

EMPLOYMENT RELATIONS TRIBUNAL

ORDER

ERT/RN 03/2023

Before:

Shameer Janhangeer	-	Vice-President
Vijay Kumar Mohit	-	Member
Karen K. Veerapen (Mrs)	-	Member
Ghianeswar Gokhool	-	Member

In the matter of:

Organisation of Hotel, Private Club and Catering Workers Unity

Applicant

and

Ravenala Attitude/Rivière Citron Ltée

Respondent

The Organisation of Hotel, Private Club and Catering Workers Unity (the “Union”) is seeking an Order for recognition as a bargaining agent in relation to employees at Ravenala Attitude (Rivière Citron Ltée) pursuant to *section 36* of the *Employment Relations Act* (the “Act”). The Applicant Union claims to have the support of 68 workers in the bargaining unit, which consists of the following 32 categories:

Housekeeping Assistant, Public Area Attendant, Handy Person, Gardener, Trainee Housekeeping Assistant, Order Taker, Plumber, Electrician, Painter, Cook, Air Condition Technician, Laundry Attendant, Trainee Public Area Attendant, Trainee Handyman, Audio Visual Support Technician, Kitchen & Laundry Technician, Porter, Receptionist, Cashier, Food & Beverage Assistant, Bartender, Telephone Operator, Guest Relation

Officer, General Cashier, Trainee Food & Beverage Assistant, Assistant Cook, Steward, Spa Therapist, Welder, Demi Chef de Partie, Hairdresser, and Supervisors; except Managerial grades.

The parties were assisted by Counsel. Mr B. Ramdenee appeared for the Applicant Union, whereas Mr N. Henry appeared for the Respondent. The Respondent has submitted a Statement of Case in resisting the application.

Mr Atma Shanto was called to depose on behalf of the Applicant Union. He notably stated that the Union addressed a demand for recognition to the employer by letter dated 16 September 2022 (produced as Document A). On 26 September 2022, there was a first reply from the employer (produced as Document B) acknowledging receipt of the former letter. There was also a second reply from the employer dated 4 November 2022 (produced as Document C) whereby the employer stated there was issue regarding the numbers, that there were leavers and that the categories of the bargaining unit should be 68 instead of the 32 proposed by the Union. The employer also stated that the bargaining unit would cause fragmentation and will not be conducive to good industrial relations.

Mr Shanto also stated that he does not agree with the stand in the last letter. They are not obliged to divulge the names of their members. The application is for manual grade workers, not middle or top management. The bargaining unit is decided according to the members who have decided to join the Union. The Union considered the letter of 4 November 2022 to be a refusal given that as per the legislation, management has two choices: either to recognise the Union or not. The letter is tantamount to a refusal. He produced a bundle of 68 membership forms (Document D), which he considers to represent not less than 20% and not more than 50% of the bargaining unit. He is therefore asking that the employer recognise the Union as a bargaining agent.

Mr Shanto was broadly questioned by Counsel for the Respondent. He notably replied that at the beginning, he would not expect all the manual grades to join the Union; once recognised, the other manual grades can democratically decide to join the Union. Regarding Document C, he is of the opinion that the employer is duty bound to reply to accept the Union or not. He does not agree that the employer has not refused in the aforesaid letter. The Union made a first application to the employer on 15 December 2021, whereby the employer asked for

clarifications regarding the categories. The Union refused to give same and applied to the Tribunal. The application was withdrawn on 1 July (2022). He cannot remember if the employer provided the proper names of the categories. He agreed that the initial application was for 25 categories with 119 members, whereas the present application is for 32 categories with only 69 members. The Ministry of Labour also provided the list of categories. They then reworked their list showing that they have 68 members in the bargaining unit mentioned.

