EMPLOYMENT RELATIONS TRIBUNAL

ERT/RN 85/13

ORDER

Before:

Rashid Hossen	**-**	**President**
Ramprakash Ramkissen	**-**	**Member**
Rajesvari Narasingam Ramdoo	**-**	**Member**
Triboohun Raj Gunnoo	**-**	**Member**

In the matter of:-

Private Enterprises Employees Union

(Applicant)

And

Tropic Knits Ltd

(Respondent)

This is an application made by the Private Enterprises Employees Union for an Order for recognition of the trade union as bargaining agent in relation to the employees of Tropic Knits Ltd.

The Applicant claims that it has the support of not less than 118 workers in the bargaining unit, representing not less than 30% of workers in the bargaining unit which is located at Royal Road, Forest Side. It is further averred that the application is made for the purpose of collective bargaining in respect of Machinist, Helper, Packer, Folder, Factory Worker, Supervisor Spreder, Printing, Checker, Cutter, Print Operator and Sorting.

In a Statement of Case produced in the Tribunal, the Applicant avers:-

- The Union defines its bargaining unit only after having taken cognizance which group of workers from which category have voluntarily adhere to the Union.

- The principal aim of a trade union of workers is to promote their members' interests. *(Para 34 Fourth Schedule Employment Relations Act).* The word interests in itself means upgrading the terms and conditions of employment of the members or any worker forming part under the bargaining unit of the Union.

- The Foreign Workers form part of a different bargaining unit whose terms and conditions of employment have already been agreed between the employer and themselves in an agreement of determined duration, unlike a local worker who signs a contract of employment with no determined duration. The situation of the Foreign Workers is similar to local contractual workers for a specific duration.

- Foreign Workers situation are similar to all contractual workers, their terms and conditions of employment are already agreed

between themselves and the employer and are not subjected to any change during the duration of the contract.

- Foreign Workers are also considered as a separate bargaining unit because they are covered by conditions of employment and allowances that no local workers enjoy as follows:-

i) Free Lodging and accommodation
ii) Food allowances
iii) Insurance cover as the employer does not contribute in the National Pension Fund for the first two years of their stay in the country.
iv) Free air travel expenses from their country of residence to Mauritius and back.

- Therefore Foreign Workers cannot be considered under the same bargaining unit of local workers doing the same type of work but not enjoying the same favours.

- Workers with less than 12 months of service are considered as not confirmed under permanent establishment in the company. On the basis of poor performance or any other reason, their employment can be terminated. As such workers with less than 12 months of service are not considered members of the Union as there is no guarantee that they will benefit from the fruits of Collective Bargaining.

- Workers voluntarily join a trade union for the purpose of promoting their interest and this can be done only through Collective Bargaining.

- The Private Enterprises Employees Union (PEEU) can only define its bargaining unit for categories of workers that has first accepted to join the union as a member and for whose interest the Private

Enterprises Employees Union (PEEU) will effectively bargain to promote their interest.

- The Foreign Workers employed on Contractual basis by Tropic Knits Ltd are a different bargaining unit with different conditions of employment and none of them have signified their intention to be a member of Private Enterprises Employees Union (PEEU). The Private Enterprises Employees Union (PEEU) cannot forcibly declare them under its bargaining unit when none of them are members of the Union and the fact they have already negotiated and agreed on their wages and conditions of employment, the Private Enterprises Employees Union (PEEU) will not cheat those poor foreign workers to make false promises that we will promote their interest.

- Workers with less than 12 months of service are reluctant to join the Union for fear of not being confirmed as a permanent employee on reaching 12 months of service. The Private Enterprises Employees Union (PEEU) cannot forcibly include workers with less than 12 months of service under its bargaining unit when none of the concerned workers want to join the Union as member.

- The Union considers that the wish of any worker not to join a trade union should be respected inasmuch as the trade union has a right not to represent a specific bargaining unit for which it will be unable to promote the interest at bilateral level.

The Respondent objects to the application on the following two grounds:-

(i) The Union's claim for recognition is based on discrimination as the Bargaining Unit excludes foreign employees as well as employees of less than 12 months service.

(ii) The Union does not have the required 30% representativeness for recognition.

