

TRADE DISPUTES (AMENDMENT) ACT, 1992

No. 23



of 1992

ARRANGEMENT OF SECTIONS

SECTION

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An Act to amend the Trade Disputes Act

Date of Assent: 29th September, 1992.

Date of Commencement: 9th October, 1992.

ENACTED by the Parliament of Botswana

1. This Act may be cited as the Trade Disputes (Amendment) Act, 1992, and shall come into operation on such date or dates as the Minister may by notice in the Gazette appoint.

2. Section 2(1) of the Trade Disputes Act, hereinafter referred to as the Act, is amended by —

- (i) deleting the definitions of “award of the Permanent Arbitrator” and “Permanent Arbitrator”;
- (ii) inserting in their correct alphabetical order the following new definitions —
““decision” in relation to the Industrial Court includes an order and an award;”
““joint industrial council” means a body constituted for an industry in accordance with the provisions of section 30A, for the purpose of negotiating terms and conditions of employment for all employees in that industry;” and

Short title
and
commence-
ment
Amendment
of section 2(1)
Cap. 48:02

- (iii) substituting for the definition of “trade dispute” the following new definition —
 - ““trade dispute” includes a dispute between unions, a grievance and any dispute over —
 - (a) the application or the interpretation of any law relating to employment;
 - (b) the terms and conditions of employment of any employee or class of employees, or the physical conditions under which such employee or class of employees may be required to work;
 - (c) the entitlement of any person or group of persons to any benefit under an existing collective agreement;
 - (d) the existence or non-existence of any collective agreement;
 - (e) the dismissal, employment, suspension from employment, retrenchment, reemployment or reinstatement of any person or group of persons; or
 - (f) the recognition or non-recognition of an organization seeking to represent employees in the determination of their terms and conditions of employment.”.

Amendment
of section 5

- 3. Section 5 of the Act is amended by —
 - (a) renumbering the present subsection (1) as subsection (1) (a) and by adding the following new paragraphs —
 - “(b) The Commissioner may delegate any of his powers under this section to specified labour officers, and where he has done so the report referred to in paragraph (a) shall be made to the nearest appropriate labour officer.
 - (c) Where the labour officer to whom a report is made under paragraph (b) is unable to negotiate a settlement between the parties, he shall refer the matter to the Commissioner together with a report of his efforts to secure a settlement.”;
 - (b) substituting for the words “Permanent Arbitrator” wherever they occur the words “Industrial Court” in each case;
 - (c) deleting the proviso to paragraph (d) of subsection (2) thereof; and
 - (d) adding at the end thereof the following new subsection —
 - “(6)(a) Notwithstanding the provisions of subsections (1) to (5), the provisions of this subsection shall apply in the circumstances specified in relation thereto.
 - (b) Where a contract of employment is or is to be terminated by the employer, the employee wishing to protest against such termination shall make such protest to the nearest labour officer.
 - (c) Where an employee whose contract of employment is for an unspecified period of time (other than a contract of employment for a specified piece of work, without reference to time) terminates the contract without giving the required notice of his intention to do so, or making full payment in terms of section 19 of the Employment Act, or where an employee whose contract of employment is for a specified piece of work, without reference

to time, or for a specified period of time, terminates the contract before the work specified by the contract is completed, or the period of time for which the contract was made has expired, the employer wishing to protest against the termination shall make such protest to the nearest labour officer.

(d) The employer or employee shall be deemed to have waived his right of protest under this subsection unless he exercises it within 14 days immediately after learning of the termination or intended termination of the contract of employment.

(e) Where a protest is made to the nearest labour officer under this subsection, he shall forthwith proceed to enquire into the circumstances giving rise to the protest to try to secure a resolution of the conflict acceptable to both the employer and the employee, and for this purpose may, by order in writing served on any person, require that person —

(i) to furnish him in writing or otherwise, within such reasonable time as shall be specified in the order, with such material particulars as the labour officer may require;

(ii) to attend before him at a time and place to be specified in the order;

(iii) to give evidence on oath or otherwise; and

(iv) to produce before him any material document.

(f) Where the labour officer is unable to negotiate a settlement of the dispute between the parties under this subsection, he shall refer the matter to the Commissioner together with a report of his efforts to secure a settlement.”.

