

A CRITICAL STUDY OF THE RIGHTS OF WORKERS TO STRIKE IN ZAMBIA

BY



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
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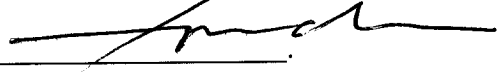
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ABSTRACT

The rights of the workers to strike is the only weapon left in the hands of the workers to fight for improved salaries and better conditions of employment. This right must be protected by ensuring that the law in place does not impede the workers from carrying out a legal strike. The strike in its broad significance has a reference to a dispute between an employer and his or her workers, in the course of which there is a concerted suspension of employment. Because it is an expensive weapon, the strike is generally labours' last resort in connection with industrial controversies.

This essay examines the rights of the workers to strike in Zambia and how the workers have been afforded such rights. It further looks at the international provisions on the right of the workers to strike and the conditions attached to the enjoyment of these rights. The essay examines at the protection given to these rights and how far that protection goes. The essay further identifies difficulties in the local law that make it difficult for the workers to go on a legal strike. The essay observes that the workers can not go on a legal strike because of the requirements that seem to be too difficult to be met by the workers and their unions. The Labour and Industrial relations Act, Chapter 269 of the Laws of Zambia, is of no help in workers taking a legal strike because of the provisions of having a strike ballot in the law for workers to legally strike. In conclusion the essay acknowledges these problems in the Industrial and labour Relations Act and hopes that the law could be reformed by making necessary amendments to the statute.

It is my sincere hope that this paper will contribute to the understanding of the rights of workers to strike and why certain strikes re termed as illegal and or legal strikes in Zambia.

Willie Daniel Chalwe

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STATUTES.

1. Constitutional of Zambia, Chapter 1 of the Laws of Zambia.
2. Employment Act, Chapter 268 of the Laws of Zambia
3. Medical Examinations of Young Persons Act No. 20 of 1973
4. Industrial and Labour Relations Act;- s.3, s.5, s.69, s.70, s.75, s.76, s.78, and s.101
5. International Covenant on Economic Social and Cultural Rights, Article 8 paragraph 1 (d).

International Statutes

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4. South African Constitution – Article 23 (1) and (2)
5. Trade Union and Labour Relations (Combination) Act 1992 of United Kingdom s.238, and s. 273.

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2. Bank of Zambia v Kasonde (1997) ZR 238
3. Barclays Bank (Z) Ltd v Chola and Mubanga (1997) ZR 212
4. B. R. Singh v Union of India (1989) 11 Lab LJ 591
5. Cassidy v Minister of Health [1951] 2 QB 343
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18. Summons v Hoover [1977] ICR 61
19. Van Gender Loos [1963] CMLR 105 ECJ
20. Young G James & Webster v UK [1981] 1 RLR 408 ECHR
21. Zambia Breweries Ltd v Whisky Kawisha (1994) ZR 32
22. Zambia Consolidated Copper Mines Ltd v Matale (1995 - 1997) Z.R 144
23. Zambia Sugar PLC v Fellow Nanzaluka (2001) SC Appeal No. 82 of 2001

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CHAPTER ONE

1.0 INTRODUCTION

1.1 Introduction

This research essay is about the rights of the workers to strike on the one hand and on the other hand there is the Act¹ in place that seems to be too rigid on the workers to go legally on strike unless certain processes² are complied with. The research tries to explore the Zambian law as well as the international law³ on the rights of the workers to strike. It further explores the legal rights of workers to strike, and restrictions on workers and their organisations to take industrial action.

The aim of the research is to critically examine the law relating to the rights of workers to strike and consider whether or not such rights exist. The essay will look at the Zambian legislation as well as the international law if such rights exist and to what extent they go. In doing so, the essay will consider how easy is it for the workers to go on a legal strike. It will also consider the local law that require workers to follow a defined process before going on a legal strike. It will further discuss why other processes like the mediation and arbitration process are not easily resorted to in times of a crisis in resolving the industrial disputes.⁴

In this essay the words industrial action and strike are used interchangeably but in essence they are talking about one and the same thing, so are the words of employees, workers and workmen which are also used in this research interchangeably as well to mean one and the same thing that of employees.

¹ Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia

² Industrial and Labour Relations Act. Cap 269, Section 78,

³ International Labour Organisation Conventions and Recommendations

⁴ Industrial and Labour Relations Act, Section 75,

1.2 Statement of the problem

The law regulating industrial action is the most politically contentious area of employment law, largely because of the propensity of industrial action to affect people who are not parties to the dispute.⁵ Where a strike affects the general public, there is likely to be a feeling that workers should not have the freedom to take industrial action because of its disruptive effect on the community.

The possibility of a strike action is a necessary weapon for the workers to have in their armoury, because it is only by the threat of collectively withdrawing their labour, or actually doing so, that they have any power. They cannot rely on the employer dealing with them fairly. In 1966 Grunfeld wrote that:-

“...if one set of human beings is placed in a position of authority over another set, to expect the former to keep the interests of the latter constantly in mind and, for example, to increase the latter’s earnings as soon as the surplus income is available...it is to place on human nature a strain it was never designed to bear.”⁶

It is not easy to participate in an industrial action in Zambia which is lawful and yet the incidences and scale of unlawful industrial action in Zambia is of public concern⁷ as they happen on an annual basis thereby disrupting industrial harmony and productivity in the nation. The country faces strikes of all kinds and most of these strikes are illegal as witnessed recently by the nurses and the teachers.⁸

The records indicate that there has been one legal strike in Zambia.⁹ Does it mean that the law that regulates industrial relations when it comes to strikes is ineffective or is it that the people themselves are so disobedient to the law? The right to strike is a workers right and therefore

⁵ Gwyneth Pitt, (2007) Employment Law, Sweet and Maxwell, London. Pg 347

⁶ C. Grunfeld, (1966) Modern Trade Union Law, Sweet and Maxwell, London. Pg 256.

⁷ Times of Zambia July 5, 2009 pg 1. RB Visits the Copper belt.

⁸ Rupiah Banda President of Zambia, Sunday Mail July 5, 2009 pg 1. RB saves striking nurses

⁹ Afro News. 19th.February, 2004. Zambia’s first strike in 20 years. An estimated five thousand members of Of the Zambia Congress of Trade Union and the Federation of Free Trade Union of Zambia took part in what was termed as the strike “over tax hikes and the frozen wages”.

that right to strike of any workers should not be denied to the workers if their economic, social and working conditions at their work place are not conducive enough to enable them work quite peacefully and if the employer does not take steps to improve on them.

The right to strike is internationally recognised¹⁰ as one of the fundamental instruments available to workers to balance the unequal economic power relations between the workers and the employers. The right to strike is an essential right, the right of every citizen, of every worker, to associate with others¹¹ and withdraw his labour, to go on strike. This right of workers to withdraw their labour is guaranteed by international treaties. As Novitz points out that;-

“mounting awareness that modern erosion of democratic participation and human rights protection, including provision for workers’ rights, necessitates greater coordination between international and regional organisations.”¹²

The central issues of labour law are the central issues of our society. How much state regulation¹³ should exist? Can economic justice be defined and administered, or must the free market be given more play? Is there a breakdown in order as competing interests vie for public sympathy and support? The drive now should be to move towards deregulation driven by competitive pressures inherent in globalisation and the growth of free trade. Regardless labour law continues to be a major component of labour relations and collective bargaining.¹⁴ In this regard is the Zambian law on labour relations that relates to strikes compatible with the times and season? This essay therefore examines Zambian law as it relates to strikes and to see whether it infringes on the rights of the workers to take industrial action when there is a need.

¹⁰ International Labour Organization Conventions No 87 of 1948

¹¹ Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 21.

¹² Novitz T. (2003) International and European Protection of the Right to Strike, A comparative Study of Standards set by the international Labour organisation, the council of European Union. Oxford, Oxford Press.

¹³ Through Acts like the Industrial and Labour relations Act Chapter 269 of the Laws of Zambia.

¹⁴ Industrial and Labour relations Act, Cap 269 of the Laws of Zambia, s. 69 and s.70

The essay therefore discusses the rights of workers to strike. It focuses on the rights of the workers to strike in relation to the law of the land as it relates to taking industrial action. The law gives workers the rights to organise themselves in organisations such as trade unions of their choice.¹⁵ The Constitution of Zambia gives this right to the workers under Article 21. (1). In Article 21. (1), of the Constitution the right of workers to form a trade union and belong to one without hindrance or want.¹⁶ Further the constitution provides for protection against slavery and forced labour.¹⁷ This can be seen as the basic provisions of the human rights in these two Article provisions.

The Industrial and Labour Relations Act Chapter 269 of the laws of Zambia governs the operations of trade unions, industrial action, and the relationship between employers and unions. The Act in Section 5 (1) (a) gives the employee the right to take part in the formation of trade union and the right to belong to a trade union of his choice.¹⁸

An employee who has reasonable cause to believe that the employee's services have been terminated or that the employee has suffered any penalty or disadvantage for exercising an employee's rights may bring up his complaint to the industrial relations court¹⁹ within reasonable time. Industrial action which has been endorsed by a trade union is regarded as official action for the purpose of the law.²⁰

Article 21 of the Constitution of Zambia provides for the right to freedom of assembly and association. The Article states, *inter alia*:-

¹⁵ Constitution of Zambia, Article 21(1)

¹⁶ Constitution of Zambia, Article 21 (1)

¹⁷ Constitution of Zambia, Article 14

¹⁸ Industrial and labour Relations Act, Chapter 269. Section 5.

¹⁹ Industrial and Labour Relations Act, Chapter 269. Section 5(4).

²⁰ Industrial and Labour Relations Act, Cap 269. Section 78(3).

