EMPLOYMENT RELATIONS TRIBUNAL

ORDER

ERT/ RN 42/21

Before

Indiren Sivaramen	**Acting President**
Raffick Hossenbaccus	**Member**
Rabin Gungoo	**Member**
Ghianeswar Gokhool	**Member**

In the matter of:-

Li Wan Po & Co. Ltd (Applicant)

And

Syndicat des Travailleurs des Etablissements Privés (Respondent)

This is an application made by the Applicant under sections 86(2)(b), 37(i) (which should read 37(1)) and 39 of the Employment Relations Act, as amended (the "Act") and section 25(b) of the Interpretation and General Clauses Act, for an order revoking the recognition of Respondent. The grounds on which this application is based are (1) that there has been a change in representativeness of the trade union and it no longer has the support of not less than 20 per cent of the workers under section 37(1) of the Act; and (2) that from January 2010 to January 2021, there was no contact at all between Applicant and Respondent and that the latter never acted as a recognised trade union. This application is resisted by the Respondent union and both parties were assisted by counsel.

The HR Manager of Applicant deposed before the Tribunal and he stated that as per Annex A to the Statement of Case of Applicant, the Respondent would be representing only 14 employees out of 102 workers at the Respondent. He stated that these figures were obtained from the payroll in relation to deductions made by 'check-off' from the salaries of workers. He also stated that from January 2010 to January 2021 the

Respondent did not contact the Applicant at all and it was only this year that the Respondent contacted the Applicant.

In cross-examination, the representative stated that the Respondent union has only a support of 13.7% of the workers. He agreed that the application made by the Applicant has nothing to do with a default or failure to comply with the procedure agreement. In re-examination, he stated that in fact he understands the stand of the Respondent that the Applicant has allegedly no basis to ask for the revocation of the recognition of Respondent, but does not agree with same.

The representative of the Respondent then adduced evidence before the Tribunal. He stated that there are several agreements on conditions of work which have been entered into between the Applicant and the Respondent and which are still valid. He also stated that the Applicant is relying solely on the "check-offs" and deductions which are made from the salaries of the workers whereas there are workers who pay their dues directly with the Respondent. He did not agree with the percentage mentioned by the Applicant as representing the alleged support enjoyed by Respondent among the workers. In cross-examination, the representative stated that the actual representativeness exceeds by far the figures produced by the Applicant. He added that the Respondent has negotiating rights for 'manual grade' workers only and not for office staff. He maintained that the Respondent represents only manual workers and that their existing agreement refers to manual workers.

The Tribunal has examined all the evidence on record and the submissions of both counsel including the Reply filed on behalf of Applicant and copies of judgments and orders filed. This application is made deliberately under several provisions of the Act and section 25(b) of the Interpretation and General Clauses Act. Counsel for Applicant submitted that the Tribunal has to apply the laws of Mauritius and cannot restrict itself to the Act. The Tribunal agrees with this submission only to the extent that the said laws are obviously relevant to the matter in issue and not repugnant with the provisions of the Act. The Tribunal will have recourse here to the general maxim '*Generalia specialibus non derogant*' as referred to by Counsel for Respondent (**vide G.Chinien v The Queen and ors 1989 SCJ 375, M.D.J Paw Chin Chan Chiang v B. Ramburn 2003 SCJ 120**). The Interpretation and General Clauses Act (and its section 25(b) being relied upon) is a general law and is anterior to the Act (which is the special Act in the present application) which caters specifically, among other things, for the recognition of trade unions and also for the revocation or variation of such recognitions of trade unions. In the light of the clear and specific provision at section 39 of the Act in relation to "*Revocation or variation of recognition of trade union of workers*", it will be wrong for the Tribunal to rely on the general provision at section 25(b) of the Interpretation and General Clauses Act to try to include in or 'amend' section 39 of the Act to read something which the legislator has not deemed proper to include in that section. This

would be tantamount to the Tribunal encroaching on the sacrosanct prerogative of Parliament under the pretext of interpretation.

Section 39 of the Act reads as follows:

"***39. Revocation or variation of recognition of trade union of workers***

(1) Subject to subsection 38(17), the Tribunal may –

> *(a) on an application made by a trade union or a group of trade unions, make an order to revoke or vary the recognition of another trade union where it is satisfied that there has been a change in representativeness; or*
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> *(b) on an application by an employer, make an order to revoke the recognition of a trade union or a joint negotiating panel for any default or failure to comply with any provisions of a procedure agreement.*

(2)Where an application is made under subsection (1), the recognition of the trade union or joint negotiating panel shall remain in force until the Tribunal makes an order.

