

Namibia's Labour Act undermines the right to strike

By Herbert Jauch, published in The Namibian, 30 November 2018

The recent strike at the University of Namibia (UNAM) and its consequences have highlighted aspects of an anti-worker bias in the legal provisions regarding strikes. The current provisions effectively encourage workers to become “free riders” and to act as strike-breakers when their colleagues embark on industrial action.

The Namibian Constitution as well as the Labour Act provide for fundamental workers' rights which include freedom of association and the right to strike. Article 21 of the Constitution deals with “Fundamental Freedoms” and states that all persons shall have the right to form and join unions and to “withhold their labour without being exposed to criminal penalties”. Likewise, the Labour Act states that no person must be prejudiced by an employer because of membership of a trade union or “participation in the lawful activities of a trade union”. Thus at first glance it seems that the right to join a trade union and to participate in its activities are recognised as inalienable workers' rights. However, the reality - particularly in cases of strikes – paints a different picture.

Protected (often referred to as “legal”) strikes are subject to several limitations set out in section 74 of the Labour Act. Firstly, strikes are limited to disputes of interests (such as wages and benefits) and thus strikes over workers' rights or broader policy and economic issues are excluded. Secondly, any protected strike has to be preceded by a referral of the dispute to the Office of the Labour Commissioner and a period of 30 days given to a conciliator who must try to resolve the dispute. Only when conciliation is unsuccessful, a strike ballot has been held and the strike rules are agreed to (by the parties) or determined (by the conciliator) can unions give 48 hours' notice of a protected strike. Only when all this is done are striking workers afforded some protection against disciplinary action from the employer. Also, employers must not require non-striking employees to do the work of striking workers and they must not hire anybody to do the work of strikers (section 76.2). This is a very crucial provision to safeguard the effectiveness of a strike but it was blatantly violated during the recent UNAM strike without any consequences for the employer.

There are other legal provisions that clearly undermine the right to strike: Employers are not obliged to remunerate striking workers but trade unions who represent the majority of employees (and are thus recognised as “exclusive bargaining agents”) have to represent the interests of all employees. Any improvements in the conditions of employment due to the actions of workers and their union apply to non-union members as well. In practice, these provisions provide an effective deterrent to union membership in general and to the participation in strikes in particular.

Non-union members have 3 distinct financial incentives to stay away from trade unions and to not participate in strikes: Firstly, they do not pay union membership fees and thus are referred to as “free riders”. Secondly, in cases of a strike they can continue to go to work and enjoy their full wages. Thirdly, if the strike is successful and results in improved employment conditions, they fully benefit without having made any contribution at all.

An example of this practice was provided by the recent UNAM strike. Despite the majority having voted for the strike, some staff continued to go to work and are now enjoying the benefits that resulted from the strike. The striking workers, on the other hand, face deductions for the days they went on strike which will practically wipe out their benefits. This sends a message to workers that it pays to be a fence-sitter, to betray the strikes of colleagues, and to cosy-up to the employer. Thus the right to strike is effectively undermined.

There must be no economic incentive for workers to break the strike of their colleagues and the Labour Act must be amended in defence of the right to strike. The current legal provisions present an incentive for workers not to join unions and not to participate in strikes. At the very least, the following legal provisions will thus have to change: Firstly, the Labour Act should compel non-union members to pay an equivalent of the union membership fees into a social or educational fund (for example to support workers' education projects). Secondly, the outcome of the democratic vote whether to strike or not (a "strike ballot") amongst all employees has to be binding and the majority decision has to apply to all. Thus if the majority of employees votes in favour of a strike, nobody (employed in the "bargaining unit") should be allowed to go to work until the dispute is resolved and the strike is called off.

Workers and their trade unions are already confronted with employers who are inherently more powerful in economic and social terms and thus strengthening the right to strike is fundamental to start redressing the existing power imbalance in labour relations.

Herbert Jauch is a labour researcher and chairperson of the Economic and Social Justice Trust (ESJT).