“...no person shall be hindered in the enjoyment of his freedom of assembly and association...in particular to form or belong to any political party, trade union or other association for the protection of his interests.”²¹

1.3 Objectives

The objectives of this research are;

- To understand the rights of workers to strike in Zambia given that the law demands that a process²² has to be exhausted before one embarks on taking an industrial action.
- To understand why workers in the country go on illegal strikes without exhausting the due process as provided for in the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.
- To study and understand the laws regulating industrial relations in the country and see whether the restrictions that are imposed on labour unions are equitable and justified.
- To study the international law on the rights of workers to strike and see whether they are in consonant with the Zambian laws.
- To investigate why there are many illegal strikes in the country and the causes of these industrial disputes despite there being a law that regulates industrial relations in the country.
- To study and understand whether the requirements placed on the labour movement to follow a defined process by the law are justified and to see whether there are some things that can be done to make striking legal.

²¹ Constitution of Zambia, Chapter 1 of the Laws of Zambia Article 21

²² Industrial and Labour Relations Act, Cap 269 Section 78,

1.4 Chapters and their titles

Chapter 1 is the Introduction chapter. It contains the statement of the problem, the methodology that the research will take, the objectives of the research and the rationale behind the research topic to be undertaken.

The title of Chapter 2 is “The right to strike.” In this chapter strikes are defined and the types of strikes that are there are given out. This chapter also explains the purposes of the strikes and the consequences of going on illegal strikes, highlighting different outcomes of legal and illegal strikes. It also discusses the unfair dismissal of a person on strike and how one can claim for unfair dismissal.

Chapter 3 is on “The law and the right to strike.” In this chapter the Constitutional provisions are discussed on the rights of the worker to strike and to see whether the right to strike is protected by the Constitution. The Industrial and Labour Relations Act provisions on the right of the workers to take industrial action are discussed as well as the international standards on the rights of workers as well.

Chapter 4 is on “The way forward in striking legally.” This chapter looks at strategies that can be put in place for the workers and their unions to go on lawful strikes as opposed to the situation now. The chapter also discusses the internal controls that could help in fostering industrial harmony; the training of the union leaders in understanding the law on illegal strikes is discussed as well. It further highlights the shortcomings that are in the statutes.

Chapter 5 will be the Conclusion. In this chapter the essay is concluded by looking at the way forward, summarising the points of discussion brought out in the essay pointing out how future strikes could be avoided stressing on the internal controls that can be strengthened. It then finally concludes the discussion of the essay.

1.5 Research questions

The essay seeks to address specific questions that are posed in this research with a view to generating knowledge that may be useful in understanding the causes of unlawful strikes in Zambia. In this regard chapter one introduces the topic of discussion and the methods that were used to do this research.

Chapter two defines what a strike is and discusses the consequences arising out of these strikes. It also attempts to find out the answers to the question of “Are people going on illegal strike just disobeying the law as provided for in the Act or is it that the law as given in the Act is too rigid to take a lawful strike? The main purpose of this question is to examine whether the law relating to industrial action conflicts with the rights of workers to strike.

In chapter three the research questions to be considered and answered are whether the law that limits the rights of the workers to take industrial action is to all purposes and intents justifiable, and whether the provisions in the Act²³ do address all the concerns. The main purpose of these questions are to identify the short comings if any in the Industrial and Labour Relations Act and to examine what impact the international labour law has on our Zambian law and the rights of the workers.

Having analysed the short comings in the Zambian law and the impact that international law has on the rights of workers and the Zambian law, chapter four looks at the question of what strategies can be used to help regulate industrial relations, with suggestions given on some of the things that may be done to reduce on the infringements on the workers’ rights to take industrial action which is lawful. Chapter five makes a conclusion of the essay on the right to strike in Zambia, it summarises the essay bringing out the salient features of the topic of discussion of the essay on the right to strike.

²³ Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia.

1.6 Rationale of the Research

The frequency of strikes in Zambia has posed a great challenge to the labour movement, the workers themselves, workers employers and the politicians who are charged with the responsibility of maintaining industrial harmony.²⁴ However it would appear that there has not been enough research done in this field in the country on the right to strike and on minimising the unlawful industrial actions that are happening on an annual basis.

The strikes are embarked on by the workers and their unions fully aware of the law of what is required of them to follow and exhaust the channels²⁵ that are laid down for them to make a strike legal and yet they do just that which is forbidden of them. The researcher is also motivated by the seemingly attitude of the people to take industrial action disregarding the law which is there and when things don't seem to go well there are pleas for forgiveness and mercy²⁶ on the workers by their unions. The going on strike by essential workers and when they are not allowed and without putting in measures to attend to problems has been a motivation to find out why this is done in this way and has been of great concern to the author.

1.7 Methodology

The study examines the various pieces of Zambian legislation which include the Employment Act, the Industrial and Labour Relations Act and the Constitution of Zambia. It further examines the international provisions as provided by the International Labour Organisation which are given as Standards and Recommendations.²⁷

²⁴ The Post July 5, 2009 pg 1, Nurses end strike

²⁵ Industrial and Labour relations Act, Chapter 269 of the Laws of Zambia. s. 76

²⁶ Times of Zambia, 7th July 2009 pg 3. Healthy Union pleads for forgiveness of striking nurses.

²⁷ International Labour Organization Convention No. 87 and Convention No. 98

Interviews with some officials from the Ministry of Labour, Zambia Congress of Trade Unions, Federation of Free Trade Unions in Zambia, Zambia Federation of Employers, Zambia National Union of Teachers, the local office of the International Labour Office shall form part of the research.

The study shall rely mainly on the library and desk-top research which involve the analysis of the legislation and other documentation like books and publications, media reports and internet based information and decided cases. All these sources were reviewed as an on-going process for the duration of the research.

1.8 Literature Review

The problem of appropriation the fruits of other peoples labour, the exploitation of man by man was of concern. It is this relationship to the means of production and the manner of its contribution of wealth which bring about the problems of strikes in industry.²⁸ In the absence of proper legal machinery or devices of dealing with grievances of the workers, the only remedy of the workers is to revolt by way of strikes with a view of compelling the employer to attend to their demands. In return the employer may dismiss or cause the strikers to be arrested where strikes are illegal.²⁹ Labour rights are human rights which women and men have with respect to the employment and working arrangements.³⁰ The ultimate source of labour rights is the Universal Declaration of Human Rights³¹ which provides that;

1. Everyone has a right to work, to free choice of employment, to just and favourable conditions of work and to protection against employment.
2. Every one without discrimination, has the right to equal pay for equal work

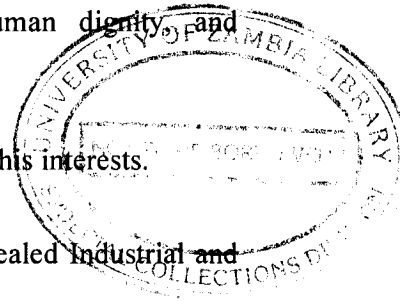
²⁸ Chimansa Chisumo C. 1978, Obligatory essay. An Analysis of Zambian Industrial Relations prior to independence to date viewed from the perspective of the rights of workers.

²⁹ Ibid

³⁰ Banji Michelo, 2004 Obligatory essay. The labour standards in the civil service: An overview.

³¹ United Nations Charter.

3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity and supplements, if necessary, by other means of social protection.
4. Everyone has a right to form trade unions for the protection of his interests.



Lufungulo Evans³² on the other hand says that the enactment of the repealed Industrial and Labour Relations Act of 1971³³ introduced far reaching effect and revolutionary impact to improve the industrial relations in Zambia the central features he points out were that; Establishment of the Industrial Relations Court under part VII of the Industrial and Labour Relations Act of 1971 now under part XI of the industrial and Labour Relations Act of 1993, the introduction of the concept of collective bargaining and its legal regulation and the provision of a legal framework for the settlement of disputes.

Chris White³⁴ also writes that the right to strike is seen as a human right, although justified on social ground where, quoting Ewing, he sees a convergence of the justifications for the right to strike. The traditional and social arguments and the civil and political justification for the right to strike are joined by a human rights justification. There is renewed advocacy for the right. International labour law is joined by human right. Ewing³⁵ goes on to show that the right to strike has interesting features. A human right is inalienable in that it cannot be abrogated by the state or by the individuals. Human rights are individual and unequivocal. The exercise of human rights has in the practice been made possible by the state. Although an individual right, the right to strike is exercised in combination; individuals organising collectively, especially in unions where they are fully protected.³⁶ The individual on strike

³² Lufungulo Evans, 1989 Obligatory essay, Impact of Industrial Relations Court. A critical study.

³³ The Industrial and Labour Relations Act. Act No 36 of 1971.

³⁴ Chris White, The Right to Politically Strike: The case for re-evaluation. School of Law, Flinders university, Adelaide. A paper for the 2005 Association of Industrial Relations Academics of Australia and New Zealand.

³⁵ Ewing K.D (1989), The right to strike in Australia: 2 Australia Journal of Law 18.

³⁶ Industrial and Labour Relations Act, s. 78 (3)

has a firewall protection. Apart from losing wages no other penalties can be imposed. A worker cannot be dismissed or discriminated against for going on a legal strike. In our globalisation network economics, individual protection is arguably still important in work place relations.

This human right to be effective requires immunity from common law sanctions. The strike action as a human right action its scope is wider than bargaining on social economic issues. It can be used to respond to the political attacks on workers individual rights. Individuals should have the freedom to determine how the right to politically protest with industrial action should be exercised and for what purposes. If the right to strike is a human right then workers must be free to determine the causes they will promote by using it, just as the same way that we do not censor the purposes that may be promoted by the exercise of the right to freedom of assembly.

From the foregoing Chimansa³⁷ does not discuss the rights of the workers to strike he only discusses strikes in a passing way and not bringing in the law that was there which is repealed now. The essay does not touch on the provisions of the Industrial and Labour Relation Act, neither does it touch on the International law as provided by ILO. Banji Michelo³⁸ also does not discuss the issue of the rights of workers to strike a subject of my discussion. Chris White³⁹ and Ewing⁴⁰ on the other hand try to discuss the right to strike as a human rights issue that confronts the political issues. My essay will discuss the right of workers to strike as a labour right which the members can use to compel the other party to come to terms with them.

³⁷ Ibid

³⁸ Ibid

³⁹ Ibid

⁴⁰ Ewing K. D (1989), "The right to strike in Australia", 2 Australia Journal of Law 18.

