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 this document Equal Education sets out the legal position. The focus of this document is therefore legal and fairly narrow, but it makes clear that education cannot legally be declared an essential service.

Political declarations

At its national conference held in Mangaung during December 2013 the African National Congress (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."

In early February 2013, the ANC Secretary-General, Gwede Mantashe, reported back 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, President 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."*

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."*

What is the significance of declaring something 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..." It is therefore very important to know which services may be declared essential, and which may not.

International obligations

South Africa is again a member of the International Labour Organisation (ILO), after having been excluded from membership during the apartheid years.

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 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.

These decisions are particularly pertinent to South Africa given that South Africa ratified both Convention 98 on the Right to Organise and Collective Bargaining and Convention 87 on Freedom of 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 Freedom of Association Committee are applicable even to countries that have not ratified.

The South African Constitution

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

Article 36(a) of the Constitution says that any of the rights in the Bill of Rights – which includes the rights provided for in articles 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."*

What is essential and what is not?

Section 213 LRA explicitly defines an essential service. The definition mirrors the international understanding of essential services which is discussed in more detail below. The definition in the LRA is that an essential service is:
"(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."

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

> *"Appropriate joint 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."*

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 decisions and principles used by the Committee in arriving at its decisions.[*]

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, i.e. services whose interruption could endanger the life, personal safety or

[*] 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.

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".

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 which types of services 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 vice-principals may be restricted, this exception proves the rule that for ordinary teachers, the right to strike cannot be prohibited.

Compulsory arbitration

The digest states that in other cases compulsory arbitration to end a strike is only acceptable if both parties involved agree to this (564), or if the strike occurs in the public service or in essential services in the strict sense of the term (565).

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).

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 some of the cases 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 an essential service.

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 "back-to-work" legislation 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 ordered the end of the 85-day strike. On 7 April 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 organizational and economic impact on the University and the broader public." The law, government argued, thus served the public interest.

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 organizations may defend their economic and social interests". 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. At most, it might justify the establishment of minimum services, which should be defined in "full consultation" with workers. The Committee noted further that mediation-arbitration should happen only on a voluntary basis.

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 Saskatchewan Act Respecting Essential Public Services and the Act to Amend the Trade Union Act 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.

In discussing the complaint, 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, which must be negotiated. However, the Committee noted that some of the services listed in the 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 the 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. The Committee confirmed that this unilateral declaration was acceptable in respect of essential services in the strict sense of the term and in respect of public services exercising authority in the name of the state, but was not acceptable for other services and workers.

Case No 2467 (Canada) - Complaint date: 01-FEB-06, Report No 344, March 2007

Another Canadian complaint was brought by twelve different unions, including the Independent Federation of Secondary Teachers (FAC), the Quebec State Teachers' Union (SPEQ) and the Quebec Provincial Association of Teachers (APEQ). The complaint concerned Act 43 of December 2005 which, among others, denied public sector employees the right to strike without providing alternative procedures for dispute settlement. The unions had resorted to strike action to protest against the law after being without a collective agreement for about three years. The strike made provision for essential services to continue, and also involved a rotation strategy to minimise inconvenience for the general public.

Act 43 applied to the full public service, the education sector and the health and social services sector. The organisations said that the Act violated the right to strike by unilaterally ending the negotiations. Further, by imposing collective agreements for a specified period (of seven years), Act 43 removed the workers' right to strike for this period, since Quebec labour law prohibits strikes while a collective agreement is in force. Act 43 also introduced measures to prevent various forms of pressure by workers.

In their response, the Government said that only the Canadian courts, and not the Committee, were qualified to assess whether the Act conformed with the charters (constitutions) of Canada and Quebec. The relevant Minister argued further that, if they agreed to the workers' demands, government would be forced to increase taxes, reduce public service employment, or "plunge into deficit". Government did not dispute the fact that the strikes that prompted the Act were legal.

In its response, the Committee noted the "fundamental importance" of the right to strike. It said that this right could only be restricted in essential services in the strict sense of the term and for public servants exercising authority in the name of the state. It noted further that disruption for government and people in Quebec did not in itself constitute a proven threat to the life, health or personal safety of the population. Further, where the right to strike was restricted for particular

undertakings or services, workers needed to receive adequate protection to compensate for the restriction. It said that this did not seem to have happened in this case.

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 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 strike 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 2788 (Argentina) - Complaint date: 08-JUN-10. Report no 362, November 2011

This complaint, brought by the Teachers' Association of Entre Ríos (AGMER) and Confederation of Education Workers of Argentina (CTERA), also involved

complaints about deduction of wages for strike days and other harsh measures. Of the two complaints, AGMER is a "first-level" union which operates in the province of Entre Ríos, while CTERA, a federation, covers the whole country.

Argentina's constitution, like that of South Africa, enshrines the right to strike, as do other labour-specific laws of Argentina. The organisations claimed that by deducting wages of striking workers, taking action against head teachers who did not provide lists of teachers who were striking, and recording participation in the strike in teachers' personal files, the government was violating that right. The government's response said that they had taken action at the request of a group of parents of children affected by the strike.