Ground 1

It will be submitted that no distinction can be made between Mauritian and Foreign employees and between employees with of less than one year service for the following reasons:-

(i) The abovenamed 'categories' of employees have a substantial common interest as per s.92 of the Code of Practice;

(ii) Foreign and Mauritian employees cannot be treated as two distinct and separate bargaining units in consistency with ss.90 and 91 of the Code of Practice;

(iii) The fundamental conditions of work for Foreign and Mauritian employees are the same;

(iv) The Tribunal cannot make an award based on discrimination on the grounds of national extraction as per s.97 of the Code of Practice, ss.3, 13 and 16 of the Constitution and of the International conventions to which Mauritius is a party.

Ground 2

The bargaining unit (i.e. the category of workers) for which the Union is seeking recognition is not defined in the application.

The total workforce of Tropic Knits Ltd is of 1181 employees, of which there are 32 managerial staff and 556 expatriate employees.

Consequently, an adherence of 118 employees does not meet the 30% threshold as per s.37 Employment Relations Act.

Mr Reeaz Chuttoo for the Union confirmed the contents of the application form. As at the date of the application, 118 workers voluntarily chose to become members of the Union with a view to improve their conditions of service through collective bargaining. The bargaining unit consists of all manual workers and excludes Management and Foreign Workers. With regard to the latter, the witness stated that their contract has already been negotiated and they are therefore not in the bargaining negotiation as such and they have different conditions of work compared to those of the local workers in relation to food allowance, free lodging and dispensation to contribute to National Pension Scheme and National Savings Fund. He also added that those local workers who have less than 12 months service are not part of the bargaining unit since they have not been confirmed yet. Also, the Foreign Workers have not made any request to the union to join the bargaining unit. Their contract of work is based on prescribed remuneration and conditions which they have to abide to. Thus, they cannot be part of the collective bargaining but are tied with a contractual obligation. However, nothing prevents them from organizing a union for their own sake. There is no union that represents Foreign Workers in Mauritius as yet. With regard to the present application, while most of the management department is based in Forest Side, the bargaining unit is actually at Reunion, Vacoas. The witness produced a bundle of signed documents in relation to the application and which number exceeds 118.

Mrs Veena Ghurburrun, Head of Human Resources at the Respondent Company, testified to the effect that foreign and local workers are treated the same way as far as remuneration is concerned. When contracts for foreign workers are being negotiated, they in fact refer to the length and duration of the contract. Whether one is a Bangladeshi, a Malagasy, an Indian or a Mauritian worker in the same production line, there is a piece rate system that is applicable and it is not negotiated in the country of origin. If there is an increase in the piece rate, there is an increase in the piece rate for all workers irrespective of nationality. The witness further added that Tropic Knits Ltd is not engaged in any discrimination whatsoever concerning remuneration.

TRIBUNAL'S CONSIDERATIONS

127 signed forms of members in the bargaining unit have been produced with reference to the application for recognition and it is not contested that as such those workers represent not less than 30% of the bargaining unit excluding foreign and temporary workers.

FOREIGN WORKERS

Section 13 of the Employment Relations Act provides for the right of workers to join a trade union.

> **«13. Membership**
> (1) A person shall be entitled to be a member of a trade union where –
>
> (a) he is a citizen of Mauritius or, in the case of a non-citizen, he holds a work permit,
>
> and

(b) he is engaged, whether full time, part-time, temporarily or permanently, in any undertaking, business, or occupation, the workers of which the trade union purports to represent;

or

(c) he has been a worker at any time.

(2) The minimum age for membership of a trade union shall be 16 years or such greater age as may be specified in the rules of the trade union.»

This right is also enshrined in **Section 13(1)** of our **Constitution:-**

"Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and, in particular, to form or belong to trade unions or other associations in the protection of his interest."

However, we note the amendment brought to the **Employment Rights Act** under **Section 40** in relation to the workfare programme in the definition of worker whereby it now excludes a part-time worker, a migrant worker or a non-citizen.

A 'bargaining agent' and a 'bargaining unit' are defined in the **Employment Relations Act of 2008** as amended as follows:-

«"Bargaining agent" means any trade union, or where there is a joint negotiating panel, such joint negotiating panel having negotiating

rights to bargain collectively on behalf of the workers in a bargaining unit. »

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

In the same Act a collective agreement and collective bargaining are defined as follows:-

«"Collective agreement" means an agreement which relates to terms and conditions of employment, made between a recognized trade union of workers or a joint negotiating panel and an employer.»

