

A COMPARATIVE SURVEY OF THE LAW RELATING TO STRIKES IN SOUTH AFRICA AND THE NETHERLANDS

by

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SUMMARY

In the first section of the dissertation, strike law in the Netherlands is focused upon. The following issues are *inter alia* dealt with: the historical background of the strike phenomenon, the right to strike and restrictions on this right, the reluctance of the Dutch legislature to legislate in the field of industrial action, and the directly applicable provisions of the European Social Charter.

The second section of the dissertation deals with South African strike law and also starts off with a discussion of the historical background thereof, whereafter the provisions of the 1995 Labour Relations Act are analysed and discussed.

The third and last section highlights some of the major differences and points to some similarities between the two legal systems. It concludes that the detailed South African labour legislation does not provide more certainty than the Dutch judge-made law in respect of the law relating to strikes.

Key terms:

labour law; right to strike; collective action; comparative survey; South Africa; the Netherlands; European Social Charter; Labour Relations Act 66 of 1995; protected strike; secondary strike; essential services; picketing; protest action; lock-out.

Industrial stoppages causes losses to the economy, and hardship to men and women. Everyone, except those on the lunatic fringe, wants to reduce their number and magnitude. But people do not go on strike without a grievance, real or imaginary. Sometimes they have ample justification for doing it, sometimes they do it wantonly. The important thing to do is to find out why strikes occur, and to remove their causes.

Otto Kahn-Freund

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PREFACE

The well-known Dutch jurist, H.L. Bakels, once stated that the strike can be seen as the *femme fatale* of labour law. I suppose that the existence of this dissertation proves beyond reasonable doubt that yet another jurist has succumbed to temptation. Over the past few decades, the law relating to strikes in South Africa and the Netherlands has been examined, re-examined and over-examined by a series of competent specialists and has been discussed in books, journals, conferences and seminars. It is my hope that this dissertation will not be a superfluous addition.

Since the field of labour law is a particularly dynamic one, rapid changes threaten to date any new text, almost as soon as it has been written. This book reflects the law as it stands as of December 1997.

I wish to thank my supervisor, Prof. P.A.K. le Roux, for his help, support and enthusiasm which unquestionably aided the completion of this dissertation. I am also deeply indebted to Prof. mr. L.H. van den Heuvel at the Vrije Universiteit of Amsterdam, who provided valuable insight in respect of the Dutch labour law. I would furthermore like to record my gratitude to my wife, Nicola, for her understanding and encouragement.

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Herman Troskie

CHAPTER 1 - INTRODUCTION

1.1 Introduction

A usual characteristic of the ordinary employer-employee relationship is a mutual intention to enter into some form of continuous relationship. However, a continuous relationship is by nature a delicately balanced one, vulnerable to numerous outside influences which can impact directly on the needs and interests of parties to the relationship. This is especially true if a disequilibrium of power exists between the parties, as is the case in an employment relationship. As a result, conflicts within the employment relationship are inevitable. Conflict can be seen as a natural consequence of the continuous relationship between employer and employee. Where the dispute involves more than one employee the conflict can take on a collective nature which may reveal itself in concerted acts of industrial action.¹ In such conflict, the most common manifestation is the strike, which represents the worker's ultimate weapon against the employer.

To "classical" legal minds the law relating to strikes is surely one of the more unsatisfactory areas of the law; strikers seek to force their demands upon their adversary by simply inflicting harm.² Nevertheless, the individualism of legal rules places the worker at a disadvantage against capital. It is only when individual labour unites its power through collective action, that the employment relationship can be considered equal. The right to strike thus fulfils an essential function in the collective bargaining process: the threat of a strike ensures that the employer will bargain properly. In addition, the collective refusal to work counteracts the employer's ability to take unilateral decisions which can negatively affect the workforce. Kahn-Freund, who describes the main purpose of labour law as the redressing of any disequilibrium of power, formulates the argument as follows:

¹ Cf Clarke, "Industrial Conflict: Perspectives and Trends", in *Comparative Labour Law and Industrial relations in Industrialised Market Economies*, 1990, 179.

² Cf Jacobs, "The Law of Strikes and Lock-outs", in *Comparative Labour Law and Industrial relations in Industrialised Market Economies*, 1993, 423.

"There can be no equilibrium in industrial relations without a freedom to strike. In protecting that freedom, the law protects the legitimate expectation of the workers that they can make use of their collective power: it corresponds to the protection of the legitimate expectation of management that it can use the right of property for the same purpose on its side."³

Because of a strike's coercive nature and delictual consequences, there has in the past been a reluctance to describe the freedom to strike as a right:⁴ no other human right has the explicit purpose of forcing other private individuals to do what they do not want to do. Recognition of the pivotal role that strikes play in the collective bargaining process has, however, overcome this conceptual difficulty.⁵ Nevertheless, the right - as opposed to the freedom - to strike is not an unlimited one. The means and/or purpose of a strike can cause the strike to be declared unlawful. The right to strike is restricted in a number of ways in both South African and Dutch practice today. These restrictions will be discussed in detail in the chapters that follow.

As the title indicates, the purpose of this dissertation is to undertake a comparative survey of the law relating to strikes in South Africa and the Netherlands. Up until now, a few introductory remarks have been made regarding strikes in general. In order to fully compare the strike phenomenon as it manifests itself in South Africa and the Netherlands, it is first of all necessary to provide some brief background information about the two countries. It may be mentioned at this stage that the historical link between the two countries was one of the main reasons why the Netherlands was chosen for this comparative survey.

1.2 The Two Countries

In 1648 the Independent Republic of the United Netherlands came into existence.⁶ The

³ Davies & Freedland, *Kahn-Freund's Labour and the Law*, 1983, 292.

⁴ A freedom to strike means that the strike is legally tolerated, but no special privileges are granted: the legal limits of the freedom to strike are thus a consequence of the general legal order. If, however, the strike is privileged (the legal order evaluates the pursuit of collective interests more highly than the opposed individual obligations of the employment contract), one may talk of a right to strike. See Birk, "The Law of Strikes and Lock-outs", in *Comparative Labour Law and Industrial relations in Industrialised Market Economies*, 1990, 270 in this regard.

⁵ See Rycroft in Rycroft & Jordaan, *A Guide to South African Labour Law*, 1992, 271.

⁶ It consisted of seven provinces of which Holland was the most important and progressive.

seventeenth century was the "golden age" of that Republic during which the arts, culture, commerce and the law reached a pinnacle. Extensive commercial exchanges took place between the Netherlands and the East via the sea route around the Cape of Good Hope. The central government of the Netherlands appointed a trading company, the *Vereenigde Oost-Indische Compagnie* (VOC), to administer the commercial relations with the East on their behalf, and to control the Dutch territories in India and Indonesia.

In 1652 Jan van Riebeeck, an official of the VOC, came to the Cape to establish a refreshment station for the ships on their journey between the Netherlands and the East. Over the next almost one hundred and fifty years the temporary settlement changed into a fully-fledged colony. Roman-Dutch law⁷ took root and was applied within the gradually expanding boundaries of the colony. In 1806 the Dutch rule at the Cape finally came to an end and the British occupation commenced. The political link between South Africa and the Netherlands was thereby effectively terminated.

1.2.1 The Netherlands

The Netherlands (or Holland as it is sometimes called) is a small country on the north-western coast of Europe, bordering Belgium and the Federal Republic of Germany. It has approximately 16 million inhabitants compressed within a relatively small area; the population density is approximately 435 inhabitants per square kilometre. The densely populated western part of the country contains the three main cities; namely Amsterdam (the capital), Rotterdam (one of the largest ports in the world) and The Hague (seat of the government). The establishment of the European Economic Community has accentuated the role of the Netherlands as the gateway to Europe: easy access from the North Sea has made the delta of the rivers Rhine, Maas and Schelde a major centre of economic activity. As a result, the delta has also become a favourite location for internationally orientated industries.⁸

⁷ The Netherlands (like the rest of Western Europe) experienced the reception of Roman law, which eventually merged with the local Germanic (Dutch) customary law. This led to the creation of so-called Roman-Dutch law; the settlement at the Cape lived according to Roman-Dutch law as that was the legal system with which they were acquainted. Roman-Dutch law, as brought to the Cape in 1652, still forms the basis of South African common law.

⁸ See Rood, *International Encyclopaedia for Labour Law and Industrial Relations*, 1993, 11 (The Netherlands) who names large corporations such as Royal Dutch Shell (petroleum and chemicals), Unilever (foodstuffs, detergents) and Philips (radio, television, electronics).

The Dutch economy has experienced an almost uninterrupted expansion since World War II, with real national income more than doubling in the period from 1961 to 1982. However, two oil crises led to a decline in economic growth during the periods 1973/74 and 1978.⁹

The Netherlands is a country composed of religious and political minorities, a fact which has dominated the country's nineteenth century history. In contrast to other countries such as Britain and Germany, the emancipation of the working class was preceded by an emancipation of religious minorities, namely the orthodox Calvinists and the Roman Catholics. Each minority built their own "pillar", which amounted to a denominational segregation of political parties, schools, trade unions, mass media, etc.¹⁰ Since World War II, the various minorities (Protestants, Catholics, liberals and socialists) have formed a number of different coalition cabinets.

The industrial revolution, already well underway elsewhere, only reached the Netherlands in 1860. The 1860's saw the organisation of trade unions among printers, diamond workers, organ-builders and railwaymen. At the beginning of this century, three federations of trade unions were created: the Dutch Federation of Trade Unions (NVV), the Catholic Federation of Trade Unions (NKV), and the Protestant Federation of Trade Unions (CNV). The NVV and NKV merged in 1982 to form the Federation of Dutch Trade Unions (FNV). Two other federations of trade unions were also established: the Federation of High and Middle Level Employees (MHP, formed in 1974) and the General Trade Union Congress (AVC, formed in 1992). The main federations of employers' organisations is the Federation of Dutch Enterprises (VNO) and the Dutch Christian Employers' Association (NCW).¹¹ The labour relations system in the Netherlands is, however, characterised by harmony and co-operation between the relevant parties, low union membership (about 30%), institutionalised

⁹ Since 1980 the number of unemployed has shown a sharp increase due to the weakened economic situation. Only recently there has been some improvement (in 1992 the total number of unemployed was 305,000). Foreigners registered in the Netherlands numbered 732,900 in 1992, of which 503,900 were unemployed. See Rood, *International Encyclopaedia for Labour Law and Industrial Relations*, 1993, 12-14 (The Netherlands) and Jansen, *Labor Law in the Netherlands*, 1994, 1 for more detail in this regard.

¹⁰ See Rood, *International Encyclopaedia for Labour Law and Industrial Relations*, 1993, 15 (The Netherlands) and Hepple (ed), *The Making of Labour Law in Europe*, 1986, 328 for more detail in this regard.

¹¹ See Rood, *International Encyclopaedia for Labour Law and Industrial Relations*, 1993, Par 217-228 for more detail in this regard.

consultations between employers' organisations and trade unions on a national level, and institutionalised co-determination within the workplace.¹² An employer is legally obliged to establish a so-called works council, composed of members elected by the employees. The employer is legally obliged to consult with the works council on several issues. There is a tradition of participatory relations at many levels between employers' organisations and trade unions, and in many companies management regularly consult with the unions.¹³

In accordance with the Dutch labour relations' tradition of harmony and co-operation and their system of industrial democracy, the country has a relatively low incidence of strikes and industrial conflict,¹⁴ as can be seen from the tables below.¹⁵

Table 1: Strike indicators (averages of 1950-1990)

	<u>1950-62</u>	<u>1963-69</u>	<u>1970-82</u>	<u>1983-90</u>
Incidence	64.8	39.0	38.3	27.8
Number of working days lost to strikes (x 1000)	96.5	25.1	153.9	71.7
Number of strikers (x 1000)	17.2	10.9	27.2	16.8

¹² See Rood, *International Encyclopaedia for Labour Law and Industrial Relations*, 1993, 17-19 for a discussion on the Foundation of Labour (a forum for discussion of wage issues and working conditions by representatives of the major employers' organisations and trade unions) and the Social Economic Council (an independent body advising government on socio-economic policy).

¹³ Cf Havinga, "Labour Office and Collective Dismissal in the Netherlands", in *Reflexive Labour Law*, 1994, 266; Windmuller, *Labour Relations in the Netherlands*, 1969, 437; Van der Ven, "Social Law in the Netherlands", in *Fifty years of Labour Law and Social Security*, 1986, 147.

¹⁴ The Netherlands compares favourably with many other industrialised western countries in this respect: see Rood, *International Encyclopaedia for Labour Law and Industrial Relations*, 1993, Table 9.

¹⁵ Source: *Central Buro of Statistics*, (not published).

Table 2: Lost working days (1989-1992)

	<u>1989</u>	<u>1990</u>	<u>1991</u>	<u>1992</u>
Due to strikes (x 1000)	23.8	206.7	96.3	85.4
Due to illness (percentage of total work days)	6.8	6.8	6.4	5.8

The Netherlands is one of the many countries which does not have an applicable statute on the law relating to strikes. It is the task of the judges to fill the gap left by the legislature. Consequently, strike law in the Netherlands is, for the greater part, judge-made law. In conclusion, therefore, something will have to be said about judicial organisation in the Netherlands.

The Organisation of the Judiciary Act of 1827 established lower courts (*kantongerechten*), district courts (*arrondissements-rechtbanken*), courts of appeal (*gerechtshoven*) and the Supreme Court (*Hoge Raad*).¹⁶ No separate labour courts exist, and industrial disputes are heard by these ordinary courts. If time is of the essence, as is the case in most strike related disputes, the President of a district court can give a summary judgement. The summary judgement is, however, subject to appeal¹⁷ and appeal in cassation,¹⁸ but very often the decision of the President acts as a final judgement. It should be noted that there is no *stare decisis* rule in the Netherlands. Consequently, a court decision has only persuasive authority, and does not create a binding precedent. In practice, however, the Supreme Court's judgements are generally followed by the other courts. This is particularly true of those cases in which the Supreme Court provides guidelines for future cases. These guidelines

¹⁶ The Dutch Supreme Court can be compared with the French and Belgian Court of Cassation.

¹⁷ The decision of a lower court judge is generally subject to appeal in a district court, whereas a decision of a district court given in the first instance is subject to the appellate jurisdiction of the court of appeal. The latter court sits with three judges.

¹⁸ Decisions of lower courts, district courts and courts of appeal are subject to "appeal in cassation" to the Supreme Court. In contrast to the ordinary appeal procedures, the Supreme Court is bound by the facts as established by the lower courts and is only allowed to decide questions of law. The Supreme Court normally sits with five judges.

will normally be taken into account by the other courts when faced with a similar case.¹⁹

1.2.2 South Africa

The Republic of South Africa (hereafter referred to as South Africa) is situated in the southern most part of the African continent, and extends from the Limpopo River in the north to Cape Agulhas in the south. South Africa is approximately 25 times larger than the Netherlands and has a total surface area of 1,127,200 square kilometres. The country consists of nine provinces and has three capitals, namely Cape Town (the legislative capital), Pretoria (the administrative capital) and Bloemfontein (the judicial capital). South Africa has an estimated total population of approximately 42 million people. Cultural and racial diversity have always been important features of South African society and conflict between the various racial groups has significantly affected political and economic development within the country. During the years from 1948 to approximately 1990 the now discarded policy of apartheid was in force. In 1990 the National Party government in effect repudiated its past policies as being unworkable and embarked on a programme of reform.²⁰ After extensive negotiations the first democratic election was held on 27 April 1994, which election was won by the African National Congress (ANC). In 1996, South Africa's new Constitution,²¹ as well as a new Labour Relations Act,²² came into force, proclaiming a new era in labour relations in South Africa.²³

Until the middle of the nineteenth century the South African economy was mainly agricultural in nature. However, from the 1860's onwards, after the discovery of diamonds and gold, the mining industry developed rapidly to become one of the most important sectors of the economy. After World War II the manufacturing sector also grew in importance, and

¹⁹ See Rood, *International Encyclopaedia for Labour Law and Industrial Relations*, 1993, 23-27 for more detail in this regard.

²⁰ See Piron & Le Roux, *International Encyclopedia for Labour Law and Industrial Relations*, 1993, 18-22 (South Africa) for more detail in this regard.

²¹ Act 108 of 1996.

²² Act 66 of 1995.

²³ See Chapter 6 for more detail in this regard.

today the textile industry, clothing industry, metal industry, chemical industry and food processing industry occupy an important position in the economy. A large and diversified service industry also exists and the agricultural sector continues to play an important role in the economy.²⁴

During the last number of years the South African economy became somewhat stagnant with very little real growth. Various factors contributed to this, including political uncertainty, economic sanctions during the apartheid era, strict monetary policies, and a drop in productivity levels coupled with high wage increases.²⁵ Despite advantages such as a sound economic infrastructure, a wealth of mineral resources, and the lifting of economic sanctions, the economy faces an uphill task in creating jobs for the population and in providing adequate housing, education and health services.

The history of industrial relations in South Africa is also characterised by conflict between racial groups.²⁶ The first documented trade union appears to have been a Carpenters' and Joiners' Union, founded in Cape Town in 1881. Other early unions were formed in the printing, engineering, iron moulding and tailoring trades, as well as the mining industry.²⁷ All these early unions were formed among skilled artisans.²⁸ While skilled labour for the mines was provided mainly by overseas recruitment, the mine owners required large numbers of unskilled labourers and turned to the indigenous Black population to provide it. The result was a racial division of unskilled and skilled workers which led to the development of trade unions split along racial lines, as well as to different bargaining structures for different groups.

²⁴ Although the government have permitted the development of a mixed economy, the economy has nevertheless been characterised by a high degree of state interference; see Piron & Le Roux, *International Encyclopedia for Labour Law and Industrial Relations*, 1993, 18 for more detail in this regard.

²⁵ Today, South Africa has an unemployment rate as high as 40%.

²⁶ See Nel (ed), *South African Industrial Relations*, 1997, 42-62 for a detailed discussion of the development of industrial relations in South Africa.

²⁷ Although early trade unionism met with hostility from employers, the law itself placed few restrictions on the formation of such bodies. The right to strike was, however, restricted in a number of ways; see Chapter 5 in this regard. Cf also Newall, *The Demand for a Living Wage*, 1988, 5-12 in this regard.

²⁸ The major objective of these unions was the protection of the status of the skilled worker. However, their position was soon threatened by the increasing use of cheap Black labour on the mines. See Finnemore & Van der Merwe, *Introduction to Industrial Relations in South Africa*, 1987, 1-5 and Nel (ed), *South African Industrial Relations*, 1997, 44-46 for more detail in this regard.

Although unions catering for Black workers were never prohibited, formidable obstacles were placed in their way. However, despite the restrictions on the formation and activities of Black unions, these unions experienced phenomenal growth from the early 1970's onwards. As a result of this growth, coupled with the changing economic and political conditions, the National Party government appointed a commission of enquiry, known as the Wiehahn Commission, to investigate and make recommendations concerning South African labour law. The recommendations of the commission were the catalyst for the dramatic changes in South African labour law and labour relations during the 1980's.²⁹ Unions catering for Black workers became entitled to register in terms of the primary act regulating collective bargaining and all forms of statutory discrimination in so far as labour and related rights were concerned were done away with. In 1985 a number of the "newer" unions (catering primarily for Black workers) formed the Confederation of South African Trade Unions (COSATU), which is at present the most important of the union groupings and which has played a major role in the ongoing transformation of the country's industrial relations.³⁰ Numerous employer bodies also exist within South African industry and these are mostly organised on an industry basis, such as the Chamber of Mines. The central employer body, which interacts with government and unions on main national level bodies such as the National Economic Development and Labour Council (NEDLAC), is Business South Africa.³¹

The abovementioned Wiehahn Commission also recommended the establishment of an industrial court, and after its creation in 1979, the Industrial Court played an important role in the development of South African labour law by applying principles of equity rather than common law contractual principles. The Industrial Court was not regarded as a court of law³² but rather as an administrative body or quasi-judicial tribunal that exercised a wide

²⁹ See Chapter 5 for more detail on the Wiehahn Commission and its recommendations.

³⁰ The National Council of Trade Unions (NACTU) and the Federation of South African Labour Unions (FEDSAL) are some of the other important union groupings; see Newall, *The Demand for a Living Wage*, 1988, 12-16 and Piron & Le Roux, *International Encyclopedia for Labour Law and Industrial Relations*, 1993, 27-31 for more detail in this regard.

³¹ Other important bodies are the South African Chamber of Business (SACOB), the Afrikaanse Handelsinstituut (AHI) and the South African Co-ordinating Committee on Labour Affairs (SACCOLA).

³² The Industrial Court did not form part of the normal judicial hierarchy but had certain links with the ordinary courts; see Piron & Le Roux, *International Encyclopedia for Labour Law and Industrial Relations*, 1993, 40-42 for detail on the judicial hierarchy and the application of the doctrine of precedent in South Africa.

variety of functions.³³ In 1988, a Labour Appeal Court was created which had the power to review the decisions of the Industrial Court as well as to hear appeals against certain of its decisions. However, the 1995 Labour Relations Act changed the above system by creating a new Labour Court and Labour Appeal Court with increased authority and power. The Labour Court has the status of a provincial division of the High Court and the Labour Appeal Court has the status of the Supreme Court of Appeal, and they are now the only courts that can hear and decide labour disputes.³⁴

1.3 The Strike Concept

Before the law relating to strikes in South Africa and the Netherlands can be analysed and discussed, it is necessary to obtain clarity on the strike concept as it has developed in the two countries. The important question of whether a particular industrial action is lawful or not will be dealt with in subsequent chapters, and only the strike concept will now be discussed.

1.3.1 The Netherlands

Until recently, almost no legal order which permits industrial action has been able to fully regulate by statute the permissibility and the limits of industrial action.³⁵ The Netherlands is no exception in this regard. Fortunately, there have been efforts at an international level to guarantee the right to strike by means of treaties and conventions and these provide some guidelines as to the law surrounding strikes. In 1980, the European Social Charter was ratified by the Netherlands. Article 6(4) of this charter recognises "the right of workers ... to collective action ..., including the right to strike...", and is considered by the Dutch Supreme

33 *SA Technical Officials' Association v President of the Industrial Court* (1986) ILJ 186 (A); *Medupe v Golden Spur* (1987) ILJ 376 (IC).

34 The appointment process for the judges involves representatives of business, labour and the government and the type of disputes that may be heard by these courts has been restricted and is specifically set out in the act; see sections 151-183 of Act 66 of 1995 for more detail in this regard.

35 In modern democracies such a statute which necessarily implies some limitation on the freedom of industrial action are not always politically feasible. See Birk, "The Law of Strikes and Lock-outs", in *Comparative Labour Law and Industrial relations in Industrialised Market Economies*, 1990, 273 in this regard.

Court to be a directly binding provision.³⁶ This article therefore forms the basis of the right to strike in the Netherlands; accordingly, the concepts "strike" and "collective action" will have to be carefully scrutinised. As no national legislation exists, one has to look elsewhere for definitions of the above concepts.

The concept "strike" has over the years been defined by numerous academic writers. Tilstra, in her comprehensive thesis on the restriction of the right to strike in the Netherlands, lists the following as key elements of the strike phenomenon:

- * a cessation of work;
- * by wage-earning employees;
- * to apply pressure in order to achieve a certain goal;
- * temporary in nature;
- * with a collective character.³⁷

It is practicable to discuss the strike concept as it developed in the Netherlands according to these guidelines.

Firstly, the cessation of work is undoubtedly the most distinctive element of any strike. Kahn-Freund, for example, defines the strike simply as a "concerted stoppage of work".³⁸ This element distinguishes the strike from all the other forms of industrial action, such as go-slows and work-to-rules.³⁹

Secondly, it is a generally accepted fact that only those employees who earn a wage or salary

³⁶ HR 30 May 1986, NJ 1986, 688.

³⁷ Tilstra isolates these elements from the following definition by Meijers, *De arbeidsovereenkomst*, 1924, 52: "Een werkstaking is het niet-verrichten van de arbeidsprestatie door arbeiders, gebezigd als middel om hun werkgever of andere personen te bewegen een bepaalde daad te doen of na te laten, met de bedoeling aan de zijde van de arbeiders om den arbeid wederom te verrichten zodra het beoogde doel bereikt is." See Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 10.

³⁸ Davies & Freedland, *Kahn-Freund's Labour and the Law*, 1983, 293.

³⁹ A distinction can be drawn between the traditional all-out strike, involving each and every employee of a plant, and relay strikes, where groups of employees within the same concern take turns to strike. See Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 10.

from an employer can, in the traditional sense of the word, go on strike. If no such link exists between employee and employer, or if there simply is no employer (as in the case of self-employed persons) any form of so-called industrial action cannot amount to more than mere mass-demonstrations.⁴⁰

Thirdly, as discussed above, the use of the strike weapon exerts pressure on an employer and so creates a balance of power between management and labour. This weapon will of course be directed towards an authoritative entity in order to achieve a certain goal. Normally, the employees' own employer will be in the line of fire. If, however, a third party is involved in the conflict, such collective action can usually be classified as a secondary or sympathy strike. Such a strike takes place in a workplace other than the one where the original dispute exists in an attempt to force the primary employer to settle the dispute. Secondary action is most effective when it affects the entire industry to which the primary employer belongs. A strike can also be a mixture of the two given cases in the sense that it is directed at the employer, but aimed at the government in order to prevent it from interfering with the conditions of employment.⁴¹ All the above actions with their various goals and objects can be classified as strikes, even though some of them might be regarded as unlawful.⁴²

Fourthly, an obvious characteristic of the strike concept is its temporary nature. The strikers merely want to *change* (or maintain) the situation they find themselves in. No mention is made of a termination of the employment relationship.

Lastly, the element of collectivity forms an essential part of the strike concept. It confirms the fundamental character of a strike, namely the unity amongst a number of individually powerless persons to counteract the powers of management and thereby redress a disequilibrium of power. The fact that the industrial action is not organised by a union (the

40 See Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 10, who mentions actions by medical practitioners and advocates against proposed changes in government policy as one example of actions which do not contain the above strike element.

41 In such a case, the striking employees' working conditions can be influenced by the government as third party, and one can thus not refer to this type of strike as a pure sympathy strike. See HR 30 May 1986, NJ 1986, 688 in this regard.

42 The issue of lawfulness will be dealt with in Chapter 3.

so-called wildcat strike), would not disqualify such action from being defined as a strike.⁴³

The minimum number of persons required to constitute a collectivity of workers would entirely depend on the circumstances of each case. In a given situation, a small number of employees may be able to paralyse an entire plant (the so-called bottleneck strike), and it can be accepted that such action would also qualify as a strike.⁴⁴ Normally, however, a reasonable number of employees would be required to execute a successful strike.

If the above characteristics of the strike concept are noted, it is possible to formulate the following working-definition of a strike in the Netherlands: a strike is the temporary cessation of work by a collectivity of wage-earning employees, to exert pressure on an employer or third party in order to achieve a certain goal.⁴⁵ As mentioned above, however, strike law in the Netherlands is based on article 6(4) of the European Social Charter, which also refers to the right to "collective action". The broad concept of "collective action" will therefore have to be analysed as well.

It is clear that the concept of collective action includes not only the traditional strike phenomenon, but also those forms of pressure which fall short of the popular notion of a strike, such as work-to-rules, go-slows, sit-down strikes, blockades, boycotts and pickets. These types of collective action are all characterised by the fact that the workers do not perform their duties in the normal manner. A work-to-rule is a strategy to slow down and disrupt the production process whereby employees meticulously adhere to their job descriptions or contracts of employment. A go-slow is what its name implies: workers

43 Regarding the relationship between the collectivity of workers and their trade union, compare Davies and Freedland, *Kahn-Freund's Labour and the Law*, 1983, at 293: "In trying to define a strike we were careful not to make any reference to trade unions. We associate strikes and trade unions, but this is not a necessary association. The freedom to strike can be understood as a freedom of the individual or as a freedom of the organisation".

44 See Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 12 where she mentions that a minimum number of two employees is needed if one still wants to speak of a collectivity of people in the grammatical sense of the word.

45 Compare also the following definitions: Rood, *Naar een Stakingswet?*, 1978, 20: "Het gemeenschappelijk neerleggen van het werk door werknemers als pressiemiddel, met de bedoeling het werk te hervatten zodra het beoogde doel is bereikt."; Bakels, *Schets van het Nederlands Arbeidsrecht*, 1992, 193: "...het collectief neerleggen van het werk door arbeiders teneinde hun werkgever of derden tot een bepaald handelen of nalaten te bewegen en met de bedoeling de werkzaamheden te hervatten zodra de beoogde doeleinden zijn bereikt."; Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 14: "...het in collectief verband neerleggen van het werk door werknemers, als uiting van protest of als middel om de werkgever of derden tot een bepaald handelen of nalaten te bewegen."

continue to fulfil their duties, but at a pace which causes a reduction in output. A sit-down strike (sit-in or work-in) occurs when workers occupy the workplace, possibly continuing to work, but with the aim of denying management control of, or access to, work processes. Just like the normal strike, these are all autonomous forms of collective action.⁴⁶

However, certain types of collective action are executed in order to support other collective action already in operation. A well-known supportive action is the blockade of the entrance to a business in order to interfere with the entry and exit of non-strikers. Boycotting (collective refusal to hold relations with someone either as punishment, or with the view to coercing employers or third parties to abandon their position) and picketing (attempts by employees engaged in an industrial dispute either to persuade other employees to take their side in the dispute, or to communicate their grievance to the public) are other popular forms of supportive collective action.⁴⁷ The above forms of industrial action can all be included in the concept of "collective action" as referred to in article 6(4) of the European Social Charter.

In the chapters on the Dutch strike law, the terms "strike" and "collective action" will sometimes be used interchangeably: unless the context dictates otherwise, the term "strike" will also include the other forms of collective action.

1.3.2 South Africa

Unlike the situation in the Netherlands, national legislation exists in South Africa which regulates the permissibility, and the limits of industrial action, and which defines the strike concept in some detail.

The former Labour Relations Act⁴⁸ defined a strike as:

⁴⁶ See 3.3.3.2 and 3.3.3.3 for more detail in this regard.

⁴⁷ See 3.3.3.4 for more detail in this regard.

⁴⁸ Act 28 of 1956. In some early court decisions definitions of strikes were enunciated in spite of relevant statutory definitions: cf *De Beer v Walker* 1948 (1) SA 340 (T); *R v Mtiyana* 1952 (4) SA 103 (N); *CWIU v Bevaloid (Pty) Ltd* 1988 ILJ 447 (IC).

"any one or more of the following acts or omissions by any body or number of persons who are or have been employed either by the same employer or by different employers-

(a) the refusal or failure to continue work (whether the discontinuance is complete or partial) or to resume their work or to accept re-employment or to comply with the terms or conditions of employment applicable to them, or the retardation by them of the progress of work, or the obstruction by them of work; or

(b) the breach or termination by them of their contracts of employment, if-

(i) that refusal, failure, retardation, obstruction, breach or termination is in pursuance of any combination, agreement or understanding between them, whether expressed or not; and

(ii) the purpose of that refusal, failure, retardation, obstruction, breach or termination is to induce to compel any person by whom they or any other persons are or have been employed-

(aa) to agree to or to comply with any demands or proposals concerning terms and conditions of employment or other matters made by or on behalf of them or any of them or any other persons who are or have been employed; or

(bb) to refrain from giving effect to any intention to change terms or conditions of employment, or, if such a change has been made, to restore the terms or conditions to those which existed before the change was made; or

(cc) to employ or to suspend or terminate the employment of any person."

This statutory definition clearly extended far beyond the popular notion of a strike,⁴⁹ namely a concerted cessation of work in support of an industrial demand. It quite clearly envisaged overtime bans (if there was a contractual obligation to work overtime),⁵⁰ work-to-rule⁵¹ and secondary strikes⁵² and was widely framed to ensure that all potentially disruptive conflicts were made subject to the statutory conciliation procedures.⁵³

The 1995 Labour Relations Act now defines a strike as follows:

"strike" means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in

⁴⁹ Cf *R v Schroeder* 1934 TPD 127 at 129: "In its ordinary sense the word 'strike' means a concerted refusal by employees to work until some grievance is remedied".

⁵⁰ *Plascon Evans Paint (Natal) Ltd v CWIU (2)* 1988 ILJ 231 (D); *Bebel Investments (Pty) Ltd t/a East London Furniture Industries v PPWAWU & others* 1989 (1) SA 908 (E); *SA Breweries Ltd v FAWU & others* (1989) ILJ 844 (A); *NUMSA v Gearmax (Pty) Ltd* 1991 ILJ 778 (A).

⁵¹ Cf *SA Breweries Ltd v FAWU* 1989 ILJ 844 (A) at 851F-G.

⁵² *Barlows Manufacturing Co Ltd v MAWU* 1988 ILJ 995 (IC); 1990 ILJ 35 (T); *Firestone SA (Pty) Ltd v NUMSA* 1992 ILJ 345 (T); *Metal Box SA Ltd t/a Blow Moulder v NUMSA* 1992 ILJ 1503 (IC); *NUMSA v Firestone SA (Pty) Ltd* 1993 ILJ 101 (T).

⁵³ Cameron *et al*, *The New Labour Relations Act*, 1989, 72. See also Wade & Van der Walt, "Aspects of the South African strike definition", in *Obiter*, 1993, 99-126 and Wallis, *Labour and Employment Law*, 1992, Par 48-51 for more detail in this regard.

respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory;⁵⁴

A comparison between the definitions of a strike under the previous Act and the 1995 Labour Relations Act reveals the following:

- * there is no change in who qualify as strikers and the new Act only deleted the words "body or number of" before the word "persons";
- * the current definition has been simplified in that there has been a reduction in the number of actions listed as constituting strike action; however, other than the refusal to accept re-employment, all the additional items contained in the previous definition could be encompassed by the current definition, signifying no real change in legislative intent;⁵⁵
- * the current definition no longer requires that the purpose of a strike should be to compel an employer to do something, but merely that the purpose must be to remedy a grievance or resolve a dispute in respect of "any matter of mutual interest between employer and employee";⁵⁶
- * the definition of "work" in the current definition of a strike includes both compulsory and voluntary overtime work whereas only the collective refusal to perform compulsory overtime work could constitute a strike under the previous definition.⁵⁷

⁵⁴ Section 213 (the definition section) of Act 66 of 1995.

⁵⁵ The deletion of the refusal to accept re-employment may have been effected as a result of the deletion in the current Act's lock-out definition ("lock-out" means the exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion) of a dismissal lock-out and a lock-out in the form of a refusal to re-employ.

⁵⁶ The softer wording should not really make a difference to the effect of the definition. Note that protest action to promote or defend the socio-economic interests of workers is regulated separately by the 1995 Labour Relations Act (see below).

⁵⁷ Under the previous definition the courts have held that the collective refusal to work voluntary overtime constituted, at most, an unfair labour practice; see *NUMSA v Gearmax (Pty) Ltd* (1991) ILJ 778 (A); *Cape Gate (Pty) Ltd v Namane* (1990) ILJ 766 (IC) and *Macsteel (Pty) Ltd v NUMSA* (1990) ILJ 995 (LAC) in this regard.

In *Afrox Ltd v SACWU & others (2)*⁵⁸ the Labour Court considered the definition of a strike in the 1995 Act. The facts can be summarised as follows: Afrox decided to introduce staggered shifts for certain employees at its Pretoria West branch. Its insistence in introducing the shifts led to a dispute and a strike at that branch. The employees at other branches then also embarked on strike action in support of the strike at the Pretoria West branch. After an unsuccessful attempt to obtain an order interdicting the "secondary" strikes at the other branches (see *Afrox Ltd v SACWU & others (1)* below), Afrox contended that the strike action engaged in by the workers did not fall within the definition of strike action in the Act since there was no grievance or dispute in respect of a matter of mutual interest. The reason for this was that the employees who had refused to work the staggered shifts had subsequently been retrenched⁵⁹ and the work done by them had been taken over by an outside contractor. The dispute had therefore fallen away and there could thus be no strike which could be the subject of protection. The Court accepted this argument in principle and stated as follows:

"A strike can terminate in various ways. One way for a strike to terminate is where the strikers abandon the strike. This normally takes the place of an unconditional return to work. Another possible way, for there are probably other ways ... is by the disappearance of the substratum. If the *casus belli* is removed, for example, by the employer's conceding to the demands of the strikers or by removing the grievance or by resolving the dispute then the foundations of the strike fall away. The strike is no longer functional; it has no purpose and it terminates. When the strike terminates so does its protection. It is not in the interests of labour peace for a strike action to be continued in such circumstances even in the case of a protected strike."

The Court then considered the facts of the case and found that the nature of the dispute between the parties had changed from one in connection with staggered shifts to one about retrenchments and its implications for the job security of some of the employees. The Court pointed out that a strike over the latter issues would be unprotected by virtue of section 65(1) read with section 191, in terms of which this type of dispute must be referred to the Labour Court for adjudication.⁶⁰

⁵⁸ (1997) ILJ 406 (LC); *Afrox Ltd v SACWU & others (1)* (1997) ILJ 399 (LC) will be dealt with below.

⁵⁹ Regarding the respondents counter-application that the Court grant an interim interdict restraining Afrox from retrenching the respondent employees, the Court found that the requirement of irreparable harm had not been made out and refused to grant the respondents urgent interim relief (at 414C).

⁶⁰ See Le Roux, "The Labour Court: some early decisions", *Contemporary Labour Law*, 1997, 73.

In *Simba (Pty) Ltd v FAWU & others*⁶¹ the Labour Court had another opportunity to consider the definition of a strike. The facts were as follows: Simba applied to the Labour Court for an order to compel the employees to stagger their lunchbreaks and to interdict them from taking their lunch at the same time. The Court held that section 7 of the Basic Conditions of Employment Act of 1983 was applicable, which compelled the employer to grant the employees a meal interval after they had worked continuously for five hours. As all the employees on a shift commenced work at the same time they became entitled to their lunchbreak at the same time.

The Court rejected a submission that by refusing to take staggered lunchbreaks the employees were retarding work as envisaged by the phrase "retardation of work" and so constituting one of the elements of a strike as defined in section 213 of the 1995 Act.⁶² It added:

"...the word 'work' in the phrase 'retardation of work' in the definition of the word 'strike' in the new Act does not include work the performance of which beyond a certain time or at a particular time will be illegal. To hold otherwise would be contrary to public policy and would sanction a contravention of the BCEA."⁶³

The 1995 Labour Relations Act also defines other forms of collective industrial action which should be distinguished from the traditional strike concept as defined above and which indicates that the legislature intended to broaden the ambit of permissible employee-based industrial action.

Secondary strikes are defined in section 66(1) as follows:

"In this section 'secondary strike' means a strike or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer but does not include a strike in pursuit of a demand referred to a council if the striking employees,

61 (1997) ILJ 558 (LC).

62 The Court stated as follows: "In *SA Breweries Ltd v Food & Allied Workers Union* 1990 (1) SA 92 (A) at 100E-F; (1989) 10 ILJ 844 (A) the Appellate Division dealt with the meaning of the phrase 'retardation by them of the progress of work' in the definition of 'strike' in the 1956 Act and said: 'the legislature clearly had in mind a go-slow or work to rule, a situation where work is done but at substantially reduced levels of activity and productivity'. I can see no basis, and none was suggested to me by counsel, for holding differently under the new Act." (at 566H-I).

63 At 568H. The application for an interdict was accordingly dismissed.

employed within the registered scope of that council, have a material interest in that demand."

A secondary strike can thus be classified as a "sympathy strike" where, for example, company A's employees strike in sympathy with a strike being conducted by company B's employees. The definition's wording is somewhat ambiguous as it could also cover a strike by employees A, B and C at a company in support of a strike by employees X, Y and Z at the same company. However, the reference in section 66(2) to "primary employer" and "secondary employer" suggests that the legislature's intention was to cover only the traditional "sympathy strike".

In *Afrox Ltd v SACWU & others (1)*⁶⁴ the Labour Court considered the definition of a secondary strike. As mentioned above, Afrox's insistence in introducing staggered shifts lead to a dispute and a strike at its Pretoria West branch, followed by strike action at other branches which was categorised by the union as a secondary strike. The Court confirmed that a secondary strike involves the employees of one employer taking action in support of employees employed by another employer. This was not the case here as all the employees at the various branches were employed by Afrox. In line with this miscategorisation of the strike Afrox argued that the strike had to comply with the provisions of section 66(2) of the Act to acquire protected status. The Court rejected this submission:

"I do not agree that the applicant is entitled to have an interdict issued in its favour against the employee respondents simply on the strength of the label that the union gives to that conduct even if, in law and in reality, that conduct is not that which the union calls it. As Shakespeare said, a rose by any other name would still smell like a rose. Accordingly a primary strike by any other name would by any other name still be a primary strike."

The Court also rejected Afrox's second submission that, if the employees at the other branches were engaged in a primary strike they were nevertheless not entitled to strike as they were not a party to the dispute that was referred to the relevant conciliation forum. The prerequisite for a protected strike was that the "issue in dispute" be referred to a bargaining council or to the CCMA.⁶⁵ The Act did not prescribe who had to refer the dispute to the

⁶⁴ (1997) ILJ 399 (LC).

⁶⁵ See section 64(1)(a) of the Act. The Court referred to the definition of the phrase "issue in dispute" in the definition section of the Act: "in relation to a strike or lock-out, means the demand, the grievance, or the dispute that forms the subject matter of the strike or lock-out". Compare also *Barlows Manufacturing v MAWU* (1988)

counsel or to the CCMA.⁶⁶ Afrox's application for an urgent interdict was accordingly dismissed by the Court.

Protest action⁶⁷ is regulated by section 77 and defined in section 213 (the definition section) as follows:

"protest action" means the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers, but not for a purpose referred to in the definition of strike;

The Act does not provide a definition of socio-economic interests and it appears that protest action is what has come to be known in South Africa as a "stayaway".⁶⁸

Picketing is regulated by section 69 and it is noteworthy that the term "picketing" (or "picket") is not defined in the Act. For present purposes it can be defined as attempts by employees engaged in an industrial dispute either to dissuade other employees from entering the workplace, or to communicate their grievance to the public.⁶⁹

Against the above background, the law relating to strikes in South Africa and the Netherlands can now be analysed and discussed. In the first section of the dissertation, strike law in the Netherlands is focused on. In Chapter 2, the historical background of the strike in both the public and private sectors is dealt with. The right to strike and restrictions on this right, or, in other words, the issue of lawfulness, are discussed in Chapter 3, while the rights of the individual within the context of the strike are investigated in Chapter 4. The second section of the dissertation deals with South African strike law and also starts off (in Chapter

ILJ 995 (IC).

⁶⁶ See Le Roux, "The Labour Court: some early decisions", *Contemporary Labour Law*, 1997, 72-73 for more detail in this regard.

⁶⁷ A feature of South Africa's turbulent history has been the collective withholding of labour as a mark of protest or for the purpose of achieving political ends. See Wallis, *Labour and Employment Law*, 1992, Par 48 in this regard.

⁶⁸ Under the previous Labour Relations Act stayaways were totally prohibited and in many instances dismissal for participation in such stayaways had been held to be fair. Compare *Business South Africa v COSATU & another* (1997) ILJ 474 (LAC).

⁶⁹ Compare *Lomati Mill Barberton v PPWAWU & others* (1997) ILJ 178 (LC).

5) with a discussion of the historical background thereof. In Chapter 6, the new Labour Relations Act that came into operation on 11 November 1996, is focused upon. The third and last section of the dissertation gives a brief comparative survey of South African and Dutch strike law.

A. THE NETHERLANDS

CHAPTER 2 - HISTORICAL BACKGROUND

2.1 Introduction

Projecting modern social concepts upon earlier centuries carries an inherent risk; if the background against which such phenomena existed is ignored, the possibility of an inaccurate representation is created. Naturally this also applies to the modern concept of a strike, a term which is closely linked to social, economical and political circumstances within a community. Therefore, when a few earlier strikes are dealt with in this chapter, the above necessary reservation must be born in mind.

In this chapter, the historical development of the law relating to strikes in both the private sector and the public sector will be dealt with. The development in the private sector can conveniently be divided into four phases.

The first phase commences with the earliest examples of strikes (1170 BC) up until the beginning of the nineteenth century.¹ In this first phase no distinction needs to be drawn between the private and the public sectors.

In the second phase (from the beginning of the nineteenth century up until 1969) the strike was initially seen as a phenomenon of criminal law. This approach was later replaced by a civil law assessment of strikes, which had the following as a point of departure: participation in a strike must, in principle, be regarded as a breach of the employment contract by the relevant employees, while the organising of a strike must be regarded as a delict committed by the trade union.²

¹ See 2.2.1.

² See 2.2.2.

The third phase commences in 1969 with the introduction of a bill on strikes which sought to regulate strikes by means of specific statutory rules. This bill played a role in the radical changes that took place in the jurisprudence.³

The fourth phase starts in 1986 when the Supreme Court, in a landmark decision,⁴ dealt with the direct applicability of the European Social Charter to strikes in the Netherlands.⁵ The law relating to strikes has followed a different path with respect to civil servants, and this path, as well as the origins thereof, will also be discussed in this chapter. The developments in the public sector can be divided into two broad phases. In the first phase (from the beginning of the nineteenth century up until 1980), collective action by civil servants was generally not tolerated, and penal provisions were applicable to this action for a great part of that period.⁶

The second phase starts in 1980 with the ratification of the European Social Charter and deals with the exception made with regard to the collective actions of civil servants, as well as the events which followed this ratification.⁷

2.2 Collective Action in the Private Sector

2.2.1 Strikes until 1811

Even though the earlier and highly interesting forms of collective action do not assist in solving the unique present-day problems regarding strikes, they often indicate that, also in the past, the social struggle did not exist outside the field of the law.⁸ In the ancient world,

³ See 2.2.3.