4. The Act is amended by substituting for section 7 thereof the following new section — Replacement of section 7

“Failure to reach settlement 7. Where there is a failure, after what, in the opinion of the Commissioner, is a reasonable time, to reach a settlement of a trade dispute referred to him under section 5, which time shall not, unless all the parties so agree, exceed forty two days, or in the case of a dispute dealt with under section 5(6), twenty one days, and in the event of the dispute not being settled by other means, the Commissioner shall issue a certificate, notice of which, in writing, shall be served on each party, to the effect that either party or both parties may refer the dispute to the Industrial Court.”

5. The Act is amended by deleting section 8 thereof.

Deletion of section 8

6. Section 9(1) of the Act is amended by substituting for the words “Permanent Arbitrator” the words “Industrial Court”. Amendment of section 9

7. The Act is amended by deleting sections 10, 11, 12, 13, 14, 15 and 16 therefrom. Deletion of section 10 — 16

Replacement
of part III

8. The Act is amended by substituting for Part III thereof the following new Part —

“PART III — *Industrial Court*

Establishment
of Court

17. (1) There is hereby established an Industrial Court, herein referred to as “the Court”, with all the powers and rights set out in this Act or any other written law, for the purpose of settling trade disputes, and the furtherance, securing and maintenance of good industrial relations in Botswana.

(2) The Court may consist of one or more divisions, as the Minister considers necessary, each headed by an Industrial Court judge.

(3) Industrial Court judges shall be appointed by the President from among persons possessing the qualifications to be puisne judges of the High Court, as prescribed in section 96(3) of the Constitution.

(4) In appointing Industrial Court judges the President shall designate one such judge to be the President of the Industrial Court, and any other judges shall rank according to their dates of appointment.

(5)(a) Every appointment made under this section shall be notified in the Gazette.

(b) Judges of the Industrial Court who are not citizens of Botswana or appointed on permanent and pensionable terms, may be appointed on contract and shall be eligible for re-appointment.

(6) In the exercise of the jurisdiction of the Court under section 18, a judge shall sit with two nominated members, one of whom shall be selected by him from among six persons nominated by the organization representing employees or trade unions in Botswana, and the other selected by him from among six persons nominated by the organization representing employers in Botswana:

Provided that, where, for any reason such nominated members are, or either of them is, absent for any part of a hearing of any trade dispute, the jurisdiction of the Court may be exercised by the judge alone or with the remaining member of the Court, as the case may be, unless the judge, for good reason, decides that the hearing should be postponed.

(7) A judge of the Court may be removed from office only for inability to perform the functions of his office, whether arising from infirmity of body or mind or from any other cause, or for misbehaviour, and the power to remove such judge shall vest in the President acting in accordance with the procedure provided in section 97 of the Constitution for the removal from office of judges of the High Court.

Jurisdiction
of Court

(8) There shall be appointed such public officers as may be necessary to staff the Court, and enable it to carry out its functions under this Act.

18. (1) The Court, or any division of the Court, shall have exclusive jurisdiction in every matter properly before it under this Act, and without prejudice to the generality of the foregoing, such jurisdiction shall include power —

- (a) to hear and determine all trade disputes;
- (b) to enjoin any employee or employer, or any trade union or employers' organization, from taking or continuing any industrial action;
- (c) to refer any matter to an expert and, at its discretion, to accept his report as evidence in the proceedings;
- (d) generally to give all such directions and do all such things as may be necessary or expedient for the expeditious and just hearing and determination of any dispute before it.

(2) Any matter of law arising for decision at a sitting of the Court, and any question as to whether a matter for decision is a matter of law or a matter of fact shall be decided by the judge presiding.

(3) Upon all issues other than those referred to in subsection (2), the decision of the majority of the persons representing the Court shall be the decision of the Court:

Provided that where there is no majority decision, the decision of the judge shall prevail.

(4) There shall be an appeal to the Court of Appeal against decisions of the Industrial Court.

(5) In the exercise of its powers under this Act, the Court may take into consideration any existing code of industrial practice agreed between the Government, employers' organizations and trade unions, and any guidelines or directives relating to wage and salary levels, and any other terms and conditions of employment that may, from time to time, be issued by the Government.

(6) The Court shall regulate its own procedure and proceedings as it considers fit.

Powers to
hear evidence

19. (1) The Court shall not be bound by the rules of evidence or procedure in civil or criminal proceedings and may disregard any technical irregularity which does not and is not likely to result in a miscarriage of justice.

