means to achieve the purpose: Less invasive and more constitutional measures are available to achieve the same outcome. Measures such as social dialogue, negotiations, improved conditions of service for teachers, and various other forms of imposing accountability on teachers all constitute alternative means to achieve the purpose of ensuring that children's right to education is met.

Further considerations against declaring education as an essential service

a) Declaring education an essential service does not solve the fundamental and prevailing institutional and structural problems in education. It does not amongst others address the issues of poor infrastructure, lack of resources and over-crowding in schools.

b) Declaring education an essential service undermines the legitimacy of the grievances that educators attempt to raise through the right to strike such as poor working conditions, lack of teaching resources and low pay.

c) The ostensible aim of declaring education an essential service is to address teacher absenteeism. The proposed method of declaring teaching an essential service is drastic in nature and seemingly does not consider less restrictive alternatives which could successfully counter educator absenteeism without infringing on the constitutional right of teachers to strike.

d) In the event that educators do strike, despite education being declared an essential service – the state, as the employer, is permitted to dismiss the educators. The mass dismissal of educators will have negative consequences on the education of children and their best interests. An example of this is where 3 000 public servants were dismissed in Botswana after they continued a strike despite being designated an essential service.

e) Declaring education an essential service will not neutralise the threat of protest action by educators. Despite being declared essential services in May 2007, members of the public sector including police officers, nurses and doctors participated in strike action.[4] Again, in 2009, doctors participated in a strike which resulted in 26 doctors being dismissed.[5] In both instances, the employers obtained interdicts and issued dismissal

[4] " Public Sector Strike Inevitable." 7 May 2007, Independent Online. Available at: https://www.iol.co.za/news/south-africa/public-sector-strike-inevitable-351878

[5] "Manto to Blame for Strike." 27 April 2007, Independent Online. Available at: https://www.iol.co.za/news/south-africa/manto-to-blame-for-strike-441500

threats to no avail. The examples cited above suggest that the effectiveness of these remedies is questionable.

f) Declaring education an essential service overlooks the fact that educators, much like the workers discussed above, strike as a measure of last resort and are often driven by desperation. They will in all likelihood risk the exposure to sanctions in the event that it may yield improvements.

g) Declaring education an essential service overlooks the fact that numerous reasons exist for the high levels of teacher absenteeism including ill health, official school duties, training and workshops and government duties. These issues will remain unaddressed despite the designation as an essential service.

International law obligations

South Africa is a party to several international and regional law agreements that deal with labour issues. These include the African Charter on Human and Peoples' Rights (ACHPR), the African Youth Charter, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights, which are all legally binding human rights agreements. Although drafted in general terms, these instruments recognise various rights in relation to labour. Conversely the International Labour Organisation (ILO), is a specialised agency of the United Nations that provides particularly detailed and precise guidelines which promote labour rights.

The ILO Convention and the international law instruments discussed above are binding in South Africa. This is because the South African Constitution states that "when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."[6]

South Africa is again a member of the ILO, after having been excluded from membership during the apartheid-era.

Many decisions of the Freedom of Association Committee of the Governing Body of the ILO ("the Committee") repeatedly confirm that education cannot be considered an essential service whatever the circumstances. The Committee's decisions, as discussed in detail below, make it clear that declaring education an essential service – and thus outlawing strikes by teachers – is neither "reasonable" nor "justifiable"; criteria which must be met to limit any right in the South African Constitution, of which the right to strike is one.[7]

These decisions are particularly pertinent to South Africa given that South Africa ratified both the Convention 98 on the Right to Organise and Collective Bargaining, and Convention 87 on Freedom of

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[6] Section 233 of the Constitution.
[7] *Case No 2803 (Canada)*

Association and Protection of the Right to Organise on 19 February 1996. These Conventions confirm, among others, the rights of workers to organise into trade unions, with the right to strike as an "intrinsic corollary" (ILO, 2006: 523). Furthermore, the decisions of the Committee are applicable even to countries that have not ratified. These are discussed in some detail below.

