

EMPLOYMENT RELATIONS TRIBUNAL

ORDER

ERT/ RN 78/20

Before

Indiren Sivaramen	Vice-President
Vijay Kumar Mohit	Member
Rabin Gungoo	Member
Kevin C. Lukeeram	Member

In the matter of:-

Rodrigues Private Industries and Allied Workers Union (Applicant)

And

Mammouth Trading Co. Ltd (Respondent)

The present matter is an application made by the Applicant union under section 36(5) of the Employment Relations Act, as amended (the "Act"), for an order directing the employer to recognise the Applicant as the sole bargaining agent in a bargaining unit ***"consisting of all the categories of workers excluding management, under employment at Mammouth Trading Co. Ltd (Rodrigues Branch)."*** The Applicant sent a letter dated 10 October 2019 to the Respondent (copy is at Annexure A to the application) seeking for sole recognition for the said bargaining unit. The Respondent replied to the Applicant by way of a letter dated 15 November 2019 (copy annexed as Annexure B to the application) whereby the Respondent informed Applicant that the Respondent refuses that Applicant *"be granted recognition for the branch situated in Rodrigues, in as much as, interalia Rodrigues Private Industries and Allied Workers Union has not the support of not less than 20% of the workers in the bargaining unit of Mammouth Trading Co Ltd."* The Respondent is objecting to the recognition of the Applicant union and both parties were assisted by Counsel. The Respondent had raised a preliminary objection which has been dealt with in a ruling of the Tribunal delivered on 18 September 2020.

The representative of the union has deponed before the Tribunal and he stated that the Applicant union initially had the support of twenty-eight workers and now has the support of thirty workers out of thirty-five workers in the bargaining unit consisting of workers excluding management at the branch in Rodrigues. He produced copies of union admission forms, pay statements and identity cards in thirty batches (Docs A to A29).

In cross-examination, he gave a list of no less than sixteen categories of workers which would be included in the bargaining unit. He also gave the number of workers as per these categories which would be members of the Applicant union. He had no idea of the number of employees at Mammouth Trading Co Ltd. He stated that the union would only represent the workers who are in Rodrigues. He agreed that the Applicant union should be in a position to sign a collective agreement on behalf of the sixteen categories of workers. He conceded that it may then happen that the two drivers (of the Respondent) in Rodrigues may benefit from terms and conditions of employment which are different from those enjoyed by drivers at the Respondent in Mauritius. The representative of Applicant then referred to the autonomy of the Rodrigues Regional Assembly.

The Head of HR of Respondent then deponed on behalf of Respondent. She stated that the Respondent has twenty-two branches in Mauritius, two branches in Rodrigues and four other units which include the Head Office in Bell Village, Bell Village Electrical Repair Centre and a Central Warehouse. She stated that there are more than six hundred employees in the different categories at the Respondent. She stated that the Respondent provides equal treatment to all its workers and that there is uniformity between all the workers at the Respondent. She added that employees in all twenty-four branches (be it in Rodrigues or Mauritius) enjoy the same terms and conditions of employment. There are, for example, no special terms and conditions for drivers in Mauritius or in Rodrigues. She stated that it would be impossible to have a bargaining unit consisting of only employees located in Rodrigues. She produced two lists which showed the count of employees at Respondent as per relevant departments, and as per specific job descriptions, in the respective branches and other units (Docs B and C respectively). She added that there is only one employer, that is, Mammouth Trading Co Ltd, and that all employees at the different branches, including in Rodrigues, are governed by The Distributive Trades Remuneration Order.

In cross-examination, the representative of Respondent suggested that the employees are not allowed to become members of the trade union because this will be discriminatory towards other employees. However, later in re-examination she stated that Respondent would not prevent employees to join a trade union so long as they comply with the law.

The Tribunal has examined all the evidence on record including the submissions of both Counsel. The issue of representativeness in Rodrigues was not seriously challenged and Respondent in fact in his Statement of Case at paragraph 6 averred that the Applicant had the support of only about 4% of the workers of the enterprise. The Respondent did not challenge the alleged support in Rodrigues but instead averred that the bargaining unit could not be limited to Rodrigues and was much larger in the present case. The real issue in the present matter is thus the determination of the bargaining unit. In the case of **Private Sector Employees Union and Fibre Marine Limited, ERT/RN 192/2015**, the Tribunal stated the following:

In this context, it would be apposite to quote from Dr D. Fok Kan in Introduction to Mauritian Labour Law 2/ The Law of Industrial Relations (2000), p.52:

Recognition involves the determination not only of the bargaining agent but also of the bargaining unit.

