

**IN THE ESSENTIAL SERVICES COMMITTEE
HELD AT JOHANNESBURG**

Case No.: ES 615

In re: Investigation in terms of Section 71 of the Labour Relations Act, 66 of 1995:

Whether the provision of food to public primary school pupils should be designated as essential services

Designation

Introduction

1. The ESC considered all the existing circumstances, and on its own accord in terms of section 71(1) read with sections 70B (1)(d) of the Labour Relations Act 66 of 1995 as amended (LRA) initiated an investigation as to whether the provision of food to public primary school pupils should be designated as essential services.

2. The gazetted terms of reference for the investigation in terms of section 71 were **'Notice is hereby given in terms of section 71, read with section 70B(1)(d) of the Labour Relations Act, 1995 (Act No 66 of 1995 as amended), that the**

Committee is in the process of conducting an investigation as to whether provision of food to public primary school pupils is an essential service.

(see Government Gazette No 48660, GN1827 of 2023, dated 26 May 2023.)”

Details of Hearings

3. The hearings were scheduled as per the notice published in the government gazette. Viz-
 - (a) 27 June 2023
 - (b) 28 June 2023
 - (c) 29 June 2023
 - (d) 04 July 2023
 - (e) 07 July 2023

4. In the hearings the ESC received an intention to participate in the public hearings from Western Cape Department of Education and an application for condonation from the Public Service Association(PSA).

Condonation

5. Regulation 2 of the Essential Service Committee Regulations, 2022 states that –
 - (1) An interested party submitting written representation in terms of sub regulation 1 must –
 - (b) indicate whether or not they require an opportunity to make oral representations to the Committee, as contemplated by section 71(2)(b) of the Act.

6. Regulation 7 states that an interested party may make oral representations to the Committee if it has filed written representations to the Committee or if it has not complied with Regulation 2 and the said party shows good cause.

7. Public Service Association (PSA) failed to comply with the provisions of Regulation 2. It made an application for condonation.
8. Having considered the submissions the panel was satisfied that it has shown good cause and the application was granted.

Submissions

9. On behalf of Western Cape Department of Education it was submitted that the service of providing food to learners is an essential service. There is a lot of poverty in the province. In some instances the meals that are provided at schools serve as the only meal that a learner would get in a day.
10. The Department of Basic Education is the custodian of the school nutrition programme. The department is responsible for the implementation of the programme. This programme is funded through the Division of the Revenue Act, which has as an outcome access to education and then provides for the provision of meals to all learners in quantile 1 to 3 and special schools. As well as some quantile 4 and 5 schools in line with available resources. The National Assembly has authorised and allocation of expenditure of funds to provide meals to those learners.
11. The provision of food has a huge impact on school attendance as most learners know that if one arrives early at school they would get a breakfast. This encourages punctuality.
12. It was further submitted that there are other learners who attend affluent schools who are also dependent on the scheme.

13. The Department also submitted that the service was mainly provided by service providers and volunteers who receive a stipend. However the Department as the custodian of the service has to ensure that the service is provided. Thus its employees are instrumental in the implementation of the service.

Public Service Association

14. Public Service Association supported the submissions of the Department and further submitted that the service is essential.

Legal Framework

15. In this matter the issue that the committee has to determine is whether the provision of food to primary school pupils should be designated as an essential service? In determining the matter, it is important that one should set out the legal framework.

16. Section 23(2) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) states that... “Every worker has the right ... (c) to strike.”

17. Section 36 (1) of the Constitution states inter alia that... “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.

18. Section 65 (1) (d) (i) of the LRA states that ... “No person may take part in a strike ... if that person is engaged ... in an essential service”.

19. An 'essential service' is defined in section 213 of the Act as:

- (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;
- (c) the South African Police Service".

20. The Constitutional Court in *South African Police Service v Police and Prisons Civil Rights Union and Another* (CCT 89/10) said the following: -

"In order to ascertain the meaning of essential service, regard must be had to the purpose of the legislation and the context in which the phrase appears. An important purpose of the LRA is to give effect to the right to strike entrenched in section 23(2)(c) of the Constitution. The interpretative process must give effect to this purpose within the other purposes of the LRA as set out in Section 1(a). The provisions in question must thus not be construed in isolation, but in the context of the other provisions in the LRA. For this reason, a restrictive interpretation of essential service must, if possible, be adopted so as to avoid impermissibly limiting the right to strike (footnotes excluded)"

21. It is trite that strike action is an important element of collective bargaining and it is recognised as a primary mechanism through which workers exercise collective power (See Ex-Part Chairperson of the Constitutional Assembly in re: Certification of the Constitution of the Republic of South Africa, 1996 (4) SA744 (CC) at paragraph [66]).