The right to strike and essential services under international law

In 1966, at the Special Intergovernmental Conference on the Status of Teachers, held in Paris, the United Nations Educational, Scientific and Cultural Organisation (UNESCO) adopted a resolution, which included the following statement:

> "Appropriate machinery should be set up to deal with the settlement of disputes between the teachers and their employers arising out of terms and conditions of employment. If the means and procedures established for these purposes should be exhausted or if there should be a breakdown in negotiations between the parties, teachers' organizations should have the right to take such other steps as are normally open to other organizations in the defence of their legitimate interests."[8]

Disputes over whether education can be declared an essential service have arisen in many countries and have been adjudicated by the Committee referred to above. A Digest published in 2006 – the fifth edition of the publication concerned – sets out the principles used by the Committee in arriving at its decisions.[9]

In the publication entitled *ILO Principles Concerning the Right to Strike*, Gernigon, Odero and Guido[10] state that the Committee has recognised the right to strike to be one of the principal means by which workers and their associations may legitimately promote and defend their economic and social interests and not simply a social act.

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[8] UNESCO, Understanding and using the ILO/UNESCO Recommendation concerning the status of teachers (1966 Recommendation) and the UNESCO Recommendation concerning the Status of Higher Education Teaching Personnel (1997), page 34.

[9] The Digest provides references to the cases concerned. The ILO web-site provides links to reports of the Committee on each of the cases. The reports detail the arguments made by the applicant (generally the union) and the respondent (generally the government), and the committee's reflections, decisions and recommendations. The Committee was established in 1951 by the Governing Body of the ILO. It is a tripartite body composed of nine members and nine deputies. These 18 people are drawn equally from the government, workers' and employers' groups of the Governing Body, with an independent chairperson. The committee cannot, therefore, be considered as biased in favour of, or against, any of the social partners. Governments and organisations or workers or employers can submit complaints to the Committee alleging government violations of trade union rights regardless of whether they are members of the ILO and whether they have ratified the Conventions on freedom of association and collective bargaining. The Committee meets three times a year and examines complaints submitted and makes recommendations to the Governing Body.

[10] Gernigon et al, ILO Principles concerning the collective bargaining, International Labour Review, Vol 139 (2000), No. 1

The following principles of the right to strike have been distilled from the decisions of the Committee:

a) it is a right which workers and their organisations (trade unions, federations and confederations) are entitled to enjoy;

b) the number of categories of workers who may be deprived of this right, as well as the legal restrictions on its exercise, which should not be excessive; and

c) the right is inextricably linked to the objective of promoting and defending the economic and social interests of workers

The concept of essential service in international law

In 1983, the Committee of Experts defined essential services as those "the interruption of which would endanger the life, personal safety or health of the whole or part of the population".[11] This definition was adopted by the Committee shortly afterwards.

Although what constitutes essential services "depends to a large extent on the particular circumstances prevailing in a country",[12] the Committee has given its opinion on the essential or non-essential nature of a series of specific services. For example, hospital sector; electricity services; water supply services; public or private prison services and air traffic control agents are considered to be essential services where the right to strike may be subject to major restrictions or even prohibitions (Digest at para 585). Conversely the education sector, transport generally, agriculture, and even airline pilots, despite the important role that these services fulfil are not considered essential services (Digest at para 587).

The following was stated by the Committee about teachers in particular:

a) Arguments that civil servants do not traditionally enjoy the right to strike because the State as their employer has a greater obligation of protection towards them have not persuaded the Committee to change its position on the right to strike of teachers;

b) The possible long-term consequences of strikes in the teaching sector do not justify their prohibition; and

c) In the Committee's opinion, teachers do not carry out tasks specific to officials in the State administration; this type of activity is also carried out in the private sector. In these circumstances, it is important that teachers with civil servant status should enjoy the guarantees provided for under Convention No. 98 (Digest at paras 235 - 237).

[11] Report of the Committee of Experts on the Application of Conventions and Recommendations. Report III (Part 4B), International Labour Conference, 69th Session, 1983, Geneva.
[12] Gravel et al, The Committee on Freedom of Association: Its impact over 50 years, page 44.

The section of the Digest (para 541) that discusses the right to strike states that the Committee has repeatedly emphasised that "the prohibition of strikes could only be acceptable in the case of public servants exercising authority in the name of the State [such as justice or police] or of workers in essential services in the strict sense of the term, therefore, **services whose interruption could endanger the life, personal safety or health of the whole or part of the population"** (541, 581).