It is clear that the starting point for any determination of an application for an order for recognition of a trade union as a bargaining agent or sole bargaining agent is the determination of the bargaining unit. "Bargaining unit" is defined in section 2 of the Act as follows:

"means workers or classes of workers, whether or not employed by the same employer, on whose behalf a collective agreement may be made".

Articles 89 to 96 (under the heading "Bargaining Units") and the immediately following provisions of the Code of Practice (Fourth Schedule to the Act) provide interesting guidelines when establishing a bargaining unit. Thus Articles 89, 90, 91, 92, 94, 95, 96 and 100 of the Code of Practice read as follows:

BARGAINING UNITS

89. Collective bargaining in an enterprise is conducted in relation to defined groups of workers which can appropriately be covered by one negotiating process.

90. A bargaining unit shall cover as wide a group of workers as practicable. Too many small units make it difficult to ensure that related groups of workers are treated consistently. The number of separate units can often be reduced by the formation of a joint negotiating panel representing a number of trade unions.

91. The interests of workers covered by a bargaining unit need not be identical, but there shall be a substantial degree of common interest. In deciding the pattern of

bargaining arrangements, the need to take into account the distinct interests of professional or other workers who form a minority group shall be balanced against the need to avoid unduly small bargaining units.

92. *Factors which shall be taken into account in establishing a bargaining unit include –*

- (a) the nature of the work;*
- (b) the training, experience and professional or other qualifications of the workers concerned;*
- (c) the extent to which they have common interests;*
- (d) the general wishes of the workers concerned;*
- (e) the organisation and location of the work;*
- (f) hours of work, working arrangements and payment systems;*
- (g) the matters to be bargained about;*
- (h) the need to fit the bargaining unit into the pattern of trade union and management organization;*
- (i) the need to avoid disruption of adequate existing collective bargaining arrangements which are working well; and*
- (j) whether separate bargaining arrangements are needed for particular categories of workers, such as supervisors or workers who represent management in negotiations.*

...

RECOGNITION – GENERAL CONSIDERATION

94. *The interests of workers are best served by strong and effective trade unions.*

95. *The competition among separate trade unions for the right to negotiate for the same category of workers leads to friction and weakens the trade unions.*

96. *Recognition agreements applying to an industry and made between federations or groups of trade unions and employers shall be concluded whenever appropriate.*

CLAIMS FOR RECOGNITION

...

100. *In general, it is in the interest of workers and of the industry that any given category of workers in an undertaking shall be represented by a single trade union.*

The Applicant union has not adduced relevant evidence to show why the **two branches** in Rodrigues (Port Mathurin and La Ferme) (and not Mammouth Trading Co Ltd (Rodrigues Branch) as wrongly described by Applicant in his application to the employer and to the Tribunal) should be considered as forming a bargaining unit in the present matter. There is no iota of evidence before us as to any differences or special circumstances which would warrant the Tribunal to find that the relevant workers or classes of workers in the branches at Port Mathurin and La Ferme (both in Rodrigues) can appropriately be considered as forming part of one separate bargaining unit from other workers having **exactly the same** job descriptions in Mauritius. This is the more so that there is unchallenged evidence on record that all relevant workers, be it in Mauritius or in Rodrigues, are being treated equally and have the same terms and conditions of employment. The list of job descriptions applicable to all the different branches, be it in Port Mathurin or La Ferme or branches in Mauritius (Doc C) is very telling and shows that in this case most of the workers in Rodrigues belong to categories of workers which exist in far larger numbers in branches in Mauritius. Also, the Tribunal notes, as per the documents produced on behalf of the Applicant union, that in some cases the job descriptions which have been handwritten opposite "OCCUPATION:" on the union admission forms do not tally exactly with the occupation as can be gathered from the annexed copies of the pay statements of the very same workers.

In the case of **Private Enterprises Employees Union and Supercash Ltd, ERT/RN/131/2015**, the Tribunal was faced with a fairly similar situation except that some evidence was also adduced in relation to different working hours of employees in Rodrigues. The Tribunal referred to relevant case law and authorities and stated the following:

"Although, the Applicant Union has demonstrated that it has the necessary support for it to be recognised as a bargaining agent, it is relevant to consider whether the workers which the trade union wishes to represent constitute a distinct bargaining unit.

