CODE OF GOOD PRACTICE: COLLECTIVE BARGAINING, INDUSTRIAL ACTION AND PICKETING

HISTORICAL BACKGROUND AND PURPOSE

The Code of Good Practice: Collective Bargaining, Industrial Action and Picketing was promulgated in 2018 to service the following purposes:

(a) strengthen and promote orderly collective bargaining by:
  (i) promoting trust and mutual understanding and constructive engagement;
  (ii) promoting the maximum involvement of workers and worker representatives in negotiations; Which code are we referring.
(b) recognise the importance of workplace democracy and dialogue and promoting employee participation in decision-making in the workplace;
(c) promote the proactive, effective, constructive and speedy resolution of labour disputes;
(d) promote the peaceful resort to strike or a lockout free of intimidation and violence, and
(e) proactively promote steps to avoid or prevent prolonged or violent strikes and lockouts."

The Code in Item 1 – Intention and Application clearly states that:

> "This Code must not be interpreted as imposing any unconstitutional limitation on the right to strike or the recourse to lockout as provided for in the Act or be applied in a way that undermines the right to strike or the employers' recourse to lockout."

Following the introduction, Context and Purpose contained in Part A of the Code the remainder of the Code is divided into the following Parts:

- PART B - Collective Bargaining
- PART C- Workplace Democracy and Dialogue
- PART D - Industrial Action: Strikes and Lockouts
- PART E - Picketing.

COLLECTIVE BARGAINING

The Code recognises that there is no constitutional or statutory duty to bargain. Collective bargaining under the Act is voluntary and employers (other than the State) and registered trade unions are permitted to determine their collective bargaining relationships in the institutional form of bargaining councils at sectoral level (the form promoted by the Act) or by way of a recognition agreement at multi-employer or workplace level. Once having established a collective bargaining relationship in the form of a bargaining council constitution or a recognition agreement, the parties have by agreement, a contractual duty to bargain.

The Code identifies a number of principles in respect of "good faith bargaining" including-

> "The parties should consider escalating the negotiations to a higher level of management or office bearer within their respective organisations to avoid deadlock and resort to industrial action through seeking to settle the differences or exploring the possibility of voluntarily referring the dispute to binding or advisory arbitration."

The Code recognises the need to develop competent negotiators and states that-

> "Negotiators of parties should on a regular basis, either jointly or separately, attend training courses using the same training materials and conducted by recognised training institutions, trade unions or employer's organisations."

In addition to the development of negotiators the Code promotes the use of independent facilitators or a panel of facilitators to facilitate their negotiations and their relationship from one course of negotiations to the next.

The Code also suggests that while it is advisable to appoint a facilitator at the commencement of negotiations, negotiators should be free to raise the appointment of a facilitator at any time during the course of negotiations if it could assist in the successful conclusion of negotiations, particularly in order to break a deadlock. The Code visualises the appointment of a facilitator beyond the declaration of dispute and during industrial action in accordance with its guideline that – "[T]he parties should remain open to continue negotiations after a dispute is declared."

Finally in Part B the Code recognises the central role of disclosure of information in the collective bargaining process stating that such disclosure is essential for rational collective bargaining and effective consultation at the level of the workplace. The Code suggests that the limitations in respect of section 16 of the Act relating to the representativeness of trade unions and the confidentiality of the information in question, should not be interpreted or applied in a restrictive manner.

The Code, in its endeavour to encourage open engagement in order to minimise conflict, encourages employers to disclose information in accordance with section 16 to any trade union with which it negotiates at the level of the workplace subject to the ability of the employer party to access the information, and the requisite agreement by the trade union not to disclose confidential information to third parties. In the event of restrictions posed by confidentiality, the Code suggests that the parties could agree to disclose such information to a trusted auditor or arbitrator to determine whether the standpoint that may be relied upon in the negotiations or consultations is supported by the information.

While the advocacy for disclosure of information places a primary onus on the employer the Code reminds trade unions of their responsibilities by stating-

> "Just as the Code urges the disclosure of credible and relevant information by employers to promote rational negotiations, so does it urge trade unions to use the information received responsibly and to take that information into account when formulating demands or responses or when deciding to declare a dispute."

WORKPLACE DEMOCRACY AND DIALOGUE

The Code explains that the object of promoting workplace democracy and dialogue is to develop a culture of mutual respect and trust between those who manage the enterprise and those

who work for it. Dialogue, with a view to consulting employees in the decision-making process on issues other than issues pertaining to collective bargaining should be encouraged.

The Code is at pains to highlight the need to separate consultative processes from collective bargaining processes by stating:

"(a) there should be a clear distinction between the structures of collective bargaining (bargaining councils, negotiation procedures in recognition agreements) and the structures of consultative forums which may be elected and inclusive of different occupational categories irrespective of union membership.

(b) there should be a clear distinction between the matters that form the subject of collective bargaining (such as terms and conditions of employment) and the subject matter of consultation such as employment equity plans, health and safety plans, plans to restructure or introduce new technology or work methods, and plans to change the organisation of work."

The Code also explains the difference between the processes and outcomes of collective bargaining and consultation. In collective barging the process is negotiation with the outcome being a collective agreement. In consultation, the process is one of informed discussion with the outcome of ensuring that workers' interests and representations are taken into account in the making of managerial decisions.

The Code provides that although there may be consensus at the end of a consultation process, it is not a collective agreement and a trade union not happy with the outcome remains free to declare a dispute.

INDUSTRIAL ACTION: STRIKES AND LOCKOUTS

The Code acknowledges that prolonged and violent strikes have a serious detrimental effect on the strikers, the families of strikers, the small businesses that provide services in the community to those strikers, the employer, the economy and the community. Therefore, the Code urges-those embarking on industrial action to recognise the constitutional rights of others.