⁴ The *Nederlandse Spoorwegen* case, HR 30 May 1986, NJ 1986, 688.

⁵ This last phase will be covered in Chapter 3, where the current position with regard to strikes will also be analysed and discussed.

⁶ See 2.3.2.

⁷ See 2.3.3.

⁸ It should furthermore be noted that the strike is a phenomenon known to almost all the different cultures of the

the disparity of bargaining power between employer and employee was accentuated by far greater extremes of wealth and poverty, and by the institution of slavery. The jurists were not social reformers; they were conservative members of the wealthy class, and saw no need for change.

One of the earliest recorded strikes in history occurred during the reigning years of the Egyptian ruler Ramses II (1198-1167 BC), when the employees of a large concern dealing with the treatment of corpses, went on strike in order to be paid their wages. When threats of imprisonment did not have the intended effect, the employees - who believed throughout that the gods would come to their rescue - each received the correct amount of corn.⁹

Many centuries later - and probably due to the frequency of strikes - the Emperor of the Eastern Roman Empire, Zeno (474-491 AD), enacted a statute which held that employees in the construction industry could be forced to either complete their unfinished work, or pay damages for such unfinished work.¹⁰

With regard to the Netherlands, the first recorded strike occurred in 1372.¹¹ It was a collective action for higher wages by the "Leidse vollers" which, however, did not succeed. During the four centuries that followed there were a number of labour conflicts which sometimes ended in collective action by the workers. These were primitive and often badly organised forms of strike action.¹²

world.

⁹ Bolkestein, *Sociale Politiek en Sociale Opstandigheid in de Oudheid*, 1934, 24.

¹⁰ Most of the labourers in the Roman *imperium* were either slaves (*servi*) who did not possess any legal competency, or emancipated slaves (*liberti*) who enjoyed a very limited legal position. A freeborn (*ingenuus*) was hardly ever in the position of a labourer (work done by a freeborn was mostly in the form of *locatio conductio operis*): see Nicolas, *An Introduction to Roman Law*, 1962, 182 and Thomas, *Textbook of Roman Law*, 1976, 292 for more information in this regard.

¹¹ In England the first arrangement relevant to strikes was created in 1349. A severe epidemic disease compelled King Edward III to enact a statute which created a type of duty to work for farming labourers. The Statute of Labourers of 1351 extended this duty to other industries.

¹² See Spruit, *Stakingsrecht in het Kader van de Arbeidsovereenkomst*, 1955, 8-15 for more information on these early examples of strikes. See also Van Kempen, *Het Juridische Karakter der Werkstaking en hare Gevolgen i.v.m. het Ontwerp Arbeidscontract*, 1907, 3; Van der Ven, *Vakvereniging en Werkstaking*, 1952, 297.

2.2.2 The law relating to strikes from 1811-1969

2.2.2.1 The abolition of the coalition prohibition

The French Code Penal, which applied to the Netherlands from 1811 up to the introduction of the Penal Code in 1886,¹³ in sections 414-416 prohibited any coalition of employers aimed at reducing wages in conflict with the principles of law and reasonableness, as well as any coalition of employees aimed at commencing striking activities.¹⁴ This so-called coalition prohibition was never applied to employers. Criminal prosecutions of employees occurred in about twenty cases - mostly where the strikes involved threats or acts of violence.¹⁵

In 1872 these penal provisions against the freedom to strike were abolished.¹⁶ It was now possible to establish trade unions through which strikes could be more effectively organised.¹⁷ At that time, the correlation between the degree to which employees were organised, and strike action was obvious, and the lifting of the penal provisions thus had the effect of acknowledging a certain freedom to strike.¹⁸ In essence, the history of the law relating to strikes in the Netherlands therefore began in 1872, when the coalition prohibitions were lifted.¹⁹

¹³ The introduction of the Dutch Civil Code in 1838 had no significance for the law relating to strikes (the industrial revolution only reached the Netherlands in 1860), and contained only five sections relevant to labour law (sections 1583, 1585, 1637, 1638 and 1639).

¹⁴ The perpetrators could be given a fine or sentenced to imprisonment.

¹⁵ See Levenbach, *De Vakverenigen in het Nederlandse Recht*, 1929, 15. The prohibition made it impossible for employees to organise themselves in a legitimate way; trade unions had no right of existence and strikes were therefore often inefficiently planned and executed. (The nineteenth century is commonly seen as the "labourers without rights" period).

¹⁶ Similar developments occurred throughout almost the entire Western Europe, with Great Britain being the first (1824), and Italy the last (1890) to abolish the penal provisions.

¹⁷ At the beginning of this century, three federations of trade unions were created: the "Nederlands Verbond van Vakverenigen" (NVV), the "Katholieke Arbeidersbeweging" (KAB), that were in 1980 amalgamated to the "Federatie Nederlandse Vakverenigen" (FNV), and the "Christelijk Nationaal Vakverbond" (CNV).

¹⁸ Drenth, *Het Stakingsrecht*, 1966, 4; De Jong, *Een Inleiding tot het Denken over Arbeidsconflictenrecht*, 1975, 159; Van den Berg, Fortuyn & Jaspers, *De Ontwikkeling van het Stakingsrecht in Nederland*, 1978, 14.

¹⁹ As a result of the huge success of the Railway strike of 1903, criminal sanctions were made possible again in the case of strikes by civil servants or railway personnel. These sanctions (the so-called "worgwetten van Kuyper") were applied only once (Rb. 's-Gravenhage, 6 June 1918, NJ 1918, 876) and were abolished in 1980: see 2.3 for

With the disappearance of criminal sanctions, the question²⁰ remained as to how far the sanctions of private law could be used against trade unions and employees.²¹ Some lawyers considered a strike to be a breach of the worker's contract of employment, and saw the union organising the strike as being delictually responsible²² for inducing the breach of contract.²³ However, this legal opinion was of little practical significance as employers involved in labour disputes did not usually resort to civil remedies. Consequently, the civil judge was hardly ever involved in strike conflicts and employees who took part in a strike lost their wages²⁴ and ran the risk of being dismissed.²⁵ The negotiations during a strike sometimes led to the granting of strikers' demands, and in such a case the wages lost during the striking period were paid out. In other cases, the employees had to resume their work under the old working conditions.

In those cases which came before a judge, the question of whether a dismissal because of participation in a strike was justified was usually considered²⁶ and the judges did not involve themselves with the issue of whether a strike was lawful or not.²⁷

more detail.

- 20 Initially, this question was of little importance due to the small number of trade unions and the scarcity of strikes. Around the turn of the century, however, this situation changed dramatically - see the statistical information in Chapter 1.
- 21 This question was not covered by any specific legislation.
- 22 See HR 31 January 1919, NJ 1919, 161; HR 11 November 1937, NJ 1937, 1096 and Bakels, "Enige juridische en maatschappelijke aspecten van de stakingsvrijheid", *Nederlands Juristenblad*, 1960, 633, on the developments that took place with respect to this delict during the 1920's and 1930's.
- 23 The Employment Contract Act of 1907 (which did not amend the law relating to the striking weapon and which was incorporated in the Dutch Civil Code) led to a Lower House debate on the question whether a strike *per se* terminated the existing employment contract. The majority of the Lower House answered this question in the negative. The strike does, however, give the employer a right to terminate the employment contract on the ground of urgent reasons created by such a strike. See Bles, *De Wet op de Arbeidsovereenkomst*, 1909, Part IV, 185.
- 24 Cf sections 1638b-1638d of the Dutch Civil Code; see also Chapter 4 in this regard.
- 25 Cf Zonderland, *Recht en Plicht bij Staking en Tegenstaking*, 1974, 167. Even though trade unions started to play a more prominent role, they were hardly ever brought to court; see for an exception Pres. Rb. Amsterdam, 4 March 1935, NJ 1935, 405.
- 26 In some instances the judge felt that participation in a strike constituted a so-called "dringende reden" or urgent reason with reference to the employer, and that the dismissal was therefore justified. Sections 1639p of the Dutch Civil Code should be noted in this regard: "Voor de werkgever worden als dringende redenen ... beschouwd zodanige daden, eigenschappen of gedragingen van de arbeider, die ten gevolge hebben, dat van de werkgever redelijkerwijze niet kan gevegd worden de dienstbetrekking te laten voortduren." See also Fase, "Het stakingsrecht in de particuliere sector in Nederland", *Tijdschrift voor Sociaal Recht*, 1982, 291.
- 27 The lawfulness of strikes was nearly beyond dispute: even the aggravated form of the strike, namely a strike

In short, it was accepted that the trade unions and employees had a certain freedom to strike. The strike was not seen as a juridical phenomenon, and this often caused parties to look for an informal solution to industrial conflict. The Labour Disputes Act of 1923 made a useful contribution in this regard.²⁸ The Act created offices for independent experts, the public conciliators, whose main duty was finding acceptable solutions to labour conflicts between parties.²⁹ The law relating to strikes was not limited by this Act; the public conciliators offered their assistance on request and the parties were free to make their own choice in this regard.³⁰ Consequently, the only possible limitation to the freedom to strike was the so-called duty of peace, which was sometimes included in a collective employment agreement.³¹

However, a fundamental change to this state of affairs came with the German invasion in 1940. The occupying forces dissolved the federations of trade unions, and the public conciliators were united into a board of public conciliators,³² who also had to prescribe wages in order to implement the new authority's policies in the field of labour relations. An absolute prohibition on strike action was created.³³

combined with a boycott, was in general perceived by the prevailing legal order as lawful. See Drenth, *Het Stakingsrecht*, 1966, 10-11 and Fortuyn, *Stakingsrecht in Nederland*, 1985, 31.

- 28 Even though this Act has never been formally abolished, it did not function at all after 1940. See Rood, *Naar een Stakingswet?*, 1978, 50-54, for a discussion on both the "Arbeidsgeschillenwet 1923" as well as the less significant "Wet op de Kamers van Arbeid 1897". See also Molenaar, *Arbeidsrecht II A*, 1957, 1146 and Loonstra, *Derden-interventie bij CAO-conflicten*, 1987, 131.
- 29 These "Rijksbemiddelaars" could thus be compared with modern-day arbitration officers: see Chapter 5 in this regard.
- 30 It should furthermore be noted that neither the "Wet op de collectieve arbeidsovereenkomst" (1927) nor the "Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten" (1937) created any barriers in the way of the freedom to strike.
- 31 Such a "vredesplicht" applied only to those matters specifically regulated in the collective labour agreement. Unlike the practice followed in Britain today, the collective labour agreement is seen in the Netherlands as a legally binding agreement: cf sections 9-12 of the Collective Labour Agreement Act of 1927.
- 32 This board of public conciliators ("College van Rijksbemiddelaars"), who were no more than an extension of the occupying forces and their wage policy, differed markedly from the previous independent experts appointed under the Labour Disputes Act of 1923. The board of public conciliators was dissolved in 1942. See Fase, *Vijfendertig Jaar Loonbeleid in Nederland*, 1980, 290 and onwards with regard to the wage policy that was followed in the Netherlands up to World War II.
- 33 It is interesting to note that the establishment of an absolute rule, eg. the Mussolini-regime (1926) or the Hitler-regime (1934), almost immediately leads to an absolute prohibition to strike. See also Rood, *Naar een Stakingswet?*, 1978, 6.

2.2.2.2 *The first period after the war*

The period after World War II was characterised by a harmonious spirit of cooperation and negotiation necessitated by the need to rebuild the economy. Order had to be created from the economic chaos by placing emphasis on the repair of industrial machinery, the creation of more employment opportunities and fighting inflation. The Extraordinary Decree on Labour Relations that came into existence in 1945, played an important role in this regard.³⁴ Chapter 3 of this decree enabled the Dutch government to supervise wages and other aspects of labour relations³⁵ and the legal position of labourers was in fact partially turned back to the pre-1872 position.³⁶ Theoretically, as the strike did not fit into this institutionalised framework of central wage policy, it became an unsound and superfluous mechanism.³⁷ In addition, a consensus-triangle between the government, employers' organisations and trade unions, made it possible to pursue a policy of low wages that left little room for wage strikes.³⁸ Whenever there were strikes, employers sought to prevent them by summary proceedings³⁹ before the president of the district court. Claims for damages were relatively scarce.⁴⁰ The opposing parties probably realised that they would still have to do business

34 "Buitengewoon Besluit Arbeidsverhoudingen 1945", in short "BBA 1945" a government order having the status of a statute due to the then still existing "State emergency law". See Van den Berg, Fortuyn & Jaspers, *De Ontwikkeling van het Stakingsrecht in Nederland*, 1978, 24-26.

35 The "BBA 1945" reinstated the "College van Rijksbemiddelaars". This board of public conciliators replaced the independent experts appointed under the Labour Disputes Act of 1923 and had a close working relationship with the Labour Foundation ("Stichting van de Arbeid"). See Drenth, *Het Stakingsrecht*, 1966, 3 and Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 22 in this regard.

36 See 2.2.2.1.

37 Cf. Pres.Rb. Haarlem, 12 March 1946, NJ 1946, 198; Pres.Rb. Den Haag, 17 June 1946, NJ 1946, 571; Hof Amsterdam, 23 January 1947, NJ 1947, 725; HR 1 February 1949, NJ 1949, 552. See also Levenbach, *De Nederlandse Loonpolitiek*, 1955, 28; Windmuller, *Labor Relations in The Netherlands*, 1969, 266-378.

38 The strike weapon was not only used in relation to wage issues. See Pres. Rb. Rotterdam, 24 January 1955, NJ 1955, 100, for an example of a strike aimed at enforcing the establishment of a works council.

39 The summary proceeding or "kort geding" can be compared to the South African urgent application and is regulated by section 289 of the "Wetboek van Burgerlijke Rechtsvordering". It normally takes place in front of only the president of one of the nineteen district courts in the Netherlands (the district courts usually have three judges on the bench) who then makes a preliminary finding on the facts presented by the parties. The parties may appeal against this finding by following the prescribed procedural rules applicable to normal (not urgent) actions and applications but this hardly ever happens in practice.

40 This is still the case today: see Rood, "Over de betekenis van het Europees Sociaal Handvest voor het stakingsrecht en het onderhandelingsrecht in de private en in de publieke sector", *Het Europees Sociaal Handvest*, 1982, 57.

with each other after the termination of the strike and liability for damages would only have spoiled the delicately balanced relationship between the employers' associations and the trade unions. These post-war developments practically ended the right to strike, and so a sharp decline in the frequency of strikes occurred.⁴¹

Later, at the end of the fifties and during the sixties, the government's restrictive wage policy led to strong demands for greater latitude in wage negotiations, accompanied by a fast-growing inclination to strike if the demands were not met.⁴² Chapter 3 of the Extraordinary Decree on Labour Relations was eventually abolished by the Wage Act of 1970.⁴³

2.2.2.3 *The Panhonlibco doctrine*

In 1958 the International Transport Workers Federation organised a world-wide action in order to prevent the loading and unloading of ships placed under so-called "cheap" flags.⁴⁴ As a result thereof, certain Dutch trade unions organised a collective action during the period 1-4 December 1958, whereby these ships were not unloaded by the harbour workers in Holland. This eventually⁴⁵ led to a decision by the Dutch Supreme Court, known as the Panhonlibco decision,⁴⁶ in which the Supreme Court ruled that employees engaged in a

41 In the 1920's the average number of working days lost annually was more than a million; in the 1930's this average fell to about 400,000 (most of the strikes were organised strikes). After World War II, from 1946-1960, the annual average dropped even further to about 80,000 working days. More than half of the strikes during this period were wildcat strikes.

42 Even as late as 1958, the president of the district court in Amsterdam - in a case that dealt with the legal position of the individual striker - clearly stated that a right to strike does not exist in the Netherlands: see Pres.Rb. Amsterdam, 27 March 1958, NJ 1958, 245; Pres.Rb. Den Haag, 18 August 1958, NJ 1958, 452; Pres.Rb. Amsterdam, 10 October 1958, NJ 1958, 545.

43 "Wet op de Loonvorming", *Staatsblad*, 1970, 69. The "BBA 1945" also contained many other regulations (for example a preventative check on dismissals) that fulfilled diverse functions in the process of rebuilding the Dutch economy after the war. Many of these provisions still exist in a somewhat modified form in the "BBA 1945". See for example Bakels, *Schets van het Nederlands Arbeidsrecht*, 1992, 91.

44 These were the flags of Panama, Honduras, Liberia and Costa Rica. This was done in order to draw attention to the following practice: an American or Dutch shipowner, for example, would pay a small registration fee and register a ship in one of the abovementioned countries, with the result that he evaded taxation in his own country. This practice had the effect of creating unfavourable working conditions for employees on such a ship, especially with regard to safety precautions (which were not regularly supervised) and insurance payouts.

45 See the differing decisions of the courts *a quo*: Pres.Rb. Rotterdam, 28 November 1958, NJ 1958, 593; Pres.Rb. Amsterdam, 29 November 1958, NJ 1959, 8; Hof Den Haag, 17 April 1959, NJ 1959, 216.

46 15 January 1960, NJ 1960, 84; the decision is named after the countries with the cheap flags.

strike were, in general, guilty of a breach of contract and, therefore, the union which organised the strike was delictually liable for inducing a breach of contract. The Supreme Court added an important qualification, stating that a case of breach of contract would not arise if, according to the prevailing ideas of justice, employees could not reasonably be expected to continue to work.⁴⁷ This loophole, however, imposed on the trade unions the heavy burden of proving - in each case - the existence of a lawful reason for ceasing to work.⁴⁸

The Supreme Court's decision fitted in with the social climate at that time, which was on the whole inhospitable to industrial conflict.⁴⁹ The *Panhonlibco* case, which was in effect a confirmation of all the previous attacks on the right to strike, attracted both positive and negative criticism. Employers' organisations obviously reacted positively: they felt that the decision provided sufficient freedom to strike, and that it was the duty of the judges to concretise the loophole created by the Supreme Court. The trade unions, however, rejected the decision as being fundamentally unjust⁵⁰ as the collective action organised by the trade union was judged solely with reference to the individual labour contract, thus ignoring the essential collective aspects of the strike phenomenon. The trade unions therefore demanded statutory regulation that would ensure a definitive right to strike.⁵¹

47 The Supreme Court did not specify under what circumstances such a stoppage of work would be legally justified and it thus remained a matter of discretion. So for example a strike aimed at securing recognition of the union by a reluctant employer was deemed to be justified: Pres.Rb. Utrecht, 6 June 1969, NJ 1969, 301.

48 According to the Supreme Court, the special circumstances activating the qualification were not present in this case.

49 See Windmuller, *Labor Relations in the Netherlands*, 1969, 319. According to Windmuller, industrial conflict was associated with attempts to achieve a social revolution and strikes were seen as expressions of class antagonism rather than as the businesslike use of economic power for short-term objectives (at 397).

50 See also De Gaay Fortman *et al*, *Advies inzake wettelijke regeling van de werkstaking*, 1961 in this regard.

51 The academic writers also fiercely criticised the *Panhonlibco* decision: see for example Bakels, "Enige juridische en maatschappelijke aspecten van de stakingsvrijheid", *Nederlands Juristenblad*, 1960, 645; Drion, "Het stakingsrecht in verband met HR 15-1-1960, NJ 1960, 84", *Sociaal Maandblad Arbeid*, 1960, 306 and Van Esveld, *De Werkstaking in onze Sociale Verhoudingen*, 1962, 46.

2.2.3 *The law relating to strikes from 1969-1986*

2.2.3.1 *A bill on strikes*

In 1958, the year of the Panhonlibco strike, the Department of Justice began preparing a bill on strikes aimed at bringing about legal certainty in this field of the law.⁵² Progress was slow and laborious⁵³ and it was not until 1968, after numerous discussions between diverse groups, that the Social Economic Council advised the government.⁵⁴ This recommendation formed the basis of Bill 10111 that was submitted to the Lower House on 29 April 1969.⁵⁵

It should be noted that this bill did not intend to regulate the strike in its totality. The primary aim was to restore the balance of power between the employers' organisations and the trade unions, an equilibrium that was disturbed in 1958.⁵⁶ The collectivity-idea was emphasised, and in the explanatory memorandum to the bill, specific reference was made to the collective agreement. If such a collective agreement was in force, it prevailed over the individual employment agreement; if a collective agreement was not in force, then the collective action prevailed over the obligations flowing from the individual employment agreement.⁵⁷ Consequently, the bill virtually turned the decision of the Supreme Court upside down by prescribing that, in general, a union organising a strike acted lawfully. The duty of the employee to perform his or her work was also suspended in such a case, and

52 The first section of the bill suspended the obligation of individual workers to continue their work when taking part in a strike organised by a trade union. However, if the strike was aimed at forcing the employer to commit illegal acts or acts in conflict with a valid collective agreement, such obligation to work would not be suspended.

53 See Van den Berg, Fortuyn & Jaspers, *De Ontwikkeling van het Stakingsrecht in Nederland*, 1978, 81-100 and Rood, *Naar een Stakingswet?*, 1978, 60-64, for more detail.

54 Sociaal Economische Raad (SER), *Avies inzake wettelijke maatregelen met betrekking tot de staking*, 1968.

55 It is interesting to note that another bill (Bill 10110), dealing with commissions of inquiry concerning strikes, was submitted to the Lower House simultaneously. This bill was aimed at replacing the Labour Disputes Act of 1923, but was eventually withdrawn in 1985: see Loonstra, *Derden-interventie bij CAO-conflicten*, 1987, 175. See also 2.3.3 in connection with Bill 11001 that was submitted to the Lower House in 1970.

56 The emphasis was thus on a strike as organised by a trade union; wildcat strikes were still judged according to the Panhonlibco doctrine.

57 *Bijlagen Handelingen Tweede Kamer*, 1968-1969, Bill 10111, No. 3, 4.

therefore he or she committed no breach of contract. According to the bill, the union⁵⁸ only acted unlawfully, and was thus delictually liable, in the following five instances:

- * if the strike was contrary to statute law or was intended to persuade the employer to act against the law;
- * if the strike was contrary to a collective agreement which the union had entered into;
- * if the strike was contrary to the existing norms concerning relations between (organisations of) employers and unions;⁵⁹
- * if there existed a manifest disproportion between the aims and the consequences of the strike;⁶⁰
- * if the strike was manifestly unreasonable towards the employer.

The bill thus shifted the burden of proof as to the unlawfulness of the strike from the union to the employer.⁶¹

Initially, the principles underlying the bill were more or less accepted by unions and employers alike, but this harmony did not last long. The trade unions felt that the bill left too little room for political and protest strikes,⁶² while the employers' organisations pleaded for rights to lock out striking workers, the stimulation of arbitration procedures and the creation

58 It should be noted that the bill only applied to unions which, according to their articles of association, were authorised to conclude collective agreements and which had been incorporated for at least two years.

59 This provision ensures that the strike is only used as an ultimate weapon (the rules for "playing the strike game", for example compulsory negotiations between the parties and other formal and procedural rules, must be adhered to). See also 3.5 in this regard.

60 The use of the word "manifest" aims to restrict interference by a judge in borderline cases in order to reduce the subjective element of judicial evaluation as much as possible.

61 The employer could dismiss workers striking unlawfully, provided that he does not discriminate between the individual strikers.

62 See the decision of Pres.Rb. Utrecht, 14 December 1970, NJ 1971, 72 in which a protest action was prohibited.

of a cooling-off period. As a result of continued resistance against it, the bill did not mature into an act of parliament, and was eventually withdrawn on 18 June 1980.⁶³

2.2.3.2 *Abandoning the Panhonlibco doctrine*

Even though the bill on strikes was eventually withdrawn, it had by that time already done its work. Influenced by its provisions, the courts significantly tempered the Panhonlibco decision in their subsequent decisions. This was possible because of the qualification added by the Supreme Court in the Panhonlibco case, namely that a case of breach of contract by striking employees would not arise if, according to the prevailing ideas of justice, employees could not reasonably be expected to continue work. By filling this loophole with the principles of the bill, the judges were able to incorporate the bill into their decisions, and in fact move away from the Panhonlibco point of departure.⁶⁴

Other factors which played a major role in the erosion of the Panhonlibco doctrine, were the changes that occurred in the wage policy arena. During the sixties, the influence of the government on wages faded away gradually, and at the end of the decade there was in principle a system of free wage negotiations between employers and unions. This factual situation was affirmed by the legislature in the Wage Act of 1970.⁶⁵ It should furthermore be noted that the European Social Charter (ESC) had already come into force in 1965 after five member states had ratified it.⁶⁶ The Dutch government signed the ESC on 18 October 1961 in Turin, Italy and even though the charter was only ratified by the Netherlands in 1980,⁶⁷ it

⁶³ There is thus no specific legislation which regulates strike action in the Netherlands today: see Chapter 3 for a discussion on the international rules applicable to the Netherlands.

⁶⁴ See Bakels, *Schets van het Nederlands Arbeidsrecht*, 1992, 198.

⁶⁵ See Van Doorn, *De Beheerste Vakbeweging*, 1976, 251 and Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 26 in this regard.

⁶⁶ Art. 6(4) of the ESC reads as follows: "With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake: (1); (2); (3)...; and recognise (4) the right of workers and employers to collective action in cases of conflicts of interests, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into." The ESC is the first international treaty to recognise the right of workers to go on strike: see 3.2.1.

⁶⁷ A possible explanation for this long delay is the fact that the Dutch law has a monistic approach to international law (sections 93 and 94 of the Dutch Constitution), and therefore the Dutch legislature would normally bring the national law into line with international conventions before ratifying them. See Van den Heuvel, "Some aspects of the European Social Charter and the right to collective action in the Netherlands", *Law at the Vrije Universiteit*

had an (indirect) effect on the Dutch jurisprudence long before it officially came into force.

The factors outlined above, including the general public opinion of the time, combined to bring about a reversal of the Panhonlibco doctrine. The court of appeal in Amsterdam took the lead.⁶⁸ The court felt that since the law relating to strikes is not regulated by statute, guidance has to be sought in the general sense of justice of the legal community. Accordingly, it expressly declared that the 1960 decision of the Supreme Court was outdated and that the equilibrium should be shifted.⁶⁹ Thereafter strikes would be lawful in principle, but the surrounding circumstances could in a particular case make it unlawful.⁷⁰ The decision of the court was convincing and well-motivated and was consequently never challenged before the Supreme Court.⁷¹

The abandoning of the Panhonlibco doctrine did not, however, guarantee an unfettered freedom to strike. The economic recession started to take its toll, and during the 1970's the country was hit by the most serious wave of labour unrest since World War II.

In 1973 conflict was caused by the trade unions' interpretation of a clause in the Central Agreement of 1973 that called for extra wage moderation by the most highly paid. When the employers unitedly refused to give in to the unions' demands they organised a strike at Hoogovens IJmuiden (a blast furnace) on 20 February 1973. The strike only ended on 5 March 1973 when it was declared unlawful by the president of the district court in Haarlem.⁷² In February 1973 several other strikes were organised in the metal industry.

Amsterdam, 1993, 41 and Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 28, for more detail in this regard.

68 Hof Amsterdam, 13 April 1972, NJ 1972, 192. See also the following three decisions leading the way to the court of appeal in Amsterdam: Pres.Rb. Utrecht, 6 June 1969, NJ 1969, 301; Pres.Rb. Den Haag, 13 February 1970, NJ 1970, 183; Pres.Rb. Rotterdam, 4 February 1971, NJ 1971, 77.

69 Cf the effect of the provisions of Bill 10111.

70 This was not considered by the court to be the case, and the strike *in casu* was thus seen as a lawful form of collective action.

71 In 1986 the Supreme Court had, for the first time, the opportunity to confirm the existence (in principle) of a right to strike (HR 30 May 1986, NJ 1986, 688). By then it had become an accepted fact, with the result that the decision was hardly sensational in this regard: see Chapter 3. See also Rood, "Over collectieve werknemers actie of: de HR terug van weggeweest", *Nederlands Juristenblad*, 1987, 301.

72 Pres.Rb. Haarlem, 5 March 1973, NJ 1973, 120. See also the decision of the court of appeal which prohibited the strike on grounds of procedural considerations: Hof Amsterdam, 3 May 1973, NJ 1973, 251.

These conflicts did not end until a compromise was reached in April 1973. The demands of the unions were however only partially met.⁷³

A second major post-war conflict, concerning "automatic price compensation" clauses in collective agreements, broke out in 1977. The trade unions demanded the full restoration of these clauses, but the employers' organisations adamantly refused to give in to these demands. A dead-lock was reached, and in February 1977 widespread strikes broke out. In an effort to persuade the parties to go back to the negotiating table, the president of the district court in Utrecht prohibited the actions.⁷⁴ On appeal, the court in Amsterdam declared the action unlawful, and ruled that the essential interests of society could be damaged by the strikes in the dairy industry. The court ruled that negotiations on how to avoid the negative effects of the strikes (dumping of milk in the canals) should have been held.⁷⁵ Nevertheless, in the end, the employers conceded to most of the unions' demands.

In general, the judges had considered the above strikes to be unlawful because the unions had not exhausted the collective bargaining process, or in other words, because the strike was not used as an *ultimum remedium*.⁷⁶ The judges adopted a strict approach in respect of the *ultimum remedium* test, frequently declaring strikes unlawful and ordering parties to go back to the negotiating table notwithstanding the fact that an impasse had already been reached.⁷⁷ Only towards the end of the 1970's did the judges become somewhat more lenient in their approach.

⁷³ See Bakels, *International Encyclopaedia for Labour Law and Industrial Relations*, Vol. 8, 1987, 79 (The Netherlands).

⁷⁴ Pres.Rb. Utrecht, 4 February 1977, NJ 1977, 79; Pres.Rb. Utrecht, 8 February 1977, NJ 1977, 80; Pres.Rb. Utrecht, 11 February 1977, in Van den Berg, Fortuyn & Jaspers, *De Ontwikkeling van het Stakingsrecht in Nederland*, 1978, 402-406.

⁷⁵ Hof Amsterdam, 17 November 1977, NJ 1978, 551. See Peeters, "Hof Amsterdam zet stakingsrecht op dood spoor", *Sociaal Maandblad Arbeid*, 1978: 21 and 1979: 84 and Van den Berg, Fortuyn & Jaspers, *De Ontwikkeling van het Stakingsrecht in Nederland*, 1978, 416 in this regard.

⁷⁶ Cf 3.5 in this regard.

⁷⁷ The Dutch writers criticised the strict approach, saying that it leads to unpredictable results. Cf Peeters, "Hof Amsterdam zet stakingsrecht op dood spoor", *Sociaal Maandblad Arbeid*, 1978, 21 and Schotvanger, "De Amsterdamse stakingsarresten 1977", *Sociaal Maandblad Arbeid*, 1979, 83.

The above-mentioned decisions all dealt with strikes that were aimed at employers in order to secure better working conditions. At the end of the 1970's, however, the labour conflicts started to take on a new dimension. During 1980 and 1981, numerous strikes broke out as a result of the implementation of a number of wage regulations; these strikes were thus aimed at the government, while the relevant employer was seen as the third party to the conflict.⁷⁸ In a decision by the president of the district court in Amsterdam, for example, a protest strike against the proposed amendment of sections 10 and 11 of the Wage Act of 1970 was dealt with.⁷⁹ This strike fell outside the scope of the bill on strikes, but was nevertheless regarded by the court as being lawful.⁸⁰

2.3 Collective Action in the Public Sector

2.3.1 Introduction

The European Social Charter (ESC) came into operation in the Netherlands on 22 May 1980. However, when the Dutch government ratified the ESC, it made an exception with regard to the applicability of article 6(4) of the ESC to civil servants.⁸¹ This exception was linked to the historical distinction that had always been drawn between civil servants and workers in the private sectors of the economy. Owing to this distinction, the law of strikes relating to civil servants has a unique historical background which will now be investigated in order to see if the distinction between the private sector and the public sector can still be justified when it comes to the right to collective action.

⁷⁸ Cf 3.3.3.1. See Rood, "Akties en loonpolitiek", *Sociaal Maandblad Arbeid*, 1980, 342 and Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 30 in this regard.

⁷⁹ Pres.Rb. Amsterdam, 10 March 1980, NJ 1980, 165. Cf also Pres.Rb. Arnhem, 12 March 1982, NJ 1982, 347 and Pres.Rb. Amsterdam, 5 January 1983, NJ 1983, 749.

⁸⁰ See also Bertrams, "Een rechtsvergelijkende beschouwing over de politieke staking", *Nederlands Juristenblad*, 1982, 889; Fase, "In verzet tegen de overheid", *Sociaal Maandblad Arbeid*, 1982, 301; Meeter, "Staking en andere collectieve acties", in *Het Collectief Arbeidsrecht nader beschouwd*, 1984, 71.

⁸¹ In 1929, the legal position of the civil servant was for the first time statutorily regulated by the Civil Servant Act of 1929. Section 1(1) of this act defines a civil servant as someone who is appointed to work in the public service; section 1(2) defines the public service as being all services and industries which are controlled by the State and its public bodies. However, the exception to the applicability of article 6(4) of the ESC was not only made with respect to civil servants, but also with respect to "employees" of the government in the widest sense of the word.

2.3.2 Developments up to 1980

In the previous century, the government mainly played a traditional "watchman" role, which entailed the maintenance of the legal order by means of various government authorities. The civil servant was seen as a "special" type of employee; he or she had a duty of obedience and had to have an undivided loyalty towards the state.⁸² Needless to say, collective actions by these "traditional" civil servants were out of the question and did not fit in with the subordinate status which they occupied in the previous century.

When the coalition prohibition was abolished in 1872,⁸³ the opportunity was created for civil servants to establish trade unions through which strikes could effectively be organised, thereby indirectly recognising their freedom to strike. However, this did not influence the general view at the time that a strike in the public sector would never occur. Even the legislature - when introducing the Penal Code of 1886 - thought it unnecessary to make penal provisions applicable to the (unlikely) refusal of work by civil servants.

In 1903, however, this state of affairs changed. Two wide-spread strikes by Dutch railway personnel⁸⁴ forced the legislature to add section 358bis to the Penal Code of 1886, which again made criminal sanctions possible in the case of strikes by civil servants and railway personnel.⁸⁵ Even though railway workers were not classified as civil servants, the smooth operation of the railway service and the traditional public sector services were regarded as being of equal importance to the general community. Ostensibly, this dramatic intervention by the Dutch legislature played a small role in practice: it was applied only once⁸⁶ and was eventually abolished in 1979. It can nevertheless be argued that section 358bis of the Penal

82 Cf Van der Pot, *Nederlands Bestuursrecht*, 1962, 173; Seelen, *De Werkstaking van Ambtenaren*, 1967, 157, Crinice le Roy, *Ambtenarenstatus en Ambtenarenethiek; mythe of werkelijkheid?*, 1979, Chapter 1.

83 See 2.2.2.1.

84 The first strike occurred in January 1903, and resulted in a huge success, while the second (April 1903) ended in a defeat for the trade unions. See Ruter, *De Spoorwegstakingen van 1903*, 1935, 260 and onwards and Bakels, *Staken bij de Spoorwegen in 1903 en 1983*, 1987, 1-5 for more details.

85 These sanctions were also called the "worgwetten van Kuyper": see Seelen, *De Werkstaking van Ambtenaren*, 1967, 97-134 and Rood, *Collectief Ambtenarenrecht*, 1989, 121-124 for more detail.

86 Rb. 's-Gravenhage, 6 June 1918, NJ 1918, 876.

Code of 1886 fulfilled a preventative function in that a civil servant would not have easily transgressed this section.⁸⁷ Furthermore, the period after World War II was characterised by a spirit of co-operation and negotiation between the government and the civil servants which would enable the rebuilding of the economy. Consequently, the organising of collective actions by trade unions was not approved of and strikes hardly ever occurred during the initial post-war years.

In the years that followed, the government started moving towards a social welfare state. The number of civil servants increased sharply and they began occupying positions in divergent social and economic fields.⁸⁸ As a result of this changing image of the public sector, the peaceful relationship between employer and employee gradually began to deteriorate. The government no longer fulfilled only its traditional law-enforcement function and the labour relations with civil servants showed more and more similarities with those in the private sector. This state of affairs began to undermine the use of a legal distinction between civil servants and private sector employees,⁸⁹ and in 1952 the Kranenburg Commission was eventually established to investigate this problematic issue.

The Kranenburg commission reached the conclusion that the legal status of civil servants should be determined unilaterally by the government. It rejected the possibility of collective labour agreements and advised that the criminal sanctions applicable to collective actions should be retained.⁹⁰ In fact, the viewpoint of the majority of the Kranenburg Commission's members did no more than confirm the legal position of the time.⁹¹ A minority within the commission, however, found the distinction between civil servants and other employees to

⁸⁷ Rood, *Collectief Ambtenarenrecht*, 1989, 122. See also Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 43-45 for more detail on strikers who were never prosecuted under section 358bis of the Penal Code of 1886.

⁸⁸ In 1870, approximately 2% of the vocational population consisted of civil servants; in 1988 that figure has increased to 15%: see Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 45-48.

⁸⁹ Van der Horst, *Ambtenaar en Grondrechten*, 1967, 182.

⁹⁰ *Rapport van de Staatscommissie van advies inzake de status van de ambtenaren*, 1958, 100-107: the civil servant was still seen as a peculiar employee under the direct authority of the state and with a singular function to fulfil in the general community.

⁹¹ See also Jeukens, "De status der ambtenaren", *Sociaal Maandblad Arbeid*, 1960, 234; Van Esveld, *De Werkstaking in onze Sociale Verhoudingen*, 1962, 94 and Seelen, *De Werkstaking van Ambtenaren*, 1967, 157-181.

be too rough and arbitrary a criterion for the adjudication of the lawfulness of collective action, and pleaded for the abolition of the penal provisions.⁹²

During the 1960's, the viewpoint of the minority of the Kranenburg Commission began to gain approval among the key players in the labour relations arena,⁹³ and was instrumental in the 1967-amendment to the Civil Servant Act of 1929. Before 1967, the civil servants already had a right to organise themselves in trade unions, but these unions only had an ineffective right to state their opinion. The amendment now created a right for the trade unions to be consulted in matters of general interest to the legal position of a civil servant,⁹⁴ which automatically stressed the need for the use of the strike weapon. Wages, however, fell outside the scope of the amendment and thus no consultation needed to take place in this regard. The reason for this peculiar exception can be found in an agreement that was reached with the civil service unions at the beginning of the 1960's: that wages would follow the average rise in wages in the private sector. The results of collective bargaining on wages in the private sector thus also affected wages in the public sector and therefore no real need existed for civil servants to go on strike for higher wages. Towards the end of the 1970's this changed abruptly when the government - because of the oil crisis - had to abandon this link with the private sector.⁹⁵ Unemployment increased and the need for a right to collective bargaining and a right to collective action became stronger and stronger among civil servants. The signing by the Netherlands of the ESC in 1961, and the fact that it took nearly twenty years for the ESC to be ratified, only contributed to the woes of civil servants.⁹⁶

92 *Rapport van de Staatscommissie van advies inzake de status van de ambtenaren*, 1958, 108. See also Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 48.

93 See Mannoury, "De status der ambtenaren", *Sociaal Maandblad Arbeid*, 1960, 243; Seelen, *De Werkstaking van Ambtenaren*, 1967, 293-308 and Koopmans, "De overheid als werkgeefster", *Weekblad voor Privaatrecht, Notariaat en Registratie*, 1970, 41 for more detail.

94 See Pres.Rb. 's-Gravenhage, 16 May 1980, NJ 1980, 533.

95 Even today the arrears of the civil servants have not been made up; wages in the public sector appear to lag behind those in the private sector by as much as 12%: see Van den Heuvel, "Some aspects of the European Social Charter and the right to collective action in the Netherlands", *Law at the Vrije Universiteit Amsterdam*, 1993, 59.

96 See Rood, "Mogen ambtenaren staken?", *Nederlands Juristenblad*, 1978, 729 for a description of the relevant legal position shortly before the ESC came into operation for the Netherlands.

2.3.3 Developments after 1980

The European Social Charter was signed by the Netherlands in 1961, but it only came into operation on 22 May 1980. This long delay between the signing and the ratification of the ESC can be partially ascribed to problems which surrounded collective action in the public sector. The ESC does not distinguish between workers in the private and the public sectors, and the unconditional ratification thereof would thus have resulted in an acceptance of the right to collective action for workers in both sectors of the economy. The implication was that the penal provisions against the civil servants' freedom to strike would have to be abolished, or that a conditional ratification would have to take place.

After the Social Economic Council had advised the government, Bill 11001 - dealing with the abolition of section 358bis of the Penal Code of 1886 - was submitted to the Lower House in 1970.⁹⁷ This bill was accepted on 21 March 1974, but the penal provisions were only abolished on 14 December 1979, after which the way was open for the ratification of the ESC.⁹⁸ However, when the ratification of the ESC took place, an exception was made with respect to the application of article 6(4) to civil servants, with the result that their right to strike was not recognised.⁹⁹ The exception was initially intended to only be of a temporary nature as the government wanted to replace it within a year by a statute dealing with the right to strike in the public sector.¹⁰⁰ If the numerous problems that were encountered by other European countries in regulating the civil servants' right to strike are noted, it is not surprising that the government did not succeed in keeping its promise.¹⁰¹

97 See also 2.2.3.1 in connection with Bill 10110 and Bill 10111 that were submitted to the Lower House in 1969.

98 *Staatsblad*, 1979, 693.

99 The exception reads as follows: "Goedgekeurd wordt, dat het Koninkrijk zich met betrekking tot Nederland...gebonde zal achten door de artikelen..., artikel 6 lid 4, voor wat betreft de niet in overheidsdienst zijnde werknemers,...". Betten, "Onevenredige schade blijft hindernis voor volledige erkenning stakingsrecht", *Sociaal Recht*, 1986, 199 sees the exception as being invalid, because the ESC makes no provision for such an exception. The Committee of Experts, however, has accepted the exception: *Conclusions VII*, 1981, 39.

100 The government still kept on motivating its actions by stressing the peculiar status of the civil servants, including the fact that the government plays the role of the employer.

101 See Betten, *De Stakende Ambtenaar in Internationaal Perspectief*, 1985 for more detail in this regard.

On 1 May 1980, the Toxopeus II Commission¹⁰² announced their report which contained suggestions for a bill regulating the collective action of civil servants.¹⁰³ The suggestions by this state commission were mainly based on the ESC, but the right to collective action was restricted in a number of ways. Some categories of civil servants were not allowed to strike at all,¹⁰⁴ while certain restrictions were also suggested for the remaining categories of civil servants.¹⁰⁵

However, the civil servants' associations also wanted to participate in the legislation-making process. This led to the introduction of a working-group which consisted of representatives from the government and the civil servants' associations. On 23 October 1980, the working-group released a report which, in certain respects, markedly deviated from the report of the Toxopeus II Commission.¹⁰⁶ Neither of the two abovementioned reports matured into an act of parliament, and in 1983 and 1984 new efforts were made by the new Minister for Home Affairs, Rietkerk. His point of departure was the recognition of the right to collective action, limited by the restrictions in article 31 of the ESC.¹⁰⁷ There is no need, however, to expand on this laborious process, because even today, no bill on the collective action of civil servants has been submitted to the Lower House, and it seems as if no bill will be introduced

102 The Toxopeus I Commission was a state commission that investigated the legal character of the civil servants: the commission terminated its activities in 1973, when the government started showing an intention to unconditionally ratify the ESC.

103 The report also contained suggestions on a bill dealing with methods - other than the strike - which could be used for the resolution of disputes in the public sector. These suggestions eventually led to the creation of the Advice and Arbitration Committee, a state committee which is still operating today. See Becking, "De Advies- en Arbitragecommissie Rijksdienst", *Sociaal Maandblad Arbeid*, 1992, 445 for more detail. See also Chapter 5 in this regard.

104 This applied to, for example, the civil servants in the police, the fire brigade, the custom offices and the military.

105 *Rapport van de commissie van advies inzake de regeling van voorzieningen bij collectieve arbeidsgeschillen in de openbare dienst*, 1980; see Schrama, "Rapport commissie Toxopeus-II/IAO-verdrag nr.151", *Sociaal Maandblad Arbeid*, 1980, 523 and Rood, "Ontwikkelingen rond de werkstaking, in het bijzonder in de publieke sector", *Nederlands Juristenblad*, 1981, 249 for more detail on the commission's report.

106 *Rapport van de werkgroep Aard, Structuur en Inhoud van het Overleg (ASIO)*, 1980: the working-group found the Toxopeus II Commission's list of restrictions too long, and made suggestions for a shorter list of restrictions on the right to strike in the public sector.

107 See "Ontwerp wet collectieve acties ambtenaren", April 1984, *Memorie van Toelichting* for more detail. See also Jaspers, "Annotatiekroniek", *Tijdschrift voor Ambtenarenrecht*, 1985, 255 and Betten, "Het wetsontwerp collectieve acties ambtenaren getoetst aan het Europees Sociaal Handvest", in *Blinde vlekken in het sociaal recht*, 1986, 309.

in the near future.¹⁰⁸

The unsuccessful efforts of the Dutch legislature did not prevent the development of new ideas. Gradually, the views on the status of civil servants started to move away from traditional conceptions, and in 1982, two detailed and well-motivated proposals on this issue were made to the Dutch Lawyers Association.¹⁰⁹ The conclusions of the two reports were in total opposition to the findings by the majority of the earlier Kranenburg Commission. In general, no justification was found for the continued legal distinction between employees in the private and the public sectors and the absence of the right to strike for civil servants.¹¹⁰ The proposals also contained suggestions for the creation of a bilateral consultative system between the government and civil servants, especially with regard to conditions of employment.¹¹¹ These proposals, together with economic developments at the time, convinced the government that the consultation system had to be adjusted. On 4 January 1988 the Minister for Home Affairs submitted a proposal for a new consultative system to the Lower House. According to this proposal - which was eventually accepted and is now used in practice - the government and the majority of the different boards of civil servants have to reach consensus before a new amendment on labour conditions can be instituted.

