

Lockout vs suspended strike: Can replacement labour be used?

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Whether replacement labour may be used where an employer has instituted a lockout in response to a strike which has subsequently been suspended by the trade union and employees concerned.



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Summary

The employees' suspension of a strike does not prevent an employer from using replacement labour when a lawful lockout has been implemented because the use of replacement labour is triggered by the lockout. The lockout itself must be in response to a strike. There is no requirement that there must be a continual refusal to work from the employees. Once the lockout has ended, the employer will no longer be permitted to use replacement labour.

Facts

In the case of *Numsa obo Members v Trenstar (Pty) Ltd [2020]*, the Labour Court (LC) had to deal with the above issue. The facts of the matter are briefly set out below.

Numsa's members ('members') had embarked on a strike against Trenstar. The members demanded a once-off taxable gratuity payment for each member. An attempt was made by Trenstar to interdict the strike. This attempt was unsuccessful. After the strike had run for approximately a month, Numsa served a notice of suspension on Trenstar. The notice recorded the members' intention to suspend the strike from close of business on 20 November 2020 and that members would return to work on 23 November 2020. In addition, the notice stipulated that the members were not withdrawing their demand. On the same day as the notice of suspension, Trenstar served a lockout notice. The lockout notice indicated that the members were locked out from 7am on 23 November 2020 and demanded that the members withdraw / waive their demand. Further, the lockout notice stipulated that it was in response to the strike action and, therefore, Trenstar would use replacement labour for the duration of the lockout.

Numsa approached the LC seeking an interdict preventing Trenstar from utilising replacement labour for the duration of the lockout. Numsa argued that the lockout was not in response to strike action and could not, therefore, be utilised.

LC's evaluation

The LC considered section 76(1)(b) of the Labour Relations Act 66 of 1995 (LRA) to determine when replacement labour may be used in such circumstances. Section 76(1)(b) of the LRA provides that "*replacement labour is permitted in a lockout...in response to a strike.*" The LC found that in terms of case law it has been established that until the underlying dispute has been resolved, an employer is entitled to institute a lockout. In this case, the members had not accepted Trenstar's demand nor had they withdrawn their demand which was the underlying reason for their strike. Therefore, the LC held that "*until the underlying dispute resolved, a lockout in response to a strike is perfectly lawful*".

In determining whether replacement labour may be used, the LC considered the definition of a strike in the LRA and section 76(1)(b). The LC found that in terms of the definition, the strike had terminated because the members were tendering their services to Trenstar and, therefore, there was no refusal to work.

However, in considering section 76(1)(b) the LC found that the section provided that the legal precondition for the use of replacement labour was not the strike itself, it was the lockout, more specifically, a lockout in response to a strike.

The LC held that the clear purpose of section 76(1)(b) is to allow for employers to use replacement labour when a strike has been initiated by a union and lockout has been implemented in response to the strike (i.e. a defensive lockout has been implemented, as opposed to an offensive lockout). This would be the case even if the strike has been suspended (as was the case in the present circumstances). The LC held, therefore, that the suspension of the strike which had caused the lockout would not prevent the use of replacement labour as the existence of a continual refusal to work does not need to be present in order to trigger the lawful use of replacement labour.

The LC held that in determining whether replacement labour may be used, a court must ask whether there is a lockout in response to a strike and if so, replacement labour may be used. Replacement labour may no longer be used when the lockout ends.

The LC therefore dismissed Numsa's interdict application.

Importance of the case

Where an employer has implemented a defensive lockout (i.e. a lockout in response to a strike) they can use replacement labour. The mere fact that the strike is subsequently suspended does not affect the use of such replacement labour if the underlying dispute remains unresolved.

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