(2) For the purpose of dealing with any matter before it, the Court may order any person to —

- (a) furnish, in writing or otherwise, such particulars in relation to the matter as it may require;
- (b) attend before it;
- (c) give evidence on oath or otherwise;

(d) produce any relevant document.

(3) Any order given under subsection (2) may include a requirement as to the date on which or the time within which the order is to be complied with.

(4) Any person who without reasonable cause, the proof of which shall be upon him, fails to comply with any order given under this section shall be guilty of an offence and liable to a fine of 500 Pula and to imprisonment for three months.

(5) Any person being required by an order made under this section to furnish information or particulars, produce any document or give evidence before the Court, who makes any statement, or furnishes information or particulars, or produces any document which he knows or has reasonable cause to believe is false or misleading in any material particular, shall be guilty of an offence and liable to a fine of 1000 Pula and to imprisonment for six months.

(6) If a witness objects to answering any question or to producing any document on the ground that it will tend to incriminate him, or on any other ground on which he could lawfully object if the objection had been made in civil or criminal proceedings in the High Court, he shall not be required to answer such question or to produce such document, nor shall he be liable to any penalty for refusing to do so:

Provided that if the Court is of the opinion that the answer to such question or the production of such document is necessary for the fair and just determination of the matter before it, it may hear the matter, or such of it as is necessary, in camera, in which case the witness shall be obliged to answer the question or produce the document, as the case may be, and such answer or such production shall not be admissible in evidence in any other civil or criminal proceedings against the witness.

Applications
to Court

20. (1) Applications to the Court shall be in such form as may be prescribed.

(2) If, in the opinion of the Court, the points in issue in any matter before it or to be brought before it are not clearly enough defined to allow the matter to be heard or determined, or if, in the opinion of the Court, the parties have not made sufficient attempt to reach agreement, the Court may remit the matter to the parties, or to the parties and the Labour Commissioner, with such directions or advice as it may deem appropriate.

Representation
in Court

21. Any interested party in any proceedings under this Act may appear by advocate or be represented by any other person so authorized by such party.

Proceedings
may be
public or in
private

22. (1) In any proceedings before the Court the judge presiding may, on the application of any party, and for good cause, exclude members of the public from such proceedings or any part of them.

(2) Until the decision of the Court in such proceedings has been published in accordance with this Act, nothing shall be published in respect of the proceedings or the evidence produced in such proceedings, other than a factual account thereof.

(3) Any person who contravenes or fails to comply with the provisions of subsection (2) shall be guilty of an offence and liable to a fine of 1000 Pula and to imprisonment for six months.

Publication
of evidence

23. (1) There shall not be included in any publication relating to any proceedings before the Court, any evidence or information disclosed during the course of such proceedings by any organization representing employers or employees or by any individual business, whether carried on by an individual person, a firm or a company, and in respect of which the Court has accepted an application made during the proceedings that such evidence or information be withheld from publication, nor shall any member of the Court, or any other person concerned in or present at the proceedings thereof, disclose any such evidence or information to any person except with the consent of the organization, or business concerned.

(2) Any person who contravenes or fails to comply with the provisions of subsection (1) shall be guilty of an offence and liable to a fine of 1 000 Pula.

Wrongful
termination
of contract
or disciplinary
action

24. (1) In any case where the Court determines that an employee has been wrongfully dismissed or disciplined the Court may, subject to its discretion to make any other order which it considers just —

(a) in the case of wrongful dismissal, order reinstatement of the employee, with or without compensation, or order compensation in lieu of reinstatement; or

(b) in the case of wrongful disciplinary action, order the payment of such compensation as it considers just: Provided that —

(i) compulsory reinstatement as a remedy for wrongful dismissal should only be considered —

(a) where the termination was found to be unlawful, or motivated on the grounds of sex, trade union membership, trade union activity, the lodging of a complaint or grievance, or religious, tribal or political affiliation; or

- (b) where the employment relationship has not irrevocably broken down; and
- (ii) in a case where reinstatement is ordered, any compensation ordered shall not exceed the actual pecuniary loss suffered by the employee as a result of wrongful dismissal, and in any other case, any compensation ordered shall not exceed six months monetary wages.

(2) In assessing the amount of compensation to be paid under subsection (1), the Court may take the following factors into account —

- (a) the actual and future loss likely to be suffered by the employee as a result of the wrongful dismissal;
- (b) the age of the employee;
- (c) the prospects of the employee in finding other equivalent employment;
- (d) the circumstances of the dismissal;
- (e) the acceptance or rejection by either the employer or the employee of any recommendations made by the Court for the reinstatement of the employee;
- (f) whether or not there has been any contravention of the terms of any collective agreement or of any law relating to employment by the employer or the employee;
- (g) the employer's ability to pay.