Mr Shanto moreover agreed that there are now 7 more categories. He is not aware if there are more than 32 categories of workers at the hotel. On being shown a list, he stated that Assistant Bartender is part of the bargaining unit. He agreed that the unit includes *Demi Chef de Partie* but not *Chef de Partie* and Food & Beverage Assistant but not Food & Beverage Coordinator. Counsel referred Mr Shanto to various provisions of the *Code of Practice*. He did not agree that the application is not in line with the provisions of the law as the letter of 4 November is not a refusal. He does not agree that there is a problem with the bargaining unit and that there are avenues to agree on the bargaining unit. He did not also agree that the application was premature and misconceived and that an order for recognition would not be conducive to good industrial relations.

The Respondent's representative, Mrs Vanisha Sohawon, HR Manager at Ravenala Attitude was called to adduce evidence. She notably stated that there was a previous application and produced the minutes of the Tribunal dated 9 August 2022 (Document E), whereby the application was withdrawn. She confirmed that the letter dated 4 November 2022 (Document C) is from her. In the hospitality sector, they have different job titles that come and go over time, but leading to this case, they have had an increase and new job titles have been since created. She produced a list of job titles at the hotel as at 23 January 2023 (Document F), whereby the number of workers in the Union's bargaining unit is 132. There are also 31 Supervisors in the bargaining unit over a total of 271 employees.

Mrs Sohawon also stated that there are related categories which have been left outside the bargaining unit, e.g. Assistant Bartenders, *Chef de Partie*, Senior Plumber and Senior Electrician. As at 8 February 2023, there were 160 persons as per the Union's categories, with 28 Supervisors out of a total of 287. An updated list as at 8 February 2023 was produced (Document G) to this effect. Between July 2021 to November 2022, there were 195 leavers at the hotel. There is no check-off agreement. The application is premature and the employer has never

refused to recognise the Union. To recognise such a bargaining unit would cause fragmentation and will be against the principles of the *Code of Practice*.

Upon being questioned by Counsel for the Applicant Union, the representative notably replied that the issue is not with the actual categories in the bargaining unit, but that other categories should have been included. She agreed that the membership of the Union would define its bargaining unit and that if a worker is not a member of the Union, he/she cannot form part of the bargaining unit and would not be represented by the Union. By fragmentation, the Union is breaking down the categories into several parts. As per Document G, she agreed that the number of workers in the bargaining unit is 160 out of a total of 287, which is more than 55%. She agreed that this is not an insignificant number. As per Document C, the employer does not recognise the Union. She was not aware if she replied to the Union outside 45 days. She agreed that the Union has 20% of workers in the bargaining unit and it should be recognised. She did not agree that the letter dated 4 November 2022 is a refusal to recognise.

Counsel for the Applicant Union has notably submitted that the Respondent has recognised that the categories in the bargaining unit have been properly defined as per their Statement of Case. The constitution of the bargaining unit is for the Union to decide in accordance with its members. The Union can only represent those members according to its rules and regulations. Counsel moreover relied on the Tribunal's order in *Export and other Enterprises Employees Union and World Knits Ltd (ERT/RN 23/2022)* in submitting that there is no issue of fragmentation. The Union has submitted evidence that it has 68 members in the bargaining unit of 160 workers, which is more than 20%. On the issue of refusal to recognise, reference was made to *section 36 (3)* of the *Act* whereby the employer shall, within 45 days, inform the trade union whether it agrees to recognise or not; there are only two options. After 45 days, there has been no recognition by the employer and the Union was entitled to come before the Tribunal.

Counsel for the Respondent, has on the other hand, notably submitted that nowhere in law has it been stated that the bargaining unit should only be constituted of categories where the Union has members. Secondly, it is not true to say that the employer agrees that the Union has 68 members; it cannot be said for sure if these persons are indeed employed by the Respondent despite agreeing that he did not put any questions regarding the membership forms produced. The Union can only come to the Tribunal where the employer has refused, and Document C does not make any mention of refusal. There has been no decision and as yet there has been no refusal. *Paragraph 93* of the *Code of Practice* refers to proposals made to establish

a bargaining unit, whereby the union and management should reach an agreement. The Union has not done so and has come directly before the Tribunal. Where there is no agreement, parties shall jointly or separately refer the matter to an employers' organisation, a higher level within the trade union or the Commission. The application is premature as the first step is to sit and discuss.

