

Beyond job titles: the evolution of essential services designation for tailings dams

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A service-based approach to essential services marks a significant shift in how tailings dam operators must approach workforce classification and labour relations, with positive impacts for meeting occupational health and safety imperatives.

The Essential Services Committee's (ESC) recent decision to expand the designation of essential services at tailings dams is more than a simple broadening of scope. It is a fundamental shift from focusing on who performs a service to what service is being performed, culminating in the expansion of essential services based on the recognition of the importance of the safety role played by personnel involved in the management and oversight of tailings dams.

When the ESC first designated services rendered by mud guards and team leaders at tailings dams as essential services on 11 May 2018, it inadvertently created a loophole. Subsequent referrals in terms of section 73(1)(a) and (b) of the Labour Relations Act (LRA) revealed that whilst employees rendered the same or similar services to those performed by 'mud guards' and team leaders, different job titles were used to describe these employees. This resulted in employers and employees finding themselves in disputes about whether the essential services designation applied, with the answer turning on terminology, rather than the substance of the work and services being performed by the persons in these roles.

This prompted the ESC to initiate an investigation to review the designation to determine the actual service as opposed to who renders the service. The shift from a position-based to a service-based approach is not merely semantic, it reflects a deeper understanding of how essential services should be identified and regulated in complex industrial environments, particularly where health and safety are at stake.

This may open the door for a broader approach to considerations of the importance of protecting the health and safety of employees, and non-employees who may be impacted by an employer's operations and the risks that may be presented when employees tasked with health and safety obligations go on strike. This decision highlights whether the consideration of the protection of health and safety should be so essential such that the persons who perform those roles should be prevented from striking.

The ESC's approach must be understood within the constitutional framework governing the right to strike. The Constitutional Court has emphasised that a restrictive interpretation of essential service must, if possible, be adopted so as to avoid impermissibly limiting the right to strike. The law requires that it is the service which is essential, not the industry or the operation within which the service falls; only those employees who are truly performing an essential service may be prohibited from striking; and essential and non-essential service workers may be found working side by side in the

same operation. This then requires balancing the right of employees to strike against the need to protect the health and safety of persons who could be negatively impacted by a failure to perform work that safeguards health and safety, especially of the public.

This framework explains why the ESC took such care to delineate precisely which services at tailings dams are essential and which are not. Before the ESC can designate any service as essential, it must be satisfied that the interruption of the said service is likely to endanger life, personal safety, or health of the whole or part of the population; in this regard, essential services designations play an important role as an occupational health and safety mechanism.

The expanded designation covers two distinct operational areas:

Deposition sites – All services that are necessary for the building and/or construction, maintenance, risk management, including monitoring, inspection, and reporting at tailings dams to ensure the integrity, safety, and stability of the deposition sites and/or tailings dams are essential services. These services are about preventing failures that would endanger workers, communities, and ecosystems. For example, monitoring phreatic surfaces, measuring piezometer readings, and inspecting for seepage are early warning systems that detect structural instability before failure occurs. Relocating pipe systems to prevent overtopping and raising catwalks to manage pool depth are active interventions that maintain the physical integrity of tailings dams. The designation ensures that these critical safety monitoring and maintenance functions continue uninterrupted, regardless of the employee's title.

Hydro mining – The hydro mining component of the designation illustrates the ESC's approach to balancing safety imperatives with constitutional rights. All services performed in hydro mining that relate to ensuring the integrity of the water management system, including monitoring and inspecting pipelines to ensure the integrity of slurry delivery pipes, valves, and water lines that must be inspected in order to timeously identify non-conformance and immediately rectify it, are essential services.

In the reming process, it is imperative that water is properly managed to ensure that the integrity of the tailings dam is not compromised, and that monitoring and inspection of pipelines to ensure the integrity of slurry delivery pipes, valves, and water lines is critical to avoid dam failure due to uncontrolled slurry or water. The ESC recognised that water management integrity is essential, whilst the actual reming operations are not.

What mining operators with tailings dams must do

The service-based approach requires mining operators to assess how they classify their workforce beyond job titles. Instead, operators must conduct a detailed analysis of the functions performed to determine which employees perform services falling within the designation.

On one hand, the designation provides operational continuity for critical safety functions. Ensuring these services continue uninterrupted protects not only the mining operation and its employees, but surrounding communities and ecosystems as well. On the other hand, the designation limits the constitutional right to strike for affected employees. This means operators must be precise in their application of the designation, ensuring they do not overreach by classifying non-essential service workers as essential.

The limitation on the right to strike for employees working in connection with tailings dams has important implications for employers and employees alike. Employers should proactively address this limitation during wage negotiations and collective bargaining processes, but may similarly consider whether the principles are equally applicable to other services, which if withdrawn, may significantly impact the ability to protect the health and safety of persons. They should further assess whether this could support additional stakeholder engagements and applications for other services to be included in essential services designations.

The expanded designation requires immediate action in the form of workforce audits, contract reviews, and employee communications. As the mining industry continues to grapple with the legacy of tailings dams and the imperative of responsible management, this designation provides a foundation for balancing competing interests in a manner that prioritises safety without unnecessarily limiting fundamental rights, provided that employers engage constructively with unions to ensure that employees who perform essential services receive appropriate recognition for the restrictions placed upon them, and for the safety-critical nature of the work they perform in protecting lives and the environment.

Following this ruling, the parties have been directed to negotiate and conclude a minimum service agreement by 29 December 2025, 90 days from the designation, which must in turn be ratified by the ESC. Principles of this agreement may equally shape the landscape of the balancing of the rights to safety and to strike. [▶](#)

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