In 1993 through Act number 27 the Zambian Parliament enacted the Industrial and labour Relations Act, Chapter 269 an Act⁴¹ meant to the regulate industrial relations in the country. In the Act we find the law relating to trade unions the Zambia Congress of Trade Union, employers' associations, Zambia Federation of Employers.' This Act regulates collective bargaining and agreements, the settlement of disputes, strikes, lockouts, essential services and the tripartite Labour Consultative Council. It also establishes the Industrial and Labour Relations Court. The question to be asked is whether the provisions of this Act are adequate to forestall any industrial disputes. It would appear the frequency of these strikes suggests that the law regulating industrial relations in the country might not be adequate enough to address the frequent strikes of workers. The looks at what possible gaps if any that could be addressed in the legislation.

1.9 Conclusion

The right to go on a legal strike is every worker's right. It a right that is available to an employee to use as a last resort to push forward his demands for improved conditions of service. Ordinarily a legal strike is possible if employees have followed the right procedures and are using it to exert pressure upon their employer in order to improve the conditions of their employment. A strike is unlawful if it done without following the laid down procedures and processes in the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.

⁴¹ Industrial and Labour Relations Act, Chapter 269 of the laws of Zambia.

CHAPTER TWO

2.0 THE RIGHT TO STRIKE

2.1 Introduction

This chapter centres on the right to strike. In employment law when a worker goes on strike he breaches a fundamental rule of the contract of employment because of contractual liability which is in force all the time, for it is expected for the worker to work and not to strike.⁴² In this chapter strikes are defined and the types of strikes that are usually embarked on by the workers are given.

It further highlights the purposes of strikes; because there has to be a purpose for embarking on an industrial action otherwise it would be pointless to do so. The chapter will show the consequences of going on illegal strike. It looks at the contractual obligations of workers in relation to their going on strike.

The good things and the bad things that come out strikes are discussed in detail so as to get a better understanding of what repercussions can be with illegal strikes. After this then the essay discusses the rights of striking employees to claim for wages and salaries, the right to reinstatement and the claim for unfair dismissal and when it can be claimed. The chapter shows to what extent the employee has the right to be reinstated after he has been on a legal strike and then at the end make a conclusion of the chapter.

2.2 Strikes defined.

A strike is a collective stoppage of work by employees undertaken in order to pressure upon those who depend on the sale or use of the products of their labour.⁴³ Ludwig Teller in his

⁴² *Simmons v Hoover Ltd* [1977] ICR 61

⁴³ S. N. Misra, (2007) *Labour and Industrial Laws* 23rd Edition, Central Law Publications, Allahabad. Pg 149.

book, “Labour, Disputes and Collective Bargaining,” says that;-

“the word ‘strike’ in its broad significance has reference to a dispute between an employer and his workers, in the course of which there is a concerted suspension of employment, because it is an expensive weapon, the strike is generally labour’s last resort in connection with industrial controversies.”⁴⁴

The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia however defines a strike as “the cessation of the work or withdrawal of labour contrary to the terms and conditions of a contract by a body of persons employed in an undertaking acting in combination; or a concerted refusal or refusal under a common understanding of a any number of persons who are so employed to continue to work or provide their labour.”⁴⁵

The word “strike” has been going constant transformation around the basic concept of stoppage of work or quitting of work by employees in their economic struggle with capital. In order to constitute a strike in its technical sense it is necessary that there should be cessation of work but it is not necessary that there must be total suspension of work because even partial stoppage of work would be a strike. Thus cessation of work for short duration will also be a strike. The term “concert” as used in the definition means “to accord together”. Thus an individual who absents himself to enforce a demand for higher wages shall not constitute a strike. Mere cessation of work does not come within the purview of strike unless it can be shown that cessation of work was a concerted action for the enforcement on an industrial demand.⁴⁶

The term strike therefore postulates three main ingredients, namely (i) plurality of employees, (ii) cessation of work or refusal to do work, and (iii) combined or concerted action. Go-slow would not technically be a strike though go-slow tactics also are generally resorted to by workers for compelling the employer to yield to their demands. Workers have the right to

⁴⁴ Ludwig Teller, (1993) Labour Disputes and Collective Bargaining, Butterworth, London. Pg 142

⁴⁵ Industrial and Labour Relations Act, s. 3

⁴⁶ Indian Iron Steel Co. Ltd v Its Workmen (1967) 1 LLJ 381

strike but there is no such right to adopt go-slow tactics which are more reprehensible in character than strike.

The word strike therefore stands for the concerted cessation by workers of their work with the object of halting the activities of a given establishment or paralysing such activities to a considerable extent, or any abandonment by workers of their work in accordance with a decision taken to that effect by an organisation.

The strike in industrial relations is therefore an organised work stoppage carried out by a group of employees, for the purpose of either enforcing demands related to employment conditions on their employer or of protesting unfair labour practices. Strikes have been called for political purposes. They are conducted most frequently by workers organised into trade unions. In other words a “strike” is the term given to industrial action by workers who refuse to work or decide to form a picket outside the workplace to dissuade normal working practices.

The determining factor of whether a strike is afforded legal protection is, under normal circumstances, dependant on whether or not it was organised pursuant to the pertinent rules.⁴⁷

The remit of protection afforded striking workers is largely determined by whether or not the strike is official or unofficial. Protected industrial action is for most practical purposes likely to be official strike. It is an act or series of acts which an employee is induced to commit by an act which by virtue of it is not illegal. This means that if the circumstances are that a trade union can take advantage of the immunity provided for trade unions operating in contemplation or furtherance of a trade dispute.

2.3 Purposes of strikes

The strike must also have a purpose, such as to induce or compel the employer to agree to

⁴⁷ Industrial and Labour Relations Act, Chapter 269 of the laws of Zambia.

any demands concerning the terms or conditions of employment, or refrain from making changes in the conditions of employment. The purpose can also be to compel the employer not to dismiss an employee or reinstate a dismissed employee.

The principle tactic aim of all the strikes is to achieve the total suspension of work within the employer's establishment. The most widely means of achieving this aim, invoked after the workers quit work and left the business establishment, is the practice of picketing.

The purpose can be like what Shoprite workers had achieved during their two days strike in which their union Secretary General⁴⁸ said the workers had decided to go on strike to pressure management to enact a pension scheme. Shoprite management was not responding enough to their demands for a pension scheme which resulted in the workers to go on a strike to compel management to act fast,⁴⁹ and after the workers went on strike Shoprite Zambia management agreed to give its employees a pension scheme based on the local conditions as demanded by the workers.

2.4 Types of strikes

Strikes can be divided into two main basic types:⁵⁰ economic and unfair labour practices. An economic strike seeks to obtain some type of economic benefit for the workers, such as improved wages and hours of work, or to force recognition of their union. An unfair labour practice strike is called to protest some act on the employer that the employees regard as unfair. There are however so many strikes taking place everywhere these days. When a strike takes place against the will of the leadership of the union, or without the union, it is known as a wildcat strike.⁵¹ In many countries, wildcat strikes do not enjoy the same legal protection as

⁴⁸ Mr. John Bwalya Secretary General – National Union of Commercial and Industrial Workers Union (NUCIW)

⁴⁹ Times of Zambia August 12, 2009. Shoprite workers end strike.

⁵⁰ Gerald N. Hill and Kathleen T. Hill (2005), A Lexicon of Labour Strikes, New York. Pg 2

⁵¹ Ewing K.D. (1989) "The right to strike in Australia" 2 Australian Journal of Labour Law 18.

a standard union strike, and may result in penalties for the union whose members participate. There is then a walkout which is unannounced refusal to perform work.⁵² A walkout may be spontaneous or planned in advance and kept secret. If the employees walkout it is an irresponsible or indefensible method of accomplishing their goals, a walkout is illegal.

The other frequently used in the country is a slowdown or go slow,⁵³ which is an intermittent work stoppage by employees who remain on the job. Slowdowns or go-slows are usually illegal because they give the employees an unfair bargaining advantage by making it impossible for the employer to plan for production by the workforce. An employer may discharge an employee for a go slow.⁵⁴

A sit-down strike⁵⁵ is one in which employees stop working and refuse to leave the employer's premises. These are illegal under the circumstances. A sympathy⁵⁶ strike on the one hand occurs when a union stops work to support the strike of another union. A sympathy strike is work stoppage designed to provide aid and comfort to a related union engaged in an employment dispute. Although sympathy strikes are not illegal, unions can relinquish this tactic in a collective bargaining agreement.⁵⁷

A lockout on the other hand is a weapon in the hands of the employer. This is when the employer closes down a place of employment or suspension of work, or refusal by an employer to continue to employ any number of persons employed by him, as a result of a dispute, and done with a view of compelling those persons, or to aid another employer in

⁵² Ibid

⁵³ The members of UNZALARU went on a go slow during the month of July to press their Council to increase their salaries to about 15% as opposed to the 5% that the Council offered them.

⁵⁴ National Coal Board v Galley (1958) 1 W.L.R 16

⁵⁵ Gerald N. Hill and Kathleen T. Hill (2005), A Lexicon of Labour Strikes. New York.

⁵⁶ s. 101(1) and s. 101 (2) of the Industrial and Labour Relations Act, forbids sympathy strikes in Zambia.