This important move from consultation to consensus on issues relating to labour conditions was preceded by the Dutch courts' recognition of the right to strike in the public sector. In 1982,¹¹² four decisions were handed down in which the courts recognised collective action by civil servants as being lawful in principle. The penal provisions were abolished and no legislation has since replaced them. The courts were therefore confronted with a legal vacuum which could only be filled by applying general legal principles.¹¹³ Only a year later,

108 The situation with respect to national legislation is thus the same in both the private and the public sectors: the legislature has failed to come up with a successful formula to regulate the right to collective action.

109 "Bestaat er aanleiding de rechtspositionele verschillen tussen ambtenaren en civielrechtelijke werknemers te handhaven?", *Handelingen Nederlandse Juristenvereniging*, 1982, 5-124; De Jong and 125-239; Niessen.

110 See Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 58-62 for more detail in this regard.

111 Obviously, such a consultation system would only be able to operate effectively if the civil servants had the right to collective action.

112 See also Pres.Rb. Utrecht, 15 June 1979, AB 1979, 355.

113 Pres.Rb. Utrecht, 11 March 1982, NJ 1982, 346; Pres.Rb. Arnhem, 12 March 1982, NJ 1982, 347; Centrale Raad

in October 1983, a storm broke out in the public sector when the government announced its intention to cut the salaries of civil servants¹¹⁴ by 3%. This led to a number of decisions¹¹⁵ in which the right to strike in the public sector was acknowledged in principle.¹¹⁶ In some of these cases, the right to strike was expressly acknowledged, while in others there was no need to decide this issue as the parties to the conflict had already accepted the existence of such a right. Since 1983, collective action has again featured in the public sector. Judges have resolved the conflicts with the use of the now accepted premise that collective action in the public sector is lawful in principle.¹¹⁷

In the light of the above decisions, the question can be asked whether the exception made at the time of the ratification of the ESC with respect to the applicability of article 6(4) to civil servants, still has a function to fulfil.¹¹⁸ After all, the exception was initially intended only to be of a temporary nature, valid only up to the point when a statute regulating collective action in the public sector came into effect. No such statute has been enacted, although the courts have recognised the right to collective action of civil servants in principle. Surely the exception has no role to play anymore?¹¹⁹ Rood states that the recognition of the right to

van Beroep, 21 October 1982, AB 1983, 35; Pres.Rb. Amsterdam, 16 November 1982, NJ 1983, 347. See Christe, "Bezonken ambtelijk stakingsrecht", *Sociaal Maandblad Arbeid*, 1983, 294 for more detail on these decisions.

114 The "trend followers" were also affected by the government's announcement: see 3.3.3.1.1.

115 See Albers *et al*, *De Ambtenarenstakingen; grenzen in kort geding*, 1983; Rood, "Novemberstorm in de publieke sector", *Nederlands Juristenblad*, 1983, 1381; Schenk, "Stakingsrecht in kort geding", *Advocatenblad*, 1984, 1; De Jong, "De poststaking", *Sociaal Maandblad Arbeid*, 1984, 3 for more detail. See also De Jong, "Annotatiekroniek", *Tijdschrift voor Ambtenarenrecht*, 1984, 95 and Stellinga, "Juridische kanttekeningen inzake de ambtenarenstaking", *Tijdschrift voor Openbaar Bestuur*, 1984, 51.

116 See for example Pres.Rb. Utrecht, 4 November 1983, NJ 1983, 772; Pres.Rb. Utrecht, 8 November 1983, NJ 1983, 773; Pres.Rb. Den Haag, 11 November 1983, NJ 1983, 774; Pres.Rb. Middelburg, 19 November 1983, KG 1983, 344; Pres.Rb. Den Haag, 25 November 1983, NJ 1984, 358; Pres.Rb. Rotterdam, 25 November 1983, KG 1983, 356; Pres.Rb. Rotterdam, 29 November 1983, NJ 1987, 375; Pres.Rb. Amsterdam, 29 November 1983, KG 1983, 358. See also (on appeal) Hof Den Haag, 17 January 1985, NJ 1986, 222; Hof Den Haag, 17 January 1985, TAR 1985, 111; Hof Den Haag, 14 February 1985, NJ 1986, 221.

117 Pres.Rb. Haarlem, 25 May 1985, NJ 1985, 896; Pres.Rb. Amsterdam, 7 November 1985, KG 1985, 366; Pres.Rb. Rotterdam, 21 November 1985, KG 1985, 386; Pres.Rb. Amsterdam, 21 May 1990, KG 1990, 194.

118 In the important NS case (HR 30 May 1986, NJ 1986, 688) the court did not deal with the validity of the exception: it was of no direct relevance to the issues in that case - see 3.3.3.1.1 for more detail.

119 See Moons, "Erkenning van een stakingsrecht van ambtenaren", *Nederlands Juristenblad*, 1982, 1149; Rood, "Novemberstorm in de publieke sector", *Nederlands Juristenblad*, 1983, 1384; Betten, "Onevenredige schade blijft hindernis voor volledige erkenning stakingsrecht", *Sociaal Recht*, 1986, 200; Cremers, "Ambtenaar in actie", *Recht & Kritiek*, 1987, 70; Maris, "Collectieve acties met een 'politiek element'", *Sociaal Maandblad Arbeid*, 1988, 705 for more detail in this regard.

collective action of civil servants is not based on article 6(4) of the ESC, even though the exception to that article has been circumvented. Rather, the acknowledgement of such a right is based on general principles of the law¹²⁰ which prescribe that the difference between the public and the private sectors has to be as small as possible. Neither the fact that such action has an inherently political element, nor the fact that the damage to third parties could be unreasonably high, can change the fact that such collective action is in principle lawful.¹²¹

It is thus clear that in recent years the factual legal positions of workers in the private sector and that of civil servants have become more or less identical. In practice, due to both the international trend and internal developments, civil servants enjoy the right to collective action. Certain categories of civil servants, such as the police and the firebrigade, will however be treated more strictly with regard to the application of lawfulness criteria. Special regard is furthermore had to issues such as possible damage to the public interest and to third parties. The unique position which is occupied by some civil servants will therefore cause the judges to be less tolerant in respect of certain collective action in the public sector. The lawfulness criteria are, nevertheless, in principle exactly the same as the criteria which have developed in the private sector since 1972.

Because the Dutch government has decided to lift its reservation on the ratification of the ESC, the whole issue concerning the exception to article 6(4) of the ESC has also lost most of its importance.¹²² In the near future, civil servants will thus also be able to claim their right to collective action directly from article 6(4) of the ESC. Just as in the private sector, all the responsibility to regulate collective action in the public sector is then placed squarely on the shoulders of the Dutch courts.

¹²⁰ The situation can thus be compared with the 1972-situation in the private sector: see 2.2.3.2.

¹²¹ Rood, *Collectief Ambtenarenrecht*, 1989, 161-170.

¹²² The intention of the government is then to statutorily regulate the military's right to strike: *Aanhangsel Handelingen Tweede Kamer*, 1989-1990, No. 635, 1277. See Van den Heuvel, "Some aspects of the European Social Charter and the right to collective action in the Netherlands", *Law at the Vrije Universiteit Amsterdam*, 1993, 59; Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 69. See also, generally, Van der Heijden, "Post-industrieel arbeidsrecht", *Nederlands Juristenblad*, 1993, 299.

Owing to the similarity between the private and the public sectors with regard to collective action, no distinction will be made between the two sectors when the lawfulness criteria are discussed in the following chapter.

CHAPTER 3 - LAWFUL AND UNLAWFUL COLLECTIVE ACTION

3.1 Introduction

In the previous chapter the legislative efforts of the Dutch government to regulate strike action were dealt with.¹ In 1981, the government again asked the central employers' organisations and workers' unions (united in the Labour Foundation) for advice on a possible code concerning the regulation of strikes. The Labour Foundation only responded in 1985 and stated that they could not formulate such a code and that they would only play a negotiating role when a strike occurred.² It is thus clear that the Dutch legislature has thus far failed to become a successful architect of the law relating to strikes.

In 1980 the president of the Supreme Court publicly declared³ that it is also the task of the judges to do justice in those cases where there are no statutory guidelines, such as in the field of strike law.⁴ Government and the social parties (employers' organisations and trade unions) have failed to provide regulation and it is the difficult task of the judge to fill the gap. Consequently, strike law in the Netherlands is for the greater part, judge-made law.⁵ Since 1972, the judges have developed lawfulness-criteria to assist them in determining whether a particular strike is lawful or not. Unfortunately, this process is hampered by the fact that the relevant parties to a labour conflict often bring the matter to court by way of summary

1 See 2.2.3.1.

2 *Advies inzake een aantal aspecten van de stakingsproblematiek*, 1985, 24. In effect, the employers' organisations and workers' unions left the question of the legality of strikes to the judges; this is still the position today. See Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 27.

3 Dubbink, "Rechtspraak in de gevarenzone", *NRC Handelsblad*, 10 May 1980.

4 It is not uncommon for a judge to fill a loophole left by the legislature, but the state of affairs regarding strikes is a special one because of its importance (no applicable statutes on a whole field of the law) and because of the passive attitude taken towards it by the role-players in the legislative process (the legislature has probably opted for a "jurisprudential" strike law).

5 The Netherlands, however, is no exception in this regard. A number of Western European countries have no applicable statutes on the law relating to strikes: cf Betten, *De Stakende Ambtenaar in Internationaal Perspectief*, 1985, 8.

proceedings.⁶ In these proceedings, time is of the essence. A judge hardly has any time to deal with lawfulness-issues and has to find practical solutions to the labour conflict. Some of these summary proceedings do of course go on appeal, but in many cases the problem has by then lost much of its practical significance. Naturally, a judge-made strike law also carries with it the inherent risk of making a judge vulnerable to accusations of preferential treatment in dealing with socio-economic problems. Fortunately, the judges have the invaluable assistance of international treaties and conventions, such as the European Social Charter, to guide them in their quest for justice.

In this chapter the central question confronting the judges in the Netherlands, namely whether particular collective action is lawful or not, will be analysed and discussed.

3.2 International Rules pertaining to Strikes

Even though Dutch legislation on strikes does not exist, and even though the Dutch Constitution is silent on the issue of a right to strike, the judge in the Netherlands has to take the applicable international and European norms on collective action into account when adjudicating on the lawfulness of a strike.⁷ These norms are contained in treaties, the most important treaty being the European Social Charter.

3.2.1 *The European Social Charter*

After lengthy preparations, the European Social Charter (ESC) was finalised on 18 October 1961 in Turin, Italy. The ESC came into force on 26 February 1965 after five member states of the Council of Europe had ratified it.⁸ The Council of Europe was founded shortly after

⁶ See 2.2.2.2 for more detail on the summary proceeding or "kort geding".

⁷ Cf Jacobs, *De Rechtstreekse Werking van Internationale Normen in het Sociaal Recht*, 1985, 57 who emphasises the fact that the totality of international social norms applicable to the Netherlands should be looked at when solving a relevant legal problem. See also Heringa, *Sociale Grondrechten; hun plaats in de gereedchapskist van de rechter*, 1989, 36 in this regard.

⁸ See 2.2.3.2. The official text of the ESC in French and in English can be found in *Tractatenblad*, 1962, No. 3; the Dutch text can be found in *Tractatenblad*, 1963, No. 90.

World War II and has supervised nearly a hundred international treaties, the most important of which are the European Convention on the Protection of Human Rights and Fundamental Freedoms (1950) and the ESC.⁹

"The European Social Charter is the regional equivalent of the international covenant of the United Nations relating to economic, social and cultural rights concluded in 1966. In Europe, the Social Charter has been officially defined as the 'pendant' of - or as complementary to - the European Convention on Human Rights signed in 1950."¹⁰

The ESC came into operation for the Netherlands on 22 May 1980.¹¹ Article 6 of the ESC reads as follows:

"With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:

1. to promote joint consultation between workers and employers;
2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulations of terms and conditions of employment by means of collective agreements;
3. to promote the establishment and use of the appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and *recognise*:
4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."¹²

Article 6(4) of the ESC is said to be a landmark in international labour law, representing the first occasion on which the right to strike has been expressly recognised by a treaty in force.¹³ This right, as well as the other rights that flow from the ESC, are subject to a system

⁹ The vibrant interest in the rights of individuals was not limited to post-war Europe. The Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966) are evidence of the world-wide move that occurred in the direction of human rights. The International Covenant on Economic, Social and Cultural Rights will be discussed in 3.2.3.

¹⁰ Wiebringhaus, "The application of the European Social Charter" in *Het Europees Sociaal Handvest*, 1982, 18. See Harris, *The European Social Charter*, 1984; Betten, "Het Europees Sociaal Handvest: Europa's stiefkind", *NJCM-Bulletin*, 1988, 438; Van den Heuvel, "Some aspects of the European Social Charter and the right to collective action in the Netherlands", *Law at the Vrije Universiteit Amsterdam*, 1993, 39-48 and Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 154 and onwards for more detailed information on the ESC.

¹¹ See 2.2.3.2. When the Dutch government ratified the ESC, it made an exception with regard to civil servants due to article 358bis of the Dutch Penal Code (which at that time was still in force) that forbids civil servants to participate in strikes. Even today the exception is still in force, but it is of no real importance anymore: see 2.3 for more detail.

¹² (Emphasis added.)

¹³ Harris, *The European Social Charter*, 1984, 74. See also 3.4 in connection with article 31 of the ESC's restrictions to the right to strike.

of supervision as laid down in articles 21-29 of the Charter. Contracting parties are obliged to send biannual reports to the Secretary-General of the Council of Europe. The "Committee of Independent Experts" is one of the supervisory bodies which examines these reports.¹⁴ The conclusions that result from these examinations are an important source for the interpretation of the ESC.¹⁵ As Kahn-Freund aptly stated:

"This comment on the Charter by a group of trained and skilled experts in social policy, in labour law, in social legislation, based as it is on careful scrutiny and deliberation ... cannot fail to have the effect of an influential gloss, of an interpretation which, whilst not being 'authentic' in the legal sense, is likely to enjoy a very high degree of persuasive authority."¹⁶

The reason why article 6(4) of the ESC is of such great importance for the Dutch law relating to strikes, is because the Dutch Supreme Court¹⁷ considered the article to be a directly binding provision. It is thus directly enforceable by the Dutch courts.

3.2.2 *The International Labour Organisation Conventions*

The International Labour Organisation (ILO) is a specialised organisation of the United Nations. The right to strike is considered to be implied in the ILO Convention on the Freedom of Association and Protection of the Right to Organise (Convention 87 of 1948, ratified by the Netherlands on 7 March 1950) and the ILO Convention on the Right to Organise and to Free Collective Bargaining (Convention 98 of 1949, not yet ratified by the Netherlands).¹⁸ These two conventions are usually referred to as the Freedom of Association

¹⁴ Other supervisory bodies that can be mentioned are the "Governmental Committee" (a subcommittee of the "Governmental Social Committee of the Council of Europe") and the "Parliamentary Assembly of the Council of Europe".

¹⁵ In the eyes of the Dutch Supreme Court, the Committee of Experts is an authoritative source in the interpretation of the Charter: see HR 30 May 1986, NJ 1986, 688.

¹⁶ Kahn-Freund, "The European Social Charter", in *European Law and the Individual*, 1976, 205. See also Betten, *The Incorporation of Fundamental Rights in the Legal Order of the European Communities*, 1985, 182; Van den Heuvel, "Some aspects of the European Social Charter and the right to collective action in the Netherlands", *Law at the Vrije Universiteit Amsterdam*, 1993, 44-48 and Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 157-169 in this regard.

¹⁷ HR 30 May 1986, NJ 1986, 688 (this case will be dealt with in detail in 3.3.). Cf also the provisions of article 32 of the ESC which provides as follows: "The provisions of this Charter shall not prejudice the provisions of domestic law or of any bilateral or multilateral treaties, conventions or agreements which are already in force, or may come into force, under which more favourable treatment would be accorded to the persons protected".

¹⁸ Betten, *The Incorporation of Fundamental Rights in the Legal Order of the European Communities*, 1985, 193. See also Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 140-150 for more information on these ILO Conventions.

Conventions.¹⁹ Convention 87 deals with the freedom of workers to form and join trade unions of their choice, as well as the freedom of those unions to organise their activities without any interference from public authorities. Convention 98 complements Convention 87 in that it first, protects workers from acts of anti-union discrimination in respect of their employment and second, protects worker and employer organisations against acts of interference from each other.

However, the ILO Conventions are aimed at imposing obligations on national governments and do not, as in the case of article 6(4) of the ESC, have direct application to employers and employees within a state. Therefore, employers and employees cannot directly call upon the implied right to strike in the conventions to assist them in collective conflict issues.²⁰

3.2.3 *The International Covenant on Economic, Social and Cultural Rights (ICESCUR)*

The ICESCUR came into being in 1966 and was ratified by the Netherlands on 11 March 1979. It is one of two United Nations Covenants on human rights²¹ and contains a large number of provisions relating to labour, such as the right to work and the right to form trade unions. The right to strike is contained in article 8(1)(d):

"The States party to the present Covenant undertake to ensure the right to strike, provided that it is exercised in conformity with the laws of the particular country."

The inclusion of article 8(1)(d) was justified as follows:

"It was pointed out that striking was the only method among many (*sic*) whereby trade unions could pursue their interests, stress being placed upon its character as a last resort to be used only when the usual conciliation procedures had failed to secure a solution; and it was

¹⁹ More recently, the Convention on the Freedom of Association and Procedures for Determining Conditions of Employment in the Public Service (Convention 151 of 1978) and the Convention on the Right to Free Collective Bargaining (Convention 154 of 1981) were adopted. They also belong to the Freedom of Association Conventions: see Betten, *The Incorporation of Fundamental Right in the Legal Order of the European Communities*, 1985, 193 for more detail. Note also Convention 135 of 1971 and Recommendation 143 of 1971 in this regard.

²⁰ Pres.Rb. Den Haag, 19 December 1980, NJCM 1981, 412 and Pres.Rb. Den Haag, 21 January 1982, NJ 1984, 487.

²¹ See also the International Covenant on Civil and Political Rights of 1966; both the covenants are regarded as an elaboration of the Universal Declaration of Human Rights of 1948.

urged that any provision relating to striking should permit the possibility of its limitation in the case of public or essential services."²²

The proviso to article 8(1)(d) is said to be ambiguous owing to the fact that the nature of the right to strike is not interpreted in the same way by all the states party to the covenant.²³

In the Netherlands, the ICESCUR has not played as big a role as the ESC has, also as a result of the fact that the Dutch Supreme Court did not want to accept article 8(1)(d) as a directly binding provision.²⁴ Just as in the case of the ILO Conventions, the employees cannot directly call upon the ICESCUR for assistance: it is a covenant aimed at national governments.

3.2.4 *The Community Charter of the Fundamental Social Rights of Workers*

In 1985, Betten's thesis on the incorporation of fundamental rights in the legal order of the European Community was published. This thesis investigated the feasibility of a charter of fundamental rights for the European Community, with special reference to the right to strike. It came to the conclusion that it would in principle be possible to construe such a charter.²⁵ A few years later, such a charter was indeed created. In December 1989, the Community Charter was signed by eleven of the twelve member states, with the exception of Great Britain.²⁶ The right to strike is expressly contained in article 13 of the Charter and is clearly based on article 6(4) of the ESC and article 8(1)(d) of the ICESCUR.

²² Doc. A/2929, "Annotations on the text of the draft International Covenant on Human Rights", 106, quoted in Betten, *The Incorporation of Fundamental Rights in the Legal Order of the European Communities*, 1985, 192.

²³ See Sieghart, *The Lawful Rights of Mankind*, 1985, 153.

²⁴ HR 6 December 1983, NJ 1984, 557. See also Christe, "Bezonken ambtelijk stakingsrecht", *Sociaal Maandblad Arbeid*, 1983, 292-294; Maris, "Het rechtspraakbeleid van de Hoge Raad in de stakingsarresten van 1986", *Sociaal Maandblad Arbeid*, 1987, 267; Fruytier, "Vrijheid van loononderhandelingen en art. 8 van het internationaal verdrag betreffende economische, sociale en culturele rechten", *Sociaal Maandblad Arbeid*, 1988, 605 and Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 137 for more information on the ICESCUR.

²⁵ Betten, *The Incorporation of Fundamental Rights in the Legal Order of the European Communities*, 1985.

²⁶ Cf Van Dijk, "Is het ESH dan niet Europees?", *Nederlands Juristenblad*, 1989, 1412; Betten, 'Het community charter inzake fundamentele sociale rechten; een verwarrende sinterklaassurprise', *NJCM-Bulletin*, 1990, 3; Betten, "EG-Handvest van sociale grondrechten; een hol vat?", *Sociaal Maandblad Arbeid*, 1990, 119 and Staal, "Veel heisa rond Handvest; meer alibi dan hoezee! Het Gemeenschapshandvest van sociale grondrechten van de werkenden in de EG", *NJCM-Bulletin*, 1990, 14.

"13. The right to collective action in the event of a conflict of interests shall include the right to strike, subject to the obligations arising under national regulations and collective agreements.

In order to facilitate the settlement of industrial disputes the establishment and utilisation at the appropriate levels of conciliation, mediation and arbitration procedures should be encouraged in accordance with national practice."

However, the European Community Charter is not a legally binding treaty and only plays a guiding role with regard to the social policy within the European Community. It has accordingly had no major influence on the Dutch law relating to strikes.²⁷

3.3 The Right to Strike: Article 6(4) ESC and its Restrictions

As stated above,²⁸ article 6(4) of the ESC - being a directly binding provision - plays a major role in providing the legal basis for strikes in the Netherlands. It is therefore necessary to analyse the requirements and restrictions of article 6(4) of the ESC in detail. Naturally, the interpretation of the European Social Charter by the respective ratifying states differs in certain respects.²⁹ The purpose of this study, however, is not to determine the possible "correct" interpretation of the Charter with respect to the right to strike, but to analyse and discuss the Dutch law in this regard. The emphasis will therefore be on the specific way in which the relevant articles of the ESC have been interpreted and applied in the Netherlands.

3.3.1 Conflicts of interests

Article 6(4) of the ESC speaks of "the right of workers and employers to collective action in cases of *conflicts of interests*, including the right to strike, ...".³⁰ The article thus contains a

²⁷ Cf Betten, in *The Future of European Social Policy*, 1991, 107-161 and Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 150-154.

²⁸ Sec 3.2.1.

²⁹ The first five member states to ratify the ESC were Great Britain, Norway, Sweden, Ireland and the Federal Republic of Germany, followed by Denmark, Italy, Cyprus, Austria, France, Iceland, Belgium, Greece, Luxembourg, the Netherlands, Turkey, Finland, Malta, Portugal and Spain.

³⁰ (Emphasis added.)

restriction with regard to the purpose of the collective action, but what does a "conflict of interests" entail?

If one looks at the preamble to article 6, it is clear that the conflict has to take place in the framework of the right to bargain collectively.³¹ This would normally be a conflict concerning the provisions of a collective agreement, e.g. concerning the amount of wages to be paid, or the working conditions of employees. However, a conflict of interests does not necessarily concern the provisions of a collective agreement. The Committee of Experts commented as follows:

"Any bargaining between one or more employers and a body of employees (whether 'de jure' or 'de facto') aimed at solving a problem of common interest, whatever its nature may be, should be regarded as 'collective bargaining' within the meaning of Article 6."³²

In formulating "collective bargaining" in such a broad manner, the Committee of Experts opened the door to an equally broad interpretation of the concept "conflict of interests".

In recognising the right to collective action only in cases of conflicts of interests, the Committee of Experts further makes a distinction between the concepts "conflict of interests" and "conflict of rights". A conflict of rights is described as a dispute concerning the existence, validity, interpretation or violation of a collective agreement.³³ Such disputes can be solved by the use of applicable rules of law, and the strike weapon may thus not be used.

The French jurist, Blanc-Jouvan, gives the following definitions:

"Disputes over rights ... turn on the existence or the content of a right claimed by a party, that is, on the application or interpretation of existing law, whether it has its source in legislation, in a collective agreement, or in the individual contract of employment.

Disputes over interests, often called economic interests, turn on amendments and improvements in existing law or even on the development of new law through the channels

31 In the NS case (HR 30 May 1986, NJ 1986, 688, 3.4) the Dutch Supreme Court gave the following definition of a conflict of interests: "Een geschil zowel met betrekking tot de belemmering in de uitoefening van het recht op collectief onderhandelen over de arbeidsvoorwaarden van de werknemers in dienst van de NS, welke voorwaarden in elk geval bij CAO plegen te worden vastgesteld, als met betrekking tot de inhoud van die arbeidsvoorwaarden." It is not clear whether the Supreme Court wanted to give a general definition or whether the definition is limited to the specific facts of the case.

32 *Conclusions IV*, 1975, 50. Cf also *Conclusions I*, 1969/1970, 184 and *Conclusions II*, 1971, 28 in this regard.

33 *Conclusions I*, 1969/1970, 38.

normally open to the parties, that is, the negotiation of collective agreements."³⁴

The abovementioned distinction between "conflicts of interests" and "conflicts of rights" led to differing decisions by the Dutch courts on the question whether collective action may be used if a dispute can still be solved by the use of applicable rules of law.³⁵ The Dutch literature on strikes also manifest differences of opinion on this issue whether collective action may be used to influence the decision-making process of an employer,³⁶ especially with regard to matters such as reorganisation and collective dismissals. In general, the majority of Dutch writers on the subject answered this question in the affirmative, and it can be accepted that such a conflict would be classified as a "conflict of interests" in the Dutch law today.³⁷

3.3.2 Collective agreements

Article 6(4) of the ESC speaks of "the right of workers and employers to collective action ... subject to obligations that might arise out of collective agreements previously entered into." It is clear that the obligations flowing from a collective agreement can stand in the way of the right to collective action. If a trade union, in calling a strike, fails to comply with an obligation contained in a collective agreement to which it is a party, the strike would most probably be regarded as unlawful. The abovementioned obligations are normally explicitly

34 Blanc-Jouvan, contribution to Aaron (ed.), *Labor Courts and Grievance Settlement in Western Europe*, 1971, 8-9.

35 For example, a court ruled that collective action could be used to influence a decision on proposed amendments to the Disability Insurance Act, even though it was possible to solve the dispute by the use of applicable rules of law (Pres.Rb. Haarlem, 3 October 1991, KG 1991, 351), whereas a strike against the nomination of a director of a company was declared unlawful as the dispute could be solved by the use of applicable rules of law (Pres.Rb. Utrecht, 21 June 1991, KG 1991, 256). Cf also Pres.Rb. Amsterdam, 16 February 1990, KG 1990, 99; HR 19 April 1991, NJ 1991, 690 and Pres.Rb. Utrecht, 28 April 1992, KG 1992, 224.

36 According to Dutch law, an employer does not have an unlimited power to make organisational decisions with regard to employment matters. Sections 25 and 26 of the Works Council Act of 1971 provides supervisory information and consultation duties to be observed by employers before they are allowed to reorganise or dismiss employees. Special duties in this regard could furthermore be found in a collective labour agreement which contractually binds the employer: see also 3.3.2 in this regard.

37 See the differing opinions of Peeters, "Het recht op collectieve actie van werknemers", *Nederlands Juristenblad*, 1980, 71; Maris, "Stakingsrecht en belangengeschillen in het ESH", *Sociaal Maandblad Arbeid*, 1983, 278; Fase, "Medezeggenschap en collectieve actie" in *Arbeid in Kort Geding*, 1983, 13; Loonstra, *Gezag, Medezeggenschap en Collectieve Actie*, 1990, Chapter 4; Duk, in *De Marisbundel*, 1989, 19; Luttmer-Kat, "Zijn collectieve acties tegen ontslagmaatregelen rechtens toegestaan?", *Sociaal Maandblad Arbeid*, 1989, 333; Luttmer-Kat, *Ondernemersbesluiten onder actievuur*, Inaugural lecture, 23 October 1990; Van het Kaar, *Medezeggenschap bij Fusie en Ontvlechting*, 1993, 199 and Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 293.

contained in the so-called "duty of peace" provision. It can be accepted, however, that collective action aimed at bringing about amendments to the agreed terms of a collective agreement during the course of that agreement - even if the duty of peace does not form a physical part of the collective agreement - are also unlawful.³⁸ This does not apply to cases where there is a clause providing for interim amendments to - or the termination of - the collective agreement.³⁹ Such a clause would thus directly influence the scope of the duty of peace and the still valid collective agreement can go back to the negotiating table, and its contents influenced by the use of collective action.

A distinction can be drawn between a relative and an absolute duty of peace. A relative duty of peace only prohibits collective action aimed at amending the provisions of the collective agreement, while an absolute duty of peace covers all collective action during the duration of the collective agreement.⁴⁰ The relative duty of peace is more common in Dutch practice today and has of course no application if the collective action is aimed at another party, e.g. the government.⁴¹

3.3.3 *Industrial action covered by article 6(4) ESC*

Article 6(4) of the ESC speaks of "the right of *workers* and employers to *collective action* ..., including the right to strike,...".⁴² The right to strike is thus conferred on individual employees and not on organisations. The Committee of Experts expressed it as follows:

38 This tacit duty of peace has to do with the underlying idea behind the Collective Labour Agreement Act of 1927, namely that there should for a certain period (the duration of the collective labour agreement) be stability with respect to the conditions of labour. Cf also Pres.Rb. Rotterdam, 27 August 1979, NJ 1979, 517 and Fase, *CAO-recht*, 1982, 48.

39 This is the so-called "openbreek-clausule".

40 This is no more than a rough distinction: in practice, numerous refinements take place with the result that the two forms often overlap, having similar consequences. See Stolwijk, *De Collectieve Arbeidsovereenkomst voor de Typografie*, 153 and Mannoury, *De Collectieve Arbeidsovereenkomst*, 53.

41 Cf Pres.Rb. Amsterdam, 10 March 1980, NJ 1980, 165; Pres.Rb. Den Haag, 6 May 1981, NJ 1981, 542; Pres.Rb. Leeuwarden, 22 November 1985, NJ 1987, 71; Pres.Rb. Utrecht, 25 September 1991, KG 1991, 346 and Pres.Rb. Groningen, 3 October 1991, KG no. 187/91.

42 (Emphasis added.) The right of employers to collective action will be dealt with in Chapter 4.

"Lastly, there is no provision in Article 6 or indeed any other article of the Charter that allows the exercise of the right to strike to be restricted to trade unions. Paragraph 6 of Part I of the Charter lays down the principle that 'all workers and employers have the right to bargain collectively'. Since therefore an ordinary group of workers without any legal status may engage in such bargaining, it can and should be given the right to strike under Article 6, paragraph 4, so that it may effectively exercise its right to bargain collectively."⁴³

No distinction is thus drawn between organised and unorganised (wildcat) strikes,⁴⁴ and this can also be reconciled with the theoretical position in the Netherlands today. However, wildcat strikes do not have much practical significance in the Netherlands and only a few of these strikes have broken out in the past; they are normally either of short duration or are transformed into organised strikes by the intervention of trade unions.⁴⁵ It is thus difficult to deduce a general legal approach towards these unorganised strikes from the Dutch jurisprudence.

The concept of "worker" is furthermore broadly interpreted by the Committee of Experts, and also includes self-employed persons and civil servants.⁴⁶ The Dutch government, however, subscribes to a slightly narrower interpretation, stating that self-employed persons do not fall under the provisions of article 6(4) of the ESC.⁴⁷ As mentioned above, the Dutch government in 1989 decided to lift its reservation on the ratification of the ESC, with the result that civil servants will in the near future also be included in the concept of "worker" as used in article 6(4) of the ESC.

It is also clear that article 6(4) of the ESC includes more than the right to strike: the broad term "collective action" is used, and even though the supervisory bodies of the ESC have not

⁴³ *Conclusions IV*, 1975, 50. Cf also *Conclusions II*, 1971, 28 and *Conclusions XII-1*, 1992, 129.

⁴⁴ A wildcat strike is a strike that is not organised by a regular trade union, but, for example, by an *ad hoc* committee rising to a particular occasion. See Rood, "Over de betekenis van het Europees Sociaal Handvest voor het stakingsrecht en het onderhandelingsrecht in de private en in de publieke sector", in *Het Europees Sociaal Handvest*, 1982, 61-62.

⁴⁵ See Bakels, *Schets van het Nederlands Arbeidsrecht*, 1992, 205. Cf also *Conclusions IX*, 1985, 57.

⁴⁶ *Conclusions I*, 1969/1970, 8: "In the light of the *travaux préparatoires* the Committee arrived at the conclusion that in principle the term 'worker' was intended to cover both employed and self-employed persons, but that this interpretation could not be applied in all cases."

⁴⁷ *Bijlagen Handelingen Tweede Kamer*, 1976-1977, 13873, No. 10, 4. See also Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 184 and 279 in this regard.

specified the contents of this concept, it is a generally accepted fact that it includes more than the typical full cessation of work.⁴⁸

In the paragraphs that follow, the effect of article 6(4) of the ESC on the different types of collective action, will be discussed.⁴⁹

3.3.3.1 The "normal" strike

In the *Nederlandse Spoorwegen* case,⁵⁰ the Dutch Supreme Court for the first time made the assumption that the compilers of the ESC had the normal type of collective action in mind when they formulated article 6(4). This "normal type" of strike, namely the strike that is directed solely at the employer, would be covered by article 6(4) of the ESC, which would thus make it lawful in principle.⁵¹ It is clear that the judge does not only investigate the physical form of the collective action, but also the *purpose* thereof, or, against whom and what the strike is directed. This latter aspect formed a central part of the *NS* case, where the Supreme Court distinguished the action *in casu* from the said "normal type" of strike by noting the following peculiar aspect: the collective action *in casu* was physically directed against the employer,⁵² but was in fact aimed at the government.⁵³ As will be seen below, the lawfulness of these types of collective action thus depends on the specific purpose of the action.

48 Cf *Collected 'travaux preparatoires'*, Volume IV, 1957, 16 and *Collected 'travaux preparatoires'*, Volume V, 1958, 48 in this regard.

49 In the Netherlands, the different types of collective action have only become relevant during the 1980's: before this time, nearly all collective action was executed in the form of the traditional all-out strike. (The definitions of the different types of collective action have been dealt with in Chapter 1.)

50 HR 30 May 1986, NJ 1986, 688. This case will hereafter be referred to as the *NS* case.

51 Failure to comply with procedural rules as well as actions in conflict with article 31 of the ESC, could still undermine the lawfulness of a strike; these issues will be dealt with in 3.4 and 3.5.

52 The action directed itself against the employer in the sense that the contracted labour was not performed as it ought to have been, which in turn disrupted and caused damage to the employer's concern.

53 The action was aimed at the government in the sense that its purpose was to exert pressure on the government in order to prevent it from interfering with the conditions of employment. Cf also Pres.Rb. Amsterdam, 10 March 1980, NJ 1980, 165 and Pres.Rb. Amsterdam, 16 April 1985, *Recht & Kritiek*, 1985, 385.

3.3.3.1.1 Actions aimed at government which are covered by the ESC

The relevant facts of the *NS* case can be summarised as follows: in 1983 the government announced its intention to cut the salaries of civil servants by three percent (3%). Railway workers, however, were not considered as civil servants at that time but were rather considered to be "trend followers".⁵⁴ According to the then existing Temporary Act on the Conditions of Employment in the Public Sector of 1980, the Minister of Social Affairs had the authority to extend the proposed civil servant wage cut to workers in that sector as well - and intended to do just that. This led to organised collective action by the railway personnel during the period from 17 October 1983 to 5 December 1983.⁵⁵ The Railway Board started a summary procedure against the unions. On 4 November 1983 the president of the Utrecht District Court declared the action of the unions to be unlawful, and on 15 November 1984 the Amsterdam Court of Appeal expressed the same opinion. This left the way clear for a decision from the Dutch Supreme Court which was given on 30 May 1986.⁵⁶

As mentioned above, the purpose of these types of action is a decisive factor in determining their lawfulness. In the *NS* case, the Railway Board argued that they could not satisfy the demand of the unions, and that the collective action was thus not covered by the ESC. Only collective action flowing from collective bargaining -and not political actions against the government's intention - fall under article 6(4) of the ESC. In countering this argument, the Supreme Court *inter alia* analysed the ratio behind article 6(4) of the ESC. According to the preamble to article 6, the ratio is to ensure the effective exercise of the right to bargain collectively. The government's intended action would have the effect of seriously limiting

54 "Trend followers" (their terms of employment normally followed wage trends in the private sector) was the term commonly used for employees that fell under the Temporary Act on the Conditions of Employment in the Public Sector. They worked in the non-profit sector, which comprised institutions such as welfare organisations and hospitals. They were regarded as "hybrid" employees; even though their salaries were paid by the government, they were not classified as civil servants as the terms and conditions of their employment differed from those of the civil servants. See Van Peijpe, "Loonvorming in de collectieve sector", *Sociaal Maandblad Arbeid*, 1986, 358 for more detail in this regard.

55 Their actions were very successful in the sense that they disrupted railway traffic for more than a month. The government, however, did not give in and in the end, the unions lost the fight.

56 HR 30 May 1986, NJ 1986, 688. In this case, the Supreme Court for the first time after the *Panthonlibco* decision, again had the opportunity to give its opinion on organised strikes. The Supreme Court made ample use of this opportunity; the lengthy, well-motivated decision reads more like a legal essay than a normal Supreme Court judgement.

the trend followers' right to bargain collectively. These actions are thus not purely political: they fall within the scope of the ESC, even though they take place in the business of an employer who is unable to do a thing about it. Only those actions whose purpose clearly fall outside the ambit of collective bargaining have no claim on the protection of the ESC. The Supreme Court based this argument on the view held by the Committee of Experts,⁵⁷ namely that collective actions aimed at government policy - involving conditions of labour which are or ought to have been the subject of collective bargaining - are covered by the provisions of the ESC.⁵⁸

The Supreme Court furthermore held that the collective action had to be qualified. Even though the action was on the face of it directed at both the employer and the government, it was on closer investigation no different from the "normal type" of strike. This equation was possible because of the fact that the salaries of the railway personnel were mainly chargeable to the government, who thus fulfilled the role of material employer (in contrast with the Railway Board who was no more than a formal employer).⁵⁹

The argument that there was no conflict of interests *in casu* was thereby also effectively countered. The government's intended action involved not only the restriction of the right to bargain collectively on terms and conditions of employment (which were normally determined by way of a collective agreement), but also the actual conditions of employment (the intended wage cut by the government as material employer), which certainly qualified it as a conflict of interests.

A few months after the *NS* case, another important decision concerning government-aimed

57 The Committee of Experts was thus seen as an authoritative source by the Dutch Supreme Court. Cf also Committee of Experts of the ILO, *General Survey*, 1983, 67: "The committee considers that trade union organisations ought to have the possibility of recourse to protest strikes, in particular where aimed at criticising a government's economic and social policies."

58. *Conclusions II*, 1971, 27. See also Rood, "Over collectieve werknemers actie of: de HR terug van weggeweest", *Nederlands Juristenblad*, 1987, 301 and Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 90 and 318.

59 See 3.4 for the related issue of restrictions imposed by article 31 of the ESC. See also Maris, "Collectieve acties met een 'politiek element'", *Sociaal Maandblad Arbeid*, 1988, 704; Bakels, *Schets van het Nederlands Arbeidsrecht*, 1992, 204 and Van den Heuvel, "Some aspects of the European Social Charter and the right to collective action in the Netherlands", *Law at the Vrije Universiteit Amsterdam*, 1993, 57.

action was given by the Dutch Supreme Court in the *Hoogovens* case.⁶⁰ The facts can be summarised as follows. In March 1980, several strikes of short duration took place at the Hoogovens Groep BV, a blast-furnace company. Just as in the *NS* case, these strikes were also inspired by the government's intention to amend legislation directly affecting the employees. The trade union felt that the proposed changes to the Wage Act of 1970⁶¹ constituted an attack on the principle of wage negotiation recognised by article 6(4) of the ESC. At the time when the strikes occurred, however, the Dutch government had not yet ratified the ESC, even though the decision to sign the charter had at that stage already been taken.⁶² In giving its decision, the Supreme Court nevertheless accepted the ESC as a guide and accordingly decided, as in the *NS* case, that the action was lawful as the purpose thereof was to defend the right to bargain collectively. In the *Hoogovens* case - unlike the *NS* case - the Supreme Court considered the strikes to be a "pure" form of protest action as the government did not fulfil the role of material employer.⁶³

In 1994, the Supreme Court was given another opportunity to adjudicate on the lawfulness of government-aimed actions.⁶⁴ This time it concerned a conflict between the transport union FNV and the employers' organisation *Scheepvaart Vereniging Zuid* (SVZ), which resulted in several strikes of short duration at the port of Rotterdam.⁶⁵ The actions were directed against proposed statutory amendments which aimed to reduce compensation paid by the national health and disability insurance schemes.

The Supreme Court confirmed its two 1986 decisions: a collective action directed against the

60 HR 7 November 1986, NJ 1987, 226. This case will hereafter be referred to as the *Hoogovens* case. It can be accepted that the essential principles involved in the *NS* case and the *Hoogovens* case were simultaneously dealt with by the Supreme Court: see Maris, "Collectieve acties met een politiek element", *Sociaal Maandblad Arbeid*, 1988, 698.

61 The actions were also directed against a "wage freeze" decision taken by the Government.

62 The ESC came into operation for the Netherlands on 22 May 1980: see 3.2.1.

63 See also Van der Heijden, "De rechter en staken tegen de overheid; het ESH voorbij", *Nederlands Juristenblad*, 1991, 1577 with regard to the protest strikes that occurred in connection with the proposed amendments to the Health Insurance Act of 1913 and the Industrial Disability Act of 1975 (these strikes are dealt with in 3.4).

64 HR 11 November 1994, NJ 1995, 152.

65 The strikes eventually spread to other locations.

employer, but aimed at the government, is lawful in principle, as long as it involves labour conditions which are or ought to have been the subject of collective bargaining.⁶⁶ In the above situation, the employer can be classified as a third party to the conflict with the result that the employer's interests (in terms of article 31 of the ESC) can affect the lawfulness of the strike.

The importance of this decision lies in the fact that the Supreme Court explicitly stated that the employer's economic interests can qualify as interests under article 31 of the ESC.⁶⁷ Article 31, the so-called public order clause, speaks of restrictions "such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals". The court added, however, that the economic interests of an employer would only justify a restriction on the right to strike in extraordinary situations, such as when the Dutch economy as a whole could be weakened by the collective action.⁶⁸ In addition, the court placed a heavy evidentiary burden on the employer who wants to qualify for protection under article 31 of the ESC. Such employer has to prove that an immediate threat of significant damage exists.⁶⁹ By placing these qualifications on the concept of "economic interests of employers", the court endeavoured to prevent the right to strike from becoming illusory. After all, damage inflicted upon an employer constitutes an inherent characteristic of collective action.

The fact that a dispute has a "political" element does therefore not ipso facto deprive such dispute of its character as a trade dispute.⁷⁰

66 The court's view is based on both article 6(4) and article 31 of the ESC. See Vegter, "Politieke staking niet snel onrechtmatig", *Bedrijfsjuridische Berichten*, 1995, 37 and Tan, "Politieke stakingen: een normaal bedrijfsrisico?", *Advocatenblad*, 1995, 70 for more detail in this regard.

67 The restrictions on the right to collective action are not only found in article 6(4) of the ESC, but also in article 31 of the ESC; see 3.4 for more detail on these article 31 restrictions.

68 The mere fact that an employer has suffered substantial damages as a result of collective action, would not be sufficient: such damage will be classified as a normal business risk.

69 The Supreme Court formulated it as follows: "...een onmiddellijk en concreet gevaar voor een specifieke, aanzienlijke schade, waarvan aard en vermoedelijke omvang, tegenover een eventuele betwisting, van de zijde van de werkgevers aannemelijk dienen te worden gemaakt." The employer *in casu* failed to prove such an immediate threat of significant damage to its concern.

70 Compare Davies & Freedland, *Kahn-Freund's Labour and the Law*, 1983, at 316-317: "In other words; the term 'political strike' is not only indistinct, but also useless, because even where the strike is unquestionably 'political', it

3.3.3.1.2 Actions aimed at government which are not covered by the ESC

From the three decisions above, it is clear that the Dutch Supreme Court makes an important distinction between collective action aimed at government policy regarding labour conditions (which are or ought to have been the subject of collective bargaining), and purely political actions aimed at government policy of a different kind.⁷¹ The definition of the purely political strike is thus determined in a negative way, as being those collective actions aimed at government policy that do not involve conditions of employment which are or ought to have been the subject of collective bargaining.⁷² However, the three Supreme Court decisions provided no further guidelines, directives or indications regarding the purely political strike. The Supreme Court only stated that the lawfulness of such a strike is left to the national legislation of each of the member states.⁷³

In the Netherlands, the elasticity of the court's future approach will depend on the scope of the words "...which are or ought to have been..." in the abovementioned formula.⁷⁴ "Conditions of employment" have previously been defined as special stipulations in a contract of employment, mostly regulated in a collective labour agreement.⁷⁵ Consequently, the use of the word "ought" would probably play the major role in determining the outer limits of ESC-protection for government-aimed actions.

may still be a trade dispute or it may not. How could one expect anything else in a world in which the political and economic spheres of life are indistinguishable? Whatever the political colour of the Government, it is involved in industry, and the organisations of both sides of industry are involved in government. Is not every major industrial problem a problem of governmental economic policy?"