22. Having regard to the above, it is clear that our law requires essential services to be restrictively interpreted, and that this means, inter alia, the following:

- It is the service which is essential, not the industry or the institution within which the service falls;
- Only those employees who are truly performing an essential service, may be prohibited from striking; and

- Essential and non-essential service workers may be found working side by side in the same institution.

23. Before the ESC can designate any service as essential, it must be satisfied that the interruption of the said service is likely to endanger life, personal safety or health of the whole or part of the population.

24. It is further trite that in view of the fact that the right that would be affected by such a designation limit or takes away a fundamental right, such designation must be reasonable and justifiable. Thus, if the ESC finds that parts of the service are not essential the Committee is obliged not to designate such services, as such a designation would be unreasonable and unjustifiable.

Analysis of the Submissions

25. In determining whether the service must be designated as essential the panel considered the nature of the services and the applicable legal framework. As indicated above the right to strike is a fundamental human right and this right should not be interfered with unless there is justification for such interference.

26. In this matter the service under consideration is the provision of food to primary school children. Section 28(1) (c) of the Constitution of the Republic of South Africa provides that every child has the right to basic nutrition...

27. The white Paper on Reconstruction and Development ,1994 (GN16085 published on 23 November 1994) initiated as one of its Lead Projects Primary Nutrition Scheme which later became known as National school Nutrition Programme. The main aim of the programme is to improve the quality of education by enhancing learning capacity, school attendance and punctuality as well as contributing to general health development by alleviating hunger. The NSNP evolved and in 2004 it was expanded to all school going children under

the auspices of the Department of Education with the programme now targeting all learners at schools from disadvantaged communities.

28. The uncontroverted submissions made before the panel are that the programme proved to improve punctuality, regular school attendance, concentration and the general well-being of participating learners. Whilst learners were being provided with nutritious meals, they were taught to establish and maintain good eating and lifestyle habits for life.
29. An example was given of the situation that arose during Covid19 where it became necessary to provide food to children despite the fact that the children were not attending school at the time as some of these children were depending on the scheme to at least get one meal a day.
30. This is a clear demonstration that the service is a lifesaving service for the poorest of the poor children as it ensures that at least one nutritious meal a day is provided.
31. The Convention on the Rights of the Child (1990) recognizes the child's right to the highest standard of health (Article 24 (2) (c)) and the obligation of signatory governments to "take appropriate measures to combat disease and malnutrition..., through inter alia...the provision of adequate nutritious foods".
32. Article 27 also specifies good nutrition as part of the adequate standard of living to which children have a right.
33. General Comment No 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art 24)(2013) CRC/C/GC/15 states that:

“School feeding is desirable to ensure all pupils have access to a full meal every day which can also enhance children’s attention to learning and increase school enrolment. The Committee recommends that this be combined with nutrition and health education, including setting up school

gardens and training teachers to improve children's nutrition and healthy eating habits."

34. From the above it is clear that school nutrition is important to enhance the standard of health of the beneficiaries and in some instances addresses the impact of malnutrition.

35. As indicated above the test that the ESC adopts in determining whether a service is essential is whether the interruption of that service would endanger the health, life and safety. Where the interruption of a service would cause inconvenience or economic hardship, such a service cannot be designated as essential.

36. Having considered the submissions of the parties, as well as the applicable law referred to above, the Panel is of the view that provision of food is a lifesaving service.

Designation

37. The ESC Panel therefore makes the following designation-

37.1. provision of food to public primary school pupils is designated as essential services.

38. The parties that are rendering this service are ordered to negotiate and conclude minimum service agreements by 31 January 2024.

A handwritten signature in black ink, consisting of a vertical line on the left, a curved line at the bottom, and a loop on the right.

Ms. Joyce Nkopane
ESC Panel Chairperson
31 August 2023