⁵⁷ Mutual agreement reached between employees and employer after joint negotiations

compelling those persons or to aid him, to accept terms of conditions of employment or terms of conditions affecting employment.⁵⁸

2.5 Consequences of striking.

It would appear that nobody likes strikes in any form. The reason for this dislike is that in a strike everybody loses something. Be it a lockout or strike there is some loss that is suffered by the employees and the employer; the employer loses his profits and continuing costs, while the employees lose their wages. It is generally believed that this mutual fear is the driving force behind collective bargaining.⁵⁹ In most cases the employers' and unions sign collective bargaining agreements without strikes.⁶⁰

When employees strike, the employer may continue operating the business and can hire replacement workers. Upon settlement of an unfair labour practice strike or dispute, the strikers must be reinstated as soon as possible and if they offer unconditionally to return to work, even if the replacement workers have to be dismissed.⁶¹

In *Barclays Bank (Z) Ltd v Chola and Mubanga*,⁶² the respondent employee of the appellant bank and members of the Zambia Union of Financial Institutions, embarked on an illegal strike and were dismissed for defying an order to report for work on a given date. Proceedings in the Industrial Relations Court led to a finding that the dismissals were unfair. On appeal as against the first respondent only, the award of four years' of salary put in issue, as against second respondent, the appellant questioned both finding liability and compensation of three year's salary. It was held that the finding of the trial court that the

⁵⁸ Industrial and Labour Relations Act, s. 3

⁵⁹ Industrial and labour relations Act, Cap. 269 of the Laws of Zambia. s. 69

⁶⁰ ZUFIAW signed a collective bargaining With Finance Bank to increase their salaries by K500,000 across the board in July, 2009 without having workers going on strike

⁶¹ *Spencer and Co. Ltd v Their Workmen* (1966) 1 LLJ 714 (LAT)

⁶² (1997) Z.R 212

second respondent was prevented from reporting for work, which findings was supported by evidence was confirmed.

Once the strike is held to be illegal, the question of justifiability does not arise and the employees are not entitled to seek wages and salaries for the strike period unless they prove that the strike was legal and justified.⁶³

2.6 Strike and the unfair dismissal.

In most countries the proximate reason for the introduction of the law on unfair dismissal followed International Labour Organisation Recommendation No.119 of 1964⁶⁴ on Termination of Employment. In Zambia however the termination of employment is founded on grounds of race sex, marital status, religion political opinion or affiliation tribal extraction or social status of the employee and is restricted by section 108 of the Industrial and labour Relations Act. ILO's recommendation no 119 of 1964, it provides that contracts should be terminated only if there is a valid reason related to the conduct or capacity of the worker or operational requirement of the business. The unfairness that common law was doing on the workers made it possible for the legislation of some law to regulate industrial relations. Countries saw it fit and justifiable to put in place a statute law to govern industrial relations.

Illegal strikes usually have a telling effect in that the employer is at liberty to dismiss the employees for going on an illegal strike. This in itself is a sad development which can be avoided by the workers to make it a point that they should engage in an industrial action which is protected by law instead of them taking it for granted that it is fine even if they went on strike which is not protected by any law.

⁶³ S. N. Misra (2007) Labour and Industrial Laws 23rd Edition, Central Law Publications, Allahabad. Pg 159

⁶⁴ International Labour Organisation Recommendation No. 119 of 1964

In *ANZ Grindlays Bank (Z) v Kaona*,⁶⁵ in which the respondent had dismissed from his employment with the appellant after the appellant left his office with the permission of his supervisor to attend union meeting. On his return he, along with his colleagues, discovered they had been locked out and treated as if they had been on strike. The respondent and his colleagues later applied for reinstatement. The appellant only reinstated only some of the dismissed workers and did not reinstate the worker who had many years' service. In an application by the trade unions, it was held that that there had been unlawful strikes and the appellant should not have been selectively re-employed workers. There was an order for reinstatement. On a further claim for reinstatement on the ground that he had been discriminated against because he had worked for the appellant for more than 20 years. The High Court held that the respondent had been discriminated against, without indicating what form of discrimination had taken place but went on to say that the respondent had not had a proper hearing and that the action taken against the respondent was nullified. Reinstatement was ordered. On appeal to the Supreme Court it was held that for the order to succeed it was necessary to show not only that the cause of action was the same but also that the appellant had no opportunity to recover in the first action what he hoped to recover in the second action. The first action brought by the trade union did not allow for reinstatement where as the second action did. The Supreme Court further held that orders for reinstatement are made in exceptional cases and that there was nothing special to suggest that reinstatement should be ordered in the present case. The reinstatement order was replaced with an order that the appellant pay respondent damages for wrongful dismissal and plus other ancillary relief.

What is important to note here is that the employer is at liberty to dismiss the worker if that worker goes on an industrial action which is not protected by law. The workers are supposed to take industrial action after declaring a dispute and fulfilling the stated requirements in the

⁶⁵ (1995) Z.R.85

Act.⁶⁶ Participation in a strike or other industrial action is likely to have a highly detrimental impact on an employee's statutory employment rights. The most serious consequence is likely to be the potential loss of the right to bring proceedings for unfair dismissal but other statutory rights of striking employees will also be affected like; (a) a striking employee's right to redundancy pay may be jeopardised and (b) the weeks during which an employee takes part in a strike will not count for purposes of calculating an employee's continuity of employment.⁶⁷

2.7 The right to claim for reinstatement, wages and salaries.

A strike that is carried out in accordance with the provisions of the Industrial and Labour Relations Act,⁶⁸ that strike must be deemed legal. In such a situation where the strike is legal the Courts are empowered under section 78 (10) of the Industrial and labour Relations Act to decide whether to direct payment of wages and salaries for the period of the strike if the strike is a legal one.⁶⁹ They can also order reinstatement in some cases, though the reinstatement order is rarely done even where the basic conditions are fulfilled, such as the contract being governed by statutory provisions or there being an element of public employment, the discretion of the court to order reinstatement as opposed to damages has to be exercised on grounds which can be identified and defended⁷⁰ in the High Court which uses common laws principles. It was stated in *Bank of Zambia v Kasonde*⁷¹, that it trite law that the order of reinstatement is granted sparingly with great care and jealousy and with extreme caution, and when one is very much seized with the general principles and found in the case circumstances which can be identified and defended for instance if the defendant is a public

⁶⁶ Industrial and Labour Relations Act Cap 269 of the Laws of Zambia, s.78

⁶⁷ Gwyneth Pitt (2007), *Employment Law*, 6th Edition, Sweet and Maxwell, London.

⁶⁸ Industrial and Labour relations Act, Cap 269 of the Laws of Zambia, s.78 (4)

⁶⁹ Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia, s.78 (10)

⁷⁰ *Zambia Breweries Ltd v Whisky Kawisha* (1994) Z.R 32

⁷¹ (1995/1997) Z.R. 238

institution and those running it must at all times adhere to the principles of fair play. Dismissals based on the misconduct of employees must be on proven grounds. All employees should enjoy equal treatment under the ruling regulations.

Section 5 (2) of the Industrial and Labour Relations Act, Chapter 269 provides for circumstances where no employee is to be prevented, dismissed, penalised or discriminated against, from exercising any of the rights given by subsection (1). Where it is found that an employee has been dismissed, penalised or discriminated against, he can sue for damages or compensation under section 5 (2) (c).⁷²

When a worker is dismissed for going on an illegal strike it is rather difficult to be reinstated. What this shows is that the employee will have lost his work. In an Indian case of *Crompton Greaves v The Workmen*,⁷³ it was held that in order to entitle the workmen to wages for the period of strike, the strike should be legal as well as justified. Similarly in the case of *Madura Coats Ltd v Inspector of Factories Madurai*,⁷⁴ the workers went on strike without serving a notice as required by law. They claimed wages for national holiday which fell in the strike period. The Supreme Court of India held that they were not entitled to wages because they themselves brought about a situation by going on strike without giving a notice whereby management was deprived of their right to take work from them.

2.8 Conclusion

A strike is the partial or complete refusal to work, or the slowing down or obstruction of work by employees in order to try to remedy a grievance or resolve a dispute with an employer or more than one employer. It comprises three elements: stoppage, concerted action and purpose. Stoppage is the prime example of a strike and is commonly called a “walkout”. It

⁷² Industrial and Labour Relations Act, s.5 (2) (a), (b), (c) (i) and (ii)

⁷³ AIR 1978 SC 1489

⁷⁴ (1981) 1 LLJ 255

may include refusals to work overtime, embarking on “go-slows” or refusals to comply with conditions of employment. Refusals to work will constitute a strike only if there is an understanding between the workers to act in a concerted fashion against their employer. The strike must be a collective act, not a series of individual acts. When a worker is dismissed for being on a legal strike, the dismissal will be termed as unfair dismissal and the worker can sue the employer for damages and or reinstatement.

A strike is legal if it is carried out in full compliance with the provisions of the statute.⁷⁵ A strike cannot be said to be unjustified unless the reasons for it are entirely perverse or unreasonable. The use of force or violence or acts of sabotage resorted to by employees during a strike should disentitle them to any wages and salaries during the strike period.⁷⁶ The effect of an illegal strike on the demand of the employees to wages and salaries or compensation and an order for reinstatement coupled with their liability to punishment is based on the strike being justified. Mere illegality of the strike does not end the matter. It means that if the strike is illegal and at the same time unjustified, the employees have no claim to wages and salaries and must also be punished, and if it is justified then they can claim for wages and salaries.

⁷⁵ Industrial and Labour Relations Act, Chapter 269. s.78,

⁷⁶ Gwyneth Pitt, (2007) Employment Law, 6th Edition, Sweet and Maxwell, London. Pg 244

CHAPTER THREE

3.0 THE LAW AND THE RIGHT TO STRIKE.

3.1 Introduction.

This chapter looks at the provisions of Constitution of Zambia, the Industrial and Labour relations Act as the Zambian legislation that is concerned with industrial labour relations matters on the right of workers to strike. It will also look at other international law given as Conventions and Standards on the right to strike. In looking at these pieces of legislation the essay will try and find out whether the right of the workers to strike is provided for and to what extent do the Acts give this protection if any. A brief look at the common law provision is done as well.

Strike action is regulated by the common law and statutory legislation. The Industrial and Labour Relations Act⁷⁷ is the law in this country that regulates industrial relations, coupled to this is the Industrial and Labour Relations Court which was established to hear matters connected with industrial relations.