In relation to the issue of fragmentation, Counsel referred to *paragraph 89 of the Code of Practice*, whereby collective bargaining is conducted in relation to a defined group of workers which can appropriately be covered by one negotiating process. Reference was also made to *paragraphs 90 and 91 of the Code*. The interests of workers need not be identical, but there shall be a substantial degree of common interest. Barman/Assistant Barman, Electrician/Senior Electrician, Assistant F & B/F & B Coordinator, *Chef de Partie/Demi Chef de Partie*; two kinds of employees on the same floor. Is this conducive to good industrial relations? That is why the employer has given all information to the Union to discuss and have an appropriate bargaining unit. It was submitted that the matter should be set aside until the parties reach an agreement on an appropriate bargaining unit.

The Tribunal shall first draw its attention to the preliminary issue raised by the Respondent to the effect that there has been no refusal to recognise the Applicant Union prior to the present application before the Tribunal. Reliance has notably been placed on the letter dated 4 November 2022 (Document C), whereby the Respondent replied to the Union's application for recognition. In this letter, the Respondent has notably invited the Union to review its bargaining unit and to provide a list of members to allow them to properly assess the application.

Pursuant to *section 36 of the Act*, a trade union must apply in writing to the employer for recognition in respect of a bargaining unit. The employer shall, within 45 days of the receipt of the application, inform the union whether it recognises or refuses to recognises stating reasons thereof. Where the employer has, *inter alia*, failed to respond to the application or refuses to recognise the trade union, the latter may then apply to the Tribunal for an order to direct the employer to recognise it.

In the present matter, the Applicant Union wrote to the Respondent's General Manager on 16 September 2022 applying for recognition stating that it has 68 members in the listed

categories of the bargaining unit. The Respondent made an initial reply on 26 September 2022 acknowledging the application letter, stated that the matter is under consideration and that it shall revert with a reply to the Union. On 4 November 2022, the Respondent sent the aforementioned letter to the Union (Document C).

A perusal of the contents of the letter dated 4 November 2022 does not reveal any express refusal by the Respondent to recognise the Union. As per *section 36 (3)* of the *Act*, the law has placed a mandatory requirement on the employer to reply to the Union within 45 days of the receipt of the application. The application made to the employer was dated 16 September 2022 and, as per the postal delivery advice (attached to the application made to the Tribunal), was delivered to the Respondent on 19 September 2022. The Respondent therefore had to reply to the Union before the 2 November 2022 to be within the required 45 days set in law. The Respondent's reply dated 4 November 2022 was therefore outside the mandatory time limit for it to reply to the Applicant Union.

The Respondent being outside the 45 days, it had therefore failed to respond to the application as required under *section 36 (3)* of the *Act* and this entitled the Applicant Union to make the present application before the Tribunal pursuant to *section 36 (5)* of the *Act*. It should also be noted that the employer did not comply with *section 36 (3)* of the *Act* in not informing the Union, within 45 days of the receipt of the application, whether it recognises the Union or not. The Respondent's intention to invite the Union to review the bargaining unit and properly assess the application should have been done much sooner so as to be within the parameters of the time limits set in the law which would also have allowed the employer to recognise the Union or not within the statutory delay. The Tribunal thus cannot find that the Respondent's lack of refusal to recognise the Union, as per its letter dated 4 November 2022, to be fatal to the present application.

The Applicant Union is seeking recognition as a bargaining agent in the present matter and has produced 68 membership forms (Document D) in support of its application. As per the figures put forward by the Respondent (*vide* Document G), the number of workers in the 32 categories of the bargaining unit amount to 160 as at 8 February 2023.

