LEGAL STRIKE PROCEDURE: AN OFTEN FLOUTED PROCESS IN MALAWI

Nearly every employee in Malawi knows that a strike is an action that can be undertaken by the employed workers in order to compel their employer to address their problem. Strike in Malawi, like in any other world country that is also a member state of International Labour Organisation (ILO), is a workers' right that has to be respected by the employers and their associations. Indeed, as put in the ILO's Freedom of Association Convention, "the right to strike is a fundamental right of workers and their organizations or trade unions". It is surprising to many Malawians, however, that strikes that take place in Malawi are often declared illegal by labour officers and courts leaving the striking employees at the mercy of their offended employers. Rumours have also often circulated that labour officers favour the employers which of course is not the case.

Why are strikes in Malawi often declared illegal yet staging a strike is the right of every worker? The answer to this question is simple only to those who know the legal procedure for staging a strike. Although staging a strike is a right for every employee, most employees in Malawi hardly know, if not partially know, the procedural steps required in order to stage a legal strike. Most of the strikes that take place in Malawi are declared illegal not because striking is illegal but rather because the legal strike procedure is somehow or somewhere flouted. Two factors account for this problem. First, as observed by some commentators including the International Trade Union Confederation (ITUC), the dispute conciliation and strike procedure as laid down in the Malawi Labour Relations Act of 1996 are too long and complicated and hence not easily followed or not usually exhausted to the extent that some workers choose to ignore them. Second, the strike procedural provisions are written in legal language which is not user friendly to most of the workers. The ultimate aim of this article, therefore, is to expose in simplest terms the required procedural steps involved in staging a legal strike in accordance with the Malawi Labour Relations Act of 1996.

To begin with, there is need, first of all, to define some key concepts that the legal strike procedure in Malawi hinges on. These key terms are "labour dispute", "collective agreement", "strike" and "lockout".

A *labour dispute*, according to Labour Relations Act, means a difference between an employer or his/her organization and employees or their trade union regarding the terms and conditions of their employment relationship. The employees can start experiencing current state of affairs that may be different from their desired state of affairs. This difference in state of affairs constitutes a problem that is referred to as a dispute.

Usually a labour dispute at any workplace may come about because of the employees being interested in having either of the following from the employer. Higher wages, improved conditions of work, enhanced benefits, frequent promotions as well as better frequency in rewards, inflation based wages (living

wages), frequent recognition and trade union's help. The demand of either of these things may result into employees conflicting with the employer who may, instead, be interested in achieving the following out of his/her workplace business operations. The employer's interests on the other hand include making profits; keeping operation costs down; realizing higher productivity; achieving company goals; ensuring company/business survival; remaining competitive and keeping trade unions' activities out of his /her workplace. Note that each of the employees' interests is in sharp contrast to each of the employer's interests hence the high likelihood for a dispute to arise. It is such a dispute, when not resolved, that may end into a strike whose procedure is the subject of this article.

Collective agreement is a written, signed and binding document between the employer or employer's organization and employees or trade union, with an effective date, containing their agreed collective bargaining rules and procedures.

The term *strike*, according to Oxford dictionary, is defined as an "organized refusal to work by employees of a company or of an individual employer because of a disagreement over an issue such as wage issue or an issue to do with conditions of service". The Labour Relations Act on the other hand defines strike as a concerted action resulting in a cessation of work by employees in a dispute with their employer. Both definitions entail a refusal to work by a group of employees usually having a common understanding or interest. The two definitions also indicate that a strike concerns two parties that have an employment relationship with each other. Thus a group of employees are one party on one hand and the employer is another party on the other hand.

A strike however must be differentiated from a lockout. A *lockout* is a temporary closure of a place of employment, or the suspension of work, or the refusal by an employer to continue to engage for work any number of persons employed by him or her. In this case, the lockout is the opposite of the strike action because it is an industrial action taken by the employer against his /her employees unlike the strike that is taken by the employees against their employer. The employer can use lockout action as a corresponding weapon to resist the collective demands of employees or to enforce his/her terms of employment with employees. Equally, the lockout is the employer's right also provided for in the Labour Relations Act. It must be noted, however, that the suspension of work by the employer as disciplinary measure or in form of lay-offs is not a lockout action.

There are four main process stages that must be observed before workers or employers can resort into a strike or lockout action. These stages are "existence of a labour dispute between the concerned parties; observance of the mandatory conciliation period; existence of a declared unresolved labour dispute between the concerned parties and observance of the strike intention notice". Details of each of these process stages have been provided in the next following paragraphs.

Existence of a labour dispute between the concerned parties

Prior to a strike action, a dispute between the employees and employer must be in existence. The dispute should be reported to the Principal Secretary for Labour who must acknowledge such a dispute report within 7 days from the dispute reporting date.

During this process stage, the disputants have an obligation to bargain in attempt to resolve their dispute on their own with reference to their agreed collective agreement procedures. If a dispute still stands upon exhaustion of all their agreed collective bargaining agreements, the law mandates the Principal Secretary for Labour to conciliate the dispute. At this point in time, the dispute settlement procedure graduates into the next process stage of the mandatory conciliation period. This is a period with a minimum of 21 days that must also be complied with.

Mandatory conciliation period

The law names the Principal Secretary for Labour to be the conciliator. However, the law allows any person authorized by the Principal Secretary to act as a conciliator. Furthermore, an authorized person by the Principal Secretary is also allowed by law to appoint another person to conciliate the dispute. This flexibility in law is aimed at ensuring that the process of dispute settlement should not be hampered in cases where there could be so many similar disputes to be attended to at the same time by the same Principal Secretary or where the Principal Secretary may be tied up with other commitments.