3.2 The common law and strikes

Under common law the contract of employment governed the relationship between the employee and the employer and it is through this relationship that statutory law works. At common law it is still true that if a reasonable notice to terminate is given,⁷⁸ then the contract is terminated lawfully, and it follows that the employee has no claim for wrongful dismissal. It does not matter whether the employer terminated for a bad or an arbitrary reason, or indeed no reason at all; nor does it matter for how long the employee has been working; nor his

⁷⁷ Laws v London Chronicles [1959] 1 W.L.R 698

⁷⁸ Gerald Musonda Lumpa v Maamba Collieries Ltd (1988) Z.R 217

record. Provided that the employer has given notice or pay in lieu of notice,⁷⁹ the employee has no claim. This is seen as the major defect of the common law position. As Gwyneth points out that;-

“There is no free market in labour. Today the employment relationship is characterised by an enormous amount of statutory regulation aimed at achieving a proper balance between the interests of the parties. However, it remains the case that the central relationship between employer and worker is one of contract, on which statutory requirements operate.”⁸⁰

In *laws v London Chronicle*⁸¹ it was held that, wilful disobedience of a lawful and reasonable order shows disregard, a complete disregard of a condition essential to the contract of service, namely the condition that the servant must obey the proper orders of the master, and that unless he does so the relationship is, so to speak, struck at fundamentally.

This relationship is the type of master and servant relationship in which common law principles remain important in understanding and interpreting the statutes. The most fundamental contractual obligations of employee (servant), is to be ready and willing to serve the employer (master). The action of going on strike is likely to be regarded as constituting a breach of the contract giving rise to the employer the right to dismiss the employee summarily, thus in *Simmons v Hoover Ltd*⁸², it was reaffirmed that an employer has the right to dismiss a striking employee. It may also entitle the employer to withhold the employees' salaries while they are on strike.

Since labour contracts follow the rules of contract law in which the parties are assumed to enter freely into agreements on the basis of roughly equal bargaining power, today it is generally agreed that equal bargaining power rarely exists. In the employment world particularly the bargaining powers of the parties is unequal. The employer holds all the trump

⁷⁹ *Raine Engineering v Baker* (1972) ZR 152

⁸⁰ Gwyneth Pitt (2007) *Employment Law*, 6th Edition, Sweet and Maxwell, London. Pg 1

⁸¹ [1959] 1 W.L.R. 698

⁸² [1977] ICR 61

cards but except for a few exceptionally talented people, most of the workers need the employer than the employer is in need of them.

The would be worker is rarely in a position to negotiate about terms now that the work environment has shrunk that people accept anything offered to them, in which case the only have a take it or leave it situation. This is where the employer exploits the worker and tramples on the worker's rights because the employer is able to define the working conditions⁸³ of the worker and further more he defines the way the worker does his job.⁸⁴ Yet employees can equalise the situation if they all act together, collectively as a group, individually they are weak.⁸⁵ It is difficult to have one voice and speak as a group fragmented unions are always in problems on who represents the workers best.⁸⁶

3.3 Constitutional provisions on the rights of workers.

The Constitution⁸⁷ states, in Article 14 (1) A person shall not be held in slavery or servitude and Article 14 (2) A person shall not be required to perform forced labour. These two provisions of the Act bar people from forced labour or any form of servitude. The wording of these two Articles is such that the Constitution simply forbids forced labour. This in essence gives the workers the right to protest if they see that the work environment is not conducive to their performing work quite satisfactory. If a workplace is not fit for workers to perform their work in a manner conducive enough they can sit down with the employer to discuss or failure to do so they can protest⁸⁸ through demonstrations and by way of strike.

The freedom of assembly, association and to form or belong to a trade union is one protected

⁸³ Cassidy v Minister of Health [1951] 2KB 343

⁸⁴ Short v J & W. Henderson [1946] 627 TLR 427

⁸⁵ ZNUT has been weakened by splinter unions who broke away from it and formed their unions.

⁸⁶ SESTUZ, BETUZ and ZNUT are all teachers' unions all representing the interests of teachers instead of one union similarly MUZ and NUMAW are two trade unions representing miners as well.

⁸⁷ Constitution of Zambia, Article 14 (1) and 14 (2)

⁸⁸ Resident Doctors Association of Zambia and others v Attorney General (2003) Supreme Court No 12 of 2003.

by the Constitution. The Constitution in Article 21 (1) states that;-

“Except with his own consent a person shall not be hindered in the enjoyment of his freedom of assembly and association,... his right to assemble freely and associate with other persons and in particular to form or belong to a political party, trade union or other association of his interests.”⁸⁹

This Constitutional Article gives the right of every worker to belong to a union of his choice and in which he feels his interests would best be served. This Constitutional provision of the freedom to form or to belong to a trade union does not only lie in a member holding a membership card only, but it should go deeper than just holding a membership card, it should entail all, even the right to strike of a member but unfortunately the Constitution does not expressly state so.

These two provisions of the Constitution are the most progressive pieces of legislation that are found on the workers’ rights. Despite this enactment of the law there are several cases where trade union recognition is almost impossible. There are employers who do not want to have trade unions at their places of work thereby sparking protests and strikes by workers. The right to strike does not seem to be expressly protected in the Constitution, being a member who belongs to a union entails one to do that which a union is allowed to do and therefore if the constitution allows one to be a member of a union it is to be assumed that he is allowed to do those activities the union is allowed to do but unfortunately the Zambian Constitution does not expressly state so. The Directive Principles of state policy as given in Article 112 (j) state that;-

“the state shall recognise the right of every person to fair labour practices and safe and healthy working conditions.”⁹⁰

⁸⁹ Constitution of Zambia, Article 21 (1)

⁹⁰ Constitution of Zambia, Article 112 (j).

The Constitution states further in the Directive Principles of State Policy in Part IX of the Constitution in Article 111, that:-

“The Directive Principles of State Policy set out in this part shall not be justiciable and shall not thereby,...be legally enforceable in any court, tribunal or administrative institutions or entity.”⁹¹

Strikes are basically as a result of unfair labour practices and here the constitution states that these cannot be litigated on if one wants to rely on the Constitution which is supposed to be the supreme law of the land.

It can then safely be said that the right to strike in Zambia is not protected by the Constitution unlike other countries like South Africa where it is protected by the Constitution.⁹² However there could be other pieces of legislation that gives the right to strike per se legal protection. The Industrial and Labour Relations Act, Chapter 269 of the laws of Zambia does provide for strikes.

3.4 The Industrial and Labour Relations Act and the right to strike.

It was said at one time that:-

“Men who have no property except their manual skill and strength ought to be allowed to confer together, if they think fit, for the purpose of determining at what rate they will sell their property.”⁹³

This has seen legislation intervening on behalf of the weaker party to prevent undue exploitation. Legislation has intervened in that it provides for the regulation of industrial relations. The rights of employees in respect of trade union membership and its activities are spelt out in Part 11 of the Industrial and labour Relations Act. In Part 11 it states in section 5 (1) notwithstanding anything to the contrary in any written law, and subject to this Act-⁹⁴

⁹¹ Constitution of Zambia, Article 111.

⁹² South African Constitution, Article 23 (1) and (2).

⁹³ Per Robert Peel in the debates on the combination Acts 1824 and 1825 of the United Kingdom.

- (a) Every employee shall as between himself and his employer, have the following rights
 - (i) the right to take part in the formation of a trade union;
 - (ii) the right to be a member of any trade union within the sector, trade, undertaking, establishment in which that employee is engaged.
- (b) Every eligible employee shall as between himself and the employer, have the following rights;
 - (i) the right, at any appropriate time, to take part in the activities of the trade union including any activities as, or with a view becoming a member, an officer of a trade union and the right to seek election or accept appointment and, if elected or appointed, to hold office as such officer; and
 - (ii) the right to absent himself from work without leave of the employer for the sole purpose of taking part in the activities of a the trade union, including any activities as or with a view to becoming an officer of a trade union, and the leave or absence though applied for was unreasonably withheld by the employer.

The above provisions compliment those of the Constitution which are given in Article 21(1) on the rights of workers to the freedom of assembly and association and for the worker to form or belong to a trade union of his choice. In fact section 5 (2) of the Industrial and Labour Relations Act prohibits the termination of employment on the grounds of trade union activity or membership.⁹⁵ The Act further gives employees the right to strike and also bars members of those excepted professions like police service, doctors, defence force and other essential workers from striking.⁹⁶

⁹⁴ Industrial and Labour Relations Act Cap. 269 of the laws of Zambia, s. 5 (1) (a), (b).

⁹⁵ Industrial and Labour Relations Act Cap 269, s. 5 (2)

⁹⁶ Industrial and Labour Relations Act Cap 269, s. 5

In Part IX of the Industrial and Labour Relation Act are the provisions for settlement of disputes which also provide for strike action. Section 75 states that a collective dispute shall exist between an employer or an organisation representing employers on one hand and the organisation representing employees on the other hand, relating to terms and conditions of, or affecting the employment of, the employees and one party to the dispute has presented in writing to the other party all its claims and demands and;⁹⁷

(a) the other party has, within fourteen days from date of receipt of the claims or demands, failed to answer the claims or demand; or

(c) both parties to the dispute have held at least one meeting with a view to negotiating a settlement of the dispute, but failed to reach settlement on all or some of the matters in issue between them.

The failure of the employer to respond to the demands of the workers within the stated period as provided by the Act in section 75 (a) leads the workers to start agitating for strike action. This then leads to a dispute between the employees and the employer, and when a dispute has arisen in such circumstance as stated in the Act in the above provisions, there are certain steps required to be taken as provided by the Act.⁹⁸ The Act requires that the dispute be referred to a conciliator as provided for in section 76,⁹⁹ and the conciliator has to be appointed by the parties to the dispute or alternatively a board of conciliators composed of appointees by the employer or organisation representing the employer, appointees by the employees or an organisation representing employees. The conciliators role is to work with the parties to a dispute and see how the parties work through the dispute. The workers

⁹⁷ Industrial and Labour Relations Act Cap 269, s. 75, s.75 (a), (b) and (c).