It is this definition that the Committee repeatedly refers to as essential services "in the strict sense of the term".[13]

The Digest acknowledges that what constitutes such a threat may differ across countries and that, for example, a non-essential service may become essential if a strike lasts a long time (582). However, the meaning of essential services might "lose its meaning" if it was applied to services that did not endanger life, personal safety or health of the population (583). Further, a later paragraph refers explicitly to education in stating that the "possible long-term consequences of strikes in the teaching sector do not justify their prohibition" (590). In contrast, for example, while refuse collection would not normally be considered an essential service, if such a strike is prolonged, it might become essential as it would endanger life, personal safety and health (591).

Paragraph 585 of the Digest contains a useful list of the types of services that could be considered essential. This list does not include education but does include "the provision of food to pupils of school age and the cleaning of schools" (585). The inclusion of the latter illustrates the need for there to be a clear danger to health.

Paragraph 587 lists services that have been considered in cases coming before the Committee and that do not constitute "essential services" in the strict sense of the term. In this list, the education sector has references to more cases than any other sector. This plethora of cases leaves no room for doubt that education cannot be considered an essential service. While paragraph 588 cites a case in which the Committee found that the right to strike of principals and deputy principals may be restricted, this exception highlights, that for ordinary teachers, the right to strike cannot be prohibited.

Minimum services

The Digest discusses cases in which, while the operation does not constitute an essential service, a minimum operational service might be required. In these cases, strikes are not outlawed for all workers, but there is instead a requirement that a limited number of specified types of workers are available to do work deemed necessary. The first such possibility relates to essential services in the strict sense of the term. The second possibility is non-essential services where the extent and duration of the strike "might be such as to result in an acute national crisis endangering the normal living conditions of the population". The third relates to "public services of fundamental importance" (606).

[13] The Digest at para 994.

The Digest emphasises that where minimal operational services are required, this should not entail "calling into question the right to strike of the large majority of workers" (607). Further, worker organisations must participate, together with employers and public authorities, in defining the minimum service. Paragraph 625 explicitly names education as a sector where minimum services could be established "in full consultation with the social partners" where a strike has continued for a long time.

Illustrative cases

The paragraphs above sum up the Committee's findings over the decades. The cases presented below illustrate instances which resulted in the Committee adopting these positions. The cases do not include all those which relate to essential services or minimum services in education. However, the findings in other cases repeat similar arguments as to why education is not and should not be an essential service. It should also be considered that unlike some of the countries referenced below, South Africa has a supreme Constitution which guarantees the right to strike. The decisions of the Committee serve to buttress South African jurisprudence on the issue.

Case No 2803 (Canada) - Complaint date: 16-JUN-10, Report No 360, June 2011

In this case, the Canadian Union of Public Employees (CUPE) complained that the Ontario government had passed a "back-to-work" law to end a legal strike of one of its constituent locally-based unions which represented graduate, research and teaching assistants at York University in Toronto. The legislation imposed compulsory and binding arbitration.

The dispute was over graduate funding, job security for contract workers, health benefits, and child care. After many months of unsuccessful negotiation, the union had held a strike vote in line with the relevant legislation, and a large majority of members voted to strike. The union went on strike on 6 November 2008 and the University responded by cancelling all classes, affecting more than 50 000 students. Some negotiations and mediation followed, but the union and its members remained dissatisfied with the government's offer. In late January 2009 the Premier of Ontario announced that the government would pass legislation to end the strike. An Act passed on 29 January 2009 ordered the end of the 85-day strike. On 7 April 2009 the union and government signed an agreement based on the arbitrator's recommendation.

In their complaint, CUPE argued that although their members were "essential to the operation of the university, they were not an "essential service". Government, in contrast, argued that "an extension or loss of an academic year has significant personal, educational, social and financial implications for students and their families, as well as serious organisational and economic impact on the university and the broader public."[14] The law, government argued, thus served the public interest.

[14] *Case No 2803* at para 336

The Committee, in its decision, notes – and "deeply deplores" – that this was the fourth time in ten years that it had been asked to consider strike-ending legislation in relation to the education sector in Canada. It reiterated that the right to strike "is one of the legitimate and essential means through which workers and their organisations may defend their economic and social interests".[15] Further, while in some exceptional cases this right might be limited, "the education sector does not fall within these exceptions". The Committee acknowledged that "unfortunate consequences may flow from a strike in a non-essential service" but said that these did not justify limiting the right to strike.