The Committee confirmed that deduction of wages for days on strike was legitimate, however, teachers (including head teachers) should not be subject to penal sanctions on the basis that they participated in, or organised, a strike. It therefore requested a copy of the final judgment.

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 per cent 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 that confirmed that 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 in September-October 2007 and involved more than 110 000 teachers and other educational workers, equivalent to 80 per cent 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 over-ride government's international obligations.

After repeating that education is not an essential service in the strict sense of the term, the Committee listed the principles in terms of which minimum services might be established. Firstly, a minimum service may be established where the extent and duration of a strike could create an "acute national crisis endangering the normal living conditions of the population." The minimum service would need to be confined to operations that "strictly necessary" to avoid such danger. In addition, worker organisations must participate in defining the minimum service alongside employers and government. Involvement of the social partners was necessary to ensure that the scope of the minimum service did not make a strike ineffective.

Case No 2670 (Argentina) - Complaint date: 29-SEP-08. Report No 355, November 2009

In this case from Argentina the Confederation of Education Workers of Argentina (CTERA) complained about Circular No. 18/08 of June 2008 issued by the Ministry of Education of the Province of Tierra del Fuego that restricted the right of teacher to participate in assemblies, and required that the names of those attending assemblies be recorded. The workers affected were members of Unified Trade Union of Fuegian Education Workers (SUTEF). The CTERA claimed that the circular reflected the wish of government to treat education as an "essential service". The Government's response provided some support for this claim in saying that the restrictions were necessary to ensure that the assembly did not "hinder the normal performance of educational tasks". The Ministry of Education in the province also argued that the restriction was necessary because while minor children were at school, their custody was "by circumstance" transferred from the parents to the class teacher.

The Committee requested that the government ensure that Circular No 18/08 be revoked or amended, in consultation with the worker organisations concerned.

Case No 2587 (Peru) - Complaint date: 10-JUL-07. Report No 354, June 2009

Three organisations laid the complaint in this case from Peru, namely the Single Union of Peruvian Education Workers (SUTEP), General Confederation of Workers of Peru (CGTP) and National Federation of Education Administrative Workers (FENTASE). The complaint was about the provisions of Act 28988 of March 2007 relating to strikes in the education sector. The law declared basic education an essential public service but also stated that this should "not affect the constitutional rights of workers or the workers' rights recognized by international treaties." Government subsequently issued Supreme Decree No. 017-2007-ED which contained regulations in terms of the Act. The regulation made the Act applicable to managerial, teaching, auxiliary, administrative and service staff, and required principals to organise to hire teachers from the National Register of Substitute Teachers within 24 hours of a strike being announced.

The Government pointed to article 28 of the Political Constitute of Peru which states that strikes must be "exercised in line with the social interest". It said that Act No. 28988 was intended to ensure full enjoyment of the "fundamental right" to education, which was enshrined in the Political Constitution, in the General Education Act and international agreements. It also pointed to clauses in the Collective Labour Relations Act which provided for restrictions on strikes in non-essential services where this was necessary to ensure the continuity of "essential activities". (It admitted that the latter were not defined.) The aim of the Act complained about was to prevent learners missing classes as a result of a teacher strike. The Ministry therefore had the power "to ensure that public schools never close, that the class schedule is followed and that classes actually take place."

As in other cases, the Committee reiterated that basic education was not an essential service in the strict sense of the term. It also reiterated that it was acceptable to establish a minimum service, but that (a) this must be the minimum necessary to avoid endangering life or normal living conditions, and (b) worker organisations must participate in defining the minimum service.

The Committee noted that the Committee of Experts on the Application of Conventions and Recommendations, which oversees a range of international conventions, had previously discussed the planned revision of the General Labour Act and said it expected such revision to include provision for worker organisations to be involved in defining minimum services. The Committee requested that the government repeal the sections of the National Register of Substitute Teachers so that it would serve the purpose of ensuring provision of minimum services rather providing lists of replacements for strikers.

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." 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".

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 2489 (Colombia) - Complaint date: 23-MAY-06. Interim Report No 365, November 2012

In this case, the Single Confederation of Workers of Colombia (CUT) complained, among others, that a meeting held following the appointment of a new vice-chancellor at the University of Córdoba was deemed by the authorities to be an illegal work stoppage and led to disciplinary proceedings against trade union leaders. Subsequently, the status of university workers was changed from public officials to public employers, which made the collective agreement invalid.

The Committee, in its discussion, referred to previous decisions by itself as well as opinions of the CEACR which found that articles 450 and 451 of the Substantive Labour Code in terms of which the strike was declared illegal were not in line with the principles of freedom of association. The first reason was that education was not an essential service in the strict sense of the term, and strikes could thus not be prohibited. The second reason was that an independent body trusted by the parties, rather than the government, should have the responsibility for declaring whether a strike was legal or illegal. The declaration of illegibility was thus invalid, and the Committee repeated its request for Colombia to change the relevant articles of the Substantive Labour Code.

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), 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 1865 (Korea, Republic of) - Complaint date: 14-DEC-95

This complaint, brought by the Korean Confederation of Trade Unions (KCTU), the Korean Automobile Workers' Federation (KAWF), the International Confederation of Free Trade Unions (ICFTU) and the Korean Metal Workers' Federation (KMWF), did not explicitly involve education. The clarification provided in respect of essential services and minimum service is nevertheless useful.

