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Updated May 2024

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Strikes and lock-outs

**QUICKLAW
GUIDE**





Strikes and lock-outs

- > The law encourages, recognizes and provides for peaceful, amicable and lawful means of resolution of industrial disputes, which means disputes that may arise between employers, employees and indeed, the Government.
- > In order for the dispute resolution process to be effective and not individualized, the law encourages and provides for collective dispute resolution processes. These include collective bargaining, conciliation, arbitration and finally judicial adjudication or hearings before the Courts.
- > In situations where the parties to the industrial disputes, the employees or workers, trade unions, employers and employers' organizations fail to settle their disputes amicably either through conciliation or arbitration, in terms of the law, they have the right to resort to less amicable means of resolving their disputes through either strikes or pickets by the employees or lockouts by the employers.

What is a strike?

- > The Botswana Trade Dispute Act defines a strike to mean the cessation of work by a body of employees in any trade or industry acting in combination or under a common understanding or concerted refusal or a refusal under a common understanding by such body of employees to continue to work.
- > Strike action is an essential element in the collective bargaining process because it ensures that an employer bargains more fairly. It takes place to resolve a dispute between the employees and their employer. The dispute must be regarding something in the employer's control such as wages, improved working conditions and other disputes of mutual interest.
- > Therefore, a collective refusal to work balances the employer's ability to make unilateral decisions to lock out workers or shut down the business.
- > Strikes are prohibited in essential services, where for instance the interruption of that service would endanger the life, personal safety or health of the whole or part of the population of Botswana.
- > Disputes regarding essential services must be referred to the Labour Commissioner for arbitration.

Immunity from civil liability

- > Participation in the strike is deemed not to constitute a delict or breach of contract in compliance with the provision set out for the strike or lockout.
- > A participant may not be dismissed for taking part in a strike or lockout. This shall not preclude the employer from dismissing an employee during a strike or lockout for any other reason that is valid and fair.
- > Civil proceedings may not be instituted against any person for participating in a strike or lockout carried out in compliance with the set-out regulations except any act in contemplation or furtherance of a strike that constitutes defamation or an offence.
- > An employer is not obliged to remunerate an employee for services that the employee does not render during a strike or lockout.

Unlawful acts

- > Conduct that constitutes a criminal offence is expressly excluded from protection, thus trespass, assault, intimidation, vandalism and the like will attract both civil and criminal liability.

What is a lock-out?

- > It means the closing of a place of employment by an employer in any trade or industry or the suspension of work by such an employer or the refusal by such an employer to continue to employ any number of his employees in that trade or industry
- > By taking part in a lockout in compliance with the law, a person does not commit a delict or a breach of contract, but an employer is not obliged to remunerate an employee for services that the employee does not render during a lockout.
- > Therefore, an employer must not institute civil legal proceedings against any other person for participating in a lockout in compliance with the law, unless those proceedings concern an act that constitutes defamation or a criminal offence.

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

- > The subject matter of a protected strike or lockout is limited to disputes of interest only. Disputes in respect of essential service must be referred to arbitration.

When can employees strike and an employer lock-out?

- > Where any Industrial action in furtherance of a trade dispute is contemplated by an employer(s) or by employees in an essential service, the trade dispute shall be reported to the Commissioner or a labour office delegated by the Commissioner, by an organisation acting on behalf of the employer(s) or employees as the case may be-
 - > **Step 1:** Refer dispute to the Commissioner or a labour office delegated by the Commissioner within 30 days of dispute. Referral must be made in writing, or orally if the employee cannot read or write, and must satisfy the Commissioner that a copy of the referral has been served to the other party to the dispute, unless Commissioner is satisfied its service was impossible.
 - > **Step 2:** The Commissioner may then assign a mediator and inform the parties to dispute the details of the mediation meeting.
 - > **Step 3:** The mediator shall attempt to resolve a dispute referred to him within 30 days of the date the dispute was received by the Commissioner or labour officer delegated. The 30-day period may be extended by agreement by the parties or via a collective labour agreement.
 - > **Step 4:** Should mediation fail after the 30 days has expired, 48 hours' notice of the commencement of the strike or lockout has been given in the prescribed form to the Commissioner and the other parties to the dispute; and the strike out or lock out conforms to provisions set out in the Act, and to any agreed rules regulating the conduct of a strike or lockout or any rules determined by the mediator.

What are the consequences of a protected strike?

- > The Act gives strong protection to strikes and lockout that comply with its provisions.
- > Employees may not be dismissed for participating in a protected strike.
- > It guarantees immunity from civil claims. It provides that by participating in a protected strike, a person does not commit a delict or a breach of contract.

- > An employer must not institute civil legal proceedings against any other person for participating in a protected strike or a lockout, unless those proceedings concern an act that constitutes defamation or a criminal offence. Employees may be dismissed for causing damage to the property of their employer, or another person in the workplace, during the strike.
- > The principle of "no work – no pay" applies. The employer does not have to pay the employees during a strike. However, the employer has to make payments in kind which include food, accommodation and other benefits such as pension, medical aid and so on.
- > An employee or member or official of a registered trade union may, in furtherance of a strike in compliance with the law, hold a picket at or near the place of employment for the purpose of peacefully communicating information and persuading any individual not to work.
- > Despite the provisions of any contract of employment or collective agreement, an employer must not require an employee who is not participating in a protected strike or whom the employer has not locked-out, to do the work of a striking or locked-out employee, unless the work is necessary to prevent any danger to the life, personal safety or health of any individual.
- > The employer must not hire any individual, for the purpose, in whole or in part, of performing the work of a striking or locked-out employee if the parties have concluded an agreement on the provision of a minimum service during the strike or lockout, or if no such agreement is concluded within 14 days of the commencement of the strike or lockout.

When does a strike end?

- > Since the continuation of a strike is dependent on the existence of the grievance or dispute, once the essential cause of the dispute is removed and there is an agreement and therefore the core of the strike has disappeared, the strike terminates.

Glossary of terms:

DISPUTE OF INTEREST : The Labour Act (Act 11 of 2007) defines a dispute of interest as a dispute between an employer or an employers' organisation on the one hand and an employee or trade union on the other hand concerning a proposal for new or changed conditions of employment but does not include a dispute that the Act or any other Act requires to be resolved by adjudication in the Labour Court or other court of law or arbitration.

DISPUTE OF MUTUAL INTEREST: when a dispute is not regulated by any law, but it is relevant to the workplace and the employment relationship.

IMMUNITY FROM CIVIL LIABILITY: an employer is prevented by the law from bringing an action against an employee for participating in either a protected strike or lockout. In this sense, it is said that the employee is not liable for any wrongful act so long as the employee acts lawfully. Consequently, he or she is deemed to be immune from civil liability such as legal obligations arising from private wrongs such as a delict or a breach of contract.

How can LegalWise assist you?

Should you require an explanation of your rights on this topic, please contact your nearest Branch.