71 These two types of action both form the group of collective actions with - to use the terminology of the Supreme Court - a "political element": see HR 30 May 1986, NJ 1986, 688 at 3.4.

72 The Committee of Experts expressed it as follows: "Political strikes are not covered by article 6 which is designed to protect the right to bargain collectively, such strikes being obviously quite outside the purview of collective bargaining." (*Conclusions II*, 1971, 27). See also *Conclusions IV*, 1975, 136.

73 See Rood, *Naar een Stakingswet?*, 1978, 77 and onwards, who feels that the distinction between a political and a non-political strike is so vague that it cannot be an effective criterion for judging the lawfulness of a strike.

74 See Nadasen, *A Perspective on Strikes in South African Labour Law*, 1991, 46 where he concludes that there is no determinative connection in the Netherlands between the characterisation "political" and a finding on the legality of the action, unless "political" is defined in terms of the contents of the dispute.

75 See Alga (ed.), *Juridisch Woordenboek*, 1985, 34: "arbeidsvoorwaarden: bijzondere bedingen in een arbeidsovereenkomst meestal in CAO's geregeld".

Even though purely political action is not protected by the ESC, it does not mean that the action is also automatically unlawful. Reference should be had to the previously discussed *Panhonlibco* case, which is still relevant to purely political strikes.⁷⁶ If one uses the criteria set out by the Supreme Court in that case, purely political action could be lawful if its purpose is closely connected to the public interest or important moral principles. However, these types of cases hardly ever occur in the Netherlands and thus present no real practical problem.⁷⁷

3.3.3.1.3 *Solidarity and sympathy strikes*

The purpose of a strike - or against whom and what the strike is directed - also plays a central role in determining whether a solidarity or a sympathy strike is lawful or not. In the *Panhonlibco* decision, the Supreme Court formulated the following rule in this regard: if the purpose of collective action falls outside the employer-employee relationship and if the collective action was caused by circumstances falling outside the employer's sphere of influence, the employees engaged in such an action would, in principle, be guilty of a breach of contract. Such action could, however, be lawful if the purpose of the action is closely connected to the public interest or important moral principles.⁷⁸ Since the *Panhonlibco* decision, the Dutch Supreme Court has had no opportunity to deal with these types of collective action, and the current validity of the abovementioned rule, especially after the prominent *NS* case, thus remains uncertain.⁷⁹

In Dutch literature, a relatively flexible approach to solidarity and sympathy strikes is propagated. Betten, for example, states that the European Community should recognise the "right of workers to organise and to participate in a strike, which is undertaken in support of a lawful strike in another Member State, which affects the rights or interests of these

⁷⁶ HG 15 January 1960, NJ 1960, 84: see Hansma, *Collectieve Actie onder de Rechter*, 1986, 20.

⁷⁷ See Maris, "Collectieve acties met een 'politiek element'", *Sociaal Maandblad Arbeid*, 1988, 698 and Nadasen, *A Perspective on Strikes in South African Labour Law*, 1991, 31-46 for more detail on purely political strikes in the Dutch context.

⁷⁸ HR 15 January 1960, NJ 1960, 84: see also 2.2.2.3. and 3.3.3.1.2. in this regard.

⁷⁹ The international treaties are of no real assistance in this regard: cf *Conclusions X-1*, 1987, 76 and Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 320.

workers".⁸⁰ A distinction can thus be made between "pure" solidarity strikes (in which the rights or interests of the solidarity strikers are not at all influenced by the other strike) and solidarity strikes in which the rights or interests of the solidarity strikers could be influenced by the other (or main) strike. In the first case, the solidarity or sympathy strike would most probably not fall under the protection of article 6(4) of the ESC; after all, there has to be a link between the strike and the right to bargain collectively. However, if such a link can be constituted, such a strike would, in principle, fall under the protection of the ESC. Such a distinction would also be in accordance with the lower court developments in this regard. The "pure" types of solidarity and sympathy action will, in general, be more easily condemned than those strikes (indirectly) aimed at securing better working conditions.⁸¹

3.3.3.2 *Work-to-rule and go-slow*

In the *NS* case - as mentioned above - the Dutch Supreme Court for the first time made the assumption that the compilers of the ESC had the "normal type" of strike in mind when they formulated article 6(4). However, the collective action in the *NS* case⁸² differed from the "normal type" of strike not only *qua* purpose, but also *qua* physical form. It consisted of work-to-rule and go-slow actions, as well as work stoppages of a short duration at varying locations (relay strikes). As mentioned above, the formulation of article 6(4) of the ESC ("...the right of workers...to collective action ...including the right to strike..."), leaves no doubt about the fact that the term "collective action" includes much more than the normal strike.⁸³ Consequently, the ESC does not only give protection to the normal strike, but also to other forms of collective action. But how wide is the protection of the ESC in this regard?

In the *NS* case, the Railway Board argued that the form of the action made them "unfair"; it

⁸⁰ Betten, *The Incorporation of Fundamental Rights in the Legal Order of the European Communities*, 1985, 225. See also Rood, *Naar een Stakingswet?*, 1978, 83; Van Schellen, *Aspecten van Internationaal Stakingsrecht*, 1983, 23; Jaspers, "Het overheids personeel en collectieve acties", in *Arbeidsverhoudingen bij de Overheid*, 1985, 126 and FNV, *Collectieve Actie: een recht*, 1987, 23 in this regard.

⁸¹ Cf Pres.Rb. Rotterdam, 24 October 1972, NJ 1972, 457 and Pres.Rb. Utrecht, 11 March 1982, NJ 1982, 346.

⁸² The collective actions in the Hoogovens case had the form of a "normal type" of strike.

⁸³ Collective action thus includes much more than a complete cessation of work. Traditionally (that is, before the ratification of the ESC), the Dutch courts did not easily tolerate work-to-rule and other similar actions: cf Pres.Rb. Den Haag, 18 August 1958, NJ 1958, 452 and Hof Amsterdam, 9 February 1967, NJ 1967, 437.

caused considerable damage to the employer, while virtually no financial sacrifices had to be made by the employees. In a normal strike (regarding working conditions), the striking employees have, after all, no right to claim their wages (articles 1638b and 1638d of the Dutch Civil Code) while, according to the Railway Board, they could in the present case still exercise that right.⁸⁴

The Supreme Court rejected this argument because of its unjust point of departure, namely the disproportional damage of the employer and the employees. The basis of the Supreme Court's reasoning was the risk-concept which it had already introduced in an earlier decision. In that case,⁸⁵ which dealt with the wage claims of employees willing to work during a strike (or put differently, the interpretation of article 1638d of the Dutch Civil Code), the Supreme Court made a distinction between two fundamental types of collective action. The first type normally possesses the following characteristics:

- * a large group of employees
- * an organised collective action
- * it concerns conditions of employment
- * for a certain period of time.

The second type displays the following features:

- * a small group of employees
- * an unorganised (wildcat) collective action
- * it is of a protest nature
- * for a short period of time.

In general, the first type of action would, according to the Supreme Court, be executed at the risk of the collectivity of employees, while the second type would be performed at the risk of the employer (who would then still have to pay those employees willing to work). In the *NS*

⁸⁴ Cf Pres.Rb. Rotterdam, 25 June 1979, NJ 1979, 518 and Hof Den Haag, 17 January 1985, NJ 1986, 222 in this regard.

⁸⁵ *Wielemaker/De Schelde*, HR 7 May 1976, NJ 1977, 55. This case will be dealt with in more detail in Chapter 4.

case, the action was classified as belonging to the first category,⁸⁶ and therefore, the employer was able to reduce the wages of all the employees (because they took part in the action at their own risk). However, if the employer - in order to avoid thorny issues of wage reduction and the amount thereof - prefers to pay the employees their normal wages, the balance of power between the parties could be shifted. On the other hand, this type of action could cause less damage to an employer than the normal all-out strike, which could restore the balance of power to a certain extent.

The Supreme Court thus recognised this type of action as being lawful in principle, even though it contains elements which could disturb the equilibrium of power between the employer and the employees.⁸⁷ These elements could, according to the Court, cause this type of action to be more easily condemned by a judge than the normal type of strike, on the basis of the disproportional damage of the employer and the employees.

The Supreme Court's reasoning concerning the form of the collective action and its influence on the issue of lawfulness forms a weak part of the decision. Neither the legal basis of the reasoning, nor the consequences and application thereof in practice, is satisfactorily dealt with.⁸⁸ One will thus have to wait for future decisions to fill in these details.

3.3.3.3 *The sit-down strike*

In some situations, such as when workers are confronted with the possible closure of a factory, there is clearly no point in using the strike weapon. An effective form of collective action often used in these circumstances, is the sit-down strike. In the Dutch jurisprudence, this form of collective action has often been condemned as being unlawful.⁸⁹ The basis of

⁸⁶ It should be noted that the distinction between the two types of action makes no mention of the form of the action: actions such as in the *NS* case could thus theoretically fall within either of the two categories.

⁸⁷ In the *NS* case, this was not considered to be the case and the actions were declared lawful.

⁸⁸ See Betten, "Onevenredige schade blijft hindernis voor volledige erkenning stakingsrecht", *Sociaal Recht*, 1986, 199 and Rood, "Over collectieve werknemers actie of: de HR terug van weggeweest", *Nederlands Juristenblad*, 1987, 301 for more detail.

⁸⁹ Cf HR 22 December 1978, NJ 1979, 372; Pres.Rb. Almelo, 19 September 1980, NJ 1981, 291; Pres.Rb. Amsterdam, 7 July 1981, NJ 1981, 424; Pres.Rb. Maastricht, 13 March 1982, KG 1982, 49. Sit-down strikes were regarded as being lawful only in exceptional circumstances: see Pres.Rb. Amsterdam, 30 November 1978, NJ 1981, 65 and Hof Den Haag, 23 April 1982, NJ 1985, 312.

the unlawfulness was originally sought in the infringement of proprietary rights caused by sit-down strikes.⁹⁰

Approximately five years after the landmark decision in the *NS* case, the Supreme Court was given the opportunity to give its opinion on the lawfulness of a sit-down strike when such a strike broke out at the central administration of Elka BV, a chain of supermarkets which had serious financial problems at the time.⁹¹ The aim of the sit-down strike was to force the two allegedly incompetent directors, who were also sole shareholders, to retire and sell their shares. The action succeeded, and the two directors claimed damages from the trade unions for the financial loss they suffered when they were forced to sell their shares. The trade unions, in turn, argued that their conduct was lawful and necessary for the continued existence of Elka BV.

In giving the decision, the Supreme Court assumed - as it had for the first time in the *NS* case - that the compilers of the ESC had the "normal type" of strike in mind when they formulated article 6(4). By using that assumption as a point of departure, and after consulting the relevant case law and literature of the Charter's member states, the Supreme Court decided that - noting its extreme purpose and unique character - the action *in casu* was not covered by article 6(4) of the ESC.⁹² The Supreme Court then investigated whether the action could be seen as lawful according to the national rules of law⁹³ and reached the same conclusion. The reason given for the finding of unlawfulness according to national law, was the fact that there

90 The Dutch writers have shown a tolerant approach to the sit-down strike, regarding it as being lawful in principle: cf Frenkel, "Staking en bedrijfsbezetting", *Sociaal Maandblad Arbeid*, 1973, 71; De Gaay Fortman, "Enka-bezetting en vennootschapsrecht", in *Verzekeringen van Vriendschap*, 1974, 261; De Jong, "Enkele rechtsoverwegingen bij de bedrijfsbezetting", *Sociaal Maandblad Arbeid*, 1974, 283; Peeters, "Het recht op collectieve actie van werknemers", *Nederlands Juristenblad*, 1980, 70; Fase, "Medezeggenschap en collectieve actie", in *Arbeid in Kort Geding*, 1983, 20.

91 HR 19 April 1991, NJ 1991, 690. This case will hereafter be referred to as the *Elka* case.

92 The Supreme Court expressed it as follows: "Een ander in aanmerking genomen, ligt de actie van de bonden zover af van het evenbedoelde type van collectieve actie van werknemers, dat - bij gebreke van duidelijke aanwijzingen voor het tegendeel - niet valt aan te nemen dat aan stellers van art. 6 lid 4 voor ogen heeft gestaan een zodanige actie onder de bescherming van deze verdragsbepaling te begrijpen, terwijl rechtspraak en rechtsliteratuur in de verdragsstaten geen blijk ervan geven dat de in die staten omtrent art. 6 lid 4 levende rechtsopvattingen zich sedert de totstandkoming van het Handvest (1961) zodanig hebben ontwikkeld dat bij een met die rechtsopvatting strokende uitleg van de bepaling een actie als onderhavige, hetzij in 1980 dan wel thans, onder de bescherming van de bepaling zou vallen."

93 Article 32 of the ESC stipulates that the ESC does not interfere with the member states' national rules of law if these rules of law are more favourable to the party seeking protection.

were other legal ways and means by which the unions could have achieved their intended purpose. The collective action was thus not used as an *ultimum remedium*⁹⁴ and the unions were ordered to pay damages to the two directors.

The *Elka* case can be subjected to critique on the basis that the Supreme Court did not make use of the opportunity to lay down general rules regarding the sit-down strike.⁹⁵ The only general rule which could be deduced from the case, is that not every type of collective action is in principle covered by the ESC. The status of a sit-down strike in relation to the ESC thus remains uncertain.

One could agree with Betten⁹⁶ that the Supreme Court created unnecessary difficulties for itself by introducing and expanding the statement that the compilers of the ESC must have had the "normal type" of strike in mind when they compiled article 6(4). Neither in the *travaux préparatoires* of the ESC,⁹⁷ nor in the conclusions of the Committee of Experts,⁹⁸ can any indications be found that the term "collective action" should be interpreted in the above way. That does not mean, however, that all collective action which falls under the protection of article 6(4) of the ESC will automatically be classified as lawful. In the *Elka* case, the Supreme Court could have reached the same conclusion by testing whether the collective action (which would then be covered by article 6(4) of the ESC) was exercised with due care,⁹⁹ and whether it would not have been disqualified by the restrictions imposed by article 31 of the ESC. Article 31 of the ESC could have been applicable. The unique character and extreme purpose of the strike led to a violation of the directors' fundamental proprietary rights, which justifies a restriction in terms of article 31 of the ESC.

94 The *ultimum remedium*-requirement is fully dealt with in 3.5.

95 The Supreme Court only dealt with the facts in issue (the unique character and extreme purpose of the strike were both seen as aggravating factors), and it is possible that a sit-down strike which occurs in more favourable circumstances will be covered by the protection of article 6(4) of the ESC.

96 Betten, "Hoge Raad worstelt verder met Europees Sociaal Handvest", *Sociaal Recht*, 1991, 200. See also Luttmers-Kat, "De Hoge Raad en de bedrijfsbezetting", *Nederlands Juristenblad*, 1991, 1649 in this regard.

97 See *Collected 'travaux préparatoires'*, Volume IV, 1957, 440.

98 See *Conclusions XI*, 1989, 89.

99 It is clear from the *travaux préparatoires* of article 6(4) of the ESC that the collective action has to be exercised with due care; the requirement that the action has to be the *ultimum remedium* is explicitly included in that duty of care: see 3.5 in this regard.

3.3.3.4 Supportive actions

The judges in the Netherlands do not readily tolerate action in support of main strikes. A well known supportive action is the blockade of the entrance to a business which is usually done in combination with a strike¹⁰⁰ in order to interfere with the entrance of employees who are willing to work. In principle, such a blockade is regarded as unlawful. It causes disproportional damage to the employer while, in addition, it leads to an unjustified infringement of the rights of employees who are willing to work.¹⁰¹ An exception to this rule would only be made in special circumstances, for example if the effect of a strike would otherwise totally be weakened.¹⁰² Such an exception occurred in a case in which the blockade consisted of the hauling up of the gangplank of a ship. The blockade was not aimed at employees willing to work, but at a new group of crew members who were supposed to replace the strikers. Such a replacement would, however, have enabled the ship to sail away, effectively ending the strike. Thus owing to these highly exceptional circumstances, the blockade was not declared unlawful.¹⁰³

Picketing however, which obviously causes nuisance and inconvenience, is in itself regarded as lawful. The fact that willing employees could thereby arrive late for work would not make the picketing unlawful.¹⁰⁴ Rood effectively summarised the current situation with respect to supportive action as follows: the striking employees may, by means of peaceful action, try to convince the willing employees to also take part in the strike. Such peaceful

¹⁰⁰ The use of a blockade as an independent form of collective action will nearly always be seen as unlawful: cf Hof Amsterdam, 14 December 1989, NJ 1991, 78 and Pres.Rb. Assen, 2 March 1990, KG 1990, 108.

¹⁰¹ Pres.Rb. Amsterdam, 13 May 1980, NJ 1980, 403; Hof Den Haag, 14 November 1980, NJ 1982, 72; Pres.Rb. Amsterdam, 26 March 1982, NJ 1982, 214; Hof Den Haag, 23 April 1982, NJ 1985, 312; Pres.Rb. Utrecht, 17 December 1985, KG 1986, 134; Pres.Rb. Dordrecht, 29 April 1986, KG 1986, 221; Pres.Rb. Almelo, 14 June 1986, KG 1986, 295; HR 7 November 1986, NJ 1987, 226; Hof Den Haag, 22 May 1987, NJ 1988, 646; Pres.Rb. Rotterdam, 15 January 1988, KG 1988, 80; Hof Den Haag, 15 January 1988, NJ 1989, 672.

¹⁰² Hof Den Haag, 22 May 1987, NJ 1988, 646: "...dat een recht om te staken in beginsel niet impliceert het recht om de toegang van het bedrijf waartegen de staking zich keert te blokkeren. Een uitzondering op dat beginsel kan ... slechts onder zeer bijzondere omstandigheden worden geaccepteerd, zoals indien onder de gegeven omstandigheden anders het stakingsrecht in feite geheel, althans nagenoeg geheel zou worden ontkracht."

¹⁰³ HR 16 December 1983, NJ 1985, 311. See also Hof Den Haag, 14 November 1980, NJ 1982, 72 in this regard.

¹⁰⁴ Pres.Rb. Dordrecht, 29 April 1986, KG 1986, 221. See also Pres.Rb. Utrecht, 1 December 1983, in Albers *et al.*, *De Ambtenarenstakingen*, 1983, 112 and Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 106 in this regard.

action would include picketing at the entrance to a business and the distribution of pamphlets in connection with the strike, but not the blockade of the entrance to a business.¹⁰⁵

3.4 Article 31 ESC Restrictions

The restrictions on the right to collective action are not only found in article 6(4) of the ESC. The Appendix to the ESC also contains *inter alia* the following declaratory stipulation:

"It is understood that each Contracting Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article 31."

Article 31 - which accordingly plays an important restrictive role - is the so-called public order clause and reads as follows:

"1. The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those Parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals.

2. The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed."

As mentioned above, strike law in the Netherlands is for the greater part judge-made law.¹⁰⁶

The question whether article 31 of the ESC requires restrictions to be prescribed by statute was answered in the negative by both the Committee of Experts¹⁰⁷ and the Dutch Supreme Court.¹⁰⁸ The phrase "except such as are prescribed by law" in article 31 of the ESC can thus

¹⁰⁵ Rood, *Naar een Stakingswet?*, 1978, 170. Another form of collective action, namely the boycott, has not yet been dealt with. The boycott hardly ever occurs in the Netherlands and the courts have thus not had the opportunity to formulate general rules in this regard: see Pres.Rb. Rotterdam, 18 September 1981, in Meeter, in *Het Collectief Arbeidsrecht nader beschouwd*, 1984, 89 and Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 108.

¹⁰⁶ See 3.1 in this regard. Jacobs, "Stakingsrecht voor spoorwegpersoneel", *NJCM-Bulletin*, 1986, 632 points out that in most of the countries which have ratified article 6(4) of the ESC, the restrictions on the right to strike are imposed by the judge and not the legislature.

¹⁰⁷ *Conclusions I*, 1969/1970, 38 and *Conclusions VIII*, 1984, 97. See also *Collected 'travaux preparatoires'*, Volume IV, 1957, 70 and 427.

¹⁰⁸ HR 30 May 1986, NJ 1986, 688 under 3.2: "Verdragsstaten die de toepassing en nadere begrenzing van art. 6 lid 4 en art. 31 aan de jurisprudentie overlaten, schenden dusdoende - mits de rechtspraak de door laatstgenoemde

be read as "except such as are prescribed by the courts".¹⁰⁹ More problematic, however, is the precise scope of these restrictions: they are vaguely formulated and no real assistance can be gathered from the documentation compiled by the ESC's supervisory bodies in this regard.¹¹⁰ It should be noted, however, that the Committee of Experts indicated that a person engaged in "essential services" is prohibited from striking in terms of the article 31 restrictions. It defined "essential services" as "services whose interruption would jeopardise the existence or well-being of the whole or part of the population".¹¹¹

Article 31 of the ESC refers to "public interest, national security, public health or morals" and in a given situation, one or more of these (public) interests could necessitate the restriction of the right to strike.¹¹² However, the most important category of restrictions contained in article 31 seems to be those restrictions that "are necessary in a democratic society for the protection of the rights and freedoms of others". In the Dutch jurisprudence, this problematic category has been widely interpreted: not only the fundamental rights and freedoms of the parties, but also their private (economic and commercial) interests can necessitate a restriction of the right to strike.¹¹³ This wide interpretation has its roots in the following independent lawfulness-criterion which has been developed by the courts since

artikel getrokken grenzen eerbiedigt - het Verdrag niet."

109 Cf Jacobs, "Noot bij HR 30-05-1986", *NJCM-Bulletin*, 1986, 632; Hansma, *Collectieve Actie onder de Rechter*, 1986, 16; Maris, "Het rechtspraakbeleid van de Hoge Raad in de stakingsarresten van 1986", *Sociaal Maandblad Arbeid*, 1987, 268; Van Veen, "De grenzen van het stakingsrecht", *Sociaal Maandblad Arbeid*, 1987, 446.

110 Cf Schut, "Collectief actierecht tegenover rechten van derden", *Nederlands Juristenblad*, 1988, 1473 and Tijkstra, *Grenzen aan het Stakingsrecht*, 1994, 226 and onwards, who seek assistance in this regard from the comparable articles 8-11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. See also Heringa, *Sociale Grondrechten*, 1989, 121 who propagates a narrow interpretation of the article 31 restrictions.

111 *Conclusions IV*, 1975, 8. Cf also the following extract from *Conclusions XII-1*, 1992, 25: "While the Committee has accepted that, in a particularly serious economic situation or to maintain essential services, a government might be able to set certain limits to collective bargaining, any total ban on the right to bargain collectively or on the right to strike over an extended period of time cannot be accepted and in any such situation, covering the whole or part only of the work-force, a government must justify its actions on the basis of Article 31".

112 See for example Pres.Rb. Utrecht, 2 May 1986, KG no. 180/86 (a strike in the dairy industries was forbidden because of its possible negative environmental consequences) and HR 22 November 1991, NJ 1992, 508 (collective actions executed by nursing staff were held to be lawful, but certain limitations were placed on the actions: the protection of the public health played a major role in this regard). Cf also Hof Amsterdam, 28 March 1985, NJ 1985, 759 and Hof Den Haag, 12 December 1985, NJ 1987, 375. It should also be noted that the Dutch government intends to statutorily regulate the military's right to strike in the near future (*Aanhangsel Handelingen Tweede Kamer*, 1989-1990, No. 635, 1277).

113 The "others" referred to in article 31 of the ESC is also widely interpreted to include an employer that can be classified as a third party to the conflict, such as in the *Hoogovens* case.

1972. If there exists an obvious disproportion between the purpose and the consequences of the strike, such a strike can be declared unlawful.

This criterion can in the first place be applied to the employer. A certain amount of damage is, however, an inherent and often inevitable consequence of a strike. The employer, being directly involved in the conflict, can also limit his own damages by giving in to the demands of the strikers. Therefore, highly exceptional circumstances will have to be present in order for a strike to be classified as unlawful on the grounds of the employer's damages.¹¹⁴

However, in some cases - and this is where the restrictions imposed by article 31 of the ESC becomes relevant - the employer is not able to do anything about the demands of the strikers, for example if the collective action is aimed at the employer, but directed at the government.

Owing to the fact that the employer can then actually be classified as a third party to the conflict, the extent of the damage can play a more prominent role in the application of the abovementioned lawfulness-criterion.¹¹⁵

Since the 1980's, losses suffered by third parties to the conflict have played an important role in determining the possible lawfulness of a strike. "Third parties" can be defined as follows: those people who are not directly involved in the conflict surrounding collective action, but whose rights and freedoms can be influenced thereby. Examples are the general public, contractual partners of the employer, willing employees and the government. In principle, the courts have treated the losses of third parties on the same basis as those of the employer. Even though third parties cannot limit their losses by giving in to the demands of the strikers, their losses form an integral part of the strike phenomenon. Losses suffered by third parties are compared with the purpose of the strike and special attention is given to the strike's

¹¹⁴ Cf Hof Amsterdam, 13 April 1972, NJ 1972, 192; Pres.Rb. Amsterdam, 10 March 1980, NJ 1980, 165; Pres.Rb. Amsterdam, 21 October 1981, NJ 1982, 33; Hof Amsterdam, 15 November 1984, NJ 1985, 758; Hof Den Haag, 17 January 1985, NJ 1986, 222; HR 7 November 1986, NJ 1987, 226.

¹¹⁵ HR 30 May 1986, NJ 1986, 688: "... redelijke toepassing van de desbetreffende bepalingen mede de werkgever te beschouwen als 'derde' in de zin van artikel 31 wiens rechten - onder omstandigheden - een beperking in de uitoefening van het stakingsrecht kunnen rechtvaardigen.". In the *NS* case, the court did not go into this issue in detail, because the collective action *in casu* was not classified as "pure" protest action (the government fulfilled the role of material employer). However, in HR 11 November 1994, NJ 1995, 152 the employer was regarded as a third party to the conflict (as in the *Hoogovens* case). The court explicitly stated that (in exceptional circumstances) the employer's economic interests can qualify as interests under article 31 of the ESC (see 3.3.3.1.1 for more detail in this regard).

duration and magnitude in order to decide whether the strike should be declared as unlawful on the grounds of the losses caused to third parties.¹¹⁶

In 1997, the Supreme Court was given another opportunity to deal with the restrictions imposed by article 31 of the ESC. It concerned a conflict between the transport unions CNV and FNV and the employers' organisation *NV Verenigd Streekvervoer Nederland (VSN)*. The VSN, which owns practically all the Dutch bus companies, was concerned about competition from other public transport companies and proposed to its workers a system of increased flexibility in working hours in an effort to reduce ticket prices. The unions were unhappy about the aforesaid proposal and no agreement could be reached between the parties, which eventually led to a six day strike during January 1995. The employer *in casu* was not a "third party" to the conflict and approached the court on the basis of the infringement of the rights and freedoms of "others", namely the approximately one million passengers conveyed each day on buses throughout the country. The Supreme Court confirmed the decisions of the courts *a quo*¹¹⁷ which provided that the workers may only strike between 10:00 and 15:00, i.e. not during peak traffic hours. The court did not find it necessary to decide whether the striking workers were engaged in a so-called essential service, and stated that there was an urgent social need¹¹⁸ for article 31 restrictions in the circumstances.¹¹⁹

116 For example, in Pres.Rb. Utrecht, 25 September 1991, KG 1991, 346 the court stressed the rights and freedoms of the general public (as well as the employer as a third party to the conflict) and declared collective action during peak hours in the public transport industry unlawful (cf also Pres.Rb. Rotterdam, 16 November 1983, KG 1983, 346; Pres.Rb. Middelburg, 19 November 1983, KG 1983, 344; Pres.Rb. Amsterdam, 29 November 1983, KG 1983, 358; Hof Den Haag, 12 December 1985, NJ 1987, 375; Pres.Rb. Amsterdam, 25 September 1991, KG 1991, 345).

117 Pres.Rb. Utrecht, 24 January 1995, JAR 1995, 33 and Hof Amsterdam, 23 November 1995, JAR 1995, 270. See Tan, "Staking", *Arbeidsrecht*, 1996, 18 for more detail on the decisions of the courts *a quo*.

118 The court emphasised the "carefulness" prescribed by society in respect of the person and property of others and referred in this regard to section 6:162 of the Dutch Civil Code, which provides as follows: "(1) Hij die jegens een ander een onrechtmatige daad pleegt, welke hem kan worden toegerekend, is verplicht de schade die de ander dientengevolge lijdt, te vergoeden. (2) Als onrechtmatige daad worden aangemerkt een inbreuk op een recht en een doen of nalaten in strijd met een wettelijke plicht of met hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt, een en ander behoudens de aanwezigheid van een rechtvaardigingsgrond. (3) Een onrechtmatige daad kan aan de dader worden toegerekend, indien zij te wijten is aan zijn schuld of aan een oorzaak welke krachtens de wet of de in het verkeer geldende opvattingen voor zijn rekening komt".

119 The court expressed it as follows: "Naar Nederlands recht...komen deze in de rechtspraak ontwikkelde vereisten erop neer dat moet kunnen worden vastgesteld dat de staking...in zodanige mate inbreuk maakt op de in het eerste lid van art. 31 ESC aangewezen rechten van derden of algemene belangen dat beperkingen, maatschappelijk gezien, dringend noodzakelijk zijn. Onbeperkte uitoefening van het grondrecht is dan jegens allen die daarvan schade ondervinden, onrechtmatig, ook jegens de werkgever". See Boonstra, "Staken, de Bond tegen de rest van Nederland", *Arbeidsrecht*, 1997, 15 for more detail.

In Dutch practice today, the serious violation of the private (economic) interests of the employer and/or third parties could thus - under certain circumstances as outlined above - justify a restriction of the right to strike.

In Dutch literature, the last-mentioned category of article 31 restrictions has led to numerous discussions on what should be included in "the rights and freedoms of others" and especially whom these others are and whether or not these rights would include the economic interests of the "others".¹²⁰ It is feared that the judges may go too far in allowing restrictions on the basis of article 31 of the ESC. If the restrictions are not applied with the utmost care, the practical consequences thereof could lead to an unjust infringement of the fundamental right to strike. Caution is therefore advisable when a Dutch judge must consider whether to restrict the right to collective action in terms of article 31 of the ESC or not.

3.5 Procedural Restrictions

Traditionally, the Dutch jurisprudence contains a number of lawfulness-criteria which were originally stipulated in the 1969 bill on strikes. This bill never matured into an act of parliament and even though it was eventually withdrawn, it had by that stage already influenced the law relating to strikes.¹²¹ According to the above lawfulness-criteria the judge had to make sure that the strike was not contrary to existing norms concerning relations between employers and employees and that there did not exist a manifest disproportion between the aims and the consequences of the strike, and that the strike was not manifestly unreasonable towards the employer.¹²² The first criterion above played a major role in

¹²⁰ Betten, "Onevenredige schade blijft hindernis voor volledige erkenning stakingsrecht", *Sociaal Maandblad Arbeid*, 1986, 199; FNV, *Collectieve Actie: een recht*, 1987, 16; Schut, "Collectief actierecht tegenover rechten van derden", *Nederlands Juristenblad*, 1988, 1473; Luttmer-Kat, "Misbruiktoetsing van collectieve werknemersacties in de civiele sector", *Sociaal Maandblad Arbeid*, 1989, 647; Hansma, "De Hoge Raad in actie", *Nederlands Juristenblad*, 1989, 528; De Laat & Van Lierop, "Spelregels en spelbrekers in het collectieve actierecht", *Sociaal Recht*, 1990, 76; Schut, "Het recht van werknemers op collectief optreden, met inbegrip van het stakingsrecht", *Sociaal Maandblad Arbeid*, 1990, 577; Van der Heijden, "De rechter en staken tegen de overheid; het ESH voorbij", *Nederlands Juristenblad*, 1991, 1577 and Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 309.

¹²¹ See 2.2.3.1 in this regard.

¹²² See Luttmer-Kat, "De toetsing van collectieve acties aan procedureregels", *Sociaal Maandblad Arbeid*, 1990, 77 and De Laat & Van Lierop, "Spelregels en spelbrekers in het collectieve actierecht", *Sociaal Recht*, 1990, 76.

restricting the right to strike and can be classified as a procedural rule that had to be observed by both parties to the conflict.

In the *NS* case, the Dutch Supreme Court stated that collective action which is in itself covered by article 6(4) of the ESC, can still be declared unlawful if weighty procedural rules were not adhered to. Unfortunately, it is not exactly clear what the Supreme Court meant by "weighty procedural rules". The court does, however, refer to "*spelregels*", or in other words, "the rules of playing the strike game". In general, two separate rules can be drawn from the Dutch jurisprudence in this regard.

In the first place, serious negotiations have to take place between the parties to the conflict. Only if deadlock is reached in these negotiations, may the strike be used as an *ultimum remedium*. The judge will thus have to decide whether such a deadlock does indeed exist; if this is not the case, the collective action will be unlawful.¹²³ In certain circumstances, the judge might also order a cooling-off period between the parties.¹²⁴ The *ultimum remedium* requirement is not expressly dealt with in the ESC, but it is possible to argue that the construction of article 6 (consultation, negotiation, mediation, collective action) implies that the strike may only be used as a final weapon.¹²⁵ Brunner, however, disagrees with this line of reasoning.¹²⁶ He sees the right to strike as a normal competence of employees, or in his own words, merely a different form of negotiation in which the judge may only interfere in serious cases of abuse. Nevertheless, the *ultimum remedium* requirement is today generally accepted and applied in every day practice.¹²⁷

123 The judge will - preferably by way of a marginal test - determine the difficult question of whether a deadlock does indeed exist: cf Pres.Rb. Haarlem, 25 May 1985, NJ 1985, 896. See also the differing views of Schotvanger, "De Amsterdamse stakingsarresten 1977", *Sociaal Maandblad Arbeid*, 1979, 81 and Peeters, "Geregeld staken", *Sociaal Maandblad Arbeid*, 1979, 90 in this regard.

124 For example a twenty-day prohibition to strike: Pres.Rb. Utrecht, 4 February 1977, NJ 1977, 79. Cf also Pres.Rb. Rotterdam, 4 February 1971, NJ 1971, 77; Pres.Rb. Haarlem, 5 March 1973, NJ 1973, 120; Pres.Rb. Utrecht, 11 March 1982, NJ 1982, 346; Pres.Rb. Utrecht, 17 December 1985, KG 1986, 134; *Conclusions I*, 1969/1970, 38; Wiebringhaus, "The application of the European Social Charter", in *Het Europees Sociaal Handvest*, 1982, 29.

125 Bakels, "Collectieve acties van arbeiders", *Sociaal Maandblad Arbeid*, 1982, 717. See also Hansma, "Actie in de rechtspraktijk", *Advocatenblad*, 1986, 499.

126 Brunner, "Het rechterlijk verbod van stakingen", *Schetsen voor Bakels*, 1987, 34.

127 Cf Hof Amsterdam, 13 April 1972, NJ 1972, 192; Hof Amsterdam, 3 May 1973, NJ 1973, 251; Pres.Rb. Breda, 17 January 1975, NJ 1975, 350; Hof Amsterdam, 17 November 1977, NJ 1978, 551; Hof Den Haag, 14 February 1985, NJ 1986, 221; Pres.Rb. Rotterdam, 21 November 1985, KG 1985, 386; Hof Den Haag, 13 March 1987, KG 1987, 274; Pres.Rb. Breda, 19 December 1989, KG 1990, 46; Pres.Rb. Amsterdam, 16 February 1990, KG 1990,

The Dutch courts have also applied the following related rule that has a direct influence on the application of the *ultimum remedium* requirement. Even when deadlock has been reached in the negotiations, the trade unions may not organise a strike if the conflict can still be resolved by means of another legal course at the parties' disposal. For example, if the parties have agreed to advisory arbitration in the case of a conflict, no strike may be organised until such time as the arbitration procedure is completed.¹²⁸

The second major "rule for playing the strike game", namely the timely announcement of the strike, gives the employer a final opportunity to reach a settlement with the unions. This requirement was dealt with by the Supreme Court in the *NS* case. The court classified it as a weighty procedural rule which could lead to the unlawfulness of collective action if it was not observed.¹²⁹ According to the Supreme Court, the timely announcement of a strike to the employer¹³⁰ has a dual function. In the first place, the interests of those persons relying on the services of the employer are protected, and secondly, unnecessary damage to the concern can be restricted as much as possible.¹³¹ The idea behind a timely announcement of the strike is not to enable the employer to eliminate all his or her damage, because then the strike will lose its effectiveness. The employer merely has to be able to organise security regulations.¹³² Such a timely announcement could also make it possible for an employer to obtain judgement on the lawfulness of the intended strike by way of a summary procedure. It is doubtful whether the Supreme Court wanted to create a general requirement (applicable to every type of collective action in any kind of concern) in this regard; it seems as if the

99. Unfortunately, the *ultimum remedium* requirement was not dealt with in the *NS* case; it is thus not clear whether the Supreme Court condones the lower court developments in this regard.

128 Cf Pres.Rb. Amsterdam, 20 October 1964, NJ 1964, 463; Pres.Rb. Breda, 17 January 1975, NJ 1975, 350; Pres.Rb. Haarlem, 25 May 1985, NJ 1985, 896; Pres.Rb. Utrecht, 17 December 1985, KG 1986, 134; HR 19 April 1991, NJ 1991, 690.

129 HR 30 May 1986, NJ 1986, 688 under 3.8: "...schending van een zwaarwegende procedureregeling inhoudend dat de collectieve acties van werknemers tijdig tevoren aan de werkgever behoren te worden aangezegd."

130 Normally, the strike only has to be announced to the employer: cf Pres.Rb. Rotterdam, 25 November 1983, KG 1983, 356. However, in Pres.Rb. Utrecht, 25 September 1991, KG 1991, 346, the court decided that the intended strikes in the public transport industry should also be announced to the general public.

131 The Supreme Court expressed it as follows (under 3.8): "...een werkgever als NS in staat te stellen zoveel als binnen de grenzen van de gekozen actievorm mogelijk is de belangen van het reizende publiek en van de belanghebbenden bij het goederenvervoer te beschermen en onnodige bedrijfsschade te voorkomen."

132 Cf Pres.Rb. Amsterdam, 10 March 1980, NJ 1980, 165; Pres.Rb. Rotterdam, 20 March 1980, NJ 1980, 186; Pres.Rb. Utrecht, 10 May 1982, KG 1982, 86; Hof Amsterdam, 15 November 1984, NJ 1985, 758.

court only dealt with the specific case in issue. Furthermore, as in the case of the *ultimum remedium* requirement, there is no provision in the ESC which regulates this "rule for playing the strike game". Consequently, it simply remains a rule of practice which will have to be applied and adjusted to each new set of factual circumstances.¹³³

It should be stressed that in applying the abovementioned procedural rules, the courts will always have to refrain from inquiring into the substance of the conflict between the two parties.¹³⁴

133 The time that should elapse between the announcement and the beginning of the strike is also dependent on the factual circumstances of each case; a period of five days will in most cases be regarded as reasonable: see Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 87.

134 Cf Luttmer-Kat, "De toetsing van collectieve acties aan procedureregels", *Sociaal Maandblad Arbeid*, 1990, at 83 who argues that the abovementioned procedural rules have in a sense always been inextricably interwoven with the material misuse of the right to strike test and that it would be a move in the direction of legal certainty if the separate tests are confined to one all-embracing misuse or abuse-test.

CHAPTER 4 - INDIVIDUAL ASPECTS OF COLLECTIVE ACTION

4.1 Introduction

As is evident from the previous chapters, the Dutch law relating to collective action has for many years been characterised by the problems surrounding trade unions, or, in other words, the organisers behind the strikes. These unions represented the interests and needs of the individual employees in their negotiations with the employers, and were consequently the direct target of legal action and other attempts to prevent the organising of collective action. In this chapter, however, the individual actors involved in the strike will be dealt with. Firstly, the legal position of strikers themselves¹ as well as that of employees who are willing to work but are unable to do so² will be analysed and discussed. Thereafter, employers' rights and remedies will be dealt with in detail.³ This latter issue also manifests itself in the form of collective action by employers themselves, but will nevertheless be dealt with in this chapter owing to its predominantly individual character.

4.2 The Legal Position of Employees

4.2.1 *Striking employees*

According to nineteenth century conceptions, a strike was in principle considered to be a breach of the employee's contract of employment. Employees who took part in a strike lost their wages, ran the risk of being dismissed and, in certain circumstances, damages could even be claimed from them.⁴ It was also possible to institute legal action in order to secure

¹ See 4.2.1.

² See 4.2.2.

³ See 4.3.

⁴ See 2.2.2.1. for more detail.

an employee's duty to work. Such a legal claim was sanctioned by either a penal sum or, in certain circumstances, imprisonment as a result of the employee's debt.⁵ In 1960, the Dutch Supreme Court confirmed the above doctrine by stating that employees engaged in a strike were, in general, guilty of a breach of their contract of employment.⁶ In the years that followed, different factors combined to bring about a reversal of this untenable doctrine,⁷ leading *inter alia* to the acceptance of a new doctrine on the legal position of the striking employees.

According to the new doctrine - which is still followed in Dutch legal practice today - the rights and duties flowing from the contract of employment are suspended for the duration of the strike, except if the judge declares the strike unlawful.⁸ By using the doctrine of suspension, the juridical dilemma caused by the fact that an employee does not fulfil the obligations of his/her contract of employment, but is nevertheless not guilty of a breach of that contract, is effectively solved. The opinion of the Committee of Experts should also be noted in this regard:

"The Committee is of the opinion that no violation of the Charter is involved in the application of legal provisions or principles making individual members of trade unions or employers' associations criminally or civilly liable in the event of their organisation resorting to illegal collective action, on the understanding that legislation enacted in this field be in keeping with the Charter."⁹

The current legal position regarding striking employees in Dutch practice can be seen as

⁵ Only in 1979 was such a claim awarded for a final time: Pres.Rb. Rotterdam, 27 August 1979, NJ 1979, 517. See Van Peijpe, "Het stakingsverbod tegen de Rotterdamse sleepers", *Recht & Kritiek*, 1979, 412; Albers, "Arbeidsconflicten", *Sociaal Maandblad Arbeid*, 1980, 571; Boon-Grouw, "De Rotterdamse havenstaking in 1979", *Sociaal Maandblad Arbeid*, 1981, 636. Since the introduction of section 1639a of the Dutch Civil Code in 1980, such a legal claim cannot be instituted anymore: see Cremers, "Geen dwangsom in arbeidsverhoudingen?", *Nederlands Juristenblad*, 1989, 52 for more detail in this regard.

⁶ The *Panhonlibco* decision (15 January 1960, NJ 1960, 84) is discussed in 2.2.2.3.

⁷ See 2.2.3.2 for more detail.

⁸ See Pres.Rb. Utrecht, 4 November 1983, NJ 1983, 772. The doctrine of suspension was developed at the beginning of this century by French jurists: cf Jacobs, *Het recht op Collectief Onderhandelen*, 1986, 164-168. In the years that followed, this doctrine gradually started to gain some ground in the Dutch literature (cf Rood, *Naar een Stakingswet?*, 1978, 41; Fase, "Het stakingsrecht in de particuliere sector in Nederland", *Tijdschrift voor Sociaal Recht*, 1982, 305; Van der Grinten, *Arbeidsovereenkomstenrecht*, 1993, 260) and today this doctrine is generally accepted in the Netherlands.

⁹ *Conclusions I*, 1969/1970, 39.

relatively simple: as long as employees strike they receive no wages,¹⁰ and neither are they entitled to social security benefits.¹¹ Insofar as they are members of the trade union organising the strike, they are, however, financially supported by that union.¹² A problem that arises in this regard is whether the employer's duty to pay wages also lapses in the case of collective action other than the "normal" strike.¹³ In the well-known *NS* case, the Dutch Supreme Court expressed a clear opinion on the employer's duty to pay wages in the case of work-to-rule and go-slow action.¹⁴ The Railway Board argued that the form of the action made it "unfair", in that it caused considerable damage to the employer, while virtually no sacrifices had to be made by the employees. The court rejected this argument and held that the employer would be able to reduce the wages of all the employees in proportion to the disruption that was caused in his concern by the action. After all, the collectivity of the employees' actions causes damage to the employer.¹⁵ In practice, hardly any use is made of this possibility provided by the court, mainly because of the fact that the employers want to avoid the thorny issues of wage reduction and the amount thereof. However, if the employer prefers to pay the employees their normal wages, the balance of power between the parties can be shifted so much as to make the action unlawful on the basis of the disproportional

10 See section 1638b of the Dutch Civil Code. Cf also Fase, "Met de vlam in de pijp", *Sociaal Maandblad Arbeid*, 1986, 210; Jacobs, *Het Recht op Collectief Onderhandelen*, 1986, 164; Pres. Rb. Rotterdam, 25 May 1989, KG 1989, 243; Pres. Rb. Den Bosch, 5 July 1990, KG 1990, 273; Ktg. Utrecht, 26 June 1996, JAR 1996, 206 (on the question what constitutes wages).

11 Section 19(1)(l) of the Unemployment Act of 1986. On the strength of section 19(7) of the Unemployment Act of 1986, the General Unemployment Fund is, under special circumstances, empowered to make an exception to the abovementioned rule: this can be of importance to employees who are willing to work, as well as to those who do not belong to the trade union organising the strike (see footnote below).