(3)(a) An application to revoke or vary shall be determined by the Tribunal within 30 days of the receipt of the application.

(b) The Tribunal may, in exceptional circumstances, extend the delay specified in this subsection for another period of 30 days.

We are in the realm of industrial relations where the principles and best practices of good employment relations are of essence. Revocation of recognition of a trade union, though provided for under section 39 of the Act, is subject to conditions provided for in the said section and is subject to control by the Tribunal. Whilst an employer may voluntarily grant recognition to a trade union, it cannot unilaterally withdraw or revoke the said recognition. The employer or another trade union or group of trade unions must make an application to the Tribunal. There are other conditions which must be met such as, for example, the minimum period of time before which any such application can be entertained by the Tribunal under section 38(17) of the Act.

Section 39 of the Act is clear. Under section 39(1)(a) of the Act, a trade union or a group of trade unions may make an application for revocation of recognition of another trade union on the ground that there has been a change in representativeness. An employer, on the other hand, may make an application to revoke the recognition of a trade union "for any default or failure to comply with any provisions of a procedure agreement." The Tribunal has consistently held that an employer cannot make an

application for revocation of the recognition of a trade union merely on the ground of change in representativeness (**vide Galvabond Ltd And Chemical Manufacturing and Connected Trades Employees Union, ERT/RN/37/2015, Compagnie Sucrière de Bel Ombre Ltd And Syndicat des Travailleurs des Etablissements Privés, ERT/RN 122/16 and Tusk Contracting Limited And Syndicat des Travailleurs des Etablissements Privés, ERT/RN 51/2018**). This interpretation is in line with the avenues available to an employer and trade unions under the different scenarios envisaged under section 37 of the Act. This interpretation is, for example, in line with section 37(5) of the Act where an employer may, in the circumstances provided for under that provision, voluntarily grant recognition to a trade union even though the latter does not have the support of not less than 20 per cent of the workers in the bargaining unit of the enterprise.

The Tribunal has thus not been impressed by the submission of Counsel for Applicant that if the law is interpreted as allowing an employer to seek the revocation of the recognition of a trade union based solely on section 39(1)(b) of the Act then this would lead to an absurdity. The intention of Parliament is clear and section 39(1)(a) of the Act caters for an application made by a trade union or a group of trade unions whilst section 39(1)(b) of the Act caters for an application made by an employer. There is no other provision under which an employer may make an application to the Tribunal to seek an order to revoke the recognition of a trade union. It is apposite to note that the Tribunal is deemed to have been established under the Act and has powers as provided for under the Act (and under any other piece of legislation under which the Tribunal may have been given jurisdiction).

In the present case, the application of the Applicant is not based solely on alleged change in representativeness. There is also an averment that from January 2010 to January 2021 there was no contact between the Respondent and Applicant and that it was only in January 2021 that the Respondent contacted the Applicant. As per the statement of case of the Applicant at paragraph 11 it is provided that "*However in the course of past twenty years there have been barely eight or nine times that the parties were involved in any talk*." The evidence adduced by the representative of Respondent to the effect that there are agreements between the parties on conditions of work which are still "valid" has not been challenged however. There is no averment or suggestion that the alleged absence of meetings between the parties, especially during the last eleven years, in fact constitutes a default or failure to comply with any provisions of a procedure agreement. There is before us no averment of a default or failure on the part of the Respondent to comply with any provisions of a procedure agreement.

The Tribunal thus finds that there is no basis at all for the Applicant to make the present application before us, the more so in the light of the evidence of the representative of the Respondent that the Respondent is asking that the Applicant continues to recognise

the Respondent so that terms and conditions of employment as per agreements already reached be maintained whilst at the same time the union may continue negotiations with the Applicant. The Tribunal is not satisfied even on a balance of probabilities that there has been any default or failure to comply with any provisions of a procedure agreement. In any event, the Applicant, which bears the burden of proof, has not adduced sufficient evidence to show conclusively that there has been any change in representativeness in the light of the denial of such change in representativeness by the representative of Respondent both in evidence and in the Statement of case of the Respondent. The Tribunal finds that workers may, for reasons best known to them, decide how to pay their trade union dues.

For all the reasons given above, the Tribunal finds that the Applicant has not satisfied the Tribunal on a balance of probabilities that the recognition of the Respondent should be revoked and the application is set aside.

Indiren Sivaramen

Acting President

Raffick Hossenbaccus

Member

Rabin Gungoo

Member

Ghianeswar Gokhool

Member

9 November 2021