Case No 2654 (Canada) - Complaint date: 12-JUN-08, Report No 365, March 2010

An earlier Canadian case was not specific to education employees, but instead related to public servants more generally. The complaint was laid by the National Union of Public and General Employees (NUPGE), Canadian Labour Congress (CLC) and Saskatchewan Federation of Labour (SFL), with the support of Public Services International (PSI). The worker organisations complained about the Public Service Essential Services and the Trade Union Act, as amended, which came into effect in May 2008. They said that these laws effectively prohibited the majority of public employees from striking by defining what constitutes essential services so broadly that virtually all public employees could be so defined. As a result of this legislation, collective bargaining had more or less ceased and most workers had not been covered by collective agreements since 2008.

The organisations also complained about government's failure to consult with them before passing the laws. In its response, government acknowledged that it had not consulted before passing the law but said that it had engaged in "extensive" consultation subsequently, resulting in five proposed amendments to one of the laws.

The Committee noted that the Act's definition of "essential services" seemed to be one where strikes were not completely prohibited but where there had to be minimum services, the terms of which must be negotiated by the parties. However, the Committee noted that some of the services listed in the Public Service Essential Services Act would not qualify as services which can unilaterally be declared as so essential that minimum services must be maintained. It noted further that while this Act provided for negotiation with worker organisations over minimum services, this negotiation did not extend to which services were to be classified as essential, only to the number of workers required for minimum services.

Case No 2657 (Colombia) - Complaint date: 22-MAY-08. Report No 355, November 2009

The complaint of the Colombian Teachers' Federation (FECODE), laid in 2008, was that government had made deductions from salaries for days not worked during a strike. The strike lasted from 15 May to 21 June, and the main purpose was to express workers' rejection of Government's neoliberal policies and related measures, including privatisation of public education and labour flexibility. The federation was

[15] *Case No 2803* at para 340.

also aggrieved that government had not involved trade unions in the national policy decision-making process.

The government did not declare the strike illegal but did instruct local authorities responsible for education not to pay workers for the days that they did not work and to institute disciplinary proceedings against them. The federation argued that this forced the teachers to return to work. Once the strike had ended, FECODE proposed that the school calendar be adjusted so that the curriculum could be completed. This was done, but the authorities nevertheless deducted pay for the days originally not work.

In its response to the complaint, the Government of Colombia argued that the strike constituted a violation of "children's fundamental right to education" which was entrenched in article 44 of the Political Constitution. It noted that the rights of children "take precedence over the rights of others" and that this principle was in line with international treaties. The Government argued further that the demands of the strike were political in nature, and thus not covered by the right to strike. Further, while workers have the right to strike, it is also universally accepted that employers are not obliged to pay workers for days not worked.

The Committee's comments noted, as in other cases, that education was not an essential service in the strict sense of the term, and thus not a service in which the right to strike may be prohibited. The Committee confirmed that deductions for days of strike do not contravene the right to freedom of association. However, it noted that in this case the workers had made up the days lost.

Case No 2784 (Argentina) - Complaint date: 18-MAY-10. Report No 360, June 2011

In this case from Argentina, the Confederation of Education Workers of Argentina (CTERA) and Educational Workers' Association of Neuquén (ATEN) complained about Decree No. 735/10 of May 2010 in which the executive authority of Neuquén province designated education as an essential public service and established a system of minimum services. The minimum staffing levels aimed to ensure that all educational establishments could open, that all learners could remain at school throughout the school day, and that at least 50 per cent of classes at all levels could take place on any given school day. For special schools, boarding schools, schools with residential facilities and schools that provide meals, the minimum staffing levels were to ensure that 100 percent of all classes and activities could take place on any given school day.

The worker organisations noted that section 24 of Act No. 25877 defined essential services as "being health and hospital services, the production and distribution of drinking water, electricity and gas and air traffic control". Other activities could only, "on an exceptional basis" be designated as essential by an independent commission. The organisations argued that, instead of an essential service, education was a "social right that should be guaranteed by the State".