12 See Zon-Kruysse, "Bedrijfsvereniging geen stakingskas", *Sociaal Maandblad Arbeid*, 1966, 83 and Martens, "Rechtsbescherming tegen weigering van uitkering ingeval van werkloosheid tengevolge van staking of uitsluiting", *Sociaal Maandblad Arbeid*, 1974, 504 for more detail in this regard.

13 Cf Peeters, "Het recht op collectieve actie van werknemers", *Nederlands Juristenblad*, 1980, 72, who feels that the type of collective action, whether it is a work-to-rule, go-slow or sit-down strike, should not play any role in this regard. The employees are not entitled to their wages if they are taking part in any form of collective action.

14 HR 30 May 1986, NJ 1986, 688: see 3.3.3.2 for more detail. The position with regard to the sit-down strike is today still uncertain: there is no clear guidance from the courts to be found, and one can thus only speculate on whether the courts will in future follow the approach of the Supreme Court in the *NS* case.

15 The Supreme Court expressed it as follows: "Dit uitgangspunt is in zijn algemeenheid onjuist. Nu ook van deze collectieve acties van werknemers in beginsel moet worden aangenomen dat zij meer in de risicosfeer van de arbeiders als groep dan in die van de werkgever liggen, kan een redelijke wetstoepassing ertoe leiden te aanvaarden dat een werkgever die wordt geconfronteerd met personeel dat in het kader van dergelijke collectieve acties geheel of in telkens wisselende delen niet naar behoren of niet volledig presteert en daardoor zijn bedrijf ontwricht ziet, zijnerzijds tegenover het gehele personeel wordt ontheven van zijn verplichting het loon over de betrokken periode volledig door te betalen."

damage of the employer and the employees. On the other hand, these types of action could cause less damage to an employer than the normal all-out strike, which can have the effect of restoring the balance of power to a certain extent.

In 1988, the Supreme Court again had the opportunity to deal with an individual aspect of the law relating to strikes. It decided that, in general, lawfully striking employees no longer ran the risk of disciplinary action being instituted against them. Strikers cannot be dismissed,¹⁶ and damages caused by the strike cannot be claimed from them.¹⁷ The facts of the case above can be summarised as follows: in December 1985, a strike was organised by the FNV trade union in the transport industry. The strike also involved the blocking of certain roads by truck drivers. The employer of two truck drivers who participated in this blockade, penalised them by means of disciplinary sanctions which *inter alia* involved a degradation of their occupational status (and consequently also of their salaries). The two drivers instituted legal action against their employer, which eventually led to a decision by the Supreme Court. In this case, the court had to deal with, as the writer Jacobs calls it, the Achilles' heel of the doctrine of suspension. The legal opinion in the Netherlands at the time stated that the doctrine only applies to lawful collective action.¹⁸ The logical connection between the doctrine of suspension and lawful collective action causes an acute practical problem. How is an employee supposed to know if the action in which he is taking part will be judged as being lawful or not? As a point of departure, the court stated that striking employees may in principle accept that they are lawfully exercising their right to collective action as recognised in article 6(4) of the ESC. Until such time as a court has decided on the issue of lawfulness of any collective action, the employer cannot penalise individual employees by means of disciplinary sanctions.¹⁹ However, the court clearly did not want its

16 According to the doctrine of suspension, the employees are no longer guilty of a breach of their contract of employment and therefore no dismissal can take place: cf Fase, "Het stakingsrecht in de particuliere sector in Nederland", *Tijdschrift voor Sociaal Recht*, 1982, 308 and Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 33-35 in this regard.

17 HR 22 April 1988, NJ 1988, 952. Cf the differing decisions of the courts *a quo*: Pres.Rb. Utrecht, 17 December 1985, KG 1986, 134; Pres.Rb. Almelo, 12 February 1986, KG 1986, 135; Hof Arnhem, 30 June 1986, KG 1987, 206. See also Duk, "Wie staakt wordt niet gestraft", *Sociaal Maandblad Arbeid*, 1988, 535 and Jacobs, "De rechtspositie van de stakende werknemer", *Weekblad voor Privaatrecht, Notariaat en Registratie*, 1989, 21.

18 Jacobs, "De rechtspositie van de stakende werknemer", *Weekblad voor Privaatrecht, Notariaat en Registratie*, 1989, 21.

19 The possibility of disciplinary sanctions being instituted at such an early stage would have a negative effect on the exercise of the employees' vital and fundamental right to collective action, a right that is recognised in article 6(4)

statement to be seen to be of general application, and qualified it in a number of ways:

- a. the collective action has to be a "normal" action relating to terms and conditions of employment;²⁰
- b. the collective action has to be organised by an acknowledged trade union;²¹
- c. the collective action has to remain within the limits set by the trade union.²²

In addition, the Supreme Court also left an important escape route: if it was perfectly clear to a striking employee that his or her actions exceeded the limits of lawfulness, he or she is not safeguarded against disciplinary actions by the employer. It can thus be said that, even though disciplinary action against strikes is still possible in certain circumstances, the Supreme Court did not leave much room for the institution of such actions.²³

4.2.2 *Employees willing to work*

Another important actor nearly always involved in collective action, is the employee who is willing to work but is unable to do so, either because the collective action has stopped production completely, or because the employee is prevented from working by pickets or blockades.²⁴ The legal position of such an employee is a little more complicated than that of

of the ESC: see the conclusion of Mok at HR 22 April 1988, NJ 1988, 952.

20 The employees taking part in a protest strike, for example, will therefore not be safeguarded from disciplinary actions. Cf also HR 30 May 1986, NJ 1986, 688.

21 Wildcat strikes or strikes organised by trade unions that are not acknowledged in the Netherlands, are therefore not protected from the institution of disciplinary actions.

22 The Supreme Court formulated the abovementioned rules as follows: "Voorop moet worden gesteld dat, wanneer een collectieve actie als de onderhavige met een doel als hier aan de orde is, op gezag van een erkende vakbond wordt ondernomen, de werknemers die aan deze actie deelnemen er in beginsel van mogen uitgaan dat het gaat om een geoorloofde uitoefening van het recht op collectief optreden, zoals dit in Nederland ingevolge art. 6 aanhef en onder 4 ESH wordt erkend, zulks tot op het tijdstip dat bekend wordt dat de rechter deze actie onrechtmatig heeft geoordeeld. Dit met het collectieve karakter van dit recht samenhangende uitgangspunt brengt mee dat in beginsel geen plaats is voor het oplegging van disciplinaire maatregelen door individuele werkgevers aan individuele werknemers ter zake van binnen het actieparool gebleven gedragingen van die werknemers, welke hebben plaatsgevonden voordat de rechter een oordeel als voormeld heeft uitgesproken." See also Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 33-34.

23 It should be noted that the Dutch Supreme Court shows a striking similarity with the German Bundesarbeitsgericht in this regard: see Jacobs, "De rechtspositie van de stakende werknemer", *Weekblad voor Privaatrecht, Notariaat en Registratie*, 1989, 22.

24 If the willing employee is able to go to work during the duration of a collective action and if he or she can

the striking employee. In the past, these non-striking employees were treated in the same way as the strikers themselves. They had no right to wages or to social security benefits, but, unlike striking employees, they had no union to fall back on.²⁵ During the 1970's, however, a number of decisions by the Dutch Supreme Court brought about a new approach to the legal position of non-strikers.²⁶ It started in 1972, when the court had to deal with a wildcat strike of short duration, in which employees who were willing to work were unable to do so because of a blockade at the entrance to the workplace. The court felt that the willing employees should - under these circumstances - not be penalised, and that the employer should bear the responsibility for those who were unable to work. In accordance with section 1638d of the Dutch Civil Code,²⁷ the employer will thus have to pay the willing workers their normal wages for the days on which the wildcat strike and the blockade made it impossible for them to work.²⁸ A year later, the court was faced with a similar problem, followed the same line of argument, and accordingly reached a similar conclusion.²⁹ The court's way of thinking in these two decisions paved the way for the detailed and fully-motivated *Wielemaker/De Schelde* judgement which was delivered on 7 May 1976.³⁰ In this decision, the Supreme Court drew a distinction between two fundamentally different types of collective action.

The first type normally possesses the following characteristics:

continue with his or her work in a productive and satisfactory way, then there is no single problem: the employer will have to pay the employee his or her wages. This will, however, rarely be the case.

- 25 Hof Amsterdam, 23 January 1947, NJ 1947, 725.
- 26 There were also some noticeable lower court decisions in this regard, i.e. Ktg. Schiedam, 7 January 1975, NJ 1975, 304 and Rb. Rotterdam, 24 June 1977, NJ 1978, 221.
- 27 Section 1638b of the Dutch Civil Code ("Geen loon is verschuldigd voor den tijd, gedurende welken de arbeider den bedongen arbeid niet heeft verricht.") is mitigated by section 1638d of the same code ("Ook verliest de arbeider zijne aanspraak op het naar tijdruimte vastgesteld loon niet, indien hij bereid was den bedongen arbeid te verrichten, doch de werkgever daarvan geen gebruik heeft gemaakt, hetzij door eigen schuld of zelfs ten gevolge van, hem persoonlijk betreffende, toevallige verhindering.").
- 28 HR 10 November 1972, NJ 1973, 60. See also Leyten, "Heeft de Hoge Raad de lust tot staken aangewakkerd?", *Nederlands Juristenblad*, 1973, 377.
- 29 HR 21 December 1973, NJ 1974, 142. See also Van Peijpe, "De toepassing van 1638d B.W. bij staking", *Sociaal Maandblad Arbeid*, 1975, 339.
- 30 HR 7 May 1976, NJ 1977, 55: see 3.3.3.2 in this regard. See also HR 25 January 1980, NJ 1980, 282 and Rood, "Noot bij HR 25-01-1980 RvdW 24", *Sociaal Maandblad Arbeid*, 1980, 404.

- * a large group of employees
- * an organised collective action
- * it concerns conditions of labour
- * for a certain period of time.

The second type displays the following features:

- * a small group of employees
- * an unorganised (wildcat) collective action
- * it is of a protest nature
- * for a short period of time.

According to the Supreme Court, the first type of action would generally be undertaken at the risk of the employees,³¹ while the second type would normally be performed at the risk of the employer.³² The court based its new approach on a number of co-ordinative grounds, namely:

- a. the history of section 1638d of the Dutch Civil Code;³³
- b. the regulation contained in section 31(1)(f) of the Unemployment Act (the employee who is unemployed because of a strike will in general receive no retaining payment);
- c. the idea that the solidarity of workers as a group is expressed through organised collective action;³⁴
- d. the desirability of maintaining an equilibrium of power between the employer and his or her employees.³⁵

³¹ In such a case, the willing employees will have no right to their wages and will in principle also lose their right to any social security benefits: cf section 19(1)(b) of the Unemployment Act of 1986.

³² The employer will then have to pay out the wages of the employees who were willing to work and who can be considered as being "outsiders" to the conflict.

³³ The history of that section undoubtedly points to the fact that the willing employees at a strike have no right to wages for the duration of the strike: see Duk, "Wielemaker en Wissekerke: welke werkwilige wel?", in *Het collectief arbeidsrecht nader beschouwd*, 1984, 99.

³⁴ After all, the willing employees will normally also profit from the agreement which the trade union has - by means of the strike weapon - managed to reach with the employer.

³⁵ The equilibrium of power could be disturbed if the employer, who already incurs damages due to the fact that the business has come to a standstill because of an organised strike, also has to pay out the wages of the willing

These grounds, coupled with the fact that the court's guidelines do not give sufficient certainty in the case of numerous mixed forms of collective action (for example an organised protest strike of short duration), have led to much criticism in Dutch literature.³⁶ In practice, however, most collective action is organised action concerning conditions of employment, and is clearly executed at the employees' risk. In the greater majority of strikes in the Netherlands, the non-strikers will therefore have no right to the wages that they would have earned during the strike.³⁷ With regard to work-to-rule and go-slow actions, the willing employees will, due to the nature of these actions, generally not be able to satisfactorily work at the normal tempo, and will thus be forced to take part in the actions. In such a case, the employer will be able to reduce the wages of all the employees commensurately.³⁸

4.3 The Employer's Rights and Remedies

If regard is had to the legal position of both striking and non-striking employees, it is clear that the individual position of these employees has radically improved over the last three decades. The doctrine of suspension has gained prominence, with the result that a strike no longer amounts to a breach of the employee's contract of employment.³⁹ The inevitable result of these developments has been the gradual weakening of the employer's legal position.⁴⁰ Even though striking employees have no right to claim their wages from the

employees: the Supreme Court particularly had a selective strike in mind, where a relatively small number of employees, working at a so-called "bottleneck", can close down a whole factory.

³⁶ Cf Bockwinkel, "Stakingsacties en reacties", *Sociaal Maandblad Arbeid*, 1977, 159; Albers, "Loondoorbetaling aan werkwilligen bij staking", *Sociaal Maandblad Arbeid*, 1977, 251; Kuin, "Loondoorbetaling aan werkwilligen bij staking", *Sociaal Maandblad Arbeid*, 1977, 496; Rood, "Over vage normen in het sociaal recht", in *Gratia Commercii*, 1981, 242; Jaspers & Van Peijpe, "Werkwilligen en stakingsrecht", *Sociaal Maandblad Arbeid*, 1983, 24; Duk, "Wielemaker en Wissekerke: welke werkwillige wel?", in *Het collectief arbeidsrecht nader beschouwd*, 1984, 95; FNV, *Collectieve actie: een recht*, 1987, 37.

³⁷ Cf also HR 27 October 1978, NJ 1979, 184; HR 28 October 1983, NJ 1984, 168; Bijker, "Groepsaansprakelijkheid en staking", *Sociaal Maandblad Arbeid*, 1989, 71.

³⁸ See also 3.3.3.2 in this regard.

³⁹ See 4.2.1 and 4.2.2 for a detailed discussion in this regard.

⁴⁰ See Bakels, "De uitsluiting en het collectief overleg over arbeidsvoorwaarden", in *Samenleven en Samenwerken*, 1983, 21 and Hansma, *Collectieve actie onder de rechter; opmerkingen over arbeidsconflicten*, 1986, 30 in this regard.

employer, they cannot be dismissed,⁴¹ and disciplinary sanctions against striking employees are only possible in certain prescribed circumstances.⁴² Moreover, section 93(1)(b) of the Employment Provision Act of 1990 provides that the employer may not continue production with the help of scab labour.⁴³ The employer can, however, start summary proceedings⁴⁴ against the relevant trade union, in which it can ask the judge to determine the lawfulness of the collective action. If the judge declares the action to be unlawful, the employees will have to start working again. If they refuse, the unlawfulness of the collective action will cause the trade union to be liable for any damages brought about by the extended action. With regard to work-to-rule and go-slow actions, the employer can also, in certain circumstances, reduce the wages of all the employees who took part in such actions.⁴⁵ The employer's only other remedy against his employees' collective action is the lock-out.

Like the strike, the lock-out is not statutorily regulated in the Netherlands.⁴⁶ The European Social Charter does, however, recognise the lock-out. Article 6(4) of the ESC reads as follows:

"With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting parties undertake: (1); (2); (3)....; and *recognise* (4) the right of workers *and employers* to collective action in case of conflicts of interests, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."⁴⁷

41 An employee who continues to strike after a judge has declared the strike to be unlawful can, however, be dismissed.

42 See 4.2.1 in this regard. See also Van Wijnbergen, "Collectieve acties van ambtenaren", in *Ambtenarenrecht en arbeidsrecht. Een vergelijking*, 1982, 103-108.

43 The subsection provides as follows: "Het is de vergunninghouder verboden: (a)...(b) voor zover aan hem bekend is of redelijkerwijs bekend kan zijn dat in een bedrijf of onderneming, of een gedeelte daarvan, een werkstaking, uitsluiting of bedrijfsbezetting bestaat, arbeidskrachten ter beschikking te stellen voor het verrichten van werkzaamheden in dat bedrijf of die onderneming, of wel dat gedeelte daarvan, waar de werkstaking, uitsluiting of bedrijfsbezetting heerst;" Cf also Pres.Rb. Roermond, 2 July 1996, JAR 1996, 150 where the court held that it was not necessary for an employer to terminate temporary employment services or replacement labour acquired *before* the strike broke out, as long as the temporary employees do not take over the work normally done by the workers on strike.

44 See 2.2.2.2 for more detail on the summary proceeding or "kort geding".

45 In order to avoid the thorny issues of wage reduction and the amounts involved, the employer could, however, prefer to pay the employees their normal wages: see 3.3.3.2 and 4.2.1 in this regard.

46 Collective labour agreements do sometimes contain provisions relating to the lock-out: see for example Olbers, "Vredesplicht- en openbreekclausules", *Sociaal Maandblad Arbeid*, 1982, 9.

47 (Emphasis added.)

The Committee of Experts mentions the following about this provision:

"It is clear from the text that this provision relates to both strikes and lock-outs even though the latter are not explicitly mentioned in the text of article 6, paragraph 4 of the Charter, or in the gloss to this provision in the Appendix. The Committee came to this conclusion because the lock-out is the principle, if not the only, form of collective action which employers can take in defence of their interests."⁴⁸

The lock-out can be defined as the mirror image of the strike. Just as workers can withdraw their labour by striking, so one or more employers can withdraw the opportunity for the workers to work by locking them out of the premises and discontinuing the business. The lock-out represents the employer's ultimate economic weapon which can be used to try to compel the workforce to submit to the employer's offer.⁴⁹ The lock-out can take two different forms. In the case of the defensive lock-out, the employer uses the weapon to defend against a collective action in the concern.⁵⁰ It can of course also be used as an autonomous weapon to secure a better position for the employer at the negotiation table. A lock-out does not only affect the employees, but also their trade unions, because locked-out workers will often be looking at their unions for financial support during such time as they are unable to work.⁵¹

In the Netherlands, however, the use of this weapon is nothing but a theoretical possibility. Between 1925 and 1940 the lock-out was utilised a few times, but since 1940 it has played no role whatsoever in the Dutch practice.⁵² Even the ratification of the ESC has had no influence on the slumbering existence of the lock-out, and it seems as if the current state of affairs will not undergo any radical changes in the near future.⁵³ A possible explanation for

48 *Conclusions I*, 1969/1970, 38. See also Jaspers & Van Peijpe, "Werkwilligen en stakingsrecht", *Sociaal Maandblad Arbeid*, 1983, 22 in this regard.

49 See Spruit, *Stakingsrecht in het kader van de Arbeidsovereenkomst*, 1955, 36.

50 In such a case, the employer will be able to lock the willing employees out from the workplace, thereby avoiding the possibility that he or she later has to pay them their wages.

51 See Zonderland, *Recht en Plicht bij Staking en Tegenstaking*, 1974, 239.

52 This forms a sharp contrast with the situation in some other West-European countries: see Birk, "Die Aussperrung in rechtsvergleichender Sicht", *Zeitschrift für Arbeitsrecht*, 1979, 231 and Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 182 in this regard.

53 There is not much to be found on the lock-out in the Dutch literature. See, for more detail, the sources in the

this tolerant state of affairs can be found in the way in which employers' organisations and trade unions generally deal with each other in the Netherlands. Since World War II, collective action has in a sense become "modernised". A high degree of co-operation in industrial relations exists, and employees seldom resort to collective action. With such a peaceful social climate, it is only natural that the lock-out (with its intolerant and aggressive undertones) no longer has a role to play.

abovementioned footnotes, as well as Meijers, *De Arbeidsovereenkomst, met aantekeningen*, 1912, 55; Van Esveld, "De regeling van de Werkstaking", *Sociaal Maandblad Arbeid*, 1973, 355; Rood, *Naar een Stakingswet?*, 1978, 89; Fase, *Vijfendertig jaar loonpolitiek*, 1980, 216; Maris, "Offensieve uitsluiting", *Sociaal Maandblad Arbeid*, 1983, 726.

B. SOUTH AFRICA

CHAPTER 5 - HISTORICAL BACKGROUND

5.1 Introduction

In this chapter, the historical development of the law relating to strikes in South Africa will be dealt with. The development can conveniently be divided into three phases.

The first phase starts with some early examples of industrial action and ends with the passing of the first major statutory enactment that sought to regulate the strike phenomenon, namely the Industrial Conciliation Act 11 of 1924.¹

The second phase is characterised by the disparity between white and black trade unionism and ends with the far-reaching recommendations of the 1979 Wiehahn Commission.²

The third phase commences with the restructuring of industrial legislation, specifically incorporating black trade unions into the dispute resolution procedures, and ends with the promulgation of the new 1995 Labour Relations Act.³ Even though the latter Act introduced far-reaching changes to the law relating to strikes, facets of the preceding law remain relevant, and the chapter thus ends with a short exposition of the law as it stood immediately before 11 November 1996.

1 See 5.2.

2 See 5.3.

3 See 5.4. The relevant provisions of Act 66 of 1995 will be analysed and discussed in Chapter 6.

5.2 Strikes until 1924

Industrial action and strikes generally related to wages and working conditions in the early days. The first recorded collective action by workers in South Africa took place in Cape Town in 1849. An association of wage and salaried workers was formed to protect workers' interests and to prevent a penal colony being set up at the Cape which would have made convict labour available at rates of pay far lower than the wages operative at that time.⁴

As discussed in Chapter 1, South African industrial relations changed dramatically after the discovery of diamonds in 1870 and gold in 1872. The formation of artisan unions comprising white skilled workers was stimulated by the rapid development of the mining industry. The major objective of these unions was to protect the skilled worker's status as their position was threatened by the many thousands of Blacks who were drawn into the industrialisation process as unskilled labourers on the mines.⁵ Many of the early conflicts on the mines had as their source the White workers' growing insecurity regarding their status as skilled workers.⁶

In 1884 South Africa had its first organised strike. The miners at the Kimberley diamond fields objected to a regulation which required them to be stripped and searched when coming off duty. Five White miners died and forty were injured in the strike.⁷

At the turn of the century, the White trade unions were often in conflict with management which resulted in hostility from, and retaliation by, employers. In 1897 White miners at Randfontein went on strike when management attempted to drop their wages in line with a decrease in the wages of Black workers. Even though the unions won the strike, the mine owners started to realise that they did not need skilled workers as before, and jobs were given

4 Corder *et al*, *Focus on the History of Labour Legislation*, 1979, 39.

5 A wildcat strike by black workers at the diamond fields in Kimberley in 1883 was one of the first recorded strikes in the country.

6 See Finnemore & Van der Merwe, *Introduction to Industrial Relations in South Africa*, 1987, 2-4 for more detail in this regard.

7 Nel (ed), *South African Industrial Relations*, 1997, 45.

to semiskilled White workers or, in some cases to Black workers. The skilled workers responded by changing the old craft unions to industrial unions to also include the semiskilled White worker, and thus began to mobilise their interests on the basis of race rather than craft.⁸

As a result of the growing friction between the unions and employers, a number of strikes took place between 1904 and 1908. The strike weapon was increasingly used by White workers in an attempt to protect the status of their jobs. A large strike by White workers at the Knights Deep Mine in 1907 was launched after a proposal by employers that skilled work should officially be extended to Blacks.⁹ However, the mine owners had still not recognised the trade unions and no real concessions were extracted from management as a result of this strike.

The industrial discord on the Witwatersrand produced the Transvaal Industrial Disputes Act of 1909¹⁰ which was specifically designed to combat strikes in the mining industry. The Act introduced procedural bars to unilateral action. No changes could be made by employers to terms and conditions of employment, and no changes could be demanded by employees, unless one month's notice had been given to the other party.¹¹ The Act also provided for the appointment of a "Board of Conciliation and Investigation" and the implementation of opposed changes to working conditions had to be stayed until 30 days after the board had delivered its report.¹² The Act demanded (upon pain of criminal sanction) that industrial action be delayed until the prescribed procedures had been exhausted.¹³

8 Finnemore & Van der Merwe, *Introduction to Industrial Relations in South Africa*, 1987, 3-4.

9 The white workers also protested against unsatisfactory economic and social conditions; see Nel (ed), *South African Industrial Relations*, 1997, 46 in this regard.

10 Act 20 of 1909 (the Act was based on a Canadian model). The first statute which prohibited strike action by white workers was in fact the Transvaal Railways Regulation Act of 1908; see Lever, "Capital and Labour in South Africa: the Passage of the Industrial Conciliation Act 1924", *SA Labour Bulletin*, 1977, 3(10), 4 for a discussion on this statute, as well as the Railways and Harbours Service Act of 1912 which also regulated strikes in the railways.

11 See section 5(i) of Act 20 of 1909.

12 See section 5(ii) of Act 20 of 1909. The board of conciliation was hardly a fully-fledged conciliation forum, and it conducted investigations directed towards a report rather than to play a role in actual negotiations.

13 See section 6(1)(b) of Act 20 of 1909. The Act's restrictive provisions were soon resisted by the trade unions.

However, it soon appeared that the Act's contribution towards conflict resolution was largely ineffectual. This was evident when White union workers started to exert pressure on the government to persuade it to pass regulations to protect White workers. The result was the Mines and Works Act of 1911¹⁴ which was aimed at institutionalising racial discrimination.

In 1913, a large strike was mounted by White workers as a result of management's refusal to consult with the workers or their representatives from the Transvaal Federation of Trades. The strike began at the Kleinfontein Mine in Benoni and subsequently spread to other mines, resulting in a strike involving 20 000 workers. A violent clash between government troops and miners resulted in the loss of twenty-one lives and thereafter an uneasy truce was negotiated.

The truce was to be shortlived, and in 1914 a general strike broke out when the government tried to break the power of trade unions by paying off railway personnel. This time the government acted swiftly by proclaiming martial law and deporting nine leading strikers under the emergency powers.¹⁵

The government tried to cope with the labour problems on the mines, as well as the problems in the growing manufacturing sector, by passing the Workmen's Compensation Act of 1914,¹⁶ and the Riotous Assemblies and Criminal Law Amendment Act of 1914.¹⁷ Sections 8-12 of the latter statute introduced prohibitions on picketing in the course of industrial disputes and also rendered the breach of essential service employment contracts a criminal offence in certain circumstances.

During these early years on the mines, the Black worker's power - in contrast to the White

14 Act 12 of 1911. The Act was promulgated in an attempt to consolidate all previous legislation relating to the mining sector; see Nel (ed), *South African Industrial Relations*, 1997, 46 for more detail in this regard.

15 Nel (ed), *South African Industrial Relations*, 1997, 47 states that "the 1914 strikes highlighted the problems of social and economic relationships between industry and labour, between skilled and unskilled workers, and between white and black persons". Cf Myburgh, "Dismissal of striking workers", *Trends in South African Labour Law (Selected papers from the Labour Law Conference 1991)*, 1992, 131.

16 Act 25 of 1914.

17 Act 27 of 1914. Other statutes promulgated in this regard were the Factories Act of 1918, the Regulation of Wages, Apprentices and Improvers Act of 1918 and the Apprenticeship Act of 1922.

skilled worker - was limited. Where strikes did occur, they were easily defeated, especially as the compounds were well controlled by police and mine management.¹⁸ Nevertheless, the number of strikes by Black workers between 1904 and 1910 compelled the government to promulgate the Black Labour Regulations Act of 1911.¹⁹ The Act attempted to place the recruitment and employment of Black workers on a more satisfactory basis, but made no provision for collective bargaining or for the redressing of grievances. A large strike occurred in 1920, when 71 000 miners went on strike. The strikers were forced to go back to work, and in the process three workers were killed by the police. Black workers did not, at that time, form trade unions on the mines.²⁰

During the period from 1914 to 1918 few labour problems were experienced as the country focused its attention and resources on World War I. However, the end of the war and the return of many men from Europe saw the re-emergence of old problems, which were now compounded by a large foreign debt, the rising cost of living and an economic depression. In order to contain costs in these circumstances, the mines started employing proportionally more Black workers who were paid significantly less than their White counterparts. Discontent grew steadily and in January 1922 the White miners went on strike, followed by engineering workers and power station personnel. The situation deteriorated rapidly, and following the imposition of martial law by the Smuts government, armed commandos of White miners clashed with troops. In the ensuing violence, about 230 persons died, nearly 600 were seriously injured, 46 were tried and convicted of murder, and four trade unionists were hanged. The strike lasted ten weeks, during which the Witwatersrand was effectively paralysed. The government perceived the breaking of the Rand rebellion as a victory, but the underlying economic and political problems remained.²¹

18 Alleged cruelty to black workers by whites was among the issues which resulted in collective action by black workers; see Nel (ed), *South African Industrial Relations*, 1997, 46 for more detail in this regard.

19 Act 15 of 1911. The term "black" is used instead of "bantu" in compliance with the change brought about by the Second Black Laws Amendment Act of 1978.

20 Finnemore & Van der Merwe, *Introduction to Industrial Relations in South Africa*, 1987, 4 states that the black workers were "firstly, isolated from one another by the compound system; secondly they received no support from white workers who may have shared their union expertise with them; finally tribal allegiances were still strong".

21 See Nel (ed), *South African Industrial Relations*, 1997, 48 who notes that the Rand rebellion was probably the most critical turning point in South Africa's pattern of industrial relations as it "marked the final parting of the ways for black and white workers, and it produced the 'conciliation system' introduced through the 1924 Industrial Conciliation Act".

5.3 The Law relating to Strikes from 1924-1979

5.3.1 *The Industrial Conciliation Act of 1924*

The 1922 labour unrest made the Smuts government realise that new labour legislation was essential. Consequently, the government passed the Industrial Conciliation Act of 1924,²² which repealed the Industrial Disputes Prevention Act of 1909. The 1924 Act was the first statute to provide a statutory basis for collective bargaining in South Africa and brought about an historic accommodation between white labour and management. White trade unions and employers' organisations were granted formal recognition and industrial councils were created to settle disputes and structure collective bargaining between unions and employers.²³

Section 12(1) of the Act provided that it would be unlawful for any trade union or other person to declare a strike until, where there was an industrial council, the matter causing the problem had been submitted to, considered and reported on by such industrial council, or where there was no industrial council, it had been submitted to, considered and reported on by a conciliation board. As pass-bearing²⁴ Black workers were excluded from the definition of "employee", they were unable to form or join registered trade unions and could thus not make use of the Act's dispute resolution procedures. Black trade unions were, however, never prohibited statutorily but the inability to register under the Act meant that they had to

²² Act 11 of 1924. According to Jones & Griffiths, *Labour Legislation in South Africa*, 1980, 23 the Act was promulgated for three specific reasons: "It aimed at making provision for the prevention and settlement of disputes between employees and employers, following the experience of the Rand Rebellion in 1922; it formed part of the overall policy of providing preferential employment opportunities to white workers as opposed to blacks in an attempt to alleviate the "poor white" problem; it represented an attempt to appease white workers and muster electoral support for Smuts's government, which had waned dramatically after 1922". Smuts, however, lost the election and his government was replaced by a National/Labour Party coalition which instituted a "civilised labour policy" to stimulate the employment of whites.

²³ Cameron *et al*, *The New Labour Relations Act*, 1989 said of the 1924 Act: "Our Act, but for its blind spot concerning race, was one of the first and most advanced of its kind in its commitment to collective bargaining as the elixir of peace. And spectacularly successful it was: the rebels of the Rand were within a short period of time the institutional inmates of industrial councils, the captors of collective bargaining".

²⁴ In an effort to solve the problem of labour supply for the mines, the Land Act of 1913 reserved approximately 10% of South Africa for Black ownership and forced many squatters into towns to look for work. To ensure cheap labour, the pass laws and regulations compelled Black male workers (Black females were not compelled to carry passes) to look for jobs in certain districts where employers most wanted labour. They were forced to take any job offered as the pass laws only permitted them a few days in which to find work in the allotted area.

operate outside the official collective bargaining system, relying on the common law. Thus began a dual system of industrial relations in South Africa that had the effect of excluding Black workers from political and economic power.²⁵

A commission of inquiry (the so-called Van Reenen Commission) was appointed in 1934 to investigate the updating of the Industrial Conciliation Act of 1924. The result of the recommendations was the more comprehensive Industrial Conciliation Act of 1937,²⁶ which aimed to create industrial peace between employers and white workers on the basis of self-government and through the mechanisms of negotiation, arbitration, conciliation and mediation.²⁷

5.3.2 *The Black Labour (Settlement of Disputes) Act of 1953*

During the 1930's and 1940's, Black trade unionism increased steadily so that by the time the National Party came to power in 1948,²⁸ Black trade unions were becoming a significant force in industry.²⁹ The National Party was opposed to any form of Black trade union activity, and decided to appoint a commission, the Industrial Legislation Commission of Inquiry of 1948 (the so-called Botha Commission), to investigate and report on the existing industrial legislation. The Botha Commission recommended that new legislation for Black workers be promulgated, which resulted in the Black Labour (Settlement of Disputes) Act of

²⁵ State control over industrial relations was extended with the enactment of the Wage Act of 1925 which provided for the unilateral determination of wages and working conditions where there was no agreement under the Industrial Conciliation Act.

²⁶ Act 36 of 1937. According to Part 5 of the Wiehahn Commission's report the provisions of the Act "embraced every undertaking, industry, trade or occupation in the private sector but excluded agricultural workers, domestic servants, government workers (including railway workers), and certain other categories of workers in the field of education, training and charitable institutions" (at 19).

²⁷ The Act caused a great deal of confusion regarding the definition of an "employee"; the Act's definition could be interpreted as only excluding Black males, because they were compelled to carry passes, while Black females were not. See Van Jaarsveld & Fourie, *The Law of South Africa*, Volume 13, 1995, 9 and Nel (ed), *South African Industrial Relations*, 1997, 50 for more detail regarding the 1937 Act.

²⁸ It was largely due to developments on the labour front and the fears of conservative white workers, that the National Party was elected to power in 1948. It is interesting to note that in both 1922 and 1947 high levels of strike activity succeeded a war and preceded a change in government.

²⁹ During World War II, the changes in black worker representation forced the Minister of Labour to impose War Measure 145 of 1942, which prohibited strikes by black workers.

1953.³⁰ One of the aims of the Act was to make provision for the resolution of disputes which might develop between Black workers and their employers by establishing a hierarchy of committees whereby these workers could negotiate and communicate with their employers.³¹ However, the Act specifically prohibited strikes by Black workers as well as lock-outs by their employers. A general lack of unity among Black trade unions, coupled with the promulgation of the Suppression of Communism Act of 1950, resulted in the virtual collapse of Black unions during the 1960's.³²

5.3.3 *The Industrial Conciliation Act of 1956*

As a direct result of the Botha Commission's investigation, the Industrial Conciliation Act of 1956 was promulgated.³³ The Act constituted the core of South Africa's labour legislation and was essentially a tightening-up of the much-amended Industrial Conciliation Acts of 1924 and 1937. However, it went further than the 1937 Act in that it introduced far-reaching discrimination into labour affairs.³⁴ The exclusion of Blacks from the Act was clearly stated,³⁵ with the result that Blacks were explicitly excluded from membership of registered trade unions and consequently from the industrial council system.³⁶

Section 65 of the Act imposed limitations on the right to strike by making a strike illegal

30 Act 48 of 1953; see Nel (ed), *South African Industrial Relations*, 1997, 52-53 for more detail on the Act. As a result of the Botha Commission's investigations, the Industrial Conciliation Act of 1956 and the Wage Act of 1957 were also promulgated; see 5.3.3 in this regard.

31 The failure of the committee system is highlighted by the fact that by 1959 only eight, and by 1969 only 26 labour committees were functioning in South Africa.

32 Newall, *The Demand for a Living Wage*, 1988, 8-9. The Suppression of Communism Act defined communism broadly and was used effectively by the government to oppose black trade unionism.

33 Act 28 of 1956. The Act's name was amended to the Labour Relations Act of 1956 after the passing of Act 57 of 1981.

34 It further entrenched the separation of races by allowing all non-Blacks ("whites, coloureds and Indians") to belong to registered trade unions, and by prohibiting the registration of multiracial trade unions. The Act also introduced a safeguard against interracial competition which became known as statutory job reservation.

35 The definition section of the Act stated as follows: "...'employee' means any person (other than a Bantu) employed by, or working for any employer and receiving, or being entitled to receive any remuneration, and any other person whatsoever (other than a Bantu) who in any manner assists in the carrying on or conducting of the business of an employer...".

36 See Nel (ed), *South African Industrial Relations*, 1997, 53-58 for more detail in this regard.

unless the statutory dispute resolution procedures were adhered to. It set out the circumstances which had to prevail and the procedures which had to be followed before a strike was lawful.³⁷

5.3.4 The 1973 strikes

During the 1960's and up until the early 1970's a calm descended on the South African industrial relations situation.³⁸ In retrospect it was the calm before the storm. In early 1973 a wave of strikes involving more than 60 000 Black workers started in Durban. The widespread strikes over wages took place throughout the country and demonstrated for the first time the *de facto* power of Black workers. The lack of formal and acceptable negotiating structures and procedures left employers without established channels of communication with the Black workforce. However, no one was prosecuted for striking illegally. The strikes underlined the major shortcomings of the existing labour legislation for Black workers, and resulted in the swift promulgation of the Black Labour Relations Regulation Amendment Act of 1973.³⁹ For the first time it was now possible for Black workers to strike legally once procedures in terms of the Act were followed.

The years 1973-1977 saw the further growth of a dualistic system, where Black workers were confined to a structure of employer-initiated committees with little or no bargaining power. In 1977, the Black Labour Relations Amendment Act was promulgated.⁴⁰ The Act made provision for the recognition of agreements negotiated by committees, but it may be argued that Blacks were only marginally better off with regard to their negotiating position as it still proved impossible to enforce such agreements in the event of a dispute with the employer.⁴¹

37 It did this by specifying when a strike could not be held. The wording of section 65 of the Act remained essentially the same through the years' amendments, and will be dealt with in detail in 5.4.4.1.

38 It was the result of suppression rather than resolution of conflict; see Newall, *The Demand for a Living Wage*, 1988, 9.

39 Act 70 of 1973. The Act still attempted to discourage the development of black trade unionism and made provision for the following committees within companies: works, coordinating works and liaison committees.

40 Act 84 of 1977. The Act sought to improve the position of black workers, particularly with respect to the machinery for negotiation.

41 Finnemore & Van der Merwe, *Introduction to Industrial Relations in South Africa*, 1987, 7-8; Friedman, *Building*

After the 1977 Act, Black trade unionism continued to expand, and it appeared that the Act was not serving its purpose. The formal system was increasingly being by-passed as employers bargained and entered into agreements with unregistered Black trade unions. The dramatic growth in Black trade union membership, the 1976 Soweto uprising, calls for disinvestment in South Africa and the growing shortage of skilled workers, were among the pressures to which the government had to respond. A complete updating of the country's labour legislation was long overdue, and the government decided to appoint a commission of inquiry to investigate.

5.4 The Law relating to Strikes from 1979-1995

5.4.1 The amendments of 1979 and the early 1980's

In June 1977, the South African government appointed a commission of inquiry, the Wiehahn Commission, to re-appraise the key labour statutes.⁴² Its first interim report was submitted in February 1979 and tabled in Parliament on 1 May 1979.⁴³ The recommendations of the Commission brought about a series of legislative amendments,⁴⁴ which by 1984 had produced something of a small revolution in South African labour law.

The Industrial Conciliation Act became known as the Labour Relations Act (but still dated 1956). Full trade union rights were extended to every worker in South Africa, full autonomy was granted to unions in respect of their membership, all racial restrictions were removed

Tomorrow Today: African Workers in Trade Unions, 1970-1984, 1987, 67; Rycroft in Rycroft & Jordaan, *A Guide to South African Labour Law*, 1992, 273; Nel (ed), *South African Industrial Relations*, 1997, 56-58.

42 Professor N.E. Wiehahn was appointed as the chairman of the commission. In a little more than two years it produced a series of six reports which led to a complete overhaul of the South African labour laws. (It was the first commission of inquiry into labour legislation since the Botha Commission of 1948.)

43 The most important recommendations were: (a) trade union rights should be granted to black workers; (b) more stringent requirements were needed for trade union registration; (c) job reservation should be abolished; (d) a new industrial court should be established; (e) a national manpower commission should be installed; (f) provision should be made for unfair labour practice legislation; and (g) separate facilities in factories, shops and offices should be abolished. Cf Van Jaarsveld & Fourie, *The Law of South Africa*, Volume 13, 1995, 10.

44 See Act 94 of 1979, Act 95 of 1980, Act 57 of 1981, Act 51 of 1982, Act 2 of 1983 and Act 81 of 1984 in this regard.

and an Industrial Court was created with unique powers in terms of its unfair labour practice jurisdiction. The Black Labour Relations Act of 1953 (as amended) was repealed. However, the fact that the Wiehahn reforms were *inter alia* intended to bring the emerging unions under statutory supervision, resulted in a number of strikes over the formal recognition of trade unions.⁴⁵

From the time the Industrial Conciliation Act was first promulgated until the appointment of the Wiehahn Commission, the legislature sought to harness the strike to the yoke of collective bargaining. Industrial action was made a criminal offence unless the statutory conciliation procedures had been exhausted.⁴⁶ However, the Commission held the view that there should be a basic right to strike and a correlative duty on the part of employers to refrain from conduct which infringes such a right.⁴⁷ The Commission's views were embodied in the post-1979 amendments, but were only tentatively supported by the industrial court.⁴⁸

In spite of the abovementioned reforms, the labour field was still deeply influenced by socio-economic and political problems. Many of these problems overflowed into the labour relations sphere, and resulted in stayaway actions, consumer boycotts and a steep increase in the number of strikes.⁴⁹ During the five-year period from 1983-1987 the level of strike activity was higher than during any other comparable period in the country's history,⁵⁰ and the beleaguered government was under tremendous pressure to introduce further amendments to the Labour Relations Act.⁵¹

45 There were 342 recorded strikes and work stoppages in 1981, compared with 207 in 1980, which itself was considered a year of major turmoil; see Finnemore & Van der Merwe, *Introduction to Industrial Relations in South Africa*, 1987, 8-9 and Maree (ed), *The Independent Trade Unions 1974-1984*, 1987, Part IV in this regard.

46 See Cheadle in Brassey *et al*, *The New Labour Law*, 1987, 244 and Cameron *et al*, *The New Labour Relations Act*, 1989, 70 in this regard.

47 See the *Complete Wiehahn Report*, 1982 and Cameron *et al*, *The New Labour Relations Act*, 1989, 70.

48 *Raad van Mynvakbonde v Kamer van Mynwese* (1984) ILJ 344 (IC) at 361; *MAWU v Hart* (1985) ILJ 478 (IC) at 494; Cameron *et al*, *The New Labour Relations Act*, 1989, 70.

49 See Van Jaarsveld & Fourie, *The Law of South Africa*, Volume 13, 1995, 11 in this regard.

50 The number of strikes has increased since 1980, when 207 strikes took place, by more than 400% to 948 in 1990: see the *National Manpower Commission Annual Report*, 1990, 20-22.

51 The major changes produced by the series of post-Wiehahn amendments also resulted in an incoherent statute

5.4.2 The 1988 Labour Relations Amendment Act

In 1986, the National Manpower Commission produced a report which proposed the following changes to the law relating to strikes and lock-outs: firstly, it suggested that the criminal sanction be removed from the statutory provisions regulating industrial action; secondly, it proposed that any industrial action not preceded by either statutory conciliation or domestic dispute procedures be regarded as unacceptable; thirdly, it suggested that the industrial court be empowered to enjoin unacceptable forms of industrial action.⁵²

The 1988 Act⁵³ did not give effect to the above propositions. Criminal sanctions remained and no explicit recognition was given to domestic dispute resolution procedures. However, the Act introduced an entirely new unfair labour practice definition which, for the first time, included lawful as well as unlawful strikes and lock-outs within its ambit. A strike that was lawful in terms of the Act could nevertheless be interdicted on the basis that it was unfair.

The relevant paragraphs of the definition read as follows:

"(l) any strike, lock-out or stoppage of work, if the employer is not directly involved in the dispute which gives rise to the strike, lock-out or stoppage of work;⁵⁴

(m) any strike, lock-out or stoppage of work in respect of a dispute between an employer and employee which dispute is the same or virtually the same as a dispute between such employer and employee which gave rise to a strike, lock-out or stoppage of work during the previous 12 months;⁵⁵

(n) any strike, lock-out or stoppage of work in contravention of section 65;⁵⁶

with obvious shortcomings; cf Kriek J in *Natal Die Casting v President, Industrial Court* (1987) ILJ 245 (D) at 253J: "...the legislature, in 1979 saw fit to cut, trim, stretch, adapt and generally doctor the old Act in order to accommodate and give effect to the recommendations of the Wiehahn Commission instead of scrapping the old Act and producing an intelligible piece of legislation which clearly and unequivocally expressed its intentions." Unfortunately, the 1988 amendments discussed below were also to a large extent unsatisfactory.

52 NMC, *Dispute Settlement, Levels of Collective Bargaining and Related Matters*, RP 115/1986 at 79-94; Cameron *et al*, *The New Labour Relations Act*, 1989, 71.

53 Act 83 of 1988 consisted of 31 sections and *inter alia* attempted to codify the unfair labour practice concept earlier introduced into the Labour Relations Act by the Industrial Conciliation Amendment Act of 1979.

54 Secondary or sympathy strikes were thus declared unfair *per se*.

55 So-called repeat strikes were thus declared unfair *per se*.

56 All illegal strikes were thus declared unfair *per se*, and could therefore be interdicted. Paragraph (h) of the definition also declared trade union product and service boycotts to be unfair. However, the mere fact that the strike was illegal did not prevent the reinstatement of dismissed strikers on that ground alone; see *JD Group v CCAWUSA* (1990) ILJ 192 (IC).