(3) Where a contract of employment is wrongfully terminated by an employee, the Court may make such order of compensation in favour of the employer as it considers just:

Provided that in no case shall such order of compensation exceed six months monetary wages.

(4) Any employer who fails to comply with an order of reinstatement made by the Court shall be guilty of an offence and liable to a fine of P1 000, or the equivalent of the employee's basic monthly wages, whichever is the greater, for every month or part thereof during which the failure to reinstate continues, and the court imposing such fine may order that such fine or any part of it be paid to the employee concerned as compensation for any loss suffered as a result of the employer's failure to reinstate him.

(5) Any person who, without lawful excuse, fails to comply with any decision of the Court under this section, other than an order referred to in subsection (4), shall be guilty of an offence and liable to a fine of 1000 Pula for every month or part thereof during which the failure continues.

Decisions of
the Court

25. (1) The Court may order the payment to any person of any money it finds to be due to him under the terms of his contract of employment, this Act or any other written law.

(2) Any decision of the Court shall have the same force and effect as a judgement or order of the High Court, and shall be enforceable in like manner as such judgement or order:

Provided that, without prejudice to any other remedy, any payment of money ordered under this section may be recovered summarily as a civil debt.

(3) A certificate signed by a judge of the Court shall be conclusive evidence of the existence of and the contents of the decision of the Court to which it refers.

(4) Decisions of the Court may be made retroactively to such date as the Court deems just in the circumstances of the particular case.

Interpretation
of decisions

26. (1) A decision shall state clearly to which parties and to which employers and employees comprised in the parties each of the provisions of the decision relates, and the date on which it is to come into effect:

Provided that the decision may be given retrospective effect, and different provisions may be brought into effect on different dates.

(2) A decision containing any provision inconsistent with the provisions of any written law relating to the terms or conditions of or affecting employment or labour, shall have effect as if such inconsistent provision were omitted.

(3) If any question arises as to the interpretation of a decision, or as to an decision being inconsistent with any written law, the Minister or any party to the decision may apply to the Court for a determination of the question, and the Court shall determine the matter after hearing the parties concerned, or if the parties concerned consent, without such hearing, and any such determination shall be deemed to be a decision made under this Act:

Provided that, where the question arises out of any clerical or incidental error or omission, the Court may rectify such error or omission without hearing the parties concerned.

(4) Subject to the provisions of this section, a decision shall, as from the date when it has effect, be binding on the parties to the dispute, and shall be an implied term of every contract between the employers and employees to whom the decision relates, so that the rate of wages to be paid and the terms and conditions of employment to be observed under the contract shall be in accordance with the decision until it is varied by a subsequent decision or by agreement.

Costs'

27. No costs shall be awarded by the Court except against a party held by it to have acted frivolously or vexatiously, or with deliberate delay in the bringing or defending of a proceeding, but where costs are awarded the tariff of costs laid down from time to time under the Rules of the High

Court shall apply *mutatis mutandis* in respect of costs awarded by the Court.

Remuneration
of Court

28. (1) Judges of the Industrial Court shall be paid salaries and allowances not less than those payable to judges of the High Court in accordance with the provisions of the Judges (Miscellaneous Provisions) Act, as from time to time amended, as may be determined by the President.

(2) Nominated members of the Court shall be paid such remuneration (including allowances) as the Minister shall, with the approval of the Minister responsible for finance, determine.”.

Replacement
of sections
29 and 30

9. The Act is amended by substituting for sections 29 and 30 thereof the following new section —

“Claims that
terms and
conditions
of employ-
ment are not
being
observed

29. (1) A claim that —

(a) the terms and conditions of employment in any trade or industry, either generally or in a particular area, have been settled by a collective labour agreement or by a decision of the Industrial Court;

(b) the parties to the collective labour agreement or the parties bound by the decision are or represent, either generally or in that particular area, a substantial proportion of the employers and employees in that trade or industry, being employees of the description to which the agreement or the decision relates; or

(c) in respect of any employee of the description referred to in paragraph (b), an employer engaged in that trade or industry, or, where the operation of the collective labour agreement, or of the decision, is limited to a particular area, an employer so engaged in that area is not observing those terms and conditions,

may be referred, in writing, by or on behalf of any employer or employee who is adversely affected thereby to the Industrial Court.

