

# EMPLOYMENT

STRIKING OUT OF BOUNDS: CAN UNIONS STRIKE ANYWHERE FOR ORGANISATIONAL RIGHTS?

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**The Labour Relations Act, No 66 of 1995 (LRA) regulates trade union membership and the powers of trade unions. Section 4(1)(b) of the LRA provides "every employee has the right to join a trade union, subject to its constitution". The courts have held that this section must be interpreted broadly in order to provide the most protection to vulnerable employees.**

The fact that a trade union's constitution does not include a certain industry does not prevent an employee from that industry joining the union. Put differently, an employee who joins a trade union operating in a different industry will be a valid member of that trade union. The question then arises whether a union in this scenario would be able to obtain organisational rights in an industry which falls outside the ambit of its constitution?

Sections 21 and 22 of the LRA deal with, among other things, the referral of a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for organisational rights. If such a dispute remains unresolved at the CCMA, a certificate of non-resolution will be issued. At this point, the trade union has a choice to either refer the issue to arbitration or give 48 hours' notice and commence with protected strike action. Importantly, if the union elects to strike then the right to refer the dispute to arbitration falls away for a year.

There has been an abundance of disputes referred to the CCMA in which trade unions seek organisational rights in an industry that falls outside the scope of their constitutions. See, for example, the cases of *Food and Allied Workers Union v Wilmark (Pty) Ltd (1998) 19 ILJ 928 (CCMA)* and *CEPPWAWU v Pop Snacks [2009] 11 BALR 1156 (CCMA)*. In these cases, the CCMA has been reluctant to grant organisational rights to unions by way of arbitration awards.

While the previously mentioned cases dealt with disputes where the parties elected to go to arbitration, the case of *Bidvest Food Service (Pty) Ltd v NUMSA C 946/2014 [2014] ZALCCT 58 (31 October 2014)* involved the election to strike in a scenario where the employer's industry fell outside the scope of the union's constitution. The Labour Court was tasked with considering whether the union's right to strike was impeded by the provisions of its constitution. The Labour Court held that the right to strike for organisational rights is not limited by the bounds of the trade union's constitution provided that the dispute is about a genuine matter of mutual interest. While the outcome permits a trade union to call a strike to acquire organisational rights, this does not mean that they will necessarily be successful in acquiring those rights.

Employers should be cognisant of the decision in *Bidvest* as they may need contingency plans if trade unions come knocking at their doors for organisational rights.

*Fiona Leppan, Lauren Salt and Nick Wright*



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