It now became possible for the court to pronounce on the legitimacy of collective bargaining procedures and demands whenever it was called upon to decide over the fairness of subsequent industrial action. In a number of decisions the lawfulness of a strike was regarded as an important but inconclusive element in deciding whether strikers should be given protection by the industrial court. The courts often required that the strike must have been used as an integral part of the collective bargaining process and then only as an *ultimum remedium* for the strike to fall outside the definition of an unfair labour practice.⁵⁷ Strikes could thus be interdicted on the basis of unfairness and such interdicts - often granted on short notice and even *ex parte* - soon became a popular weapon in the hands of the employers.⁵⁸

The fact that industrial action was for the first time brought within the scope of the unfair labour practice definition elicited intense union reaction. Large-scale industrial unrest and mass action broke out and again forced the government to amend the Labour Relations Act of 1956.

5.4.3 The 1991 Labour Relations Amendment Act

On 1 May 1991 another Labour Relations Amendment Act came into effect.⁵⁹ The amending Act effectively re-introduced the earlier unfair labour practice definition which explicitly excluded strikes and lock-outs from its ambit,⁶⁰ with the result that the Industrial

⁵⁷ See Rycroft in Rycroft & Jordaan, *A Guide to South African Labour Law*, 1992, 276-277; *NUM v Libanon Gold Mining Co Ltd* (1988) ILJ 832 (IC); *BAWU v Edward Hotel* (1989) ILJ 357 (IC); *FBWU v Hercules Cold Storage (Pty) Ltd* (1990) ILJ 47 (LAC); *Stocks & Stocks Natal (Pty) Ltd v BAWU* (1990) ILJ 369 (IC); *Buthlezi v Labour for Africa* (1991) ILJ 588 (IC).

⁵⁸ The legislature also tried to contain the rising tide of industrial action by amending section 79 of the Act: union members, office-bearers and officials who instigated illegal strikes were now deemed to be acting with due authority on behalf of their trade unions unless the contrary was proved.

⁵⁹ Act 9 of 1991. President F.W. de Klerk's sweeping announcements on 2 February 1990 had far-reaching implications and all participants in the industrial relations arena seemed to realise that a need existed for political, economic and social restructuring of the country; the essence of Act 9 of 1991 was agreed upon in the broad-ranging Laboria Minute, a historic tripartite agreement between labour, management and the government, concluded on 14 September 1990. Cf also the ILO Fact Finding and Conciliation Commission Report on South Africa discussed in Chapter 6.

⁶⁰ Strikes and lock-outs could thus not be the subject of litigation in the Industrial Court in terms of sections 17(11)(a), 46 and 46(9) of the Act.

Court could no longer interdict either forms of industrial action on the basis of unfairness.⁶¹ Section 17(11)(aA) did, however, give the Industrial Court the power - concurrently with the (pre-existing) power of the Supreme Court - to interdict strikes and lock-outs on the basis of unlawfulness, i.e. non-compliance with the provisions of section 65 of the Act. Section 17D was also introduced which required employers to give reasonable notice of any intention to interdict strikes.⁶²

Even though strikes and lock-outs were excluded from the unfair labour practice definition, a dismissal following upon a strike,⁶³ or an employer's retaliatory measures during a strike,⁶⁴ could still be declared an unfair labour practice by the Industrial Court.⁶⁵

5.4.4 *Strike law immediately preceding the 1995 Labour Relations Act*

Although the 1995 Labour Relations Act introduced far-reaching changes to the law relating to strikes, facets of the preceding law remain relevant. It is thus important to give a short exposition of the law as it stood immediately before 11 November 1996.

5.4.4.1 *The legality of strikes*

Section 65 of the Labour Relations Act of 1956 (as amended)⁶⁶ specified the circumstances which had to prevail and the procedures which had to be followed before a strike⁶⁷ (and lock-

61 It could, however, still do so in respect of industrial action falling short of a "strike" or "lock-out" as defined.

62 Section 79(2) of the previous Act, which held unions vicariously liable for certain delicts of its members, office-bearers and officials unless the contrary was proved, was also removed by the 1991 amendments.

63 *Sasol Industries (Pty) Ltd v SACWU* (1990) ILJ 1010 (LAC).

64 See *CWIU v BP South Africa* (1991) ILJ 599 (IC) and *NUM v East Rand Gold & Uranium Co Ltd* (1991) ILJ 1221 (A) in this regard.

65 The process that led to the promulgation of the new Labour Relations Act of 1995 will be dealt with in Chapter 6.

66 For the remainder of the chapter to be referred to as "the Act".

67 It should be noted that if a strike was committed for any purpose other than a purpose referred to in the Act's strike definition, it would not be a strike as defined and section 65 of the Act would thus not apply. See Chapter 1 for the Act's definition of a "strike". Cf also *Dunlop SA Ltd v MAWU* (1985) ILJ 167 (D); *Barlows Manufacturing Co Ltd v MAWU* (1990) ILJ 35 (T); *Buthlezi v Labour for Africa (Pty) Ltd* (1991) ILJ 588 (IC); *Ndamane v Marble Lime & Associated Industries Ltd* (1991) ILJ 148 (IC); *CWIU v Boardman Bros (Pty) Ltd* (1991) ILJ 864 (IC); *Amcoal Colliery & Industrial Operations Ltd v NUM* (1992) ILJ 359 (IC); *Nestle SA (Pty)*

out) could be classified as lawful.⁶⁸ It created an absolute prohibition on strikes in the following circumstances:

- a. during the period of the currency of any binding agreement, award or determination which regulated the issue in dispute;⁶⁹
- b. during the period of one year reckoned from the date of a binding wage determination which regulated the issue in dispute;⁷⁰
- c. if the employees concerned in the strike were employees engaged in essential services;⁷¹ or
- d. if the issue in dispute was referred to arbitration, until the cessation of the arbitration proceedings or the making of an award, whichever event occurred first.⁷²

If the absolute prohibitions were not applicable, a strike could be classified as legal only if the other requirements of section 65 of the Act were met, which provided that a strike could

Ltd v FBWU (1992) ILJ 1623 (ARB).

⁶⁸ In terms of the common law, participation in a strike constitutes a fundamental breach of the contract of employment which entitles the employer summarily to terminate the contract (cf *R v Smit* 1955(1) SA 239 (C); *Ngewu v Union Co-operative Bark & Sugar Co* 1982(4) SA 390 (N)). The Supreme Court initially held the view that as the Labour Relations Act of 1956 did not alter the common law, employees were not granted the right to strike and could thus be summarily dismissed by their employer (*Marievale Consolidated Mines Ltd v NUM* (1986) ILJ 108 (W)). However, the inadequacy of the common law of strikes and its inability to govern the complexities of industrial action was recognised by the Industrial Court, and the right to strike was gradually recognised (cf *SACWU v Sentrachem Ltd* (1988) ILJ 410 (IC); *NUMSA v Elm Street Plastics t/a ADV Plastics* (1989) ILJ 328 (IC); *SACWU v Sasol Industries (Pty) Ltd* (1989) ILJ 1031 (IC)).

⁶⁹ Section 65(1)(a) of the Act. Cf *Photocircuit SA (Pty) Ltd v De Klerk NO* (1991) ILJ 289 (A); *BAWU v Asoka Hotel* (1989) ILJ 167 (IC).

⁷⁰ Section 65(1)(b) of the Act. It concerned a determination made under section 14(2) of the Wage Act 5 of 1957. Cf also *Vereeniging Refractories Ltd v BCAWU* (1989) ILJ 79 (W).

⁷¹ Section 65(1)(c) of the Act. These employees were statutorily prohibited from striking under any circumstances and were compelled to submit to compulsory arbitration in the event of an unsolved dispute. Cf *SABMAWU v Kagiso Town Council* (1989) ILJ 1085 (IC); *Rand Water Board v MSFAWU* (1991) ILJ 893 (IC); *Langeberg Foods Ltd v FAWU* (1992) ILJ 548 (E). This ban on strikes was not uncontroversial: see Benjamin, "The big ban theory: Strikes in essential services", *Employment Law*, 1989, 6 at 44 and Cooper, "Strikes in Essential Services", *Industrial Law Journal*, 1994, 903. Furthermore, what constitutes an essential service differs from country to country, proving that strikes by a particular group of employees do not necessarily cause irreparable harm to society in general. See also section 8B of the Armaments Development and Production Act 57 of 1968, section 55A(1) of the Medical, Dental and Supplementary Health Service Professions Act 56 of 1974 and section 40(2) of the Nursing Act 50 of 1978.

⁷² Section 65(1)(d)(iii) of the Act. Cf also section 65(2)(a) of the Act which provided that no strike shall take place by a party to an industrial council "the constitution of which provides that disputes which cannot be settled by the council shall be referred to arbitration".

not be held:

- a. unless the issue in dispute had been considered by an industrial council with jurisdiction and until the council had reported thereon or a period of 30 days had expired, whichever event occurred first;⁷³ or
- b. if there was no such council, unless a conciliation board had been established for the consideration of the issue in dispute and until the board had reported thereon or a period of 30 days had expired, whichever event occurred first;⁷⁴ and
- c. unless the majority of the members of the union had voted by ballot in favour of the strike action.⁷⁵

Even though the Act did not explicitly recognise the right to strike,⁷⁶ it clearly acknowledged strikes to be an indispensable feature of a free collective bargaining system.

The law favoured legal strikers in four ways.⁷⁷ Firstly, strikers and their unions were immune from the criminal sanctions which industrial action would otherwise have

⁷³ Cf *NUMSA v Jumbo Products CC* (1991) ILJ 1048 (IC); *Firestone SA (Pty) Ltd v NUMSA* (1992) ILJ 345 (T) (industrial council without jurisdiction). In *NTE Ltd v Ngubane* (1992) ILJ 910 (LAC) it was stated that the purpose of this requirement was to preclude a party to a dispute from resorting to unilateral industrial action until the dispute resolution mechanisms were exhausted.

⁷⁴ Cf *Dunlop SA Ltd v MAWU* (1985) ILJ 167 (D); *Chamber of Mines v NUM* (1987) ILJ 68 (A); *CWIU v Boardman Bros (Pty) Ltd* (1991) ILJ 864 (IC); *Hessel's Cash & Carry CC v SACCAWU* (1992) ILJ 554 (E).

⁷⁵ The holding of a ballot went beyond a mere formality and the following guidelines had to be complied with: (1) the ballot procedure prescribed by the union's constitution must be adhered to; (2) a ballot officer must be appointed; (3) the employer must be notified of the place and time of the ballot; (4) the ballot must be held in a quiet and orderly fashion (preferably on the employer's premises); (5) a member is entitled to only one (secret) vote; (6) the ballot issue must be the same as the issue considered by the industrial council or the conciliation board and must be described in clear and concise terms; (7) after counting and recounting the votes, the ballot officer must issue a certificate indicating specified information regarding the voting. The failure to hold a pre-strike ballot resulted in an illegal strike; see *NUM v Deelkraal Gold Mining Co (Pty) Ltd* (1987) ILJ 147 (IC); *CWIU v Bevaloid (Pty) Ltd* (1988) ILJ 447 (IC) *Sasol Industries (Pty) Ltd v SACWU* (1990) ILJ 1010 (LAC); *NUMSA v Jumbo Products CC* (1991) ILJ 1048 (IC); *Edgars Stores v SACCAWU* (1992) ILJ 177 (IC) and *SA Nylon Spinners (Pty) Ltd v SACWU* (1992) ILJ 1014 (IC).

⁷⁶ In 1991, the Labour Appeal Court held that the Act does not introduce a fundamental right to strike; see *Perskor v Media Workers Association of SA* (1991) 12 ILJ 86 (LAC) and *NUMSA v Vetsak Co-operative Ltd* (1991) 12 ILJ 564 (LAC) in this regard. See, however, the decision by the Appellate Division of the Supreme Court in *NUMSA v Vetsak Co-operative Ltd* (1996) ILJ 455 (A), as well as the discussion thereon by Fabricius, "The Dismissal of Strikers: A New Value Judgement?", *Industrial Law Journal*, 1996, 611.

⁷⁷ See Cameron *et al*, *The New Labour Relations Act*, 1989, 85-88; Le Roux, "The legal consequences of industrial action", *Contemporary Labour Law*, 1992, 105; Wallis, *Labour and Employment Law*, 1992, Par 55; Van Jaarsveld & Fourie, *The Law of South Africa*, Volume 13, 1995, 250.

attracted.⁷⁸ Secondly, civil indemnity (contractual and delictual) was effected by the provisions of section 79(1) of the Act.⁷⁹ Thirdly, no interdicts could be brought against those instigating or participating in a legal strike.⁸⁰ Finally, dismissal of legal strikers was normally inappropriate unless business operations dictated otherwise and then only if the business faced extinction or irreparable harm.⁸¹

The following were further consequences of lawful strike action under the Act: (1) for the duration of a strike the employees received no wages in terms of the principle "no work no pay";⁸² (2) employees willing to work (but being unable to do so because of the strike) were in principle entitled to their wages;⁸³ (3) striking employees were not entitled to any unemployment benefits in terms of the Unemployment Insurance Act of 1966;⁸⁴ and (4) if the employer's enterprise was disrupted by the striking employees, temporary replacement labour could be recruited to keep the enterprise running.

As appears from the foregoing, a strike was regarded as illegal if it took place contrary to the provisions of section 65(1) and (2) of the Act. The illegality of a strike often had serious consequences for the organisers as well as employees who participated in the strike, as the indemnity against contractual and delictual liability provided by section 79 of the Act did not apply to illegal strikes.⁸⁵ An employer could also apply for an interdict in an attempt to

78 The statutory offences are set out in section 65(3) of the Act. However, the criminal provisions were not enforced in practice.

79 The indemnity was only applicable if the strike was lawful in terms of section 65 of the Act and if the action did not constitute a criminal offence. Compare also the statutory delict that was created by section 79(2) of the Act, namely that of an interference with the contractual relationship between an employer and an employee resulting in the breach of the contract: see Cameron *et al*, *The New Labour Relations Act*, 1989, 87-88.

80 See section 17(11)(aA) of the Act in this regard.

81 *BAWU v Prestige Hotels CC t/a Blue Waters Hotel* (1993) ILJ 963 (LAC); *Laeveld Kooperasie Bpk (Tobacco Division) v SACCAWU* (1993) ILJ 1354 (IC); see 5.4.4.3 for more detail in this regard.

82 *Nampak Products Ltd v PPWAWU* (1992) ILJ 1292 (ARB); *Nestle SA (Pty) Ltd v FBWU* (1992) ILJ 1623 (ARB).

83 *Johannesburg Municipality v O'Sullivan* 1923 AD 201. The employer remains bound to remunerate the employee for as long as the employee makes his or her services available to the employer (unless, of course, the employer's obligation to pay becomes objectively impossible). The tender of services must be real and should be brought to the employer's attention. Cf Claasen, *Stakingsreg in Diensverband in SA*, 1975, 177.

84 Section 35(13)(d) of Act 30 of 1966; the section did, however, provide for certain exceptions.

85 see 5.4.4.4 for more detail in this regard.

prevent an illegal strike.⁸⁶

Since the dismissal of striking employees was evaluated against the background of the fairness of such dismissals, the mere legality of a strike was not in itself decisive. And yet illegal strikers were generally less likely to receive the protection of the court.⁸⁷

5.4.4.2 *The dismissal of striking employees*

As stated above, a strike constitutes a material breach of the contract of employment in terms of the common law, which entitles the employer to summarily terminate the contract.⁸⁸ However, the introduction of the industrial court's unfair labour practice jurisdiction in 1979 provided a mechanism whereby the employer's common-law right of dismissal could be limited.⁸⁹ A dismissal following upon a strike could be declared an unfair labour practice by the Industrial Court. Unfortunately, the court's approach to this complex and controversial issue was not always consistent, which led to a certain degree of incoherence in the law relating to the dismissal of strikers.

The first decision in which this vexing question was considered in some detail was *Raad van Mynvakbonde v Die Kamer van Mynwese van SA*.⁹⁰ The court was of the opinion that it was

⁸⁶ Section 17D(1) of the Act required that 48 hours' notice of the application for an interdict or other order should be given to the respondent (the court could permit a shorter period under certain circumstances). The industrial court has consistently required that the applicant must establish urgency, even where 48 hours' notice of the application has been given; see Olivier, "Lawful and unlawful strikes", *De Rebus*, 1993, 194 for more detail.

⁸⁷ See Gauntlett & Rogers, "When all else has failed: illegal strikes, ultimatums and mass dismissals", *Industrial Law Journal*, 1991, 1171 at 1175: "...a serious disregard for the prescribed machinery will generally render the further prospect of conciliation remote. It will bring about a degree of industrial anarchy in which an employer must generally be free to resort to the ultimate weapon. The doors of the court are not automatically barred to the participant in the illegal strike who is dismissed. He will, however, have to establish exceptional circumstances which render his dismissal an unfair labour practice". Cf also Olivier, "The dismissal of striking workers: illegal strikes", *De Rebus*, 1993, 595.

⁸⁸ A contractual approach to the dismissal of strikers was followed in *Perskor v MWASA* (1991) ILJ 86 (LAC) where it was stated that the mere fact that the strike was legal in the sense that it did not contravene section 65 of the Act did not mean that striking employees could not be dismissed. Cf also *NUMSA v Vetsak Co-operative Ltd* (1991) ILJ 564 (LAC); Le Roux & Van Niekerk, *The South African Law of Unfair Dismissal*, 1994, 296-298.

⁸⁹ It should be noted that the limitations imposed upon the employer's right to dismiss strikers did not bring forth a right to strike; see Jordaan in Rycroft & Jordaan, *A Guide to South African Labour Law*, 1992, 216-217 in this regard.

⁹⁰ (1984) ILJ 344 (IC). The *Raad van Mynvakbonde* case was the origin of the so-called "basket of factors" approach, which was subsequently endorsed in *NUM v Marievale Consolidated Mines Ltd* (1986) ILJ 123 (IC) and *MAWU v Natal Die Casting Co* (1986) ILJ 520 (IC).

possible that the lawful dismissal of legal strikers could constitute an unfair labour practice, and formulated a list of general factors to be taken into account in determining the fairness of such a dismissal. These included:

- * the cause,⁹¹ nature,⁹² extent, and purpose of the strike
- * the circumstances of the employer and the employees
- * the duration of the strike⁹³
- * the consequences and result of the strike⁹⁴
- * the purposes of the Act and the principles of collective bargaining
- * the presence or absence of negotiations in good faith⁹⁵
- * the provisions of the relevant contracts of employment, particularly those provisions dealing with employees' participation in an illegal strike
- * the manner in which the employer and employees conducted themselves during the strike.⁹⁶

This "basket of factors" approach was followed in numerous subsequent decisions in an attempt to define when a strike will be "legitimate" or "acceptable". No single factor was regarded as definitive⁹⁷ and the importance of a specific factor thus largely depended on the

91 See for example *CWIU v Bevaloid (Pty) Ltd* (1988) ILJ 447 (IC); *BAWU v Palm Beach Hotel* (1988) ILJ 1016 (IC); *BTR Dunlop v NUMSA (2)* (1989) ILJ 701 (IC).

92 Cf *FAWU v Spekenham Supreme* (1988) ILJ 628 (IC) ("wild-cat" strike); *Kolatsoeu v Afro-Sun Investments (Pty) Ltd t/a Releke Zezame Supermarket* (1990) ILJ 754 (IC) (sit-in); *SASTAWU v Motorvia (Pty) Ltd* (1991) ILJ 1058 (IC) (go-slow).

93 It is not the duration of the strike that matters as such, but whether the strike has in fact achieved its purpose; cf *FBWU v Hercules Cold Storage (Pty) Ltd* (1990) ILJ 47 (LAC); *Seven Able CC t/a The Crest Hotel v HARWU* (1990) ILJ 504 (LAC).

94 See *FBWU v Hercules Cold Storage (Pty) Ltd* (1990) ILJ 47 (LAC) where the maximum losses possible were caused to the employer.

95 See for example *Kolatsoeu v Afro-Sun Investments (Pty) Ltd t/a Releke Zezame Supermarket* (1990) ILJ 754 (IC); *Sentraal-Wes (Kooperatief) Bpk v FAWU* (1990) ILJ 977 (LAC).

96 Cf *Themba v Nico van Rooyen Tuksidermie* (1984) ILJ 245 (IC); *SACWU v Pharma Natura (Pty) Ltd* (1986) ILJ 696 (IC); *BHAWU v Garden City Clinic* (1987) ILJ 462 (IC); *Nisaba v Eastern Province Textiles (Pty) Ltd* (1987) ILJ 470 (IC); *Mshumi v Roben Packaging (Pty) Ltd t/a Ultrapak* (1988) ILJ 619; *SACWU v Sasol Industries (Pty) Ltd (2)* (1989) ILJ 1031 (IC); *Buthlezi v Labour for Africa (Pty) Ltd* (1991) ILJ 588 (IC); *Performing Arts Council of the Transvaal v PPWAWU* (1994) ILJ 65 (A).

97 Even though the legality of the strike was not cited as a specific factor in the *Raad van Mynvakkbonde* case, it has also played an important role in the development of the law; see *MWASA v Argus Printing & Publishing Co Ltd* (1984) ILJ 16 (IC); *PPWAWU v Uniply (Pty) Ltd* (1985) ILJ 255 (IC); *Tshabalala v Minister of Health and*

circumstances of the case in question.⁹⁸ This did not lead to any legal certainty, and in this regard the gradual development in recent years of the so-called "functional" approach to determine the acceptability of strike action and the consequential dismissal of striking employees, was certainly welcomed.

In *BAWU v Prestige Hotels CC t/a Blue Waters Hotel*⁹⁹ the functional approach, which had the advantage of relative simplicity, was expressed as follows:

"The Act contemplates that the right to strike should trump concerns for the economic losses which the exercise of that right causes. That is because collective bargaining is necessarily a sham and a chimera if it is not bolstered and supported by the ultimate threat of the exercise of economic force by one or other of the parties, or indeed by both. Of course there are exceptions to this general proposition; the denial of essential services causes such harm that the social and/or economic considerations of such harm are deemed to be sufficient to outweigh the usual protection of the right to strike. That is why the Act provides, at section 46, the next best alternative to a negotiated settlement - arbitration - as the means of resolving disputes in essential services. So too the threat of extinction of an enterprise or of irreparable harm to it may supersede protection of the right to strike."¹⁰⁰

The functional approach thus emphasised two factors, namely the strike's vital function in the collective bargaining arena¹⁰¹ and the economic circumstances of the employer,¹⁰² and was

Welfare (1986) ILJ 168 (W); *MAWU v Siemens Ltd* (1986) ILJ 547 (IC) and *SACWU v Pharma Natura (Pty) Ltd* (1986) ILJ 696 (IC) in this regard.

98 See for more detail on the "basket of factors" approach Cheadle in Brassey *et al*, *The New Labour Law*, 1987, 257; Jordaan in Rycroft & Jordaan, *A Guide to South African Labour Law*, 1992, 217; Basson, "The dismissal of strikers in South Africa (Part 2)", *SA Mercantile Law Journal*, 1993, 20; Olivier, "Die ontslag van stakende werkers", *De Rebus*, 1993, 295, 405, 492, 595 & 684; Van Jaarsveld & Fourie, *The Law of South Africa*, Volume 13, 1995, 255 and Le Roux & Van Niekerk, *The South African Law of Unfair Dismissal*, 1994, 298.

99 (1993) ILJ 963 (LAC) at 972D-F. The existence of the right to strike was at long last accepted in this decision: cf Basson, "The Labour Appeal Court and the Right to Strike", *SA Mercantile Law Journal*, 1994, 104.

100 The court's approach is summarised as follows by Le Roux & Van Niekerk, *The South African Law of Unfair Dismissal*, 1994 at 307: "...legal strikes are functional to collective bargaining. They therefore do not constitute misconduct and strikers may not be dismissed on this ground. However, if the employer can show that its business faces 'the threat of extinction' or of 'irreparable harm', dismissal may be justified - not on the grounds of misconduct but rather because of the operational requirements of the business."

101 Cf *Barlows Manufacturing Co Ltd v MAWU* (1990) ILJ 35 (T); *NUM v East Rand Gold & Uranium Co Ltd* (1991) ILJ 1221 (A); Le Roux, "The Use of Economic Power during Industrial Action: Some Thoughts on *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd* (1991) 12 ILJ 1221 (A)", *SA Mercantile Law Journal*, 1992, 16; Le Roux & Van Niekerk, *The South African Law of Unfair Dismissal*, 1994, 304-310.

102 The question of when the operational requirements of the business will justify dismissal, is obviously a difficult one to answer; see *Perskorporasie van SA Bpk v MWASA* (1993) ILJ 938 (LAC); Rycroft, "The Employer's 'Level of Tolerance' in a Lawful Strike", *Industrial Law Journal*, 1993, 285; Le Roux & Van Niekerk, *The South African Law of Unfair Dismissal*, 1994, 308-309.

seen as an important step in the development of a "right to strike".¹⁰³

Where the dismissal of legal strikers was found to be unfair, the industrial court made the following orders: (1) reinstatement with¹⁰⁴ or without¹⁰⁵ retrospective effect; (2) compensation;¹⁰⁶ (3) that strikers be treated the same as non-strikers as regards wages;¹⁰⁷ (4) compelling the employer to commence bona fide negotiations.¹⁰⁸

5.4.4.3 *The employer's rights and remedies*

Firstly, an employer threatened with an illegal strike could apply for an interdict in terms of section 17(11)(aA) of the Act in an attempt to prevent the strike.¹⁰⁹ The 1991 amendments to the Act inserted section 17D which confirmed the industrial court's view at the time that such interdicts should not be granted as a matter of course, but with circumspection.¹¹⁰

Secondly, as stated above, an employer was able to dismiss workers who took part in a strike where such strike was not "legitimate", "acceptable" or "functional".¹¹¹

103 It is important to note that the Labour Relations Act of 1995 attempts to maintain a significant degree of continuity in the law relating to the dismissal of strikers: cf 6.4.3 in this regard.

104 *BAWU v Edward Hotel* (1989) ILJ 357 (IC); *BAWU v Asoka Hotel* (1989) ILJ 167 (IC).

105 *SACWU v Cape Lime Ltd* (1988) ILJ 441 (IC); *Buthlezi v Labour for Africa* (1991) ILJ 588 (IC).

106 *Ferodo (Pty) Ltd v De Ruiter* (1993) ILJ 974 (LAC).

107 *NUM v East Rand Gold & Uranium* (1989) ILJ 103 (IC); (1991) ILJ 1221 (A).

108 *SACWU v Control Chemicals* (1988) ILJ 606 (IC).

109 For example *Dunlop SA Ltd v MAWU* (1985) ILJ 167 (D); *Libanon Gold Mining Co Ltd v NUM* (1985) ILJ 180 (W); *Murray & Roberts Buildings (Cape Town) (Pty) Ltd v SAAWU* (1987) ILJ 325 (IC). Cf also Van Eck, "Bevoegdheid van die nywerheidshof om interdikte te verleen", *THRHR*, 1992, 67 and Landman, "The striking value of interdicts", *Contemporary Labour Law*, 1994, 41.

110 Section 17D of the Act *inter alia* required employers to give 48 hours' notice of any application to interdict a strike.

111 The basis for such dismissal was the breach of the contract of employment. (As no right to strike existed even workers taking part in a lawful strike could thus in theory be dismissed on the basis of the breach of the contract of employment.) In practice it was required of an employer to first give a timely ultimatum of its intention to dismiss before such dismissal would be regarded as fair; see *BAWU v Edward Hotel* (1989) ILJ 357 (IC); *Liberty Box & Bag Manufacturing Co (Pty) Ltd v PPWAU* (1990) ILJ 427 (ARB).

Thirdly, an employer could resort to its ultimate economic weapon, the lock-out.¹¹² The Act treated strikes and lock-outs on the same basis. Section 65 set the same requirements for the legality of both forms of industrial action, while section 79 granted immunity from civil liability for legal strikes as well as legal lock-outs.¹¹³

The above definition of a lock-out included the possibility that an employer could lock out an employee by dismissing such employee. The fact that lock-outs were excluded from the definition of an unfair labour practice led to the argument that employees who were dismissed as part of a lock-out would not be entitled to approach the industrial court for relief in terms of section 46(9) of the Act. The courts were generally not willing to countenance this argument on the basis that, where a lock-out is instituted with the intention of terminating the employment relationship permanently instead of compelling compliance with one of the demands provided for in the Act's definition, this no longer constituted a lock-out as an essential element of the definition was missing.¹¹⁴

5.4.4.4 *The limited ambit of the Labour Relations Act of 1956*

The Act did not apply to farmworkers, domestic servants and public sector workers such as

112 The lock-out was defined as follows in the Act: "any one or more of the following acts or omissions by a person who is or has been an employer - (a) the exclusion by him of any body or number of persons who are or have been in his employ from any premises on or in which work provided by him is or has been performed; or (b) the total or partial discontinuance by him of his business or of the provision of work; or (c) the breach or termination by him of the contracts of employment of any body or number of persons in his employ; or (d) the refusal or failure by him to re-employ any body or number of persons who have been in his employ, if the purpose of that exclusion, discontinuance, breach, termination, refusal or failure is to induce or compel any persons, who are or have been in his employ or in the employ of other persons - (i) to agree to or comply with any demands or proposals concerning terms or conditions of employment or other matters made by him or on his behalf or by or on behalf of any other person who is or has been an employer; or (ii) to accept any change in terms or conditions of employment; or (iii) to agree to the employment or the suspension or termination of the employment of any person." Cf *NUTW v Stag Packings (Pty) Ltd* (1982) ILJ 39 (W); *Ngewu v Union Co-operative Bark & Sugar Co Ltd* 1982 (4) SA 390 (N); *NTE Ltd v SACWU* (1990) ILJ 43 (N); *BCAWU v Thorpe Timber Co* (1991) ILJ 843 (IC); *NTE Limited v Ngubane* (1992) ILJ 910 (LAC); *Sappi Fine Paper (Pty) Ltd v Pienaar* (1994) ILJ 137 (LAC).

113 An employer could thus refuse to pay the locked out employees their wages as the employer was protected from civil liabilities by the provisions of section 79 of the Act.

114 *CCAWUSA v Game Discount World Ltd* (1990) ILJ 162 (IC); *FAWU v Middevrystaatse Suiwel Kooperasie Bpk* (1990) ILJ 776 (IC); *CWIU v Indian Ocean Fertilizer* (1991) ILJ 822 (IC). See Trollip, "Lock-outs in South African law", in Benjamin *et al*, *Strikes, Lockouts & Arbitration in South African Law*, 1989, 83; Moodley, "The key to unlocking the 'lock-out'", *Industrial Law Journal*, 1990, 1; Rycroft in Rycroft & Jordaan, *A Guide to South African Labour Law*, 1992, 290; Grogan, *Collective Labour Law*, 1993, 109; Le Roux, "The lock-out and the unfair labour practice", *Contemporary Labour Law*, 1994, 87; Le Roux & Van Niekerk, *The South African Law of Unfair Dismissal*, 1994, 316 for more detail in this regard.

teachers, nurses, members of the police, university lecturers and parliament workers.¹¹⁵ Most of these employees' terms of employment were regulated under separate pieces of legislation which replicated some of the Act's features.¹¹⁶ The public sector employee's right to strike will now briefly be discussed.

The public sector employee's terms of employment were regulated by the Public Service Labour Relations Act (PSLRA).¹¹⁷ The PSLRA created a new labour relations dispensation for the state, civil servants and employee organisations in the public service. It retained the traditional administrative law remedies,¹¹⁸ but also offered extended protection to striking public servants. The PSLRA recognised in principle that public servants had the right to strike.¹¹⁹ The definition of the word "strike" in section 1 of the PSLRA made it clear that only labour-related objectives and specifically objectives related to the change of conditions of service, were classified thereunder.

The position of striking public servants was absolutely protected for 30 days, unless the strike was "conducted in an unfair manner", in which case the 30-day protection was forfeited.¹²⁰ Striking public servants could be dismissed (i) if the strike was illegal (i.e. if the

115 Cf the 1995 Labour Relations Act which applies to all workers, except members of the National Defence Force, the National Intelligence Agency and the South African Secret Service.

116 See, for example, the Defence Act 44 of 1957; the Police Act 7 of 1958; the Armaments Development and Production Act 57 of 1968 and the Nursing Act 50 of 1978.

117 Act 102 of 1993. The Act excluded uniformed personnel attached to the defence force, police and correctional services, as well as teaching personnel employed at state schools (cf the Education Labour Relations Act 146 of 1993), from its ambit, as separate labour relations dispensations were envisaged for these sectors. Compare also the Public Service Act 111 of 1984 (which still exists); Grogan, "Strike dismissals in the Public sector", *Industrial Law Journal*, 1991, 1; *Tshabalala v Minister of Health & Welfare* (1986) ILJ 168 (W); *Mayekiso v Minister of Health & Welfare* (1988) ILJ 227 (W); *Mokoena v Administrator, Transvaal* 1988 (4) SA 912 (T); *Administrator, Orange Free State v Mokopanele* 1990 (3) SA 780 (A); *Administrator, Transvaal v Zenzile* (1991) ILJ 259 (A); *Ngongoma v Minister of Education & Culture* (1992) ILJ 329 (D) and *Minister of Health, Kwazulu v Ntozakhe* 1993 (1) SA 442 (A).

118 If a decision was taken that adversely affected a public servant in his or her rights, liberty and property, or where his or her legitimate expectations were affected, such public servant could invoke the so-called rules of natural justice.

119 Section 19(1) of the PSLRA. Employees in essential services were, however, not allowed to strike.

120 Section 19(10)(a) of the PSLRA; the useful mechanism of final and binding arbitration was thus replaced by a 30-day arrangement and it was furthermore difficult to establish when a strike was "conducted in an unfair manner". See for more detail Olivier, "Labour Relations Legislation for the Public Service: An International and Comparative Perspective", *Industrial Law Journal*, 1993, 1371.

procedural requirements, for example the statutory conciliation requirements, the ballot provisions or the 10 days' strike notice, have not been complied with); (ii) if the strike continued for more than 30 days; or (iii) if the strike was "conducted in an unfair manner", irrespective of whether the period of 30 days had elapsed or not. Before dismissing the employer had to give an ultimatum to return to work within one day and then strikers had three days to make individual representations on why they should not be dismissed.

It should thus be clear that the PSLRA suffered from more or less the same shortcomings as the Labour Relations Act, namely complex and lengthy pre-strike procedures, onerous ballot provisions, no adequate protection from dismissal for strikers, no protection against damages claims and interdicts where the strike is illegal for some technical reason, and a prohibition on striking over socio-economic and political issues.

CHAPTER 6 - THE LABOUR RELATIONS ACT OF 1995

6.1 Introduction

It is clear from the previous chapter that the Labour Relations Act of 1956 was seriously defective. In addition, provisions in the old law on industrial action did not pass constitutional muster and were also contrary to internationally accepted standards. The major failures in this regard were:

- * complicated and technical pre-strike procedures;
- * onerous ballot provisions;
- * the criminalisation of strikes and lock-outs;
- * the prohibition of socio-economic strikes;
- * the ready availability of interdicts and damages claims;
- * the absence of statutory protection from dismissal for striking employees.¹

It is against this background that the provisions relating to strikes in the new Labour Relations Act of 1995² will now be discussed.

The chapter starts with a brief look at the recent international³ and constitutional⁴ influences on the South African law relating to strikes, whereafter the Labour Relations Act of 1995 will be analysed and discussed.⁵

1 Explanatory Memorandum, *Government Gazette 16259*, 10 February 1995, 128; Cheadle *et al*, *Current Labour Law*, 1995, 49.

2 Act 66 of 1995.

3 See 6.2.

4 See 6.3.

5 See 6.4.

6.2 The ILO Fact Finding and Conciliation Commission

On 11 May 1988, COSATU lodged a complaint with the International Labour Organisation (ILO) that the proposed amendments to the Labour Relations Act of 1956 infringed the ILO's principles of freedom of association by *inter alia* infringing the freedom to strike. Despite this, the Labour Relations Act was amended in 1988 in accordance with the proposed changes of the previous year's draft bill. This led to two major stay-aways by the main trade union federations' members during June 1988 and September 1989, followed by extended negotiations during 1989 and 1990 between COSATU, NACTU and SACCOLA which eventually resulted in the COSATU/NACTU/SACCOLA Accord in May 1990. The Accord set out a number of proposals for amending the Labour Relations Act, but the 1991 amendments to the Labour Relations Act did not fundamentally address the issues outlined in the complaint to the ILO.

On 19 February 1991, after it had committed itself to the 1991 amendments to the Labour Relations Act, the government consented⁶ to COSATU's complaint being investigated by an ILO Fact Finding and Conciliation Commission. The Commission visited South Africa during February 1992 "to deliberate on and consider the present situation in South Africa insofar as it relates to labour matters with particular emphasis on freedom of association".⁷

The Commission's report contained a fairly detailed analysis of South African strike law and pointed out the following aspects thereof that did not comply with ILO guidelines:⁸

- (i) the complicated nature of the pre-strike procedures found in the Labour Relations Act

⁶ Where the complaint concerns a country that is not a member of the ILO (South Africa was a member of the ILO from its inception in 1919 until 1964), it can only be investigated with the consent of the government concerned: see Saley & Benjamin, "The Context of the ILO Fact Finding and Conciliation Commission Report on South Africa", *Industrial Law Journal*, 1992, 731-738 for more detail in this regard.

⁷ The Commission examines complaints of alleged infringements of trade union rights referred to it with a view to securing the removal of these infringements: see Saley & Benjamin, "The Context of the ILO Fact Finding and Conciliation Commission Report on South Africa", *Industrial Law Journal*, 1992, 731-738 for more detail on the Commission.

⁸ See the *Report of the Fact Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa*, International Labour Office (Geneva), 1992, paragraphs 639-670 for more detail in this regard.

of 1956, the length of time needed to comply with them, as well as the onerous ballot provisions requiring an absolute majority of union members in an undertaking to vote in favour of strike action;⁹

- (ii) the restriction contained in section 65(1A) of the Act on strikes over disputes not classified as "industrial disputes";¹⁰
- (iii) the Act's broad definition of essential services, the fact that not all workers employed in essential services have dispute resolution machinery, for example arbitration, available to them, as well as the unsatisfactory dispute resolution procedures found in the Act for essential service employees;¹¹
- (iv) the various criminal and other sanctions which could be utilised against picketers during a strike;¹² and
- (v) the sanctions (such as interdicts, claims for damages, penal sanctions, and the dismissal of strikers) which employers could invoke in terms of the Act against unions and employees who instigated or participated in a strike.¹³

⁹ Cf the *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 1985, paragraph 377: "The conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organisations".

¹⁰ Cf the *General Survey*, International Labour Conference 69th Session, 1983, Report III, paragraph 216: "The Committee considers that trade union organisations ought to have the possibility of recourse to protest strikes, in particular where aimed at criticising a government's economic and social policies. However, strikes that are purely political in character do not fall within the scope of the principles of freedom of association". It is interesting to note that the Commission did not consider the legal position of sympathy strikes.

¹¹ The Commission recommended that only employees who are involved in the provision of "genuinely essential" services should be prevented from striking.

¹² The Commission argued that peaceful picketing should be protected by the law and that the use of criminal and civil sanctions should be confined to situations of violence.

¹³ Cf the *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 1985, paragraphs 444-445: "The use of extremely serious measures, such as dismissal of workers for having participated in a strike and refusal to re-employ them, implies a serious risk of abuse and constitutes a violation of freedom of association.....Industrial relations troubled by the collective dismissal of strikers can be greatly improved if the employers concerned give serious consideration to the possibility of reinstating the persons thus sanctioned".

It is clear that the Commission's analysis and recommendations played a significant role when the 1995 Act was drafted.

6.3 The Impact of the Constitution

The 27th of April 1994 saw both the first fully democratic election in the history of South Africa and the birth of the interim Constitution.¹⁴ The interim Constitution brought about a radical and fundamental change to the South African constitutional system, and the introduction of a Bill of Rights in Chapter 3 of the interim Constitution led to a lively debate concerning the inclusion and protection of certain labour rights. Section 27 of the interim Constitution provided as follows:

- "(1) Every person shall have the right to fair labour practices.
- (2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.
- (3) Workers and employers shall have the right to organise and bargain collectively.
- (4) Workers shall have the right to strike for the purpose of collective bargaining.
- (5) Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to section 33(1)."¹⁵

On 8 May 1996 the Constitutional Assembly adopted a new constitutional text which was referred to the Constitutional Court for certification in May 1996. On 6 September 1996 the court gave judgement and found that the new text failed to comply with the Constitutional Principles contained in Schedule 4 to the interim Constitution and declined to certify the new

¹⁴ Constitution of the Republic of South Africa, Act 200 of 1993.

¹⁵ Section 33(1) provided as follows: "The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation - (a) shall be permissible only to the extent that it is - (i) reasonable; and (ii) justifiable in an open and democratic society based on freedom and equality; and (b) shall not negate the essential content of the right in question,...". The force of the impact of the interim Constitution on labour legislation was also temporarily blunted by section 33(5)(a) which provided as follows: "The provisions of a law in force at the commencement of this Constitution promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain of full force and effect until repealed or amended by the legislature." See Olivier, "A charter for fundamental rights for South Africa: Implications for labour law and industrial relations", *Tydskrif vir Suid-Afrikaanse Reg*, 1993, 651; Beatty, "Constitutional Labour Rights: Pros and Cons", *Industrial Law Journal*, 1993, 1; Cheadle, "Impact of the Constitution on Labour Law", *Current Labour Law*, 1994, 94; Brassey, "Labour Relations under the New Constitution", *South African Journal on Human Rights*, 1994, 179; Basson, "Labour Law and the Constitution", *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, 1994, 498; Basson, *South Africa's Interim Constitution*, 1995, 40; Brassey in Chaskalson *et al*, *Constitutional Law of South Africa*, 1996, 30-1; *Mbelu v MEC for Health & Welfare, Eastern Cape* (1997) 11J 462 (HC) and *Cape Local Authorities Employers Organisation v Independent Municipal and Allied Trade Union* 1997(3) BCLR 306 (C) for more detail in this regard.

text.

The Constitutional Court *inter alia* held that the omission in section 23 of the new text of the right of employers to lock out workers was not in conflict with Constitutional Principle XXVIII which required recognition and protection of the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining. The failure of section 23 to entrench a right of individual employers to engage in collective bargaining was, however, held to be in conflict with the aforesaid Constitutional Principle since the text failed to recognise that individual employers could and did engage in collective bargaining with their workers.¹⁶

The Constitutional Assembly reconvened and on 11 October 1996 it passed an amended text which was certified by the Constitutional Court on 4 December 1996.¹⁷ The new Constitution came into operation on 4 February 1997,¹⁸ thereby repealing the interim Constitution. Chapter 2 of the new Constitution contains the Bill of Rights which has several provisions that specifically regulate labour relations. Of these the most important is section 23:

- "(1) Everyone has the right to fair labour practices.
- (2) Every worker has the right -
- (a) to form and join a trade union;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike.
- (3) Every employer has the right -
- (a) to form and join an employers' organisation; and
 - (b) to participate in the activities and programmes of an employers' organisation.
- (4) Every trade union and every employers' organisation has the right -
- (a) to determine its own administration, programmes and activities;
 - (b) to organise; and
 - (c) to form and join a federation.
- (5) Every trade union, employers' organisation and employer has the right to engage in collective

16 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996(4) SA 744 (CC) at 794D - 797C.*

17 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997(2) SA 97 (CC).*

18 Constitution of the Republic of South Africa, Act 108 of 1996.

bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

- (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).¹⁹

The constitutional entrenchment of the right to strike in section 23(2)(c) forms the logical conclusion to the developments in strike law over the past few years, and should play an important role in deciding the question of the fairness of the dismissal of (legal) strikers.²⁰

The concept of a "strike" is not defined in the Constitution, and it will probably be given its ordinary meaning, namely a concerted cessation of work in support of an industrial demand.

The aims which the strikers may pursue are no longer limited as was the case in the interim Constitution as the strike need not be "for the purpose of collective bargaining".

Even though the above section of the Constitution now places the issue of a right to strike beyond question, the impact of the Constitution on the outcome of labour disputes would probably not be as forceful as one might have expected. As Brassey put it:

"For seventy years our legislature has been modernising our system of labour law, and for the last twenty years the labour courts have been doing the same under the aegis of the unfair labour practice. As a result, labour law already has a kind of charter of fundamental rights of its own. There is, no doubt, a lot that still needs to be done, but the Constitutional Court may not be the best place to do it in."²¹

19 It should be noted that all the "rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill" (section 7(3) of the Constitution). Section 36(1) reads as follows: "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, taking into account all relevant factors including - (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."

20 In *Ceramic Industries Ltd t/a Beta Sanitary Ware v Nation Construction Building & Allied Workers Union* (1997) ILJ 550 (LC) Basson J stated as follows at 552: "... when the court is called upon to interpret the provisions of the Act (the Labour Relations Act 66 of 1995) which limit a fundamental right which is entrenched in the Constitution, such as the right to strike, such provisions must rather be given a more restrictive interpretation, in keeping with the statutory obligation to interpret the Act so as to give effect to the fundamental rights conferred by the Constitution and to interpret the Act in compliance with the Constitution."