⁹⁸ Ibid

⁹⁹ Industrial and Labour Relations Act, s. 76.

however have always shunned the conciliation process because answers are not normally found and parties have tended to stick to their positions and refused to be reconciled.¹⁰⁰

Section 78 (1) requires that where a settlement has failed the dispute should be referred to the Court or the union conducts a strike ballot. The section states that, where a conciliator fails to settle a collective dispute the parties to the collective dispute may-

(a) refer it to the Court; or

(b) conduct a ballot to settle the dispute by a strike or lockout.¹⁰¹

(3) Where the parties, decide to proceed on strike or lockout, the parties shall not proceed on strike or lockout unless a simple majority decision of the employees present and voting is made by employees in favour of the strike or lockout.¹⁰²

The above provisions of the Act try to regulate the industrial action in such a way that if anything is done outside these provisions then it would be considered as unlawful and therefore not protected by law. The workers are of the view that that the Ministry of Labour and Social Security is poorly funded and therefore lacks capacity to ensure adherence to this requirement of the law in effectively conducting a strike ballot.¹⁰³

The Act is further reinforced by the provisions in section 78 (4) where it is provided that the strikes or lockout may, subject to section *seventy-five* commence ten days following the decision to do so and shall continue for a period of fourteen days after which the dispute shall if it remains unresolved, be referred to the court.¹⁰⁴ The remit of the Act here affords workers to strike lawfully after ten days following a decision to do so and in accordance with its provisions. The ten days also gives the employer time to find a solution to the problem.

¹⁰⁰ Interview: Steven Mumbi, Director Organisation- ZCTU 20th November 2009.

¹⁰¹ Industrial and Labour Relations Act, s. 78 (1).

¹⁰² Industrial and Labour Relations Act, s. 78 (3).

¹⁰³ Interview: Steven Mumbi-Director of Organisation ZCTU 20th November 2009.

¹⁰⁴ Industrial and Labour Relations Act, s. 78 (4).

Section 78 (5) provides for the intervention of the minister of labour under subsection (4) before or after the strike begins in order for him to try and settle the dispute between the workers and the employer.¹⁰⁵ The minister must act before the strike starts this is meant for the minister to forestall the strike action by the workers. The minister can, after consultations with the Tripartite Consultative Labour Council, in fact apply to the Court for a declaration that the continuance of the strike or lockout is not in the public interest,¹⁰⁶ especially strikes like those of health workers can be declared as not being in the best interest of the nation as they compromise the health of the nation. The essence of the section is the protection of public interest.

In practice however the procedural requirements are such that it is regarded as virtually impossible to comply with the same to ensure such action is official, and therefore legal. Most unions resort to strikes without bothering to give notice of their intention to go on strike and the unions are mostly powerless to do anything about the situation as they feel the law on strikes is quite laborious and do not ultimately make the employees exercise the right to strike.¹⁰⁷ The Industrial and Labour Relations Act however prohibits workers from taking part in sympathy strikes as it states clearly that for one to get involved in such a dispute the worker must be a party to that dispute.¹⁰⁸ The Act further bars workers and their trade unions from taking part in strikes that have not been authorised by a strike ballot.¹⁰⁹ But this is often over looked by the unions for the Ministry of Labour lack of capacity. The Act however states in section 101 (2) No employee, trade union or other person shall take part in a strike which-

(a) has not been authorised by a strike ballot taken in the manner provided by the

¹⁰⁵ Industrial and Labour Relations Act, s. 78 (5).

¹⁰⁶ Industrial and Labour Relations Act, s. 78 (6).

¹⁰⁷ Interview: Steven Mumbi- ZCTU Director Organisation 20th November 2009.

¹⁰⁸ Industrial and Labour Relations Act, s. 101 (1).

¹⁰⁹ Industrial and Labour Relations Act, s. 101 (2) (a) and (b).

Constitution of a trade union under this Act;

(b) is not in contemplation or furtherance of a collective dispute to which the employee or trade union is a party.

The above provisions show that the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia is for lawful strikes and not unlawful ones which are not protected by the constitutions of trade unions and the Industrial and labour Relations Act and the Zambian Constitution. However the provisions of the Acts make it practically impossible for the union members to go on lawful strikes in Zambia because of the ballot requirement. The Unions are required to conduct a ballot for them to go on strike in accordance with s.78 as all unlawful strikes are not given protection by the law since they are illegal and the law cannot be seen to be promoting any illegality.

3.5 The International Standards and the right to strike.

The freedom to form and belong to associations, whether they be political parties is regarded as an aspect of human rights, and is found stated as a right in principal treaties on the subject: The Universal Declaration of Human Rights 1948,¹¹⁰ (Article 20), the International Covenant on Civil and Political Rights, 1966. Additionally it is given in Europe in the European Convention on Human Rights in Article 11 and in the African Charter in Article 2. Therefore on the international law, the International Labour Organisation has the right to strike as an integral to uphold the Human Rights and is guaranteed by the following Conventions; The ILO's Freedom of Association Protection of the Right to Organise Convention 1948 (No 87)¹¹¹ and the Right to Organise and Collective Bargaining Convention 1949 (No 98).¹¹²

¹¹⁰ The United Nations Universal Declaration of Human Rights 1948

¹¹¹ International Labour Organization Convention No. 87 of 1948

¹¹² International Labour Organization Convention No. 98 of 1949

These two conventions are the international law standards that seem to give protection to the right to strike. Convention (No.87) in fact provides that;-

“workers and employers’ organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.”¹¹³

While the convention does not set out an express right, it is however impliedly protected as an essential means available to workers and their organisations for the promotion and protection of their social and economic interests.¹¹⁴ Convention 87 on Freedom of Association and Protection of the Right to Organise 1948 is the most relevant in the present context and it provides in Article 2 that;-

“workers....without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”

Article 3 of Convention No. 87 provides that;-

“workers...organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.”

Article 8 (2) of Convention No. 87 provides that;-

“The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this convention.”

Article 8 in fact hinders its members in their formulating of laws not to impair the unions nor apply the law to impair the unions.

This is a significant step taken by ILO to try and impress upon nations not to have laws that will impair the unions and their activities. Article 10 of Convention No. 87 provides that:-

“...‘organisation’ means any organisation of workers or of employers for furthering and defending the interests of workers or employers.”

¹¹³ International Labour Organisation Convention No. 87 of 1948, Article 3.

¹¹⁴ This view is held by the International Labour Organisation Committee of experts. (CEACR ILO 1983)

Article 11 of Convention No. 87 provides that:-

“each Member State of ILO undertakes...to take all necessary and appropriate measures to ensure that workers...may exercise freely the right to organise.”

The International Labour Organisation’s convention makes it clear that the right to union members is not restricted to the right to hold membership cards only, it holds that that the right involves the protection of members’ interests by the union. ILO has always regarded the right to strike as constituting a fundamental right of workers and their organisations as a legitimate means of defending their economic and social interests. The right to strike is one of the essential means through which workers and their organisations may promote and defend their economic and social interests.

However Article 8 paragraphs 1(d) of the International Labour Organisation’s International Covenant on Economic, Social and Cultural Rights of 1966, provides for;- the right to strike provided it is exercised in conformity with the laws of the particular country.¹¹⁵

ILO Convention No. 135 of 1971 states that:-

“In so far as they act in conformity with existing laws or collective agreements,...must enjoy effective protection against any act prejudicial to them including dismissal based on their status or activities as workers representatives, their union membership and their participation in union activities.”¹¹⁶

These measures are to include priority to be given to workers representatives with regard to their retention in employment in case of reduction of the workforce.

It is an obligation for the employer to prove, in the case of an alleged discriminatory dismissal or unfavourable change in conditions of employment of a worker’s representative, that such action was justified. It is to be noted that these provisions do not prohibit the workers from going on strike but require them to fulfil the conditions before going on strike.

¹¹⁵ ILO’s International Covenant on Economic, Social and Cultural Rights, Article 8 paragraph 1(d).

¹¹⁶ International Labour Organisation Convention No. 135 of 1971

The ILO Committee of experts made a key statement on the right to strike. Therefore the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests.¹¹⁷ These interests not only have to do with obtaining better working conditions and pursuing collective demands of an occupational nature but also with seeking solutions to economic and social policy questions and to labour problems of direct concern to the workers.

3.6 Impact of international law on local law.

International labour law has had an effect on the Zambian legislation in that, what has been given as Recommendations by International Labour Office, it is required that the country aligns its local law to the international standards to take into account what is recommended by the ILO. In this vein Zambia tries to bring the Conventions into local labour law by enacting legislation that implements the convention. These standards have been heavily instrumental towards the achievement of industrial peace and progress. Whenever it is appropriate it seems that state policy is geared towards bringing legislation in line with international labour standards (Conventions). The provisions of Convention 87 of 1948 are seen in the rejection of forced labour or compulsory labour in all its forms and the abolition of the discrimination among workers on grounds of race, colour, sex, religious belief and tribal association or trade unions, others include the protection of labour leaders by enacting the Industrial and Labour relations Act. Therefore the ratified standards have found themselves in the Zambian legislation, by a process of domestication of foreign conventions. But in some cases where it is found that Zambia has not ratified certain conventions as required, these have already been legislated for and are in the statutes, for instance the hours of work (commerce and offices) Convention No 23¹¹⁸ was not ratified because it was well

¹¹⁷ International Labour Organization CEACR (1983)

¹¹⁸ International Labour Organisation Convention No. 23 of 1930

covered by the Employment Act, Chapter 268 of the laws of Zambia, which also cover forty hour week (1935) convention. The medical examination of Young Persons (Underground work) Convention No 124¹¹⁹ resulted in the enactment of the 1973 Act of Parliament, The Medical Examinations of Young Persons Act¹²⁰ (Act no 20 of 1973).¹²¹

However where these standards are not incorporated in the Zambian legislation by way of domesticating them, the approach from the Courts is that the Convention or instrument will be of persuasive nature only and cannot be substituted for the domestic law available. This was stated in the case of Zambia Sugar PLC v Fellow Nanzaluka.¹²² The facts of the case were that the respondent was employed by the appellant company in 1992. His employment was terminated without notice in 1996. He was paid three months salary in lieu of notice. He brought an action in the Industrial Relations Court. The Court accepted that the conditions of service had been complied with but held that the action was contrary to the International Labour Convention No. 158 of 1982 which forbids termination of workers' employment without valid reasons. On appeal to the Supreme Court, it was held that, "international instruments on any law although ratified and assented to by the state cannot be applied unless they are domesticated." Zambia had not domesticated the convention. Although the court below was empowered to do substantial justice, that had to be done within the sphere or scope of domestic law. As already pointed out the impact of International law on the Zambian legislation has been phenomenal in as far as labour laws are concerned. Most of the international standards have found their way into Zambian statutes where they have been incorporated into the Zambian legislation as a way of domesticating them.