(....)

It may also be noted that paragraph 92 of the Code of Practice lists the ‘organisation and location of work’ as one factor amongst others to be taken into account when establishing a bargaining unit.

It is also relevant to note the following from K. Daniels, Employee Relations in an Organisational Context (2011) on single-employer bargaining in an organisation:

As Salamon (2000) notes, a big advantage of single-employer bargaining is that the terms and conditions are decided by people at the local level, rather than those who are remote from the situation. This results in management and employees becoming more committed to and responsible for the agreements that they reach.

However, if there is some bargaining happening at employer level and some at site level, there can be fragmentation and it can result in something of a lottery for the employees. Their terms and conditions of employment can become affected by the ability of their representatives to bargain, rather than be governed in accordance to overall company policy.

*In this context, it would be useful to note what was stated by the Supreme Court in *Periag v International Beverages Ltd* [1983 MR 108]:*

English case law, as we have observed, is based partly on specific statutory general provisions and partly on the English common law. It is useful as a guide to illustrate the general direction taken by judicial thinking in England in order to reach just solutions in industrial disputes and it shows a similarity in the direction taken by French and Mauritian judicial thought.

*Thus guidance may be appropriately gathered from the case of *R (on the application of Cable & Wireless Services UK Ltd) v Central Arbitration Committee and Communication Workers Union* [2008] EWHC 115 (Admin) reported in [2008] IRLR 425, 426 where the following was held in relation to the ‘desirability of avoiding small fragmented bargaining units within an undertaking’ under the English Trade Union and Labour Relations (Consolidation) Act 1992:*

For the purposes of para. 19B(3)(c) of the Schedule, small fragmented units are regarded as undesirable in themselves. In that regard, the use of the plural “units” in the paragraph does not indicate that Parliament had in mind that the real undesirability was the existence of a number of such units. However, it is obvious that the real problem is risk of proliferation which is likely to result from the creation of one such unit; therefore it is important to see whether such a unit is self-contained. Fragmentation carries with it the notion that there is no obvious identifiable boundary to the unit in question so that it

will leave the opportunity for other such units to exist, which would be detrimental to effective management.

(The underlining is ours)

In the circumstances, the Tribunal cannot find that the employees of the bargaining unit under application to be distinct from their counterparts based in Mauritius by reason of their geographical location and hours of work.”

The Tribunal finds no reason to depart from the reasoning adopted in the case of **Private Enterprises Employees Union and Supercash Ltd (above)**. Also, in the present case no evidence at all has been adduced to try to show that the “(Rodrigues Branch)”, which should in fact have been the branches in Rodrigues, constitute a “self-contained” unit. In fact, the unchallenged evidence on record is that all relevant workers, be it in Rodrigues or in Mauritius, benefit from equal treatment and from the same terms and conditions of employment. To depart from the decision in the case of **Supercash Ltd (above)**, on the basis of the evidence here, may lead to an unsatisfactory situation, not to say chaotic situation, where a sole bargaining agent for a small ‘unit’ may seriously influence the terms and conditions of employment of all workers excluding Management at the Respondent both in Mauritius and Rodrigues. It is also not challenged at all that the representativeness of the Applicant union, as per the application itself, will be very much less than the required minimum of 20 per cent (as per section 37 of the Act) of the relevant workers if the bargaining unit is not restricted to the branches in Rodrigues.

Also, and since this issue has been briefly relied upon on behalf of Applicant, the Tribunal finds it appropriate to state clearly that this order has no bearing whatsoever on and in no way affects the powers of the Rodrigues Regional Assembly or the autonomy of Rodrigues. Also, the right of a worker to join a trade union of his own choice (or not to join a trade union) remains intact, and the matter at hand concerns collective bargaining and more specifically the determination of a bargaining unit.

For all the reasons given above, the Tribunal finds that the Applicant Union has failed to show that the workers or classes of workers on whose behalf the application for recognition is made do indeed constitute, on the basis of the evidence adduced before us, a bargaining unit on whose behalf a collective agreement may be made. The application is thus set aside.

SD Indiren Sivaramen

Vice-President

SD Vijay Kumar Mohit

Member

SD Rabin Gungoo

Member

8 October 2020

SD Kevin C. Lukeeram

Member