21 Brassey in Chaskalson *et al*, *Constitutional Law of South Africa*, 1996, at 30-13.

6.4 The Labour Relations Act of 1995

Shortly after the April 1994 elections the new Minister of Labour, Tito Mboweni, appointed a task team to overhaul the laws regulating labour relations and to prepare a draft Labour Relations Bill to initiate a process of public discussion and negotiation by organised labour and business as well as other interested parties. Its brief was to draft a Bill which would *inter alia* -

- * comply with ILO Conventions 87, 98 and 111, among others, and with the findings of the ILO's Fact Finding and Conciliation Commission
- * comply with the Constitution
- * promote and facilitate collective bargaining in the workplace and at industry level
- * provide simple procedures for the resolution of disputes through statutory conciliation, mediation and arbitration and the licensing of independent alternative dispute resolution services
- * entrench the constitutional right to strike subject to limitations which are reasonable and justifiable in an open and democratic society based on values of freedom and equality, and regulate lock-outs in a similar manner
- * provide for the decriminalisation of labour legislation.²²

After months of negotiation between all the interested parties, an agreement was finally hammered out and adopted by parliament on 13 September 1995. However, the 1995 Act could not come into effect immediately as new institutions such as the Commission for Conciliation, Mediation and Arbitration, the new Labour Court and the new Labour Appeal Court had to be established.

The Labour Relations Act of 1995²³ finally came into operation on 11 November 1996, and thereby announced the start of a new era in labour relations in South Africa; today South Africa has a new Labour Relations Act based, for the first time, on a negotiated consensus between labour and capital.

²² Explanatory Memorandum, *Government Gazette 16259*, 10 February 1995, 128.

²³ Hereinafter referred to as the Act.

In *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union (1)*²⁴ the Court said the following about the interpretation of the Act:²⁵

"In my opinion it is not appropriate to jettison the golden rule and avoid a literal interpretation. The retention of a literalist approach is compatible with a broad purposive approach to the interpretation of the Act and with an interpretation seeking to ensure compliance with the spirit and purpose of the Constitution."

After summarising the democratic manner in which the Act was drafted the Court continued as follows (at 719E):

"In some ways the Labour Relations Act 1995 is the supreme collective bargaining agreement entered into between employees, employers and the representatives of civil society. This, in my view, indicates that it ought to be treated and interpreted, except insofar as it relates to the Bill of Rights, as a collective agreement. It contains checks and balances; trade-offs and compromises. Few are expressly articulated. They occurred in the bargaining chambers but their results are plain to see. A literal interpretation which assumes, justifiably in my opinion, that the Labour Relations Act 1995 means what it says, ought not to be disturbed for the sake of a liberal interpretation. Trade-offs should not be disturbed lest the bargain be unravelled. This would disturb the confidence of the bargaining partners and lead to a loss of acceptance and legitimacy of the Act."²⁶

Chapter IV (sections 64-77) of the Act deals with the issue of strikes and lock-outs and the relevant sections will now be analysed and discussed.

6.4.1 Protected and unprotected strikes

As in the previous Act, both substantive and procedural requirements for strike action are set out in the new Act. A distinction is still drawn between two types of strikes, referred to in the Act as protected strikes and unprotected strikes.²⁷ Section 64 contains the procedural requirements for the holding of a protected strike (or lock-out) and reads as follows:

²⁴ (1997) ILJ 716 (LC) at 719A.

²⁵ See further on the interpretation of the Act *Business South Africa v COSATU & another* (1997) ILJ 474 (LAC), discussed in 6.4.10.

²⁶ Cf *NUMSA v The Benicon Group* (1997) ILJ 123 (LAC) at 142: "The court should therefore purge itself of misdirected sympathy with the workers in the light of the subsequently successful negotiations, which culminated in the democratic transition".

²⁷ The 1995 Act decriminalised strike law; strikes that do not comply with the relevant provisions of the Act will no longer constitute criminal offences and be "illegal" or "unlawful", but will fail to receive the protections which flow from compliance and will thus be so-called "unprotected" strikes.

"64. Right to strike and recourse to lock-out

- (1) Every employee has the right to strike and every employer has recourse to lock-out if -
 - (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and -
 - (i) a certificate stating that the dispute remains unresolved has been issued; or
 - (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that -
 - (b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless -
 - (i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or
 - (ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation;

or
 - (c) in the case of a proposed lock-out, at least 48 hours' notice of the commencement of the lock-out, in writing, has been given to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or
 - (d) in the case of a proposed strike or lock-out where the State is the employer, at least seven days' notice of the commencement of the strike or lock-out has been given to the parties contemplated in paragraphs (b) and (c).

- (2) If the issue in dispute concerns a refusal to bargain, an advisory award must have been made in terms of section 135(3)(c) before notice is given in terms of subsection (1)(b) or (c).²⁸ A refusal to bargain includes -
 - (a) a refusal -
 - (i) to recognise a trade union as a collective bargaining agent; or
 - (ii) to agree to establish a bargaining council;
 - (b) a withdrawal of recognition of a collective bargaining agent;
 - (c) a resignation of a party from a bargaining council;
 - (d) a dispute about -
 - (i) appropriate bargaining units;
 - (ii) appropriate bargaining levels; or
 - (iii) bargaining subjects.

- (3) The requirements of subsection (1) do not apply to a strike or a lock-out if -
 - (a) the parties to the dispute are members of a council, and the dispute has been dealt with by that council in accordance with its constitution;
 - (b) the strike or lock-out conforms with the procedures in a collective agreement;
 - (c) the employees strike in response to a lock-out by their employer that does not comply with the provisions of this Chapter;
 - (d) the employer locks out its employees in response to their taking part in a strike that does not conform with the provisions of this Chapter; or
 - (e) the employer fails to comply with the requirements of subsections (4) and (5).

- (4) Any employee who or any trade union that refers a dispute about a unilateral change to terms and conditions of employment to a council or the Commission in terms of subsection (1)(a) may, in the referral, and for the period referred to in subsection (1)(a) -
 - (a) require the employer not to implement unilaterally the change to terms and conditions of employment; or
 - (b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.

²⁸ Section 135 of the Act contains provisions relating to dispute resolution by the Commission through conciliation.

- (5) The employer must comply with a requirement in terms of subsection (4) within 48 hours of service of the referral on the employer."

In certain respects the procedural requirements for the holding of a protected strike remain similar to the requirements of the old Act.²⁹ The issue in dispute has to be referred to a bargaining or statutory council or to the Commission for Conciliation, Mediation and Arbitration (replacing the conciliation board) for conciliation and a period of 30 days has to elapse before action can be taken.

There is a new requirement that at least 48 hours' (or seven days' where the State is the employer) written notice of the commencement of the strike must have been given to the party against whom the action is to be taken. In *Ceramic Industries Ltd t/a Betta Sanitary Ware v Nation Construction Building & Allied Workers Union (2)*³⁰ the union sent a faxed letter to the employer headed "NOTICE TO COMMENCE STRIKE" and stating that "this serves to inform the company that a strike shall start at any time after 48 hours from the date of this notice". The court found that the provisions of section 64(1)(b) were not complied with.³¹

"The section's specific purpose is to give an employer advance warning of the proposed strike so that an employer may prepare for the power-play that will follow. That specific purpose is defeated if the employer is not informed in the written notice in exact terms when the proposed strike will commence. In the present case the notice is defective for that reason."

The main difference between the old Act and the new as regards procedures is that there is no longer a strike ballot requirement. In the past employers relied on various technical irregularities in the balloting procedure to interdict strikes and to justify the dismissal of strikers, which will now no longer be possible. Although the traditional strike ballot requirement has been abolished by the Act, it nevertheless recognises the need for democratic decision-making processes within trade unions regarding the decision whether to

²⁹ See 1.3.2 for a discussion on the definition of a strike.

³⁰ (1997) ILJ 671 (LAC) at 675-677.

³¹ Cf the differing decisions of Basson J and Landman AJ in the courts *a quo*: (1997) ILJ 550 (LC) and (1997) ILJ 716 (LC).

strike or not.³²

The new procedure relating to a refusal to bargain (defined to include the refusal to recognise a union or establish a bargaining council) should also be noted. The intention of the legislature is that there should be no legal duty to bargain enforced by the courts.³³ The Act thus provides that disputes concerning the issue of a refusal to bargain must first be referred to advisory arbitration before notice can be given of the commencement of the strike.

The Act emphasises voluntarism and self-regulation in labour relations. Consequently, the general requirements do not apply where the parties to the dispute are members of a council whose constitution contains procedures for regulating the dispute, or where the parties themselves have set out their own procedures in a collective agreement.

In *North East Cape Forests v SA Agricultural Plantation & Allied Workers Union & others*³⁴ the applicant company approached the Labour Court to obtain an urgent interdict against strike action.³⁵ It contended that the strike was unprotected because the wage dispute over which the strike had been embarked upon had not been referred to the CCMA in terms of section 64(1) of the Act. However, the company and the union had concluded a recognition agreement which also contained a dispute settlement procedure. The Court analysed the collective agreement between the parties and concluded that the company's submission was devoid of substance. It stated that section 64(3)(b) of the Act "gives recognition to domestic arrangements between parties so that, where there is a collective agreement between parties which contains pre-strike dispute settlement procedures, there is no obligation on them to use

32 Section 95(5) provides as follows in this regard: "The constitution of any trade union or employers' organisation that intends to register must - (p) provide that the trade union or employers' organisation, before calling a strike or lock-out, must conduct a ballot of those of its members in respect of whom it intends to call the strike or lock-out; (q) provide that members of the trade union or employers' organisation may not be disciplined or have their membership terminated for failure or refusal to participate in a strike or lock-out if - (i) no ballot was held about the strike or lock-out; or (ii) a ballot was held but a majority of the members who voted did not vote in favour of the strike or lock-out;". See also section 67(7) in this regard.

33 See Cooper & Cheadle, "Strikes and Lock-outs", in *Current Labour Law*, 1995, 51.

34 (1997) ILJ 729 (LC).

35 The Court found that the company had failed to show that the matter was one of urgency as the company failed to interdict the threatened strike for three and a half months, as the strike had been in progress for two weeks before the company had applied for the interdict and as the company had failed to substantiate the financial losses it allegedly suffered as a result of the strike. The Court nevertheless dealt with the matter on the merits.

the statutory pre-strike procedures after they have exhausted the internal procedure".³⁶ The application was accordingly dismissed.³⁷

The general requirements also do not apply where the strike is in response to an unprotected lock-out or where the employer does not comply with the provisions pertaining to unilateral changes to terms and conditions of employment.³⁸

Section 65 of the Act contains the limitations on strike action and reads as follows:

"65. Limitations on right to strike or recourse to lock-out

- (1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if -
 - (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;
 - (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;
 - (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;
 - (d) that person is engaged in -
 - (i) an essential service; or
 - (ii) a maintenance service.³⁹
- (2)
 - (a) Despite section 65(1)(c), a person may take part in a strike or a lock-out or in any conduct in contemplation or in furtherance of a strike or lock-out if the issue in dispute is about any matter dealt with in sections 12 to 15.⁴⁰
 - (b) If the registered trade union has given notice of the proposed strike in terms of section 64(1) in respect of an issue in dispute referred to in paragraph (a), it may not exercise the right to refer the dispute to arbitration in terms of section 21 for a period of 12 months from the date of the notice.
- (3) Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out -
 - (a) if that person is bound by -
 - (i) any arbitration award or collective agreement that regulates the issue in dispute; or

³⁶ At 7371-J. It should be noted that parties were required to exhaust the statutory dispute resolution procedures in addition to their own agreed domestic dispute settlement procedures under the provisions of the old Act. Section 64(3)(b) of the Act now eliminates this unnecessary duplication.

³⁷ The Court did not consider whether the parties' intention at the time of entering into the agreement should have been considered. See Grogan, "First judgements", *Employment Law*, 1997, 98 for more detail.

³⁸ In the past our courts have found that the unilateral change of conditions of employment is unfair if imposed before parties have bargained to impasse; see Cooper & Cheadle, "Strikes and lock-outs", in *Current Labour Law*, 1995, 52.

³⁹ Essential services, agreed minimum services and maintenance services are dealt with in 6.4.7 below.

⁴⁰ These sections deal with organisational rights, and specifically with trade union access to workplace, deduction of trade union subscriptions or levies, trade union representatives and leave for trade union activities.

- (ii) any determination made in terms of section 44 by the Minister that regulates the issue in dispute; or
- (b) any determination made in terms of the Wage Act and that regulates the issue in dispute, during the first year of that determination."

It is clear that the limitations on strike action remain similar to those in the old Act. Employees may not strike where the issue in dispute is regulated by an arbitration award or collective agreement, or a Wage Act determination during its first year of operation,⁴¹ or where the employee is engaged in an essential service. New limitations on strike action are where the employee is engaged in a so-called maintenance service, where the employee has the right to refer the issue in dispute to arbitration or the Labour Court,⁴² or where the issue in dispute is regulated by a section 44 ministerial determination.

In *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union (2)*⁴³ the issues that gave rise to the strike were (1) a dispute relating to the payment of wages during a previous work stoppage; (2) a dispute about the alleged harassment of shop stewards and employees by certain company officials; and (3) a dispute concerning production targets. In an urgent application the company claimed that the aforesaid issues were all arbitrable or justiciable in terms of the Act, and therefore could not form the subject-matter of a protected strike (section 65(1)(c) of the Act). A rule nisi was issued and the Court confirmed that the alleged harassment amounted to victimisation in contravention of section 4 of the Act, and that such a dispute was justiciable by the Labour Court (section 9(4) of the Act). The dispute could accordingly not form the subject-matter of a protected strike.⁴⁴

41 However, the previous Act did not make these prohibitions subject to a collective agreement, which again emphasises the notion of voluntarism in the Act.

42 This limitation effectively means that strikes over what are currently known as "rights" disputes are no longer permissible. These include disputes concerning freedom of association, the interpretation and application of collective agreements, matters which are the subject of joint decision-making by workplace forums, dismissals and disciplinary action, and workplace equality. Cf *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union (2)* (1997) ILJ 671 (LAC).

43 (1997) ILJ 671 (LAC). The Court also added the following about the interpretation of the Act: "For the purpose of this case it must be accepted that the provisions of the Act, insofar as they deal with the right to strike, are constitutionally valid....Where constitutional validity is not an issue it seems that an interpretation that accords best with the general purpose of the Act (as set out in s 1) and the more specific purpose of a particular section, should be followed. Such a purposive interpretation may not then necessarily be least restrictive of the fundamental right at stake..."(at 675G-H).

44 *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union & others* (1997) ILJ 550 (LC).

On the return day of the rule nisi the Labour Court avoided this result by characterising the subject-matter of the dispute as also a demand for the dismissal of the offending company officials. Since this was a dismissal demand which was neither justiciable nor arbitrable, the Labour Court ruled that issue (2) could legitimately form the basis of a protected strike.⁴⁵ The Court granted leave to appeal to the company against that part of the order whereby portion of the rule nisi was discharged, and the Labour Appeal Court thus had to decide whether the disputed issue relating to the alleged harassment of employees by the company officials could form the subject-matter of a protected strike in terms of the Act.⁴⁶

It found that the Labour Court could not decide the matter on the aforesaid characterisation for the simple reason that that factual basis was not raised by the union or the employees in their opposing affidavits or in the original referral to the CCMA. Moreover, the union's initial complaint was the alleged harassment of union officials and employees. That was a justiciable rights dispute with a specific remedy to be pursued in the Labour Court. It continued:

"The union could not convert the nature of that underlying dispute into a non-justiciable one simply by adding a demand for a remedy falling outside those provided for by the Act. The tail cannot wag the dog. If such an approach is allowed, an underlying rights dispute normally justiciable or arbitrable in terms of the Act could be transformed into a strikeable issue simply by adding a demand for a remedy not provided for in the Act. That would be unacceptable."

The Court accordingly found that the proposed strike was unlawful. It upheld the appeal with costs.

The importance of organisational rights is recognised by the legislature in that provision is made for the right to strike over such rights despite the aforesaid prohibition on strike action where employees have the right to refer the issue in dispute to arbitration or the Labour Court.⁴⁷

⁴⁵ *Ceramic Industries Ltd t/a Beta Sanitary Ware v National Construction Building & Allied Workers Union & others* (1997) ILJ 716 (LC).

⁴⁶ The other issue dealt with on appeal, namely whether the notice of the strike complied with the provisions of section 64(1)(b), is discussed above together with the other provisions of section 64 of the Act.

⁴⁷ Note, however, the provisions of section 65(2)(b) that seeks to avoid a situation where a registered trade union can utilise both industrial action and arbitration to achieve its goals: cf *Metal & Electrical Workers Union of South*

In line with the Act's commitment to self-regulation in labour relations, the Act allows employees to contract out of the right to strike where a collective agreement prohibits a strike in respect of the issue in dispute, or where an employee is bound by an agreement⁴⁸ that requires the issue in dispute to be referred to arbitration.

6.4.2 *The consequences of a protected strike*

The consequences of a protected strike are set out in section 67 of the Act which is to the following effect:

"67. Strike or lock-out in compliance with this Act

- (1) In this Chapter, "protected strike" means a strike that complies with the provisions of this Chapter and "protected lock-out" means a lock-out that complies with the provisions of this Chapter.
- (2) A person does not commit a delict or a breach of contract by taking part in -
 - (a) a protected strike or a protected lock-out; or
 - (b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.
- (3) Despite subsection (2), an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or a protected lock-out, however -
 - (a) if the employee's remuneration includes payment in kind in respect of accommodation, the provision of food and other basic amenities of life, the employer, at the request of the employee, must not discontinue payment in kind during the strike or lock-out; and
 - (b) after the end of the strike or lock-out, the employer may recover the monetary value of the payment in kind made at the request of the employee during the strike or lock-out from the employee by way of civil proceedings instituted in the Labour Court.
- (4) An employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike.
- (5) Subsection (4) does not preclude an employer from fairly dismissing an employee in accordance with the provisions of Chapter VIII for a reason related to the employee's conduct during the strike, or for a reason based on the employer's operational requirements.⁴⁹

Africa v Cape Gate and Fence (Pty) Ltd (1992) SALLR 39 (IC) and *Food & General Workers Union v Lanko Co-op Ltd* (1994) SALLR 127 (IC) in this regard.

⁴⁸ The agreement apparently need not be a collective agreement in contrast with the position under section 65(1)(a). Theoretically speaking, an employer could thus, by means of an ordinary contract of employment, require an employee to agree that all disputes be referred to arbitration. It is doubtful whether this result was in fact intended by the legislature: see Rudd & Van Zyl, *Guide to the 1995 Labour Relations Act (Part 1)*, 1996, 233.

⁴⁹ Chapter VIII (sections 185-197) deals with unfair dismissals and section 187 provides as follows: "A dismissal is automatically unfair ... if the reason for the dismissal is - (a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV; (b) that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health; ...".

- (6) Civil legal proceedings may not be instituted against any person for -
 - (a) participating in a protected strike or a protected lock-out; or
 - (b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.
- (7) The failure by a registered trade union or a registered employers' organisation to comply with a provision in its constitution requiring it to conduct a ballot of those of its members in respect of whom it intends to call a strike or lock-out may not give rise to, or constitute a ground for, any litigation that will affect the legality of, and the protection conferred by this section on, the strike or lock-out.
- (8) The provisions of subsections (2) and (6) do not apply to any act in contemplation or in furtherance of a strike or lock-out, if that act is an offence.
- (9) Any act in contemplation or in furtherance of a protected strike or a protected lock-out that is a contravention of the Basic Conditions of Employment Act or the Wage Act does not constitute an offence."

Compliance with the provisions of the Act attracts certain protections. An employee who takes part in a protected strike or any conduct in contemplation or in furtherance of a protected strike does not commit a delict⁵⁰ or a breach of contract and is protected from civil legal proceedings⁵¹ and from dismissal in that regard, except where the act in contemplation or in furtherance of the strike constitutes an offence.⁵² The protection against dismissal does not, however, preclude an employer from fairly dismissing an employee for a reason relating to the employee's conduct during the strike, or to the employer's operational requirements.⁵³

In line with international jurisprudence an employer is furthermore not obliged to remunerate an employee during a protected strike (or a protected lock-out). However, to protect employees such as farm workers who depend on an employer for their basic amenities of life, the Act provides that the employer, at the request of the employee, must not discontinue

⁵⁰ Compare section 79 of the previous Act which excluded the delict of defamation from indemnity. No such exception appears in the 1995 Act.

⁵¹ In *Afrox Ltd v SA Chemical Workers Union (2)* (1997) ILJ 406 (LC) at 410 Landman J says the following about section 67(6) after discussing section 67(2) of the Act: "In addition and probably ex abundata cautela the legislature has opted for a belt and braces approach. Not only do the protected strikers not commit breaches of contract nor delicts, the strikers also enjoy immunity from the institution of civil legal proceedings ... The reference to civil legal proceedings is, in my opinion, a reference to civil legal proceedings in the High Court and other courts of law of this country and to proceedings in the Labour Court. A strike which is a protected one is beyond the jurisdiction of this court and every other court of law. The clear intention is to leave it to the economic muscle of the parties involved. The general rule is that the courts are to refrain from intervening in a protected strike and from influencing the outcome of the powerplay inherent in a strike." Cf also *Lomati Mill Barberton v PPWAWU* (1997) ILJ 178 (LC) at 183.

⁵² The term "criminal offence" was used in the comparable section 79(1) of the previous Act and presumably section 67(8) of the Act also refers to a criminal offence, as opposed to an internal disciplinary offence.

⁵³ See 6.4.3 below for more detail on strike dismissals.

such payment in kind during the strike.⁵⁴ At the end of the strike, however, the employer may recover the monetary value of the payment in kind through civil proceedings in the Labour Court.

6.4.3 Unprotected strikes: the employer's rights and remedies

Section 68 of the Act deals with strikes (and lock-outs) that are not in compliance with the Act, and provides as follows:

"68. Strike or lock-out not in compliance with this Act

- (1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction -
 - (a) to grant an interdict or order to restrain -
 - (i) any person from participating in a strike or any conduct in contemplation or in furtherance of a strike; or
 - (ii) any person from participating in a lock-out or any conduct in contemplation or in furtherance of a lock-out;
 - (b) to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, having regard to -
 - (i) whether -
 - (aa) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;
 - (bb) the strike or lock-out was premeditated;
 - (cc) the strike or lock-out was in response to unjustified conduct by another party to the dispute; and
 - (dd) there was compliance with an order granted in terms of paragraph (a);
 - (ii) the interests of orderly collective bargaining;
 - (iii) the duration of the strike or lock-out; and
 - (iv) the financial position of the employer, trade union or employees respectively.
- (2) The Labour Court may not grant any order in terms of subsection (1)(a) unless 48 hours' notice of the application has been given to the respondent: However, the Court may permit a shorter period of notice if -
 - (a) the applicant has given written notice to the respondent of the applicant's intention to apply for the granting of an order;
 - (b) the respondent has been given a reasonable opportunity to be heard before a decision concerning that application is taken; and
 - (c) the applicant has shown good cause why a period shorter than 48 hours should be permitted.
- (3) Despite subsection (2), if written notice of the commencement of the proposed strike or lock-out was given to the applicant at least 10 days before the commencement of the proposed strike or lock-out, the applicant must give at least five days' notice to the respondent of an application for an order in terms of subsection (1)(a).

⁵⁴ This provision will limit the tactical measures (for example eviction orders) open to an employer to try to discourage a strike or bring it to an end quickly. It remains to be seen, however, what other items (apart from those listed) will be held to constitute basic amenities of life: see Rudd & Van Zyl, *Guide to the 1995 Labour Relations Act (Part 1)*, 1996, 236-237 in this regard.

- (4) Subsections (2) and (3) do not apply to an employer or an employee engaged in an essential service or a maintenance service.
- (5) Participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account.⁵⁵

The Labour Court has exclusive jurisdiction⁵⁶ to deal with strikes not in compliance with the provisions of the Act.⁵⁷ The court may grant an interdict or order to restrain any employee from participating in a strike, or it may order the payment of just and equitable compensation for any loss attributable to the strike.⁵⁸

The contentious issue of the dismissal of strikers is also dealt with in the above section of the Act.⁵⁹ Although participation in an unprotected strike amounts to misconduct, it is recognised that it will not always be fair to dismiss an employee for participating in an unprotected strike. The substantive fairness of dismissals in such cases must be determined in the light of the facts of each case and with reference to section 6(1) of the Code of Good Practice on dismissal contained in Schedule 8 to the Act which is to the following effect:

⁵⁵ See the discussion on section 6 of Schedule 8 of the Act below.

⁵⁶ The Labour Court has concurrent jurisdiction with the High Court in respect of violations of the Constitution and disputes over the constitutionality of executive and administrative acts.

⁵⁷ Under the previous labour law regime, relief in the form of, for example, interdicts could be obtained in the former Industrial Court and the Supreme Court (now High Court). In *Sappi Fine Papers (Pty) Ltd (Adamas Mill) v PPWAWU & others* (unreported) the High Court was called upon to decide whether it had the necessary jurisdiction to interdict unlawful conduct committed during the course of a protected strike. Referring to the long title of the Act and its purpose, the court held that the granting of urgent interim relief against unlawful conduct clearly promoted that purpose and that it was the Labour Court which had exclusive jurisdiction to do so, regardless as to whether the strike was protected or unprotected. In the court's view, any other interpretation would render section 157(1) of the Act meaningless. See "Latest court cases", *Employment Law*, 1997, 131 for more detail in this regard.

⁵⁸ Under the previous Act the option of recovering damages in the Industrial Court in respect of illegal strikes did not exist, and such compensation could presumably only be recovered in the Supreme Court: see Rudd & Van Zyl, *Guide to the 1995 Labour Relations Act (Part 1)*, 1996, 276-277 in this regard. Due to the the Labour Court's exclusive jurisdiction as outlined above, an aggrieved party would no longer be able to claim damages at common law.

⁵⁹ As far as protected strikes are concerned, section 67(4) of the Act is at first glance unequivocal: "An employer may not dismiss an employee for participating in a protected strike...". Section 187(1) also classifies as automatically unfair the dismissal of protected strikers (for that reason alone) and the dismissal of employees who refuse to do the work of such strikers. However, section 67(5) contains two exceptions to this seemingly blanket protection. Employees may be dismissed for misconduct during a strike, and for a reason based on the employer's operational requirements.

- "(1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including -
- (a) the seriousness of the contravention of this Act;
 - (b) attempts made to comply with this Act; and
 - (c) whether or not the strike was in response to unjustified conduct by the employer."⁶⁰

The procedural fairness requirements of the dismissal of strikers are set out in section 6(2) of the above Code of Good Practice on dismissals and reads as follows:

- "(2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum.⁶¹ The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them."

Even though strike dismissals are categorised as misconduct dismissals in terms of the Act, the above subsection clearly omits the requirement to hold a disciplinary hearing before dismissing striking employees. This is in line with the position under the previous Act in terms of which disciplinary hearings have been held to fall within the domain of individual dismissals rather than collective strike dismissals.⁶²

In light of the foregoing, it is clear that the Act's provisions relating to the dismissal of strikers largely reflect the complex jurisprudence that developed under the previous Labour Relations Act in this regard.

⁶⁰ It is submitted that, in light of the collective nature of strike action, the only factors to be considered in determining the substantive fairness of a strike dismissal are these "collective" factors, and not those personal factors (such as the individual employee's previous record) normally relevant to the determination of the fairness of the sanction in misconduct cases. See also the following cases for examples of unjustified conduct by an employer: *MAWU v Natal Die Castings Co Ltd* (1986) ILJ 520 (IC) and *FBWU v Transvaal Atlas Wholesale Meat Distributors (Pty) Ltd* (1987) ILJ 335 (IC).

⁶¹ Compare the following decisions in which the requirements for rendering an ultimatum fair have been considered: *NUMSA v Elm Street Plastics* (1989) ILJ 328 (IC); *BAWU v Edward Hotel* (1989) ILJ 357 (IC); *Liberty Box & Bag Manufacturing Co (Pty) Ltd v PPWAWU* (1990) ILJ 427 (ARB); *NUMSA v Tek Corporation Ltd* (1990) ILJ 721 (IC) and *Administrator, OFS v Mokopanele* 1990 (3) SA 780 (A).

⁶² Compare Rudd & Van Zyl, *Guide to the 1995 Labour Relations Act (Part 1)*, 1996, 258 and the cases discussed at 272-274 in this regard.

6.4.4 Secondary strikes

Secondary strikes are governed by section 66 of the Act which is to the following effect:

"66. *Secondary strikes*

- (1) In this section "secondary strike" means a strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer, but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees, employed within the registered scope of that council, have a material interest in that demand.
- (2) No person may take part in a secondary strike unless -
 - (a) the strike that is to be supported complies with the provisions of sections 64 and 65;
 - (b) the employer of the employees taking part in the secondary strike or, where appropriate, the employers' organisation of which that employer is a member, has received written notice of the proposed secondary strike at least seven days prior to its commencement; and
 - (c) the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.
- (3) Subject to section 68(2) and (3), a secondary employer may apply to the Labour Court for an interdict to prohibit or limit a secondary strike that contravenes subsection (2).
- (4) Any person who is a party to proceedings in terms of subsection (3), or the Labour Court, may request the Commission to conduct an urgent investigation to assist the Court to determine whether the requirements of subsection 2(c) have been met.
- (5) On receipt of a request made in terms of subsection (4), the Commission must appoint a suitably qualified person to conduct the investigation, and then submit, as soon as possible, a report to the Labour Court.
- (6) The Labour Court must take account of the Commission's report in terms of subsection (5) before making an order."

Under the previous Act a strike was defined so as to include persons employed "either by the same employer or by different employers" and the courts accepted that the definition was broad enough to include secondary or sympathy strikes.⁶³ By providing separate procedural and substantive requirements for the holding of a protected secondary strike, the Act seeks to provide clarity on the legality requirements for sympathy strikes developed under the previous Act.⁶⁴

⁶³ *Barlows Manufacturing Co Ltd v MAWU* (1988) ILJ 995 (IC); *Barlows Manufacturing Co Ltd v MAWU* (1990) ILJ 35 (T); it is interesting to note that the 1988 unfair labour practice definition effectively prohibited secondary strikes by including "any strike, lock-out or stoppage of work, if the employer is not directly involved in the dispute which gives rise to the strike, lock-out or stoppage of work".

⁶⁴ See 1.3.2 for a discussion on the definition of a secondary strike.

For a secondary strike to fall within the ambit of the above section and to be a protected strike, three requirements must be met. Firstly, the primary strike must satisfy the procedural and substantive requirements for the holding of a protected strike set out in sections 64 and 65 of the Act.⁶⁵

Secondly, the secondary strikers must give their employer written notice of the proposed strike at least seven days before it starts.⁶⁶

Thirdly, the nature and extent of the secondary strike must be reasonable in relation to its possible direct or indirect effect on the business of the primary employer.⁶⁷ In other words, the secondary strike must be functionally related to the purpose of the primary strike. The underlying idea is that a secondary employer can only be expected to suffer the losses incurred by a secondary strike if such losses are in some way proportional to the impact that the strike may have on the business of the primary employer. The requirement is thus based on the notion of proportionality and effectively curtails secondary strikes where the primary and secondary strikers work in totally unrelated occupations or sectors of the economy.⁶⁸

In *Sealy of South Africa & others v PPWAWU*⁶⁹ the Labour Court *inter alia* considered the effect of section 66(2)(c) of the Act and stated that "... there must be some relationship or

65 This requirement is in line with international jurisprudence, which requires that the primary strike must be legal for the secondary strike to be lawful; see Cooper & Cheadle, "Strikes and lock-outs", in *Current Labour Law*, 1995, 53.

66 This notice period is longer than the normal 48 hours' notice period in respect of primary strikes (see section 64(1)(b) of the Act).

67 Compare section 66(2)(c) with the test developed by Goldstone J in *Barlows Manufacturing Co Ltd v MAWU* (1990) ILJ 35 (T), namely that for a secondary strike to be lawful in terms of the definition of a strike under the previous Act "it must ... appear from the evidence as a reasonable possibility that its purpose is to induce or compel compliance with its demands and that the purpose may reasonably be achieved" (at 42F).

68 See Du Toit *et al*, *The Labour Relations Act of 1995*, 1996, 202: "Where the impact (on the primary employer) is likely to be substantial, for example where the secondary employer is a customer or supplier of the primary employer, a supplier of temporary labour, or is in some other way associated with the primary employer, greater latitude must be permitted when evaluating the reasonableness of the nature and extent of the strike. On the other hand, where the impact on the primary employer is likely to be insignificant, for example where the primary and secondary employers have no business relationship whatsoever, a more restrictive approach must be adopted". See also Le Roux, "The Labour Court: some early decisions", in *Contemporary Labour Law*, 1997, 74-76.

69 (1997) ILJ 392 (LC); the Court found that the first two requirements of section 66(2) were met and then went on to consider the requirements of section 66(2)(c) of the Act.

nexus between the primary employer and the secondary employer(s) for the proposed strike at the business of the secondary employer(s) to have a possible direct or indirect effect on the business of the primary employer in such a way as to make the nature and extent of the secondary strike 'reasonable'."

In the *Sealy* case the secondary employers were all involved in the furniture manufacturing industry, whereas the primary employer, Mondi Paper, manufactured paper and pulp. Consequently, none of the secondary employers operated in the same sector as the primary employer and there was further also no link in production or financial terms between the secondary employers and the primary employer. The only remote link between the primary and secondary employers which could be identified was that the Anglo American Corporation of South Africa had some interest in the companies concerned. On the facts, however, the Court found this tenuous link insufficient and granted an interdict in terms of section 68(1) of the Act to restrain the trade union from promoting, inciting, or instigating the unprotected secondary strike action. However, an exception was made with respect to the third applicant. The Court found that the fact that the third applicant was a customer of the primary employer constituted a strong enough link between the parties to comply with the section 66(2)(c) requirement.⁷⁰

This decision highlights the complicated factual investigations the Court could be faced with to determine whether a sufficient link has been established between the primary employer and the secondary employer. As appears from subsections 66(4)-(6), the CCMA is supposed to assist the Court in this regard.

6.4.5 *Essential services*

Employees engaged in essential (and maintenance) services are prohibited from striking in terms of section 65(1)(d) of the Act. The relevant statutory provisions in respect of the determination of essential services are sections 70-71 and 73-74 which are to the following effect:

⁷⁰ See Le Roux, "The Labour Court: some early decisions", *Contemporary Labour Law*, 1997, 74-76 and Grogan, "First Judgements", *Employment Law*, 1997, 100 for more detail on the *Sealy* case.

"70. Essential services committee

- (1) The Minister, after consulting NEDLAC, and in consultation with the Minister for the Public Service and Administration, must establish an essential services committee under the auspices of the Commission and appoint to that committee, on any terms, persons who have knowledge and experience of labour law and labour relations.
- (2) The functions of the essential services committee are -
 - (a) to conduct investigations as to whether or not the whole or a part of any service is an essential service, and then to decide whether or not to designate the whole or a part of that service as an essential service;
 - (b) to determine disputes as to whether or not the whole or a part of any service is an essential service; and
 - (c) to determine whether or not the whole or a part of any service is a maintenance service.
- (3) At the request of a bargaining council, the essential services committee must conduct an investigation in terms of subsection (2)(a).

71. Designating a service as an essential service

- (1) The essential services committee must give notice in the Government Gazette of any investigation that it is to conduct as to whether the whole or a part of a service is an essential service.
- (2) The notice must indicate the service or the part of a service that is to be the subject of the investigation and must invite interested parties, within a period stated in the notice -
 - (a) to submit written representations; and
 - (b) to indicate whether or not they require an opportunity to make oral representations.
- (3) Any interested party may inspect any written representations made pursuant to the notice, at the Commission's offices.
- (4) The Commission must provide a certified copy of, or extract from, any written representations to any person who has paid the prescribed fee.
- (5) The essential services committee must advise parties who wish to make oral representations of the place and time at which they may be made.
- (6) Oral representations must be made in public.
- (7) After having considered any written and oral representations, the essential services committee must decide whether or not to designate the whole or a part of the service that was the subject of the investigation as an essential service.
- (8) If the essential services committee designates the whole or a part of a service as an essential service, the committee must publish a notice to that effect in the Government Gazette.
- (9) The essential services committee may vary or cancel the designation of the whole or a part of a service as an essential service, by following the provisions set out in subsections (1) to (8), read with the changes required by the context.
- (10) The Parliamentary service and the South African Police Service are deemed to have been designated an essential service in terms of this section.⁷¹

⁷¹ An essential service is defined in section 213 as follows: "essential service" means - (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 Services.

73. *Disputes about whether a service is an essential service*

- (1) Any party to a dispute about either of the following issues may refer the dispute in writing to the essential services committee -
 - (a) whether or not a service is an essential service; or
 - (b) whether or not an employee or employer is engaged in a service designated as an essential service.
- (2) The party who refers the dispute to the essential services committee must satisfy it that a copy of the referral has been served on all the other parties to the dispute.
- (3) The essential services committee must determine the dispute as soon as possible.

74. *Disputes in essential services*

- (1) Any party to a dispute that is precluded from participating in a strike or a lock-out because that party is engaged in an essential service may refer the dispute in writing to -
 - (a) a council, if the parties to the dispute fall within the registered scope of that council; or
 - (b) the Commission, if no council has jurisdiction.
- (2) The party who refers the dispute must satisfy the council or the Commission that a copy of the referral has been served on all the other parties to the dispute.
- (3) The council or the Commission must attempt to resolve the dispute through conciliation.
- (4) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration by the council or the Commission.
- (5) Any arbitration award in terms of subsection (4) made in respect of the State and that has financial implications for the State becomes binding -
 - (a) 14 days after the date of the award, unless a Minister has tabled the award in Parliament within that period; or
 - (b) 14 days after the date of tabling the award, unless Parliament has passed a resolution that the award is not binding.
- (6) If Parliament passes a resolution that the award is not binding, the dispute must be referred back to the Commission for further conciliation between the parties to the dispute and if that fails, any party to the dispute may request the Commission to arbitrate.
- (7) If Parliament is not in session on the expiry of -
 - (a) the period referred to in subsection (5)(a), that period or the balance of that period will run from the beginning of the next session of parliament;
 - (b) the period referred to in subsection (5)(b), that period will run from the expiry of the period referred to in paragraph (a) of this subsection or from the beginning of the next session of Parliament."

The set list of services in which strikes were prohibited in terms of the previous Act (as well as the PSLRA) was too broad and fell foul of the ILO definition of essential services: "Any service, the interruption of which threatens the health, safety or life of the population or a part thereof".⁷² The 1995 Act takes the ILO requirements as its starting point in designating

⁷² Cf *Explanatory Memorandum*, ILJ, 1995, 304; Cooper, "Strikes in Essential Services", *Industrial Law Journal*, 1994, 904.

essential services and provides procedures for the determination of essential services on an ongoing basis, thus introducing a more flexible approach.⁷³

Investigations into whether a service is an essential service will normally be conducted by the Essential Services Committee.⁷⁴ The Act provides for a transparent process whereby notification of an investigation must be given in the *Government Gazette*. Interested parties may submit written submissions or appear at public oral hearings. The designation of a service as essential must appear in the *Government Gazette*.⁷⁵

The ILO recognises that the right to strike may be limited in certain circumstances, but requires that "restrictions on the right to strike should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage...and awards, once made, are fully and promptly implemented".⁷⁶ The previous Act's (and the PSLRA's) procedures for compulsory arbitration were time consuming and cumbersome. The 1995 Act seeks to remedy these shortcomings by providing for conciliation and arbitration by a council or the CCMA. Although no time frames are set, the conciliation and arbitration under the Act are expected to be "adequate" and "speedy" as required by the ILO.

6.4.6 *Minimum services*

Minimum services are dealt with in section 72 which is to the following effect:

"72. Minimum services

The essential services committee may ratify any collective agreement that provides for the maintenance of minimum services in a service designated as an essential service, in which case -

⁷³ Cf the definition of essential services in section 213 of the Act quoted above.

⁷⁴ The CCMA can assist the Essential Services Committee in this regard: the Essential Services internet website is linked to the CCMA website, and can be located at www.ccma.org.za for more detail in this regard.

⁷⁵ Cf *Government Gazette* No. 18276 of 12 September 1997 in which the Essential Services Committee designated *inter alia* the following services as essential services: municipal traffic services and policing; municipal health; municipal security; the supply and distribution of water; the generation, transmission and distribution of power; fire fighting; the services required for the functioning of courts; correctional services.

⁷⁶ *Explanatory Memorandum*, ILJ, 1995, 301.

- (a) the agreed minimum services are to be regarded as an essential service in respect of the employer and its employees; and
- (b) the provisions of section 74 do not apply."

The Act allows for self-regulation by providing that collective agreements may provide for the maintenance of minimum services in an essential service. Once the Essential Services Committee has ratified such an agreement, the minimum service will be regarded as an essential service in respect of the employer and its employees. In such cases, workers may go on a protected strike except in the agreed minimum service.

6.4.7 Maintenance services

Maintenance services are dealt with in section 75 which is to the following effect:

"75. Maintenance services

- (1) A service is a maintenance service if the interruption of that service has the effect of material physical destruction to any working area, plant or machinery.
- (2) If there is no collective agreement relating to the provision of a maintenance service, an employer may apply in writing to the essential services committee for a determination that the whole or a part of the employer's business or service is a maintenance service.
- (3) The employer must satisfy the essential services committee that a copy of the application has been served on all interested parties.
- (4) The essential services committee must determine, as soon as possible, whether or not the whole or a part of the employer's business or service is a maintenance service.
- (5) As part of its determination in terms of subsection (4), the essential services committee may direct that any dispute in respect of which the employees engaged in a maintenance service would have had the right to strike, but for the provisions of section 65(1)(d)(ii), be referred to arbitration.
- (6) The committee may not make a direction in terms of subsection (5) if -
 - (a) the terms and conditions of employment of the employees engaged in the maintenance service are determined by collective bargaining; or
 - (b) the number of employees prohibited from striking because they are engaged in the maintenance service does not exceed the number of employees who are entitled to strike.
- (7) If a direction in terms of subsection (5) requires a dispute to be resolved by arbitration -
 - (a) the provisions of section 74 will apply to the arbitration; and
 - (b) any arbitration award will be binding on the employees engaged in the maintenance service and their employer, unless the terms of the award are varied by a collective agreement."⁷⁷

The Act introduces the concept of a maintenance service. It prohibits strike action in breach

⁷⁷ Subsections (5)-(7) were added to section 75 by the Labour Relations Amendment Act of 1996.

of a collective agreement, an Essential Services Committee determination, or an arbitration award concerning maintenance services. The Act does not provide for compulsory arbitration in respect of maintenance service disputes, which means that employees engaged in maintenance services must continue working while their fellow employees are on strike, but only for the purposes of maintenance. The justification for this prohibition on the right to strike is the concern to contain collective action which goes beyond the infliction of economic harm, to the material physical destruction of the wealth-generating capacity of the working area, plant or machinery.

6.4.8 *Replacement labour*

The relevant statutory provision is section 76 which is to the following effect:

"76. Replacement labour

- (1) An employer may not take into employment any person -
 - (a) to continue or maintain production during a protected strike if the whole or a part of the employer's service has been designated a maintenance service; or
 - (b) for the purpose of performing the work of any employee that is locked out, unless the lock-out is in response to a strike.
- (2) For the purpose of this section, 'take into employment' includes engaging the services of a temporary employment service or an independent contractor."

Apart from the withdrawal of wages, the other serious disincentive for striking employees is the ability of their employer to continue production with the help of scab labour.⁷⁸ As under the previous law, employers remain free to take on scab labour. However, the Act prohibits the employment of such labour for the purpose of maintaining production during a protected strike if any part of the employer's service has been designated as a maintenance service, or for the purpose of performing the work of locked out employees, unless the lock-out is in response to a strike.

6.4.9 *Picketing*

Picketing is regulated by section 69 of the Act which is to the following effect:

⁷⁸ See "Strikes and lock-outs", in *Employment Law*, 1996, 7 in this regard.

"69. Picketing

- (1) A registered trade union may authorise a picket by its members and supporters for the purposes of peacefully demonstrating -
 - (a) in support of any protected strike; or
 - (b) in opposition to any lock-out.
- (2) Despite any law regulating the right of assembly, a picket authorised in terms of subsection (1), may be held-
 - (a) in any place to which the public has access but outside the premises of an employer; or
 - (b) with the permission of the employer, inside the employer's premises.
- (3) The permission referred to in subsection (2)(b) may not be unreasonably withheld.
- (4) If requested to do so by the registered trade union or employer, the Commission must attempt to secure an agreement between the parties to the dispute on rules that should apply to any picket in relation to that strike or lock-out.
- (5) If there is no agreement, the Commission must establish picketing rules, and in doing so must take account of -
 - (a) the particular circumstances of the workplace or other premises where it is intended that the right to picket is to be exercised; and
 - (b) any relevant code of good practice.
- (6) The rules established by the Commission may provide for picketing by employees on their employer's premises if the Commission is satisfied that the employer's permission has been unreasonably withheld.
- (7) The provisions of section 67, read with the changes required by the context, apply to the call for, organisation of, or participation in a picket that complies with the provisions of this section.
- (8) Any party to a dispute about any of the following issues may refer the dispute in writing to the Commission -
 - (a) an allegation that the effective use of the right to picket is being undermined;
 - (b) an alleged material contravention of subsection (1) or (2);
 - (c) an alleged material breach of an agreement concluded in terms of subsection (4); or
 - (d) an alleged material breach of a rule established in terms of subsection (5).
- (9) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.
- (10) The Commission must attempt to resolve the dispute through conciliation.
- (11) If the dispute remains unresolved, any party to the dispute may refer it to the Labour Court for adjudication."