The Court recognises that the amendments to section 69 of the Act (discussed under "Picketing" below) have transformed conciliation of mutual interest disputes into a two stage process stating-

"The primary object of the conciliation is to try to resolve the dispute without resorting to industrial action. The parties must, in good faith, endeavour to settle the dispute failing which, the commissioner or conciliator must propose alternative means to do so, such as arbitration, including advisory arbitration."

If the parties fail to settle the dispute or agree to an alternative means to resolve it, a secondary object of conciliation is to:

(a) "record the demands in respect of which the workers, trade union, or employer or employers' organisation intend to take industrial action;

(b) to agree on the following:
   (i) the need for maintenance and minimum services, if necessary;
   (ii) the lines of communication between the conciliator (or facilitator if there is one), the employer and the police, and
   (iii) strike and picketing rules."

The Code reminds us that balloting prior to industrial action is a requirement for trade unions and employers' organisations if they are to be registered in terms of section 95 of the Act and that section 67(7) of the Act states quite explicitly that failure to conduct a ballot may not give rise to any litigation that will affect the legality and protected status of the industrial action. Nevertheless the Code states-

"Registered unions and employers' organisations are obliged to comply with their constitutions ……." And also that the ballots in question – "must be secret".

The Code also gives guidance on the purpose of giving notice prior to the commencement of industrial action.

The Code states-

"Since the object of notice is to allow the other party to put its house in order and limit the negative effects of industrial action to loss of production on the part of employers and the loss of income on the part of employees, the parties should agree a notice period, notwithstanding the minimum periods set out in the Act, that is of sufficient duration to allow the employer to shut down its plant and to allow employees to make the necessary arrangements to face a period of no income."

The Code also emphasises the need for ongoing communication between the parties for the duration of industrial action and encourages parties to include rules, including picketing rules, that regulate peaceful and protected industrial action. The Code states that these may, depending on the circumstances, include the establishment of a peace and stability committee made up of union officials, shop stewards, employer representatives, the conciliator or facilitator, a person representing the private security company and a person by the South African Police Services in accordance with the Accord.

PICKETING

The following amendments to section 69 (picketing rules) of the LRA were introduced at the same time as the Code and are as follows:

(i) "the Commissioner conciliating the dispute must determine the picketing rules ……. at the same time as issuing any certificate ……" section 69 6 (A)
(ii) no picket in support of a protected strike or in opposition to a lockout may take place unless picketing rules are (a) agreed to in a collective agreement or at a conciliation or, (b) have been determined (by the conciliator) section 69 6 (C)."

The Code states the purpose of the picket is to peacefully encourage non-striking employees and members of the public to oppose a lockout or support strikers in a protected strike.

> "The nature of the support can vary. It may be to peacefully encourage employee not to work during the strike or lockout. It may be to peacefully encourage employee not to work during the strike or lockout. It may be to peacefully dissuade replacement labour from working. It may also be to persuade members of the public or other employers and their employees not to do business with the employer."

The Code reminds us that:

(a) "a picket contemplated in section 9 of the Act can only be authorised by a registered trade union, in accordance with that trade union's constitution, that the authorisation only applies to its members and supporters and that a copy of the resolution authorising the picket ought to be served on the employer prior to the commencement of the picket.
(b) the picket may only be held in a public place outside of the premises of the employer or, with the permission of the employer, inside its premises and such permission may not be unreasonably withheld."
In this respect the Code list the following factors to be taken into account:

(i) the nature of the workplace e.g. a shop, a factory, a mine etc.,
(ii) the particular situation of the workplace e.g. distance from the place to which the public has access, living accommodation situated on the employers' premises etc.,
(iii) the number of employees taking part in the picket inside the employers' premises;
(iv) the potential for violence and other unlawful acts;
(v) the areas designated for the picket;
(vi) time and duration of the picket
(vii) the proposed movement of persons participating in the picket;
(viii) the proposals by the trade union to exercise control of the picket; and
(ix) the conduct of the picketers.

The Code further reminds us that no picketing may take place unless rules have been agreed or determined and that if picketing rules have to be determined, it be done in accordance with the Default Picketing Rules annexed to the Code. In particular, the two annexures attached to the Default Picketing Rules require-

Description of Place or Places for the Picket

(i) addresses the location/s of pickets and the number of picketers at each location;
(ii) limitations of activity at each designated picketing area;
(iii) hours during which picketing may take place at each designate picketing area.

Names and Details of the Participants

(i) name and contact detail of the commissioner determining the Default Picketing Rules;
(ii) name and contact detail of the Convenor and Marshals responsible for monitoring and controlling the picket as set down in the Default Picketing Rules.
(iii) name and contact details of the Employer Representative/s who along with the Convenor and Marshals must be present at the start and end of the picket each day, to ensure they fulfil the requirements of "Employer Conduct" contained in the Default Picketing Rules.

Finally, the Code reminds us that Default Picketing Rules remain in effect – "until the settlement of the dispute, the termination of the strike, termination of the picket by the union or until it is terminated or reviewed by mutual agreement whichever may come first."

CONCLUSION

The Code provides guidelines that every person interpreting and applying the LRA, must take into account. The spirit of the Code is to promote peaceful and orderly collective bargaining, industrial action and picketing. It provides a holistic view of the importance of upholding the right to strike within the context of upholding the constitutional rights of others.

REFERENCES

- Code of Good Practice: Collective Bargaining, Industrial Action and Picketing (2018)
- Ekurhuleni Declaration, November 2014
- Labour Relations Act 66 of 1995.