The question that can be asked and needs to be addressed in respect to the appointment of a conciliator is what happens in cases where one of the disputants is the government or a public institutional body controlled by the government such as the statutory corporations like ESCOM, ADMARC and Water Boards for example? In this case, the law allows the disputants to agree on the person to conciliate them. However, if it happens that the disputing parties fail to agree on the conciliator within 7 days from the date of dispute reporting, then either of the parties is allowed by law to apply to the Industrial Relations Court (IRC) to choose an independent arbitrator for them.

The 21 day mandatory conciliation period is a minimum period provided for the dispute conciliation. This means that disputants have the right to agree to extend this conciliation period if they so wish.

In the event that the dispute is settled, a certificate of settlement is written by the conciliator, signed and served to either party in a dispute. The certificate's original copy should be filed with the office of the Principal Secretary for Labour. However, in the event that the dispute is not settled after the expiry of the minimum 21 day conciliation period, then a certificate of unresolved dispute is written, signed and served to either party in a dispute with its original copy filed

with the office of the Principal Secretary for Labour. At this point, the dispute is declared unresolved dispute.

Existence of the declared unresolved dispute between the concerned parties.

The declared unresolved labour dispute between the employees and employer must indeed be in existence. The dispute must be declared unresolved by the dispute conciliator through writing.

There are three conditions that would qualify a dispute to be unresolved. These are if a minimum of 21 day mandatory conciliation period has elapsed from the dispute reporting date; if one of the parties fails to attend the conciliation proceedings without informing the other party and the conciliator; and if the parties fail to reach an agreement on the dispute settlement. A combination of the first condition and any one of the other two conditions or both of them necessitates the dispute conciliator to declare the dispute unresolved. This means that an unresolved dispute can be in existence but not yet as a necessity for either of the parties to a dispute to issue a strike notice, until the 21 day conciliation period expires.

The Industrial Relations Court in this process stage, like in the first process stage, has a role to play in respect to the unresolved labour dispute. It is mandated, upon receiving an application from either party to the unresolved dispute, to determine their dispute that involves all or one of the following: the interpretation or application of any statutory provision; the interpretation or application of a collective agreement provision; the interpretation or application of a contract of employment. In addition, the court has a role to determine the parties' unresolved dispute that concerns essential services, in the same manner, upon receiving the application to do so from the Principal Secretary for Labour.

Furthermore, parties to the unresolved dispute that does not involve either the interpretation or application of statutory provision, contract of employment and/or collective agreement provision or the essential services, provided they agree, can refer their dispute to IRC for determination.

It must be noted that it is a law requirement for the Principal Secretary for Labour or for either of the party to the unresolved dispute involving the essential services and interpretation or application of some of the parties' employment issues respectively, to refer to IRC for determination. Hence such a requirement must be observed if particular parties' unresolved dispute calls for such a requirement.

The existence of the declared unresolved dispute if not pending in a court of law for determination and if it does not concern workplace employees involved in the delivery of essential services calls for either party to the dispute to take an industrial action upon serving a notice to either party according to the law.

Observance of the strike intention notice

Once the unresolved dispute is not pending in a court of law for determination and if it does not concern workplace employees involved in the delivery of essential services, the law necessitates either party to a dispute intending to strike or lockout to serve a 7 day notice to the other party with a copy to the Principal Secretary for Labour. It is within the emphasis of the law that only after the expiry of the 7 day notice period, can the party with strike or lockout intention, proceed with the action otherwise the strike/lockout action would still be illegal if done before the expiry of the 7 day served notice.

In summary, the Malawi Labour Relations Act of 1996 provides for the industrial dispute (strike/lockout) settlement process procedure that has 7 days between reporting and acknowledging receipt of the report; 21 days from the date of acknowledgement of the report to the end of conciliation process period; and 7 days from the end of the conciliation process period to a strike/lockout. This gives a minimum total of 35 days (i.e. 7 + 21 + 7) before a strike or lockout, which can be legally supported by law, takes into effect. The term *minimum* fits here because, more than 35 days before the strike or lockout action takes place is allowed by law in cases where the parties agree to extend their conciliation period beyond the prescribed 21 day conciliation period.

This means that every strike action in Malawi must precede the observance of a 7 day strike intention notice that is written by either party to the unresolved dispute with the intention to stage a strike having copied the other party and the Principal Secretary for Labour. The issuance and observance of the strike intention notice must precede the declared unresolved dispute by the dispute conciliator following the expiry of the 21 day minimum mandatory conciliation period whenever the parties' unresolved dispute does not concern workplace employees delivering essential services nor does the dispute pends in a court of law for determination. The observance of the mandatory conciliation period must precede the existence of a labour dispute that should have been reported to the Principal Secretary for Labour for the purpose of conciliation following the Secretary's acknowledgement of the reported dispute, to be done within 7 days from the dispute reporting date, and the exhaustion by the disputants of all their agreed collective agreement procedures if any.

The 35 days minimum total is the only accepted procedural time frame provided for in the Labour Relations Act which when followed shall help to overcome the challenge of which most employees in Malawi stage strike actions that are illegal having flouted the law required process. It is therefore high time Malawians especially the employees got interested to read, to know and to apply the strike procedure that would help them exercise their right to strike in responsible manners and within the requirements of our own adopted laws.

Author of this article: Mr Kalani FM. Malema, District Labour officer for Rumphi.