The complaint was a follow-up on previous complaints and, like previous complaints, covered a very wide range of issues. Of particular interest for our purposes is that a new complaint related to labour law amendments that provided for compulsory arbitration for public sector workers. The organisations said that while government had presented its system of "essentially maintained services" as representing an agreement between employers and workers that balanced the right to strike with the public interest, the legislation moved Korea's labour relation systems further away from international labour standards. Thus the new amendments both expanded the list of "essential" public services and provided for "minimum" services in each of these services. The organisations argued that this involved "double regulation" of the services and contradicted the idea that "essential services" was intended as a way of restricting the right to strike, while "minimum services" was intended to protect labour rights. A further problem was that the amendments allowed for "replacement" workers beyond minimum services. This contradicted the intention of "minimum services", which was to ensure that the public interest was served while still allowing workers to exert effective pressure through withdrawing their labour.

In the government's response, it noted that the amendments defined minimum services as those where interruption would endanger the life, health, physical safety and "daily lives" of the public.

In its discussion of the right to strike, the Committee once again requested that restrictions only be applicable to public servants exercising authority in the name of the State and public servants in essential services in the strict sense of the term.

In respect of minimum services, the Committee noted that the amendment of 2006 introduced limitations on the right to strike which effectively "wiped out" the benefits of abolishing compulsory arbitration, which Korea had previously done after the Committee had requested this. The problematic limitations were the possibility of emergency arbitration, minimum services and replacement workers.

According to the KCTU, minimum services were in effect imposed by arbitration rather than negotiated given that workers and employers found it "nearly impossible" to agree on anything. In several cases, the Labour Relations Commission had established "excessively high" minimum services which would make strikes ineffective. The Committee observed that in this situation, a system of compulsory arbitration could, in effect, mean an "absolute prohibition" on the right to strike and that this would contravene the right to freedom of association. The Committee again emphasised that compulsory arbitration was only acceptable if both parties agreed to it.

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

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 this year 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) must 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 all these developments.

The CEACR has also expressed concern about Nigeria including "defining "essential services" in an overly broad manner".

These instances show that some countries are still attempting to declare education as 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 not be a legal course of action.

In summary

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" refers 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" that strikes may be totally prohibited. President Zuma's statement that education is an essential service, but that this does not take away the right of teachers to strike, thus makes sense only if he was using the term "essential services" in a very loose way – and a way that will confuse many people about a basic right, namely the right of workers to strike.

The ILO's Committee responsible for making decisions on this topic 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 state. It has repeated this statement in countries from different regions of the world, and in respect of a wide range of different circumstances.

While education is not an essential service, there could be cases in which a strike of teachers continues for a long time and affects a large number of learners where it might be in line with the principle of freedom of association to require that a minimum service be ensured. However, for this to be in line with freedom of association principles, worker organisations must participate in defining what constitutes a minimum service. In addition, the service must not be defined in a way that makes a strike have no effective impact. Instead, the minimum service is intended to have some workers back at work while negotiations continue to resolve the dispute.

The discussion of cases by the ILO Committee strongly suggest that the considerations prescribed in the South African Constitution for the limitation of any right, including the right to strike, would not allow for teacher strikes to be outlawed. The considerations – with a brief response to each – 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;

(b) *the importance of the purpose of the limitation*: Although essential, education does not fulfil the internationally accepted definition of an "essential service". This definition is repeated in South Africa's Labour Relations Act;

(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. A limitation, in the form of ensuring minimum services, is only permissible in respect of a particular strike where the strike is protracted and affects many learners. Where this is done, workers – through their trade unions – must participate in agreeing on the definition of minimum services;

(d) *the relation between the limitation and its purpose*: The limitation's purpose is ostensibly to safeguard the education of children. 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. The international case law provides for the right to strike to be limited, in specific circumstances, only to the extent that a minimum service may be required for the purpose of avoiding danger to health and safety while the parties negotiate a solution to the dispute;

(e) *less restrictive means to achieve the purpose*: social dialogue, negotiations, improved conditions of service for teachers, and various other forms of imposing accountability on teachers constitute alternative means to achieve the purpose of ensuring that children's rights to education are met.

As a matter of law, therefore, it seems that education is not an essential service in South African law, or under the international treaties to which South Africa is a party, and cannot be declared an essential service in South Africa.

References

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

NEWS24 'Education an Essential Service – ANC' 4 February 2013. Downloaded 24 February from: http://www.news24.com/SouthAfrica/News/Education-an-essential-service-ANC-20130204.

Mail & Guardian '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.

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

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

Observation (CEACR) - adopted 2012, published 102nd ILC session (2013)
Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Canada (Ratification: 1972)
http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3085430

'Follow-up to the conclusions of the Committee on the Application of Standards (International Labour Conference, 100th Session, June 2011)'
Observation (CEACR) - adopted 2012, published 102nd ILC session (2013)
Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Nigeria (Ratification: 1960)
http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3084126

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.

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

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

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.

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