(2) If, in the opinion of the Court, a claim lodged with it for the purposes of this section does not contain sufficient particulars, it may require to be provided with further particulars of the claim and, where it does so, the claim shall be deemed, for the purposes of this Act, not to have been lodged with the Court in accordance with this section until it is satisfied that it has been provided with the particulars required.”

Addition of
section 30A

10. The Act is amended by inserting in Part V thereof immediately before section 31 the following new section 30A —

“Joint in-
dustrial
councils

30A. (1) When a union and an employers’ organization consider themselves to be sufficiently representative of employees’ and employers’ interests in an industry, they may jointly apply in writing to the Commissioner for the

establishment of a joint industrial council for that industry, and shall submit a copy of the proposed constitution of such joint industrial council with the application.

(2) On receipt of the application, the Commissioner shall consult any other interested parties and, after satisfying himself that the establishment of such a council is desirable and practicable, and that the proposed constitution is suitable, subject to any amendments that he may consider are desirable, and that all conditions required under this Act are met, he may, by notice published in the Gazette, establish and register a joint industrial council for the industry concerned.

(3) If the Commissioner does not consider that the establishment of the joint industrial council is desirable or practicable, and after hearing representations from any interested parties, he shall, as soon as possible so inform the parties in writing, setting out the reasons for his decision.

(4) The constitution of a joint industrial council shall provide for the following matters —

- (a) the industry and class or classes of employee to be covered by the council;
- (b) the appointment, number and method of selection of employer and employee representatives;
- (c) the appointment and method of selection of a chairman and deputy chairman of the council;
- (d) the appointment and method of selection of a secretary or joint secretaries of the council;
- (e) the procedure for the appointment of alternative members of the council;
- (f) the number of members required to form a quorum;
- (g) the procedure for the replacement of members;
- (h) the term of office of members of the council and office holders;
- (i) the procedure to be followed in the event of a dispute or deadlock in the council;
- (j) the method by which persons affected by any collective agreement made or amended by the council shall be informed thereof;
- (k) such other matters as may be included in the constitution by the party making the application and approved by the Commissioner, or as may be advised by the Commissioner.

(5) The Commissioner may, on the application of an interested party, and upon reasonable cause being shown, cancel the registration of a joint industrial council.

(6) Any interested party aggrieved by a decision of the Commissioner not to establish and register a joint industrial council, or a decision to cancel the registration of a joint

industrial council, may appeal against such decision to the Minister, whose decision thereon shall be final”.

Deletion of
section 31

11. The Act is amended by the deletion of section 31 therefrom.

Replacement
of section 33

12. The Act is amended by substituting for section 33 thereof the following new section —

“Registration
of collective
labour
agreements

33. (1) Each party to a collective labour agreement, or to an agreement extending or varying the terms of a collective labour agreement, shall lodge a certified true copy thereof with the Commissioner within 28 days immediately after the day on which such agreement was concluded.

(2) The Commissioner shall register, in such manner as may be prescribed, or in the absence of any such prescription as he may determine, one copy of the agreement lodged with him, and shall serve notice on each party to the agreement that he has done so.

(3) Where the Commissioner is of the opinion that any term of the agreement lodged with him under the provisions of this section is contrary to any provision of this Act or any other written law, he shall withhold registration thereof and shall serve notice of such fact and his opinion, in writing, on each party to the agreement.

(4) Any interested party aggrieved by a decision of the Commissioner to withhold the registration of a collective agreement, may appeal against such decision to the Minister, whose decision shall be final.

(5) Any party to a collective labour agreement who contravenes or fails to comply with the provisions of subsection (1) shall be guilty of an offence and liable to a fine of P1 000.”.

Amendment
of Part VI

13. Part VI of the Act is amended —

(a) in the title thereto by substituting for the words “awards of the Permanent Arbitrator” the words “decisions of the Industrial Court”;

(b) in subsection (1)(a) of section 37 thereof, by substituting for the words “an award of the Permanent Arbitrator” the words “a decision of the Industrial Court”; and

(c) by substituting for the word “award” wherever it occurs in section 37 the word “decision” in each case.

Deletion of
sections 40
and 49

14. The Act is amended by the deletion of sections 40 and 49 therefrom.

PASSED by the National Assembly this 1st day of September, 1992.

C.G. MOKOBI,
Clerk of the National Assembly.