¹¹⁹ International Labour Organisation Convention No. 124 of 1965

¹²⁰ The Medical Examination of Young Persons Act. (Act No 20 of 1973)

¹²¹ Chanda Chalwe Kabazo 1988 Thesis for LL M:- Problems encountered by Zambia in the task of implementing the international standards.

¹²² (2001) SC Appeal No 82 of 2001.

3.7 Protection of the right to strike

In Zambia, the Constitution does not provide for the protection of economic, social and cultural rights. The bill of rights, as found in Part 111 of the Constitution, only provides for the protection of civil and political rights. *Prima facie* this entails that one would find it extremely difficult to seek redress of the violations of his or her economic, social and cultural rights of which the right to strike may be regarded as such as an economic right.

Therefore the right to strike is protected at the international level only in treaties that deal with socio-economic rights rather than civil and political rights. It can be seen that the International Covenant on Economic, Social and cultural rights guarantees the right to strike, although it is subject to the proviso that “it is exercised in conformity with the laws of the particular country.”¹²³ The substantive content of the right to strike is limited.

The Industrial Relations Court, which has been established to consider industrial disputes, does have jurisdiction to determine matters under the Industrial and Labour Relations Act, such as termination on grounds of trade union activity or membership, or discrimination,¹²⁴ as was stated in *ZCCM Ltd v Matale*,¹²⁵ by the Supreme Court that;-

the general jurisdiction of the Industrial Relations Court and the extensive extent of its manifest in section 85 under various subsections which cumulatively confer a sufficient jurisdiction unrestrained by the technicalities under real justice can be dispensed.

Subsection 4 of section 85 for example confers jurisdiction to hear any dispute between employers and the employees even if connected with group rights or grievances. The subsection reads;- the court shall have jurisdiction to hear and determine any dispute between the employer and the employees notwithstanding that such dispute isn't connected with

¹²³ ILO's International Covenant on Economic, Social and Cultural Rights 1966, Article 8 (1) (d)

¹²⁴ Industrial and Labour Relations Act, Cap 269, section 5 (2)

¹²⁵ (1995-1997) Z.R 144

collective agreement or other trade union matter.”¹²⁶

3.8 Conclusion

The provisions in the Industrial and Labour Relations Act give the workers the right to form and belong to a union of their choice and the right to strike while the Zambian Constitution gives the workers the right to form and belong to a union of their choice. The argument of the matter is that the law as given is quite adequate but the problem is lack of adherence to the law. The workers see the Government as being part of the problem in this regard such that what they do, the private sector also follows suit. The right to strike in Zambia is however subject to certain restraints¹²⁷ in law and it is said that you cannot make a strike effective without doing more than is lawful.

At common law if you went on strike, you will be breaching a fundamental condition of the contract and the employer is entitled to summarily dismiss such an employee.¹²⁸ It is in this vein that legislation came in to protect the worker who was the weaker party in this contractual relationship. It gave regulations and guidelines of striking. The law as seen above has put in place measures which the unions must follow failure to which are sanctions. It is these measures which are not followed by the unions. International law while upholding the strike action as being justified action has given greater leeway to the national law in such matters as strikes by stating that these could be held in conformity with the national laws of a country.¹²⁹

¹²⁶ Industrial and Labour Relations Act, s. 85 (4).

¹²⁷ Industrial and Labour Relations Act, s. 78.

¹²⁸ *Simmons v Hoover Ltd* [1977] I.C.R 62

¹²⁹ ILO's International Covenant on Economic, Social and Cultural Rights, Article 8 paragraph 1 (d).

CHAPTER FOUR

4.0 THE WAY FORWARD IN STRIKING LEGALLY.

4.1 Introduction.

There are a number of strategies that can be put in place to try and help improve the situation. The Constitution it seems does not protect workers when they are striking as seen in the provisions of directive principles of state policy.¹³⁰ It is the feeling that if the right of every person to fair labour practices was not a Directive Principle but rather that right of every employee to fair labour practices was protected by the Constitution and made justiciable then we can see an improvement in the conditions of our workers for the employers would be willing to negotiate rather than go to court. It is difficult now because the political leaders behave as though they are begging employers to be around and give the Zambians jobs regardless of the conditions that they will be subjected to.

4.2 Collective bargaining period.

Once a union has been registered and recognised it is entitled to require the employer to meet with its representatives and bargain over the terms and conditions of employment that will form the collective agreement for the employees in the bargaining unit. If no collective agreement is reached by that process and in some cases after a strike vote has been conducted, the employees can lawfully strike.

Many a time strikes are caused by the never ending negotiations for salaries, wages and improved conditions of service for the workers. In part VIII of the Labour and Industrial Relations Act are found provisions for the collective bargaining. The provisions in section 69 on collective agreements are usually not followed. Section 69 (1) (c) states that (1) *the*

¹³⁰ Constitution Of Zambia, Article 111 and Article 112 (j)

*bargaining unit shall-(c) conclude and sign the collective agreement within three months, after the commencement of the negotiations.*¹³¹

These negotiations are provided for in section 69 (1) (a) in which it is required that the negotiations should start at least three months before the expiry of the current collective agreement, but most of the time the employers don't seem to be willing to start the negotiations in good time.¹³² They wait for the workers to take the strike action well after the expiry of the last agreement. But nowhere is there a provision that states that these negotiations should go on indefinitely. There doesn't seem to be any finality to the negotiations. The blame is placed on the Government as the largest employer in which it does not seem to show the way by starting and finishing the negotiations within the time frame given by the Act. In some instances when the negotiations are completed and the collective agreement signed as provided for in section 70 of Cap 269, there comes a time of not following the collective agreement to the letter by the employer.¹³³ There is need for employers to follow the agreement as agreed in the negotiations to avoid strikes.¹³⁴

The time limit given to conclude the negotiations must be adhered to, failure to which there should be a process to proceed to mediation and or arbitration which are not so much in use these days or any other alternative dispute resolution procedure must be implemented. The period of three months given by statute in which negotiations must be concluded is enough and must be adhered to. Failure to conclude negotiation parties can seek other alternative dispute resolution methods. Other alternative dispute resolution mechanisms must be employed in order to minimise on strikes.

¹³¹ Industrial and labour relations Act, s. 69 (1)(c)

¹³² KCM agreement expired in April 2009, its almost a year now since expiry of the collective agreement and No new agreement has been signed yet. Mr Mbulu - MUZ Daily Mail 19th February 2010

¹³³ The Government has taken over seven years to pay the agreed housing allowances to its employees in various ministries prompting the teachers and nurses to be going on strikes every now and again. Times Of Zambia, March 2010 – Government releases last instalment of housing allowance for teachers.

¹³⁴ Ibid

4.3 Strikes and the conciliation process.

The workers are not in favour of the conciliation process because of the stances taken by parties to the dispute in the past that they parties to the dispute don't seem to change their positions.¹³⁵ The parties stick to their positions without shifting the stand and have refused to be reconciled a good example is the negotiations between KCM and the mineworkers unions which have not been concluded to date from last time the collective agreement expired in April 2009.¹³⁶

In order to avoid unlawful strikes, there is need for parties to engage in dialogue all the time as what has been observed is that information does not seem to filter through to the workers in good time. The workers and the employers need to work at resolving their differences about the conciliation process so as to give it time to work. The conciliation process being a give and take situation, parties going for reconciliation must go into the talks with open minds. On the other hand since workers do not favour the conciliation process, it is time other alternative dispute resolutions mechanisms like administrative channels¹³⁷ were employed in order to reduce on the illegal strikes.

4.4 Reducing on illegal strikes.

The requirement in section 78 of the Industrial and labour Relations Act for a strike ballot makes it difficult for workers to strike legally. The requirement for a ballot is not feasible in Zambia with the Labour Ministry being short of staff to assist in conducting the ballot. Teachers for instance are so scattered that conducting a ballot is practically impossible. It is suggested that the ballot should be replaced by the requirement from unions of a notice of

¹³⁵ Interview: Mr. Roy Mwaba ZCTU Secretary General 27th November 2009

¹³⁶ Mr. Sikufele- President NUMAW Daily Mail 12th January 2010, pg 3 KCM still offers 3% increment

¹³⁷ Industrial Labour and Relations Act, s. 85 (3)

reasonable time be given. This will greatly improve on the illegal strikes that occur in the country.

There must also be dialogue and consultations in work places. The parties must work with one another in reducing strikes by building consensus amongst themselves as the law presently in place is quite adequate except for the strike ballot requirement to deal with the current spate of strikes. Adherence to the law is cardinal and the government must be seen to be the first to adhere to the law on labour matters as the workers feel the employers don't seem to adhere to the law because the government itself is in the forefront of not respecting the law that it has put in place. Respect for workers rights is what the unions are asking for.

There should be equity in remuneration of workers. The employers are to blame for the unequal payments that are obtaining in industry today as the workers feel injustice is being done to them, where the expatriates are given free accommodation and the local people are left to rent homes¹³⁸ with little assistance from their employers. This they see as a disparity in working conditions where equity in remuneration is just given lip service and not practiced despite having the same qualifications. In some cases the Zambian workers are more qualified than their expatriate counterparts.

4.5 The right to strike compared.

A comparison of countries that have laws similar to the Zambian law reveal that the notice is required to be given before a union embarks on a strike. This is supposed to assist the employer plan for the strike period or alternatively give the employer time in which to resolve the differences.