The Committee noted that Act No 2587 provided that an independent commission could rule that any activity was essential if the duration and geographical extent of the strike endangered life or safety, or when the strike affected a "a public service of vital importance". The information provided by the provincial authority did not prove that these conditions were met. However, the Committee's response did acknowledge that earlier decisions confirmed that the provision of food to learners of school age and the cleaning of schools could be considered essential services in the strict sense of the term.

The Committee noted further that this was not the first time it had been asked to consider a case relating to allegations that government was restricting the right to strike of education workers in Neuquén province. In a previous case it had recommended that minimum services be established in the education sector, in full consultation with the social partners, where a strike was prolonged. However, in its response the government had not given any indication that it had consulted with the social partners. The Committee therefore requested "with insistence" that in future where long strikes occurred in education, that organisations of workers should participate in defining the minimum service. It also asked the government to confirm that the offending decree was no longer in force.

Case No 2696 (Bulgaria) - Complaint date: 15-FEB-09: Report No 356, March 2010

In this case Education International (EI), the Trade Union of Bulgarian Teachers (SEB) and Trade Union of Teachers Podkrepa complained about litigation following a 42-day strike. The strike took place from September to October 2007 and involved more than 110 000 teachers and other educational workers, equivalent to 80 percent of public education workers. The workers went on strike after their many other attempts to win higher salaries had failed.

The organisations noted that in 2004 teachers had declined to accept the status of public servants in terms of the law on public servants. They had done so, despite the benefits that the status would have brought, because that status would have denied them the right to strike. The strike was fully in line with Bulgarian legislation. However, more than four months after the strike ended, an association of six parents lodged a complaint against two teachers' unions with the Commission for Protection against Discrimination in Bulgaria saying that the strike had discriminated against learners in public education when compared with those in private education. The Supreme Administrative Court then, on appeal, ruled that the rights of children in public schools had been violated. The Court ruled further that, given the importance of public education, there should be a minimum service in schools, kindergartens and nurseries. The worker organisations argued that the "the notion of essential services and minimum service must not have the purpose or effect of weakening the most powerful means of pressure available to workers." In its response, the government gave the assurance that any amendments to the Settlement of Collective Labour Disputes Act to provide for a minimum service in public education would be discussed with the social partners.

In discussing this case, the Committee expressed its concern that the Commission had interfered in a "long-established right" of teachers on the basis of the implied discrimination between learners served by the private and public sectors. The Committee noted that the discrimination about which the

Commission was concerned did not arise because public sector teachers had the right to strike while private sector teachers did not, as private teachers also had this right. It noted further that a decision by an independent body such as the Commission could not override government's international obligations.

The Committee stated that education is not an essential service in the strict sense of the term.

Case No 2569 (Korea, Republic of) - Complaint date: 20-MAY-07. Report No 351, November 2008

This is one of several Korean complaints and was laid by Education International (EI) and Korean Teachers and Education Workers' Union (KTU). Each of the complaints included a number of different sub-complaints, including some relating to detention and other forms of harsh treatment of individuals. This complaint, like others, included denial of the right to strike. The complaint is an example of one laid in respect of a country which had not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

The organisations complained that while the Teacher Union Act guaranteed the right to organise, it forbade strikes. The government responded that many teachers had the same status as public officials (thus "exercising the authority of the state"), and teachers in private schools were subject to the same laws and regulations as those in public schools. Thus "teachers have the duty to perform their job in good faith and are prohibited from leaving their workplace without permission and engaging in political movement."[16] Government argued that restriction on the right to collective action, including strikes, was justified "in light of the nature of teachers' work and expectations about their role in society" and that interruptions in education "could have an enormous impact on the lives of the general public as well as the education of the students".[17]

In its discussion, the Committee noted that it had already twice previously dealt with restrictions on the freedom of action of teachers in the Republic of Korea. In previous decisions it had stated that education was not an essential service, neither did it meet the definition of the exercising the powers of public authority". It was only school principals and deputy principals who could be considered to exercise such authority and whose right to strike could therefore be limited. The Committee therefore requested the government to amend the legislation to provide teachers in the public and private sectors with the right to strike.