*It is a fact of life that strike action is also quasi-political, in the sense that the strikers may desire and need to mobilise public support or sympathy. The right to demonstrate in support of a strike has traditionally been viewed as coercive and a threat to the public order. Under the previous labour dispensation the law of picketing was primarily based on general common law principles. Even though the Courts had accepted the existence of a right to picket, picketers still exposed themselves to civil liability based on breach of contract or

delictual principles.⁷⁹ Today the right to picket is protected in the Constitution⁸⁰ and specifically regulated in the Act.⁸¹

The Act provides detailed procedures for the orderly regulation of the right to picket during a strike. The most significant limitations on the right to picket are that it can be authorised only by a registered union, must be peaceful, can only be in support of a protected strike or in opposition to a lock-out, and must take place outside the employer's premises (unless the employer agrees otherwise). Pickets authorised by the Act may be held despite any laws regulating the right of assembly. The same protection is given to pickets in conformity with the Act as to protected strikes, with the result that an employer should be able to interdict the actions of picketers where the actions of the person involved amount to a criminal offence. The employer's other option in the case of an unprotected picket would be to utilise the provisions of section 69(8) of the Act. If this fails, the matter may be referred to the Labour Court for adjudication.⁸²

The use of section 69(8) was considered in *Lomati Mill Barberton (A Division of Sappi Timber Industries) v PPWAWU & others*.⁸³ The facts of the case can be summarised as follows: the respondent employees were involved in a protected secondary strike. In preparation for this strike, the applicant employer and the shop stewards concerned entered into two agreements, a code of conduct for picketing and a code of conduct for striking. The employer alleged that these collective agreements had been breached, and approached the court in terms of section 69(8). The fact that the aforesaid picketing code was not entered into with the assistance of the CCMA as required by section 69(8)(c) was deemed by the

79 Cf Davis & Arendse, "Picketing", *Industrial Law Journal*, 1988, 26 and Rycroft in Rycroft & Jordaan, *A Guide to South African Labour Law*, 289.

80 The Constitution states in section 17: "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions" (the right to picket, like other rights, may be limited by the operation of section 36(1) of the Constitution).

81 It should be noted that neither the Constitution nor the Act defines or describes a picket; cf 1.3.2 in this regard. See generally Landman, "The new right to picket", *Contemporary Labour Law*, 1996, 41 and Le Roux, "The Labour Court: some early decisions", *Contemporary Labour Law*, 1997, 76.

82 Pending the adjudication it may be possible to obtain interim relief in terms of section 158(1)(a) of the Act.

83 (1997) ILJ 178 (LC). See Le Roux, "The Labour Court: some early decisions", *Contemporary Labour Law*, 1997, 77-78 for a detailed discussion of this case.

Court to be immaterial. The Court also condoned the absence of conciliation by the CCMA and argued that it had the right to dispense with this requirement on the basis of the provisions of section 157(4) of the Act. The employees were accordingly interdicted from interfering with traffic entering and leaving the employer's premises and from assaulting or intimidating replacement workers, and were ordered to adhere to the picketing rules.

The Court also considered the effect of the other collective agreement pertaining to conduct during the strike. It held that, as the agreement did more than incorporate picketing rules, it could not enforce it while there was a protected strike in progress. The distinction between the two agreements was that the picketing agreement was specifically authorised in terms of the Act.⁸⁴

6.4.10 Protest action

Protest action to promote or defend the socio-economic interests of workers is regulated by section 77 of the Act which is to the following effect:

"77. *Protest action to promote or defend socio-economic interests of workers*

- (1) Every employee who is not engaged in an essential service or a maintenance service has the right to take part in protest action if -
 - (a) the protest action has been called by a registered trade union or federation of trade unions;
 - (b) the registered trade union or federation of trade unions has served a notice on NEDLAC stating
 - (i) the reasons for the protest action; and
 - (ii) the nature of the protest action;
 - (c) the matter giving rise to the intended protest action has been considered by NEDLAC or any other appropriate forum in which the parties concerned are able to participate in order to resolve the matter; and
 - (d) at least 14 days before the commencement of the protest action, the registered trade union or federation of trade unions has served a notice on NEDLAC of its intention to proceed with the protest action.
- (2) The Labour Court has exclusive jurisdiction -
 - (a) to grant any order to restrain any person from taking part in protest action or in any conduct in contemplation or in furtherance of protest action that does not comply with subsection (1);
 - (b) in respect of protest action that complies with subsection (1), to grant a declaratory order

⁸⁴ Le Roux, "The Labour Court: some early decisions", *Contemporary Labour Law*, 1997, 78 comments as follows in this regard: "This distinction may be justifiable in terms of the specific wording of the LRA. It is, however, a profoundly disturbing one. One of the underlying premises of the LRA is the importance of collective bargaining as a means of regulating relationships between employers, employees and unions. The mere fact that the employees have embarked on a protected strike should not absolve them of the duty to comply with the provisions of a collective agreement regulating their conduct during the strike".

contemplated by subsection (4), after having considered

- (i) the nature and duration of the protest action;
- (ii) the steps taken by the registered trade union or federation of trade unions to minimise the harm caused by the protest action; and
- (iii) the conduct of the participants in the protest action.

- (3) A person who takes part in protest action or in any conduct in contemplation or furtherance of protest action that complies with subsection (1), enjoys the protections conferred by section 67.
- (4) Despite the provisions of subsection (3), an employee forfeits the protection against dismissal conferred by that subsection, if the employee -
 - (a) takes part in protest action or any conduct in contemplation or in furtherance of protest action in breach of an order of the Labour Court; or
 - (b) otherwise acts in contempt of an order of the Labour Court made in terms of this section."

Under the provisions of the old Act the kind of protest action envisaged in the above section (work-stoppages such as stay-aways and mass action) would have been branded as unlawful, in contravention of section 65(1A) of the old Act and "an act of misconduct which justified...taking disciplinary action against those who participated in it".⁸⁵ The ILO's Fact Finding and Conciliation Commission (FFCC) regarded the old Act's limitation of strikes to collective bargaining matters as one of the more flagrant breaches of the right of freedom of association. The FFCC and the ILO's Committee on Freedom of Association regard it as fundamental that workers have the right to collective action in order to promote or defend their socio-economic interests.⁸⁶ The Act seeks to achieve a balance between this right and the needs of the economy by providing for specific constraints in the exercise of such collective action.⁸⁷

The ambit of the right to protest action will depend, of course, on the benevolence with which the phrase "socio-economic interests"⁸⁸ will be interpreted by the courts. In light of the inextricable connection between general socio-economic interests and politics, the phrase is likely to be interpreted generously. This would confirm the right of employees to withdraw their labour in furtherance of political objectives.⁸⁹

85 *NUM v Free State Consolidated Gold Mines Ltd* 1996 (1) SA 442 (A) at 447E-F.

86 *Explanatory Memorandum*, ILJ, 1995, 307.

87 See the definition of protest action in 1.3.2.

88 See the definition of protest action in Chapter 1 (the Act does not provide a definition of socio-economic interests).

89 See "Strikes and lock-outs", in *Employment Law*, 1997, 11 in this regard.

In *Business South Africa v COSATU & another*⁹⁰ the Labour Appeal Court (sitting as a court of first instance) was given the opportunity to analyse the provisions of section 77 of the Act.

The facts can be summarised as follows: on 23 February 1996 the Minister of Labour published a Green Paper on Employment Standards. NEDLAC established a negotiating committee on employment standards and after a number of meetings a draft Employment Standards Bill was tabled by government on 9 July 1996. After a number of meetings held between the parties the negotiations stalled and no further meetings were held after November 1996. On 18 February 1997 COSATU wrote a letter to NEDLAC in which it was informed of COSATU's "Programme of Action". The letter stated that a deadlock had been reached on "key issues such as paid maternity, working week, child labour, Sunday work, and variations" and that "if no sufficient progress has been made a general strike planned for 12 May will be sanctioned". This stimulated certain exchanges between the parties but on 21 April 1997 COSATU wrote a letter to NEDLAC giving notice of its intention to commence protest action at 12:00 on 12 May 1997. On 23 April 1997 a NEDLAC meeting was held to consider the bill and how negotiations on it should take place. On 5 May 1997 Business South Africa (BSA) launched an urgent application in which it sought a declaratory order, an interdict, and a mandamus alternatively, a request for directions in terms of section 77(2)(b) of the Act.

The majority of the Court (Myburgh JP and Froneman DJP) distinguished protest action from strike action and commented as follows on the interpretation of section 77 of the Act:

"Because of the different nature and character of the right to take part in protest action in terms of the Act, the interpretation and application of that right needs to be assessed in a broader context than the fundamental 'labour rights' which form part of the primary objects of the Act in terms of s 1. The application and interpretation of the latter takes place in the context of their contribution, in general, to collective bargaining...Not so in the case of protest action. Collective bargaining is not at stake. The extent of the right to protest action involves the weighing up of that right, taking not only the rights of employees and employers into consideration, but also, importantly, the interests of the public at large and, in a case such as this, the effect on the national economy ... of the Act. In a nutshell: the purpose of the Act does not necessarily require an expansive or liberal interpretation of s 77, in the sense that the exercise of the right to protest action must be restricted as little as possible."⁹¹

90 (1997) ILJ 474 (LAC).

91 At 481D-G.

In his minority judgement Nicholson JA dissented. He was of the opinion that protest action falls outside the context of an ordinary strike and deserves a liberal rather than a restrictive interpretation.

The Court further found that it was common cause between the parties that the provisions of section 77(1)(a) had been complied with as COSATU was a registered federation of trade unions. After stressing the importance of the remaining provisions of the subsection, the Court found that COSATU's letter of 18 February 1997 constituted compliance with the provisions of section 77(1)(b) and that its letter of 21 April 1997 complied with the provisions of section 77(1)(d), even though COSATU did not complete the Act's prescribed forms in this regard. The only question that remained was whether the "key issues" giving rise to the intended protest action was considered by NEDLAC between 18 February and 21 April in order to resolve the dispute. The majority of the Court found that the key issues had not been considered by NEDLAC and granted the relief sought, save for the interdict which the Court thought unwise to grant.

Nicholson JA dissented. He found that NEDLAC had properly considered the issues under the circumstances and would have dismissed the application, which shows just how far the elastic term "considered" can be stretched.⁹²

6.4.11 *The lock-out*

As in the previous Act, the procedural and other provisions regarding strike action apply to lock-outs.⁹³ On the face of it, the restrictions on the right to strike apply equally to lock-outs.

But, while acknowledging the right to strike, the Act does not extend the same status to lock-outs and provides only for "recourse" to the lock-out.⁹⁴

⁹² See Grogan, "First Judgements", *Employment Law*, 1997, 101 for more detail in this regard.

⁹³ Section 213 of the Act defines a "lock-out" as follows: "the exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion". See generally Le Roux, "The lock-out and the unfair labour practice", *Contemporary Labour Law*, 1994, 87 and Landman, "The right to strike and the right to lock-out in a new labour dispensation", *Contemporary Labour Law*, 1995, 85.

⁹⁴ The Act's wording follows the wording of the interim Constitution in this regard: see 6.3 for more detail. The final Constitution does not even mention the lock-out and thereby reduces the lock-out's status even further.

The Act settles the disputed question whether employers may lawfully dismiss employees in pursuance of a lock-out: they may not, since among the list of automatically unfair dismissals is a dismissal "to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and the employee" - by definition the objective of a lock-out.⁹⁵ Not only are locked out employees thus protected against dismissal, but an employer may not employ replacement labour in their stead, save where the lock-out is in response to a strike.

However, section 241 of the Constitution insulates all the provisions of the 1995 Labour Relations Act from constitutional attack until they are amended or repealed. Jordaan, "A look at the lock-out", *Employment Law*, 1997, 97 states as follows in this regard: "...The repeal of the lock-out provisions in the new LRA will not have a marked impact where employees take the initiative and embark on full-scale industrial action in support of their demands. Employers will still be permitted to take the initiative in pursuing their demands as nothing prevents them from varying conditions of service unilaterally. Repeal will, however, tilt the balance against employers faced with partially protected strikes. If only for this reason, the Act should at least allow defensive lock-outs and termination for operational reasons in instances where agreement cannot be reached on employer initiated amendments to terms and conditions of service - subject, of course, to the safeguards provided in Chapter VIII of the Act.

⁹⁵ The definition of a lock-out also does not provide for such dismissals: see "Strikes and lock-outs", in *Employment Law*, 1997, 12 in this regard.

C. COMPARATIVE SURVEY

CHAPTER 7 - COMPARATIVE SURVEY

7.1 Introduction

The previous six chapters provided an overview of the historical development as well as the state of the current law relating to strikes in the Netherlands and South Africa. Perhaps the most striking difference between the two countries in this regard is the reluctance to legislate in the field of industrial action in the Netherlands. The Dutch legislature has thus far failed to produce a statute to regulate collective action. Consequently, strike law in the Netherlands is for the greater part, judge-made law. In South Africa, however, the legislature has over the years passed a number of statutes to regulate the strike phenomenon. Ironically, the South African labour legislation does not provide more certainty than the Dutch judge-made law in respect of the law relating to strikes. In both legal systems there are a number of grey areas that will continue to generate litigation.

In this final chapter, the South African strike law of today will be looked at from a Dutch perspective. The idea is not to provide a detailed comparison, but to highlight some of the major differences and to point to some of the similarities between the two legal systems.

7.2 Substantive Limitations

7.2.1 *Right to strike conferred on individual employees*

Section 64(1) of the Labour Relations Act of 1995¹ provides that "every employee has the right to strike...".² The right to strike is thus an individual right exercised by a collectivity of

¹ Act 66 of 1995, hereinafter referred to as the Act.

² Cf also section 23(2)(c) of the Constitution of the Republic of South Africa, Act 108 of 1996, referred to

workers, and no distinction is drawn between strikes organised by trade unions and so-called wildcat strikes. In the Netherlands, the directly binding article 6(4) of the European Social Charter (ESC) speaks of "the right of workers and employers to collective action...including the right to strike...". In both South Africa and the Netherlands the right to strike is thus conferred on individual employees and not on organisations. This is in line with international jurisprudence.³

7.2.2 Collective agreements

In terms of section 65(1)(a) of the Act no person may take part in a strike or in any conduct in contemplation or furtherance of a strike if that person is bound by a collective agreement⁴ that prohibits a strike in respect of the issue in dispute. According to section 65(3)(a)(i) of the Act, a strike (or any conduct in contemplation or furtherance of a strike) is furthermore unprotected if the employee is bound by a collective agreement (or arbitration award) that regulates the issue in dispute.⁵

Under Dutch law the position is the same. Article 6(4) of the ESC speaks of "the right of workers and employers to collective action...subject to obligations that might arise out of collective agreements previously entered into." As collective agreements are legally binding contracts, the parties are also bound by any so-called *vredesplichtclausules* or "duty of peace" clauses contained therein.⁶ A distinction is drawn between a relative and an absolute duty of peace. The operation of a relative duty of peace can be compared with the regulation

hereinafter as the Constitution.

³ See 3.3.3 for more detail in this regard.

⁴ A "collective agreement" is defined in section 213 of the Act as "a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more trade unions, on the one hand and, on the other hand - (a) one or more employers; (b) one or more registered employers' organisations; or (c) one or more employers and one or more registered employers' organisations;"

⁵ It should be noted that the previous Labour Relations Act only provided for a limited "peace clause", for example, a strike could not be called if an industrial council or conciliation board agreement was binding. As most agreements were concerned with minimum terms and conditions of employment the clause was of little use. In addition, an undertaking by workers or their union not to strike for a specified period was hardly worth the paper it was written on: see Landman, "The right to strike and the right to lock-out in a new labour dispensation", *Contemporary Labour Law*, 1995, 87.

⁶ See 3.3.2 for more detail in this regard.

of an issue in dispute in a collective agreement in terms of section 65(3)(a)(i) of the Act. Similarly, the absolute duty of peace can be compared to the prohibition of a strike in a collective agreement in terms of section 65(1)(a) of the Act. Consequently, the law relating to strikes in both countries gives effect to the notion of voluntarism in labour relations.

7.2.3 Agreement requiring referral of a dispute to arbitration

In terms of section 65(1)(b) of the Act no person may take part in industrial action if that person is bound by an agreement⁷ that requires the issue in dispute to be referred to arbitration. As stated above, the Dutch law also recognises self-regulation in labour relations by giving effect to the collective agreement provision of article 6(4) of the ESC.

As regards the mechanics of arbitration procedures in Dutch practice,⁸ it is necessary to briefly refer to the Advice and Arbitration Commission, a state commission created in 1984.

The purpose of the commission is to avoid unilateral decisions by the government on the labour conditions of civil servants, and to ensure open, genuine and responsible bargaining between the parties. The commission plays an important role in countering the disparity in bargaining power between government and civil servants. Once a dispute has been referred to the commission, it reduces the likelihood that civil servants will resort to strikes. Since its establishment, the commission has given advice on a number of occasions, although it has thusfar not played a major role in the arbitration of disputes.⁹ It is not clear why the arbitration procedure in the public sector is not extended to the private sector. After all, there exists a similar disparity in bargaining power in the private sector, with an equal need for

⁷ The subsection does not refer to a collective agreement and appears to include agreements between individual employees and employers. It is doubtful whether this result was in fact intended by the legislature; cf Du Toit *et al*, *The Labour Relations Act of 1995*, 1996, 188.

⁸ The Labour Disputes Act of 1923 played an important role in the development of voluntary arbitration procedures in the Netherlands. The Act created offices for independent experts, the public conciliators, whose main duty was finding acceptable solutions to labour conflicts between parties. The public conciliators offered their assistance on request and the parties were free to make their own choice in this regard. Even though the Labour Disputes Act of 1923 was never formally abolished, it virtually ceased to operate when the tasks of the conciliators were fundamentally altered after the German invasion in 1940. The Extraordinary Decree on Labour Relations of 1945 reinstated a board of public conciliators.

⁹ Cf De Groot, "De advies- en arbitragecommissie en het recht", *Sociaal Maandblad Arbeid*, 1988, 281; Becking, "De Advies- en Arbitragecommissie Rijksdienst", *Sociaal Maandblad Arbeid*, 1992, 445; Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 54.

open and serious bargaining between management and employees.¹⁰

7.2.4 *Conflicts of interests*

Section 65(1)(c) of the Act prohibits a strike if the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of the Act. Although no mention is made of conflicts of interests or conflicts of rights, the intention of the legislature appears to be the prohibition of "rights disputes" (or what may be described under the Act as "justiciable disputes").¹¹

In the Netherlands specific mention is made of the concept conflict of interests. The directly binding article 6(4) of the ESC refers to "the right of workers and employers to collective action in cases of conflicts of interests, including the right to strike...".¹²

7.2.5 *Protest action*

In line with international jurisprudence and following the advice of the ILO's Fact Finding and Conciliation Commission, section 77 of the Act provides for protest action to promote or defend socio-economic interests of workers.¹³ In these types of action the employer is effectively prevented from meeting and unable to negotiate the strikers' demands. The demands and the objective sought to be attained are entirely beyond the employer's control. The Act does not provide a definition of the phrase "socio-economic interests", but the phrase is likely to be construed generously.

The approach followed under Dutch law to determine the lawfulness of protest action also

¹⁰ The provisions of article 6(3) of the ESC is not directly binding on the Netherlands, but it has persuasive authority and should be noted in this regard: "With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake: 1....; 2....; 3. to promote the establishment and use of the appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;". Cf Van Voorden, "Derdeninterventie in de arbeidsverhoudingen", *Sociaal Maandblad Arbeid*, 1991, 664 and Jacobs, "Post-industrieel stakingsrecht", *Sociaal Maandblad Arbeid*, 1991, 673.

¹¹ See 6.4.1 for more detail in this regard.

¹² See 3.3.1 for more detail in this regard.

¹³ See 6.4.10 for more detail in this regard.

emphasise the specific purpose of the collective action. If collective action is aimed at government policy, the Dutch Supreme Court will only allow it if the collective action is functional to collective bargaining. Those actions whose purpose clearly fall outside the ambit of collective bargaining have no claim on the protection of article 6(4) of the ESC.¹⁴ The Dutch Supreme Court thus makes a distinction between collective action aimed at government policy regarding labour conditions (which are or ought to have been the subject of collective bargaining), and purely political actions aimed at government policy of a different kind.¹⁵ Furthermore, it classifies an employer as a third party to the conflict with the result that the employer's economic interests can affect the lawfulness of the protest action in terms of article 31 of the ESC.¹⁶

In both legal systems the ambit of an employee's right to protest action remains dependent on a court's interpretation of largely vague criteria in the circumstances of each case.¹⁷

7.2.6 *Secondary strikes*

As with protest action, the Act provides separate procedural and substantive requirements for the holding of a protected secondary strike.¹⁸ Firstly, the primary strike must comply with the provisions of sections 64 and 65 of the Act. Secondly, the employer must have received written notice of the proposed secondary strike, and, thirdly, the nature and extent of the secondary strike must be reasonable in relation to its possible direct or indirect effect on the business of the primary employer.¹⁹

¹⁴ In the Netherlands there are no procedural requirements for these types of action as required in South Africa by section 77(1)(b)-(d) of the Act.

¹⁵ Even though purely political action is not protected by the ESC, it does not mean that the action is automatically unlawful. See 3.3.3.1.1 and 3.3.3.1.2 for more detail in this regard.

¹⁶ In South Africa, the specific constraints provided for in section 77 of the Act has to protect the employer's economic interests against the misuse of this form of extended industrial action.

¹⁷ It can perhaps be argued that the South African system is more flexible than the Dutch system in this regard in that the protection against dismissal can be lifted in certain circumstances: compare section 77(4) of the Act.

¹⁸ See the definition of a "secondary strike" in section 66(1) of the Act from which it appears that it "does not include a strike in pursuit of a demand and referred to a council if the striking employees, employed within the registered scope of that council, have a material interest in that demand". Cf in this regard the distinction made between "pure" solidarity strikes and other solidarity strikes (in which the rights or interests of the secondary strikers could be influenced by the primary strike) in the Dutch literature.

¹⁹ See 6.4.4 for more detail in this regard.

In contrast to the situation in South Africa, secondary strikes are rare and play an insignificant role in the Netherlands.²⁰ In 1960, the Supreme Court held that employees engaged in such action would, in principle, be guilty of a breach of contract, except if the purpose of the action was closely connected to the public interest or important moral principles. Since then the Supreme Court has had no opportunity to deal with these types of action, and the current state of the law remains uncertain.²¹

7.2.7 Wage determinations

Section 65(3)(a)(ii) and (b) of the Act provides that subject to a collective agreement, no person may take part in industrial action if that person is bound by any Ministerial determination made in terms of section 44 (similar to a wage determination) or any determination made in terms of the Wage Act (during the first year of that determination) which regulates the issue in dispute.

In the Netherlands, a different system of wage negotiation led to a different practice in this regard. After many years of government interference in wage negotiations, the Dutch Wage Act was amended in 1987.²² Since the amendment, the government could only interfere in wage negotiations if so justified by a serious threat to the national economy.²³ No such wage determination has yet been made, and in practice wages are agreed upon between the parties in collective agreements.²⁴

²⁰ See 3.3.3.1.3 for more detail in this regard.

²¹ The lower courts have in the past restricted secondary strikes on the ground that they violate the rights of the immediate employer who is not the real opponent.

²² See Bakels, *Schets van het Nederlands Arbeidsrecht*, 1992, 182-193 and Rood, *International Encyclopaedia for Labour Law and Industrial Relations*, 1995, 71 for more detail in this regard.

²³ Section 10(1) of the *Wet op de Loonvorming van 1970* provides as follows: "Onze Minister kan, indien naar zijn oordeel een zich plotseling voordoende noodsituatie van de nationale economie, veroorzaakt door een of meer schoksgewijze optredende externe factoren, het nemen van maatregelen ten aanzien van het peil van de loonkosten vereist, algemene regelen vaststellen betreffende lonen en andere op geld waardeerbare arbeidsvoorwaarden".

²⁴ In terms of section 4 of the *Wet op de Loonvorming* the Minister must, however, be notified of the conclusion of collective agreements.

7.3 Procedural Requirements

7.3.1 Referral of issue in dispute to council or Commission

According to section 64(1)(a) and (b) of the Act a strike is protected only if the issue in dispute has been referred to a bargaining council or statutory council with jurisdiction or to the Commission for Conciliation, Mediation and Arbitration (CCMA) and, thereafter, a certificate has been obtained from either the council or the CCMA stating that the dispute remains unresolved or, alternatively, a period of 30 days (or an extension of that period agreed between the parties) has elapsed since the referral was received by the council or the CCMA.

Even though there are no institutions such as bargaining councils and statutory councils in the Netherlands, the Dutch jurisprudence also prescribes certain procedural rules that must be adhered to before a strike may be embarked upon. One of these procedural rules requires that the strike may only be resorted to after serious negotiations between the parties have reached a deadlock. Another procedural rule related to this *ultimum remedium* requirement should also be noted. Even when deadlock has been reached in negotiations, the union may not organise a strike if the conflict can still be resolved by means of another legal course at the parties' disposal.²⁵ These procedural requirements, coupled with the willingness of the social partners to solve their problems by consultation and co-operation,²⁶ ensure genuine collective bargaining between the parties to the conflict.²⁷ The introduction of obligatory conciliation procedures appears superfluous against the backdrop of the effective collective

²⁵ For example, if civil servants have referred a dispute to the Advice and Arbitration Commission for its consideration, no strike may be organised until such time as the commission has reported on the dispute. Similarly, if the parties have agreed to advisory arbitration in the case of a conflict, no strike may be organised until such time as the arbitration procedure is completed. Cf HR 19 April 1991, NJ 1991, 690.

²⁶ The willingness of the social partners to solve their problems by consultation and co-operation led to the establishment in 1945 of the Foundation of Labour, a national body composed of representatives of the major employers' organisations and trade unions. The Foundation seeks to constantly promote consultation between employers and employees. It can also conciliate informally if there is consent between the social partners concerned. See Rood, *International Encyclopaedia for Labour Law and Industrial Relations*, 1993, 17-19 for more detail in this regard, as well as a discussion on the Social Economic Council (an independent tripartite body advising government on socio-economic policy).

²⁷ See the *Wet op de collectieve arbeidsovereenkomst 1927*, *Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten 1937*, *SER-besluit Fusiegedragsregels 1975* and the *Wet op de loonvorming 1970* for detail on the Dutch system of collective bargaining.

bargaining system in the Netherlands.

The provisions of section 64(3)(b) of the Act must not be overlooked. In line with the Dutch jurisprudence in this regard, the Act promotes voluntarism and self-regulation in South African labour relations and provides that the formal requirements outlined above do not apply where the parties themselves have set out their own procedures in a collective agreement.

7.3.2 Referral of issue in dispute to advisory arbitration

Section 64(2) of the Act provides that if the issue in dispute concerns a refusal to bargain, an advisory arbitration award must be made by a commissioner before notice can be given of the commencement of the strike. The intention of the legislature is that there should be no legal duty to bargain enforced by the courts.

In the Netherlands an employer has no legal obligation to bargain with a trade union, except in the case of collective dismissals²⁸ and in the case of mergers.²⁹ Nevertheless, the system of collective bargaining is generally accepted in practice and as a result no problems regarding the duty to bargain are encountered.³⁰ Bargaining generally occurs on an industry-wide basis and seldom at company level. Union activity at company level is limited and has been replaced by a system of institutional participation which occurs chiefly through works councils (*ondernemingsraden*).³¹ The works council and the employer hold joint consultation meetings at least six times a year. The Act provides works councils with a right

²⁸ The *Wet melding collectief ontslag 1976* creates a legal duty to bargain in the case of a proposed (operational requirement) dismissal of more than 20 employees: see Bakels, *Schets van het Nederlands Arbeidsrecht*, 1992, 109 for more detail on the aforesaid Act.

²⁹ The *SER-besluit Fusiegedragsregels 1975* contains procedural rules to be followed in the case of mergers.

³⁰ See Brink, "Een 'recht' op collectief onderhandelen?", *Sociaal Maandblad Arbeid*, 1988, 184 and Rb. Utrecht, 31 December 1986, 4 November 1987, NJ 1988, 676 for more detail in this regard.

³¹ A works council is an independent body of employee representatives and should be distinguished from a trade union. The Works Council Act or *Wet op de ondernemingsraden 1971* provides for the establishment of works councils in all enterprises with more than 35 employees. (A simplified form of participation also exists for enterprises where at least 10 persons but less than 35 are employed. In such enterprises the employer must hold a meeting with his personnel at least twice a year.) See Rood, *International Encyclopaedia for Labour Law and Industrial Relations*, 1995, 81 for more detail in this regard.

to information, a right to prior consultation on important company decisions, and a right to co-determination on certain specified social issues. The aforesaid statutory rights appear to imply an extension of collective bargaining to company level. However, the activities of councils are not regarded in that light. As consultative bodies they are participating in the operation of the business, rather than bargaining on behalf of employees.³²

7.3.3 Notice of the strike to the employer

Section 64(1)(b) of the Act requires that for a strike to be protected at least 48 hours' written notice of the commencement of the strike must be given to the employer.³³

The Dutch Supreme Court has developed a similar rule which requires the timely announcement of the strike. The court classified it as a weighty procedural rule which could lead to the unlawfulness of collective action if it was not observed. No fixed period is specified, and the courts generally decide after the event whether there was a reasonable lapse of time between the announcement and the commencement of the strike.³⁴

7.3.4 Balloting requirements

Even though the traditional strike ballot requirement has been abolished by the Act, it still recognises the need for democratic decision-making processes within trade unions regarding the decision whether to strike or not.³⁵

32 For this reason these bodies cannot easily be equated with the workplace forums under South African law which are essentially trade union driven institutions. Cf also Schut, "Stakingsrecht en (uitleg) cao; betekenis vredesplicht", *Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen*, 1996, 231 for detail on the interaction between trade unions and works councils.

33 This amounts to a considerable "cooling off" period in light of the fact that notice can be given only after a certificate has been issued by a council or the Commission or, alternatively, after the lapse of a period of 30 days.

34 A period of five days will in most cases be regarded as reasonable. See Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 87 and Pres.Rb. Rotterdam, 25 November 1983, KG 1983, 356 (three days' notice regarded as sufficient).

35 Section 95(5) provides as follows in this regard: "The constitution of any trade union or employers' organisation that intends to register must - (p) provide that the trade union or employers' organisation, before calling a strike or lock-out, must conduct a ballot of those of its members in respect of whom it intends to call the strike or lock-out; (q) provide that members of the trade union or employers' organisation may not be disciplined or have their membership terminated for failure or refusal to participate in a strike or lock-out if - (i) no ballot was held about the strike or lock-out; or (ii) a ballot was held but a majority of the members who voted did not vote in favour of the strike or lock-out;"

The situation in the Netherlands is different. Trade unions are treated as associations in general,³⁶ and registration is not required.³⁷ No general strike ballot requirement exists and each trade union has its own strike ballot regulations. In most unions the initiation of strike action requires the agreement of 75% of the members.

7.4 The Consequences of a Strike

7.4.1 Civil liability

In both South Africa and the Netherlands neither a delict nor a breach of the individual contract of employment is committed by an employee participating in protected or lawful strike action.³⁸

When employees embark on unprotected strike action in South Africa, the Labour Court has exclusive jurisdiction to grant an interdict or order to restrain any employee from participating in a strike.³⁹ It may also order the payment of compensation for any loss attributable to the strike. The Act creates a *sui generis* cause of action according to which a plaintiff is not necessarily entitled to the full amount of its proven damages but only to such compensation as is "just and equitable".⁴⁰

In the Netherlands, however, the Supreme Court did not leave much room for civil liability

36 An association must set out its articles of association in a notarial deed in order to conclude contracts. Only unions having explicitly stated in their articles of association that their objective is to conclude collective agreements are allowed to do so.

37 Consequently, no ballot requirement as a condition for registration exists. As in South Africa, every trade union has the right to regulate its own affairs without state interference.

38 See 4.2.1 and 6.4.2 for more detail in this regard. In South Africa section 67(8) of the Act provides that the civil indemnity falls away if an act in contemplation or in furtherance of a protected strike constitutes "an offence". The aforesaid section presumably refers to criminal offences, and corresponds with the Dutch courts' intolerance of action in support of main strikes.

39 See section 68(1)(a) of the Act.

40 Compensation is the issue and not a claim for damages. See section 68(1)(b) of the Act and the list of factors which the court must take into account to determine what the compensation should be. See also Du Toit *et al*, *The Labour Relations Act of 1995*, 1996, 198 in this regard.

in respect of illegal strike action.” This is mainly because it is recognised that striking employees would not easily know whether their action will be judged as lawful or not.⁴² As a result, an employer cannot penalise individual employees until such time as a court has decided on the lawfulness of the strike action. Where strike action is held to be illegal (i.e., not covered by article 6(4) of the ESC), individual employees are not held liable for their conduct up to that date,⁴³ provided that the strike was an official one sanctioned by the trade union.⁴⁴ But where the employees continue with strike action after a declaration of illegality by a court, they may be held liable for their actions.⁴⁵ However, the role of sanctions is insignificant in practice, as a finding of illegality is normally respected by all disputing parties.

7.4.2 Dismissal

According to section 67(4) of the Act, an employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike.⁴⁶ The protection against dismissal does not, however, preclude an employer from fairly dismissing an employee for a reason relating to the employee's conduct during

41 Cf also the view of the Committee of Experts in this regard: "The Committee is of the opinion that no violation of the Charter is involved in the application of legal provisions or principles making individual members of trade unions or employers' associations criminally or civilly liable in the event of their organisation resorting to illegal collective action, on the understanding that legislation enacted in this field be in keeping with the Charter" (*Conclusions I*, 1969/70, 39).

42 However, if it was perfectly clear to a striking employee that his or her actions exceeded the limits of lawfulness, he or she is not safeguarded against disciplinary action by the employer. This will only be the case in exceptional circumstances: see 4.2.1 for more detail in this regard.

43 Theoretically speaking, a trade union may be held liable for all damage suffered by an employer during an illegal strike. In practice, however, the employers rarely institute damages claims against the unions, mostly because of the detrimental effect such claims would have on the ongoing relationship between the social partners. See, however, the *Elka* case (discussed under 3.3.3.3) where the unions were ordered to pay damages to the two directors.

44 In the case of an unofficial (wildcat) strike, the employer may claim damages from the individual strikers. However, wildcat strikes do not have much practical significance in the Netherlands. Only a few of these strikes have broken out in the past, and no damage claims were instituted against the strikers.

45 See Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 341, who argues that damages can only be claimed from an employee if one or more of the interests under article 31 of the ESC are negatively affected by the strike action.

46 Such a dismissal would be automatically unfair in terms of section 187(1)(a) of the Act: see 6.4.2 and 6.4.3 for more detail.

the strike, or to the employer's operational requirements.⁴⁷ The Act further recognises that it will not always be fair to dismiss an employee for participating in an unprotected strike.⁴⁸

In the Netherlands - as in South Africa - the question whether strikers may fairly be dismissed is not determined by the strike's lawfulness per se. An employee may not be dismissed for participating in strike action covered by article 6(4) of the ESC.⁴⁹ As with civil liability, it is recognised that striking employees would not easily know whether their action will be judged as lawful or not. Where strike action is held to be illegal, individual employees cannot be dismissed for their conduct up to that date, provided that the strike was an official one sanctioned by the trade union.⁵⁰ However, if the employees continue with strike action after a declaration of illegality by a court, they may not automatically be dismissed. The Supreme Court stated that an employer must then take the following factors into consideration before resorting to the drastic remedy of dismissal: the duration of the collective action, the nature of the business, the length of service of the employee as well as the willingness of the employee to make up for time lost due to the collective action.⁵¹ Unlike South Africa,⁵² however, the dismissal of strikers plays an insignificant role in practice,⁵³ as a finding of illegality is usually respected by all disputing parties.

47 Section 67(5) of the Act.

48 See 6.4.3 for more detail in this regard.

49 Cf 3.4 for a discussion on the restrictions contained in article 31 of the ESC which can influence the lawfulness of collective action.

50 Even in the case of an unofficial (wildcat) strike, the employer may not automatically dismiss the individual strikers (see below).

51 Cf HR 25 November 1977, NJ 1978, 176; Duk, "Wie staakt wordt niet gestraft", *Sociaal Maandblad Arbeid*, 1988, 535; Jacobs, "De rechtspositie van de stakende werknemer", *Weekblad voor Privaatrecht, Notariaat en Registratie*, 1989, 21.

52 The new labour courts in South Africa have thus far mainly dealt with the question whether the industrial action concerned was protected under the new Act. A more thorny question will arise when employers dismiss strikers for what they perceive to be unprotected strikes. That will entail an enquiry into the vexed issue of whether employers can unleash their ultimate weapon against strikers who have not complied with the provisions of the Act. Cf Grogan, "First judgements", *Employment Law*, 1997, 102.

53 The Dutch courts view the dismissal of strikers as extremely serious and only tolerates it if exceptional circumstances exist: see Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 344. Cf the view held by the ILO's supervisory bodies in this regard: "The use of extremely serious measures, such as dismissal of workers for having participated in a strike and refusal to re-employ them, implies a serious risk of abuse and constitutes a violation of freedom of association" (*Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 1985, para 444).

7.4.3 Remuneration

In line with international jurisprudence an employer in South Africa is not obliged to remunerate an employee during a protected strike.⁵⁴ The Act provides for an exception where an employee's remuneration includes payment in kind in respect of accommodation, provision of food and other basic amenities of life. After the end of the strike the employer may recover the monetary value of the payment in kind made at the request of the employee.⁵⁵ The employer also remains bound to remunerate non-strikers for as long as they make their services available to the employer.⁵⁶

The situation in the Netherlands is similar: as long as employees strike they receive no remuneration, and neither are they entitled to social security benefits. Insofar as they are members of the trade union organising the strike, they are, however, financially supported by that union.⁵⁷ Unlike South Africa, no exception applies to the rule that an employee who is on strike loses his or her right to claim remuneration from the employer. As far as payment of wages to non-strikers are concerned, the Supreme Court have held that only employees who are prevented from working as a result of unorganised (wildcat) collective action of a protest nature are entitled to be paid by their employer.⁵⁸

54 Section 67(3) of the Act.

55 Section 67(3)(a)&(b). Cf Grogan, "Few striking changes", *Employment Law*, 1995, 91 who comments that a "surer recipe for bedeviling industrial relations in the wake of a strike can hardly be imagined".

56 *Johannesburg Municipality v O'Sullivan* 1923 AD 201. The tender of services must obviously be real and should be brought to the employer's attention: see Jordaan in Rycroft and Jordaan, *A Guide to South African Labour Law*, 1992, 72-76 for more detail in this regard.

57 See 4.2.1 for more detail in this regard.

58 See 4.2.2 for more detail in this regard.

7.5 Miscellaneous Issues

7.5.1 Essential services

Employees engaged in essential (and maintenance) services are prohibited from striking in terms of the Act. Provision is made for the establishment of an Essential Services Committee which has to decide the difficult question whether or not a certain service or part of a service is an essential services in terms of the Act. The parties can also agree on the extent to which certain minimum services will be maintained during a strike in an essential service, thus allowing for an element of self-regulation.⁵⁹

No such procedures exist in the Netherlands. The courts restrict the right to strike in terms of article 31 - the so-called public order clause - of the ESC insofar as it is "necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals".⁶⁰ The restrictions are vaguely formulated and no real assistance can be gathered from the documentation compiled by the ESC's supervisory bodies in this regard.⁶¹ The Committee of Experts did, however, indicate that a person engaged in "essential services" is prohibited from striking in terms of the article 31 restrictions. It defined "essential services" as "services whose interruption would jeopardise the existence or well-being of the whole or part of the population".⁶²

⁵⁹ See 6.4.5 for more detail in this regard.

⁶⁰ See for example Pres.Rb. Utrecht, 2 May 1986, KG no. 180/86 (a strike in the dairy industries was forbidden because of its possible negative environmental consequences) and HR 22 November 1991, NJ 1992, 508 (collective actions executed by nursing staff were held to be lawful, but certain limitations were placed on the actions: the protection of the public health played a major role in this regard). The Dutch government intends to statutorily regulate the military's right to strike in the near future (*Aanhangsel Handelingen Tweede Kamer*, 1989-1990, No. 635, 1277).

⁶¹ Cf Schut, "Collectief actierecht tegenover rechten van derden", *Nederlands Juristenblad*, 1988, 1473 and Tilstra, *Grenzen aan het Stakingsrecht*, 1994, 226 and onwards, who seek assistance in this regard from the comparable articles 8-11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. See also Heringa, *Sociale Grondrechten*, 1989, 121 who propagates a narrow interpretation of the article 31 restrictions.

⁶² *Conclusions IV*, 1975, 8. Cf also the following extract from *Conclusions XII-1*, 1992, 25: "While the Committee has accepted that, in a particularly serious economic situation or to maintain essential services, a government might be able to set certain limits to collective bargaining, any total ban on the right to bargain collectively or on the right to strike over an extended period of time cannot be accepted and in any such situation, covering the whole or part only of the work-force, a government must justify its actions on the basis of Article 31".

7.5.2 Picketing

In South Africa, picketing is comprehensively regulated in section 69 of the Act.⁶³ Picketing authorised by the Act may be held despite any laws regulating the right of assembly. The term "picketing" is not defined in the Act. In the Netherlands, picketing resorts under the generic term "collective action" in the ESC, and is in itself regarded as lawful.⁶⁴ Striking employees may, by means of peaceful action, try to convince the willing employees to also take part in the strike. Even though the regulation of picketing thus differs in the two countries, the employees have more or less the same rights and freedoms in respect of picketing.

7.6 Conclusion

The strike has become generally accepted as a weapon in labour disputes in industrialised democracies, and both South Africa and the Netherlands are no exception in this regard.

As stated above, the South African labour legislation does not provide more certainty than the Dutch judge-made law concerning the law relating to strikes. In South Africa both capital and labour are still to come to grips with the provisions of the 1995 Labour Relations Act. Although many of the Act's provisions are little more than a codification of principles that were applied before the Act came into operation, the interpretation of the new provisions creates a fair amount of uncertainty. Accordingly, the parties rely heavily on guidance offered by the courts in the interpretation of the statutory provisions.

In the Netherlands, the parties rely heavily on the courts' interpretation of the relevant provisions of the ESC. Seen from this perspective, there is little difference between the two countries. This is even more so if the purpose of the Labour Relations Act is noted. Section 1 of the Act states that one of the primary objects of the Act is "to give effect to obligations

⁶³ See 6.4.9 for more detail in this regard.

⁶⁴ The judges in the Netherlands do not readily tolerate other collective action in support of main strikes, e.g. blockades at the entrance to a business: see 3.3.3.4 for more detail in this regard.

incurred by the Republic as a member state of the International Labour Organisation". Emphasis is thus placed on the emulation of international standards, and one can assume that the South African labour courts will continue to look at international trends in interpreting the new Act.

Nevertheless, the South African law relating to strikes is regulated in much more detail than the Dutch law in this regard.⁶⁵ However, it is interesting to note that, even though different methods are used by the judges in the two countries, the same result is often achieved in both legal systems.⁶⁶

Regarding the future resolution of industrial conflict in the two countries, it is difficult to envisage the likelihood of any major changes.⁶⁷ In recent years, there has been little change in the nature or manifestation of strikes and other forms of collective action. However, the strike phenomenon is to a large extent influenced by non-legal factors such as governmental policy and the character of the employer-employee relationship, and these factors will, to a large extent, determine the future of this weapon.

Internationally, however, the strike seems to be losing some of its effectiveness in practice. Multinational companies have helped create a new "global village" society, with their influence reaching across the world. New technology and communications have helped create ways for management of such companies to circumvent the pressure traditionally exerted by strike action.⁶⁸ It can therefore be expected that the working population will continue to look at all possible ways to maintain a balance of power, including self-

⁶⁵ This is probably the result of the tremendous difference between the industrial relations systems of the two countries. In the Netherlands, there is a high degree of co-operation between the "social partners" in a peaceful social climate. South Africa, on the other hand, had a turbulent history of industrial relations which in turn led to a high incidence of industrial action. It is an open question whether the new Act will reduce the number of strikes.

⁶⁶ Cf the procedural limitations placed on the right to strike in the two countries.

⁶⁷ Cf Clarke, "Industrial Conflict: Perspectives and Trends", in *Comparative Labour Law and Industrial relations in Industrialised Market Economies*, 1990, 195, who states as follows: "There is nothing new about the successful resolution of industrial conflict: it remains, as it has always been, a function of good management and a simple, expeditious, effective and trusted set of procedures for dealing with the terms of collective relations and individual grievances".

⁶⁸ See Jacobs, "The Law of Strikes and Lock-outs", in *Comparative Labour Law and Industrial relations in Industrialised Market Economies*, 1993, 452 and Blanpain & Engels, *European Labour Law*, 1993, 227.

regulation and arbitration. The following comment by Jacobs provides an excellent summary in this regard:

"I will not be amazed if the decades to come see a growing interest in the development of new techniques, e.g. final offer arbitration, for the peaceful solution of interest conflicts in the labour market. I think the aim of every civilized society should not be to outlaw strikes altogether but to stimulate as much as possible the replacement of the use of this weapon in the resolution of industrial conflict by other less harmful techniques."⁶⁹

Fortunately, employers and employees in both South Africa and the Netherlands have shown a willingness to overcome the stumbling blocks in the field of industrial disputes. This attitude should stimulate the development of other techniques to resolve industrial conflict, and thereby streamline the law relating to strikes in the two countries.

⁶⁹ Jacobs, "The Law of Strikes and Lock-outs", in *Comparative Labour Law and Industrial relations in Industrialised Market Economies*, 1993, 453. See also generally Van der Heijden, "Post-industrieel arbeidsrecht", *Nederlands Juristenblad*, 1993, 297.

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