¹³⁸ KCM has built new houses for its Indian expatriate workers while Zambians are left to rent homes. Times of Zambia, 15th January, 2010 Rioting miners break windows to Indian block of flats pg 3

4.5.1 United Kingdom

Industrial action in the United Kingdom has somewhat been reduced because there are several ways in which disputes can be resolved. Various alternative dispute resolution methods are employed and this has seen industrial action drastically reduced to zero. In the United Kingdom, at its peak, trade unions wielded considerable power. That position largely changed during the 1980s when government of the day introduced legislative measures to curb trade union powers per se. It is a known fact that a variety of employees in UK are not entitled by law to join trade unions, these include: police officers, members of the security services and certain Crown employees.¹³⁹

Trade Union and Labour Relations (Consolidation) Act of 1992 governs the operations of trade unions, industrial action, and the relationship between employers and unions. It was noted in the case of *Young G. James and Webster v U.K* ¹⁴⁰ in which the court held that the right to join or form a trade union constitutes a fundamental aspect of the freedom of association. Article 11 of the European Charter of Human Rights enshrines the right to freedom of association, by stating, *inter alia*, the right to freedom of association with others, including the right to form and join trade unions.¹⁴¹

Industrial action which has been endorsed by a trade union is regarded as official action for the purpose of the law. Pursuant to section 237 of the TULR (c) A 1992,¹⁴² a dismissal for participation in unofficial action is fair. The remit of the Act affords protection for official industrial action for the period of 8 weeks, which can be extended if the employer fails to take 'reasonable procedural steps' to resolve the dispute under s. 238 (A) (6). Subsequent to this period any dismissal will be deemed fair.

¹³⁹ Laybourn Keith, *Miners Strike [1984-1985]*, "Microsoft ® Encarta ®[CD] Microsoft Corporation

¹⁴⁰ [1981] IRLR 408 ECHR

¹⁴¹ European Charter of Human Rights, Article 11

¹⁴² Trade Union and Labour Relations Act of the United Kingdom, s. 273.

It can be seen here that the British Government though themselves do not have the right to protection in a Constitution as they do not have a written Constitution, have to follow European law in interpreting their Acts and tune their Acts to suit in the requirements of the European Union and its treaties. The ambit of the Act per se includes: protection for those party to approved industrial action,¹⁴³ outlawing secondary strikes; and ascribing criminal offences for those participating in industrial action which is likely to endanger human life or cause serious bodily injury and intimidation.

4.5.2 India

In India the strike action is held as a form of demonstration, and that the right to strike or demonstrate is not a fundamental right.¹⁴⁴ It is one recognised as a mode of redress for resolving the grievances of the workers. Though this right has been recognised by all democratic countries but it is not an absolute right. Certain restrictions have been placed on it by legislation, the Industrial Disputes Act of India on the right to strike. Thus in the case of *B.R. Singh v Union of India* (1989)¹⁴⁵, it was held that the strike is a form of demonstration. Though the right to strike or demonstrate is not a fundamental right, is recognised as a mode of redress for solving the grievances of the workers.

The Industrial Disputes Act¹⁴⁶ requires the employees intending to take industrial action to inform their employer that is a strike notice has to be given to the employer giving at least 14 days notice and the strike must be within six weeks. The Act¹⁴⁷ provides that (i) the strike takes place within 6 weeks of giving notice; and (ii) 14 days have expired after such notice. Meaning of the two terms “within 6 weeks before striking” and “within 14 days of giving notice, taking them together it means that a person employed in a public utility service may

¹⁴³ Trade Union and Labour Relations (Consolidation) Act 1992 of U.K, s. 223

¹⁴⁴ *B. R. Singh v Union of India* (1989) 11 Lab LJ 591,

¹⁴⁵ *Ibid*

¹⁴⁶ Industrial Disputes Act of India

¹⁴⁷ Industrial Disputes Act of India, s. 24 (3) (i), (ii)

go on strike on giving the employer a notice as provided. Thus the strike can take place only when 14 days have passed but before 6 weeks have expired after giving such notice. The minimum period of fourteen days after notice within which employees are prohibited to go on strike is prescribed with a view to give some time to the employer to look into the charter of demands of the employees and also to give time to the Labour Department of the government to intervene so as to avoid a strike by finding out some compromise.¹⁴⁸

Neither the employees are restrained from going on strike nor the employer is restrained from locking out the industry but some minimum conditions before striking or locking out are required to be fulfilled, otherwise the stoppage of work in a public utility concern may result in an inconvenience to the society. Therefore these safeguards were felt necessary to be provided.

4.6 Conclusion

The right to strike is provided for by the Industrial and labour Relations Act Cap 269 though stringent steps have to be followed. The unions need to understand the labour law that regulates strikes in Zambia as it is not possible to just leave things without any regulation. The understanding of the law by the unionists will greatly help in the reduction of illegal strikes as now it is possible for a very vocal worker to win the elections to the union though he may be ignorant of the law. There must be internal controls in the unions and the flow of information is critical to a smooth industrial harmony. The unions and the employer must always engage in dialogue to reduce on the frictions at places of work.

¹⁴⁸ Industrial Disputes Act of India, s. 24 (3)

CHAPTER FIVE

5.0 CONCLUSION

5.1 Introduction

The viability of collective bargaining rests solely on the economic strength of the parties and is often maintained by recourse to economic sanctions.¹⁴⁹ Workers use the strike for several purposes: as an instrument of persuasion to induce employers to recognise a trade union as their bargaining agent; as an instrument of negotiation to achieve desired terms and conditions of employment within a collective agreement; and as an instrument of relief to resolve disputes arising under a collective agreement once achieved. In this era the industrial relations system is characterised by instability, labour unrest and widespread interference with production.¹⁵⁰

Morden labour law provides or tries to provide greater stability and ensure more orderly production by regulating the strike, replacing its use as an instrument of persuasion by the process of recognition; replacing its use as an instrument of relief by the process of arbitration; and restricting its use as an instrument of negotiation to a variety of timeliness requirement.

5.2 Workers representatives

Organisations responsible for defending workers' socio-economic and occupational interests should be able to use strike action to support their position in search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and the standard of living. A strike can be said to be political insofar as it challenges the

¹⁴⁹ Strikes are used to compel employers to agree to workers demands.

¹⁵⁰ Ewing K. D (1991), *The right to strike*, Clarendon Press, Oxford pg 62

traditional balance of power between capital and labour in any particular enterprise or industry. With industrial action that challenges traditional powers of managerial prerogative there may be an argument for protection of the right to strike as an aspect of industrial democracy.

5.3 Suspension of contract when on strike

The truth is that neither the employers nor the workers wish to take drastic action of termination of contracts of employment if it can be avoided at all costs, as each is mindful of the loss that he will incur during the strike. The workers do not wish to leave their work forever. The employers do not wish to scatter their labour force to the winds. Each side is therefore content to accept a strike notice of proper length as lawful. If a strike takes place, the contract of employment is not terminated if the employer terminates employment then he can be accused of unfair termination of employment. The strike is only supposed to suspend the contract during the strike and revives when the strike is over as Lord Denning suggested in the case of *Morgan v Fry* (1968)¹⁵¹, that;-

“where strike notice of adequate length was given, the strike was not unlawful, since notice had the effect of suspending the contracts for the duration of the strike period and not breaking them.”

The contract of employment is merely suspended and does not therefore break as the common law will demand that this is a breach of a fundamental nature of the contract of employment.

5.4 The right to strike in Zambia

Generally speaking as seen under Article 21 of the Constitution of Zambia, the right to freedom of assembly and association is provided. The article states *inter alia*;-

¹⁵¹ [1968] 2 Q.B 710

“...a person shall not be hindered in the enjoyment of his freedom of assembly and association...to form or belong to any political party, trade union or other association for the protection of his interests.”¹⁵²

Section 5 of the Industrial and Labour Relations Act, Chapter 269 of the laws of Zambia prohibits the termination of employment on grounds of trade union activity or membership,¹⁵³ *inter alia*. Further discrimination for union activity is prohibited by law. Employees also do possess the right to strike provided they adhere to the requirements in the Act. Irrespective of the legal position, anti-union activity is reported to be prevalent in the country and there have been reported incidents of workers being dismissed, arrested and even shot for participating in strikes.

An individual has *locus standi* under section 5 of the Industrial and Labour Relations Act to appear before the court if he feels that his rights given to him by section 5 of the Act have been trampled upon. Under section 5, any complaint must be lodged within 30 days of the event occurring, unless leave for an extension is granted by the court. The potential remedies include: damages, compensation for loss of employment, re-employment or reinstatement, *inter alia*, or the court can make any other order it sees fit.

The Industrial and Labour Relations Court which was established to be a court to hear representations from workers, now takes years for a grieved party to hear his case. ZCTU says the court has become too legalistic that it has a huge backlog of cases that the worker has no trust in the system and what is left for the worker is to depend on his weapon which is the strike.

5.5 PROPOSALS ON THE WAY FORWARD

It is proposed that the current law requiring a strike ballot be reformed to that requiring the workers to give notice of reasonable time in which they can go on strike. The vastness of the

¹⁵² Constitution of Zambia, Article 21 (1)

¹⁵³ Industrial and Labour Relations Act Cap 269 s. 5 (2).

country and the difficulties faced in obtaining a strike ballot makes it inevitable to reform the law. It is proposed that the notice period of two weeks could be given and then the strike could take effect ten days after the two weeks have elapsed. This period gives the employer enough time to think through the demands of the workers and also gives time for the minister of labour to discuss with the employer and intervene in the matter. This will bring the high levels of illegal strikes down and at the same time employers will be able to sit up as the strike ballot will not be required which has been a hindrance to having legal strikes in the country.

5.6 CONCLUSION

The illegal strikes don't seem to end and workers take to striking with impunity as though there are no laws to regulate strikes. It is important for unions to have in their leadership people who will be able to understand the law and be able to explain the law to their fellow workers. Continuous training of the workers leaders in labour law will improve the way strikes are conducted.

In Zambia it is apparent that the country has made great strides in terms of passing various pieces of legislation to protect workers' rights, and in some instances, has gone beyond the recommended international standards. However it appears that the realisation of these rights, particularly pertaining to striking workers, are yet to come to fruition in that the requirement of a ballot before going on strike does not make it any easier for the workers to fulfil that condition, hence making it difficult for a Zambian worker to legally strike as a last resort for him to fight for his rights.

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