Case No 2305 (Canada) - Complaint date: 09-OCT-03. Report No 355, November 2004

In the case Education International (EI), acting on behalf of the Canadian Teachers' Federation (CTF), the Ontario Teachers' Federation (OTF) and the Ontario English Catholic Teachers' Association (OECTA),

[16] *Case No 2569 at para 615.*
[17] *Case No 2569 at para 615.*

complained that the Government of Ontario has adopted back-to-work legislation in the form of the Education and Provincial Schools Negotiations Amendment Act of 2003 (Bill 28). This was the fifth time that government had passed such legislation in the space of five years, and worker organisations had submitted similar complaints in respect of previous legislation.

The worker organisations noted that from 1975 until 1997 teachers had the right to strike under the School Boards and Teachers Collective Negotiations Act. There were only two qualifications. The first was that principals and vice-principals had to remain on duty. The second was that the Education Relations Commission could advise the government when it felt that continuation of a strike (or lockout) could mean that affected learners would not complete their courses. The Commission had given such advice only in strikes that lasted for 27 school days or longer.

From 1997 the government introduced legislation covering many different aspects of education. These include four pieces of legislation containing back-to-work provisions. The 2003 Act, as the fifth such piece of legislation, provided for mandatory arbitration and redefined the term "strike" in a way that further restricted the right to strike of teachers. The new definition included any action that "may reasonably be expected" to "curtail, restrict, limit or interfere with school programmes… [or] the normal activities of a [school] board or its employees." The amendments were passed in reaction to a specific dispute, but applied to all 135 000 teachers in Ontario, including large numbers not involved in the specific dispute.

In its response, the Committee highlighted the similarity between this and previous complaints in terms of the parties involved, the allegations, the violations of the right to strike, and the imposition of arbitration. It therefore did not repeat all its previous arguments. However, it did again note that while "unfortunate consequences" might result from a strike in a non-essential service, these did not justify restricting the right to strike unless there was danger to life, personal safety or health. It also referred to an earlier case in which it had explicitly said that the possible long-term consequences of a teachers' strike did not justify prohibiting such strikes. The Committee therefore strongly requested that the government establish a voluntary and effective dispute prevention and resolution mechanism and asked to be kept informed of what government had done to meet this request.

Case No.3164 (Thailand) - Complaint date: 07-OCT-15 - Follow-up

The complaint brought by IndustriALL Union raised complaints of several legislative shortcomings which included the denial of the right to strike to workers. Most notable in this instance was that by virtue of section 23 of the Private University Act of 2013, private schools and university teachers were effectively excluded from the scope of the Labour Relations Act and were prevented from organizing, forming trade unions and bargaining collectively.

The Government response was that teachers can exercise their right to form an association but should do so as prescribed by the Constitution and the Interim Constitution. The Committee reiterated that teachers should have the right to establish and join organizations of their own choosing, without

previous authorization, for the promotion and defence of their occupational interests [Digest at para 235]. The Committee considers that these rights must be effectively ensured for teachers in both the public and the private sector and the Government was requested to take the necessary measures to ensure that, in line with the mentioned principle, teachers can fully enjoy, in law and in practice, the right to organize, form trade unions and bargain collectively.

Recent declarations of education as an "essential service" in foreign jurisdictions

In a few foreign jurisdictions governments have declared education an essential service, prohibited teachers from striking, or at least attempted to do one or both of these things.

The ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) noted that certain Canadian provinces, including British Columbia and Manitoba, have seen "recurrent problems in the exercise of the right to strike by workers in the education sector". The Labour Relations Board of British Columbia ordered on 28 February 2012 that the British Columbia Public School Employers' Association (BCPSA) and the British Columbia Teachers Federation (BCTF) work with the Board to "designate essential service levels". The CEACR noted that in Manitoba section 110(1) of the Public School Act prohibits teachers from engaging in strike action. It also noted reports that the Government of Ontaria announced that it would introduce a Bill against education workers and school boards that would block any possible strike for up to two years and end all negotiations, particularly on teachers' wages. Similar legislation in Quebec and Saskatchewan is the subject of litigation. The CEACR expressed its concern about these developments.

These instances highlight that some countries are still attempting to declare education an essential service, and that if the government of South Africa were to pursue this course, it would not be alone. However, as the legislation and cases reviewed above show, this would unlikely be a lawful course of action.