An examination of the 68 membership forms produced show that 19 forms relate to categories which are not listed in the bargaining unit as applied for. These 19 forms show the

workers to be in the categories of Accounts Receivable Officer, Head Porter, Account Payable Officer, *Lingerie* (runner), Mason, Senior Carpenter, Carpenter, Housekeeping Attendant, Public Area Supervisor, Public Area Assistant, HVAC Technician, Kitchen and Shop Assistant.

Moreover, a perusal of the membership forms has revealed that the Applicant Union has members in only 18 categories out of the 32 in the bargaining unit. These 18 categories are Housekeeping Assistant, Public Area Attendant, Handy Person, Gardener, Plumber, Electrician, Painter, Cook, Air Condition Technician, Laundry Attendant, Kitchen & Laundry Technician, Porter, Cashier, Food & Beverage Assistant, Assistant Cook, Steward, Welder and *Demi Chef de Partie*. The Union has 49 members in these 18 categories. As per the Respondent's figures (*vide* Document G), there are a total of 121 workers in these 18 categories.

Counsel for the Respondent, in submissions, notably stated that it cannot be said for sure if the names appearing on the membership forms are indeed employed by the Respondent. He did however agree that he did not question the membership forms produced. Nor did he dispute same in evidence. If ever the Respondent did not agree with the forms, same should have been demonstrated through evidence. In any event, it is for the Respondent to say whether the persons whose names appear on the forms are employed by them or not.

The Respondent has notably contended that the bargaining unit is incomplete and must cover other categories of employees. In this regard, the Tribunal would wish to cite what was stated in *Export and other Enterprises Employees Union and World Knits Ltd (supra)*:

It is trite that a trade union can only constitute a bargaining unit according to the workers who have joined the union and the bargaining unit is accordingly grouped according to the categories of its members. Workers who are not members of the union and whose categories do not fall within the constituted bargaining unit would not be part of the bargaining unit. It also stands to reason that the Union would not normally be aware of other categories of workers if the workers in those particular categories have not approached them for membership.

It should also be noted that the Applicant Union has not ruled out that once recognised, other manual grades may democratically decide to join the Union. Indeed, the following was also noted by the Tribunal in *Export and other Enterprises Employees Union and World Knits Ltd (supra)*:

Although the Respondent is contending that the bargaining unit is not complete as other categories have been left out, it cannot be excluded that the workers in these categories may also opt to be unionised with the Applicant Union or any other trade union, as their choice maybe, for the protection of their interests in the future. It is well recognised that the right to join a trade union is a fundamental right under the Constitution.

Besides, the Tribunal has taken due note of the Respondent's representative evidence to the effect that the bargaining unit is defined by the Union's membership and that if a worker is not a member of the Union, he or she would not form part of the bargaining unit. Bearing in mind the fundamental right of the worker to join a trade union for the protection of his interests (*vide section 13 of the Constitution*), it would be unfair on the workers who have joined the Union not to have their Union recognised by the employer because of the workers, whether related or not, who are not members of the Union.

Counsel for the Respondent has notably referred to *paragraph 93 of the Code of Practice* in submitting that the Union and management should meet to discuss the bargaining unit. This particular paragraph applies where proposals are made to establish or vary a bargaining unit, which is not the case in the present matter as the Applicant Union has applied for recognition in relation to a bargaining unit established in accordance with the workers who have opted to join it. In any event, the substantive provisions of the law relating to recognition of a trade union have not placed any requirement as regards the constitution of the bargaining unit. In this vein, it must be noted that the *Code of Practice* is meant for guidance to promote good employment relations (*vide section 35 of the Act*).

The Respondent has also raised the issue of fragmentation and has notably sought support from *paragraphs 89, 90 and 91 of the Code of Practice*. The Respondent contends that the bargaining unit as it is would leave the employer with two kinds of workers on the same floor. The Tribunal, however, considers that this argument would relate more to the issue of the categories that have not been covered by the bargaining unit, which has already been considered by the Tribunal. The issue of any given category of workers being fragmented within itself has not been shown to arise in the present case.

