

# Public sector strike action may put the new ESC Regulations to the test

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Trade unions in the public sector vow that planned protest action will disrupt essential services such as hospitals and courts during a 'National Day of Action' on 22 November 2022, with promises of full-blown strike action thereafter. How do the restrictions on workers' right to strike in essential services mitigate the potential disruption?



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The Transnet strike which ended in mid-October 2022 brought road, freight, and port logistics to a near standstill with a devastating impact on the economy. The threat of strike action in the public sector promises further disruption. Trade unions representing 800,000 public service members have announced that a 'National Day of Action' will take place across the country on Tuesday, 22 November 2022, to protest the unilateral 3% wage increase implemented by the government. The recent industrial action in the public sector which began with a stayaway, and lunchtime pickets is the first in over a decade. The deputy president of Police, Prisons and Civil Rights Union, however, warned that demonstrations would evolve to a full-blown strike. It was reported that public servants who perform essential services are prepared to join the industrial action as well.

## Essential vs non-essential services: Restrictions on the right to strike

What differentiates the Transnet strike from the threatened public sector strike is that many services in the public sector are

designated as essential services. Workers who provide essential services are legally required to provide their services even while a collective bargaining dispute remains unresolved. An essential service is a service that if interrupted, would endanger the life, personal safety, or health of the whole, or any part of the population. The Labour Court in *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* recognised that trade unions hold more bargaining power when engaging in collective bargaining in respect of essential services because their strike can cause more destruction and devastation than a strike by non-essential service workers. This is why essential service workers' constitutional right to strike is restricted, and rightly so.



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The 2021 list of designated essential services includes the services required for the functioning of courts as well as emergency health services, nursing, medical and pharmaceutical services - the full list may be accessed [here](#). Once a service has been declared an essential service, employees who render that service may not participate in strike action (these disputes must be referred to conciliation and arbitration instead) or participate in protest action.

A strike by employees who perform an essential service will therefore constitute unprotected strike action and an employer may approach the labour court on an urgent basis to interdict the unlawful industrial action. This remedy only arises once the strike action has commenced, while employers providing essential services would correctly seek to prevent strike action from taking place altogether.

## ESC Regulations

**Essential Service Committee Regulations published on 21 October 2022 set out, amongst other things, the steps that an interested party may take to request the essential services committee (ESC) to investigate whether the whole, or part of any service should be designated as an essential service.**



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In deciding whether a service constitutes an essential service upon the application of a party, the Labour Relations Act (LRA) provides that the ESC may direct the bargaining parties to negotiate a minimum services agreement setting out the minimum number of employees performing an essential service who may not strike to ensure that the life, personal safety, or health of the population is not endangered. If a minimum services agreement is reached, the agreed minimum service levels become a minimum essential service, but all other

employees, who are not required to provide the minimum service, will be allowed to strike.

The ambit of what may be declared an essential service in this respect is however limited to services that would endanger the life, personal safety, or health of the whole or any part of the population, if the services were interrupted. The narrow criteria for a service to be considered 'essential' for the purposes of the LRA mean that economic stability, operations of national strategic importance or the general welfare of the population, do not constitute justification for a service to be declared 'essential'. The impact of the interruption of the services must go beyond a mere interference with trade and commerce.

The trade unions' threat of a full-blown strike in which essential service workers will participate promises to test these tenets of our labour law. Employers in public sector services that do not meet the criteria of an essential service, may nevertheless consider strike mitigation strategies such as agreeing minimum services in the picketing rules during the collective bargaining process. The introduction of the ESC Regulations provides practical guidance on how to request a service be declared as an essential service. Where this is unsuccessful, however, collective bargaining parties should be encouraged to incorporate agreed minimum services into the collective agreements or in the picketing rules that must be established before protected strike action may occur.

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