Conclusion

The ILO has a clear definition of essential services, being services in which it is permissible for strikes to be totally prohibited. In the strict sense of the term, "essential services" refer only to services that endanger the life, personal safety or health of the whole or part of the population. It is only in respect of these services, and in respect of workers such as police and the judiciary who "exercise authority in the name of the state"[18] that strikes may be prohibited.

Former President Zuma's statement that education is an essential service, but that this does not take away the right of teachers to strike, makes sense only if he was using the term "essential services" in an informal manner. On the other hand, the Committee has repeatedly said that education is not an essential service, and that ordinary public sector teachers do not exercise authority in the name of the

[18] The Digest at para 962.

state. It has repeated this statement in countries from different regions of the world, and in respect of a wide range of different circumstances.

Equal Education believes that education provision more broadly should not be declared an essential service both for the legal and other considerations as discussed above. It is unlikely that declaring education an essential service will pass constitutional muster. This is based on the import of the right and the definition of an essential service. As a matter of law, therefore, education cannot be an essential service in South African law, or under the international treaties to which South Africa is a party.

References

African National Congress. 2012. Resolutions of the ANC's 53rd National Conference, Mangaung, December 16-20 2012.

Deacon, H.J (2014). *The Balancing Act between the Constitutional Right to Strike and the Constitutional Right to Education.* South African Journal of Education; 34(2)

Du Toit et al, Labour Relations Law: A comprehensive Guide (2015) Lexis Nexis 341.

'Education an Essential Service – ANC' 4 February 2013. Downloaded 24 February from: http://www.news24.com/SouthAfrica/News/Education-an-essential-service-ANC-20130204. (News24)

'Education is Essential but not an Essential Service' 26 February 2013. Downloaded 28 February from http://mg.co.za/article/2013-02-26-education-is-essential-but-not-an-essential-service. (Mail and Guardian)

Equal Education. February 2010. Statement on Tokiso Review and SADTU. Downloaded 9 February 2013 from: http://www.equaleducation.org.za/ee-tr-sadtu.

'Follow-up to the conclusions of the Committee on the Application of Standards (International Labour Conference, 100th Session, June 2011)'

Freedom of Association and Protection of the Right to Organise Convention, 1948
Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Nigeria (Ratification: 1960)

Government Gazette, 15 June 2018. Department of Labour, Notice 338 of 2018. Notice published by the Essential Services Committee (ESC) in terms of Section 71 read with Section 70(2)(a) of the Labour Relations Act, 1995 (Act No. 66 of 1995 as amended). Available at: https://www.gov.za/sites/default/files/41704_gen338.pdf

Government of South Africa. February 2013. State of the Nation Address 2013.

Gravel et al, The Committee on Freedom of Association: Its impact over 50 years

http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3085430

http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3084126

ILO Principles Concerning the Right to Strike, Gernigon, Odero and Guido, International Labour Review, Vol 139 (2000), No. 1

International Labour Organisation. 2006. Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Fifth (revised) edition. International Labour Office: Geneva.

John Mawbey, South African Municipal Workers Union, personal communication, 9 February 2012.

NORMLEX: Freedom of Association Cases
http://www.ilo.org/dyn/normlex/en/f?p=1000:20030:0::NO:::

NUMSA v Bader Bop (Pty) Ltd and Others [1996] ZACC 26

Observation (CEACR) - adopted 2012, published 102nd ILC session (2013) (No. 87) - Canada (Ratification: 1972)

Observation (CEACR) - adopted 2012, published 102nd ILC session (2013)

Report of the Committee of Experts on the Application of Conventions and Recommendations. Report III (Part 4B), International Labour Conference, 69th Session, 1983, Geneva.

South African Police Service (SAPS) v Police and Prisons Civil Rights Union and Another [2011] ZACC 21.

Teachers and public transport could soon become "essential services"' 18 June 2018. Business Tech. Available at: https://businesstech.co.za/news/business/252141/teachers-and-public-transport-could-soon-become-essential-services/2

United Nations Educational, Scientific and Cultural Organization (UNESCO). 1966. Recommendation concerning the Status of Teachers adopted by the Special Intergovernmental Conference on the Status of Teachers, Paris, 5 October 1966.

UNESCO, Understanding and using the ILO/UNESCO Recommendation concerning the status of teachers (1966 Recommendation) and the UNESCO Recommendation concerning the Status of Higher Education Teaching Personnel (1997), page 34.

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