It should also be noted that the Respondent's representative did recognise that the bargaining unit of 160 workers is more than 55% of the workforce and that this is not an insignificant number. The Respondent's letter of 4 November 2022 has acknowledged that the categories of the bargaining unit have been properly named. Moreover, the Respondent, at paragraph 9 of its Statement of Case, does say that the bargaining unit is properly defined.

In observing the *Code of Practice*, it would be highly desirable for the bargaining unit to cover as wide a group of workers as possible (*vide paragraph 90 of the Code of Practice*). However, the Union cannot, as has been recognised by the Respondent's representative, include workers who have not joined in the bargaining unit.

The Tribunal has also noted that the Respondent has made reference, in its evidence, to a previous application made by the Union which was withdrawn before the Tribunal on 9 August 2022. The Tribunal fails to see the relevance of the previous application to the present matter before it and notes that this issue was rightly not pressed upon by the Respondent in its submissions.

As has been previously noted, the membership forms produced have shown the Applicant Union to have only 49 members in 18 categories of the bargaining unit comprising a total of 121 workers. The Tribunal has not found any evidence of membership support in the remaining 14 categories of the bargaining unit.

It would be pertinent to note the following from the Supreme Court in *Private Enterprises Employees' Union v Industrial Relations Commission and Mauritius and New Zealand Dairy Enterprises Ltd [1985 MR 219]* in relation to a case of recognition under the then *Industrial Relations Act*:

It follows that, bearing in mind the fact that the provisions of the Code of Practice are meant for guidance only, while it would not be proper for the Commission to adopt, as a general principle applicable to all cases, a yardstick that recognition will never be granted unless the union has at least x% of employees on its books, there is nothing to prevent the Commission from saying, in a given situation, that a union which has only 18 members out of 63 workers in an enterprise and has no member at all in 4 out of 6 grades cannot qualify for full recognition under section 58 (4) (b) of the Act.

In view of the above, the Tribunal cannot find that the Applicant Union would be entitled to recognition as a bargaining agent in respect to the following categories of the bargaining unit: Trainee Housekeeping Assistant, Order Taker, Trainee Public Area Attendant, Trainee Handyman, Audio Visual Support Technician, Receptionist, Bartender, Telephone Operator, Guest Relation Officer, General Cashier, Trainee Food & Beverage Assistant, Spa Therapist, Hairdresser and Supervisors.

The bargaining unit to which the Applicant Union would be entitled for recognition as a bargaining agent relates to the 18 categories whereby it has 49 members. Considering the total number of workers in these 18 categories to be 121, the Applicant Union would have about 40% support in the bargaining unit. As per *section 37 (1)* of the *Act*, a trade union shall be entitled to recognition as a bargaining agent where it has the support of not less than 20% and not more than 50% on the workers in the bargaining unit.

The Tribunal therefore orders that the Organisation of Hotel, Private Club and Catering Workers Unity be recognised by Ravenala Attitude/Rivière Citron Ltée as a bargaining agent in respect of a bargaining unit consisting of the following categories of employees:

Housekeeping Assistant, Public Area Attendant, Handy Person, Gardener, Plumber, Electrician, Painter, Cook, Air Condition Technician, Laundry Attendant, Kitchen & Laundry Technician, Porter, Cashier, Food & Beverage Assistant, Assistant Cook, Steward, Welder and Demi Chef de Partie.

Moreover, the Union and the Respondent are to meet at specified intervals or at such time and on such occasions as the circumstances may reasonably require for the purpose of collective bargaining.

The Tribunal orders accordingly.

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SD Shameer Janhangeer
(Vice-President)

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SD Vijay Kumar Mohit
(Member)

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SD Karen K. Veerapen (Mrs)
(Member)

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SD Ghianeswar Gokhool
(Member)

Date: 10th May 2023