«"Collective bargaining" means negotiations relating to terms and conditions of employment or to the subject-matter of a procedure agreement. »

In determining a bargaining unit, the **Code of Practice at paragraph 89** provides that Collective Bargaining is to be "conducted in relation to defined groups of workers which can appropriately be covered by one negotiating process." It is apposite to refer to **paragraph 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. »

It then provides for the following factors which are to be taken into account in defining the bargaining unit:-

«(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 organization 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. »

We find that Foreign Workers form part of a different group whose terms and conditions of employment have already been agreed between the employer and the workers for contracts of fixed duration whereas the local workers enter into contracts of employment with no determined duration. Foreign Workers' conditions of work differ from those of local workers in terms of privileges and benefits with regard to:-

(i) free lodging and accommodation;

(ii) food allowances;

(iii) insurance cover as the employer does not contribute in a National Pension Fund for the first and second years that they stay in the country; and

(iv) free air travel expenses from and to their country of residence.

We reproduce here the:-

"Non-Citizens (Employment Restriction) Act

THE EMPLOYMENT (NON-CITIZENS) (RESTRICTION) REGULATIONS 1973

2nd schedule

CONDITIONS

1. This permit is valid for the period indicated overleaf.
2. This permit is personal to the holder and is not transferable.
3. The holder is NOT permitted to seek or accept alternative employment while in Mauritius or to engage in any trade, art or gainful occupation.
4. This permit shall be kept by the holder and produced to any authorized person on demand or within three days after demand at such police station as may be specified by the authorized person at the time of the demand.
5. The Minister for Employment may, at any time, vary or cancel this permit.
6. In the event of any change of circumstances affecting the accuracy of particulars submitted at the time of applying for this permit, the holder shall, within fifteen days notify particulars of such change to the Minister for Employment."

Also, in Section 5(3) of the Employment Rights Act as amended, we note the difference brought again to the contract of employment of a local worker and that of a migrant worker.

"(3) Subject to subsections (3A) and (3B), where a worker, other than a migrant worker, has been in the continuous employment of an employer under one or more determinate agreements for more than

> 24 months, in a position which is of a permanent nature, the agreement shall, with effect from the date of the first agreement, be deemed to be of indeterminate duration."

Furthermore, the joining of a trade union is a voluntary exercise. Although our law does not prevent Foreign Workers from associating to trade union activities, it remains a matter of "general wishes of the workers concerned".

We find no reason to compel the union to include Foreign Workers as part of the bargaining unit.

Counsel for the Respondent referred to the Code of Practice where provision is made for a claim for recognition not to be entertained if that claim is based on discrimination as to 'national extraction'.

It is our view that 'national extraction' is more in relation to a particular country rather than migrant workers in general. In the same breath we hold that although the contract of foreign workers is different to that of local workers this cannot amount to discrimination. 'To differentiate is not necessarily to discriminate.' **[Police v/s Rose 1976 MR 79].**

TEMPORARY WORKERS

These are workers not confirmed under the permanent establishment of the company and who have been in service for less than 12 months. Their contract may be terminated as a result of poor performance or for any valid reason. Indeed, there is no guarantee that they will benefit from the advantages of collective bargaining. Though

the nature of the work may be the same, the training, experience and extent to which the temporary workers may have common interests with confirmed workers will not be the same. More importantly, it is unlikely for temporary workers to wish to join a trade union before they are confirmed in their jobs. It stands to reason that they ought not to be in the same bargaining unit.

REPRESENTATIVENESS

It is for the Applicant to make its case with sufficient evidence that will justify an order in its favour. An application form that avers 'not less than 118' in the bargaining unit located at Royal Road, Forest Side must satisfy the Tribunal that the 'not less than 118' represents 'not less than 30%'. The Tribunal has not been favoured with the exact number of those workers in the bargaining unit, excluding foreign and temporary workers. In any event even if we were to accept the figures (unchallenged) provided by the Respondent and discard managerial staff and expatriate employees, the Applicant would have the support of only 19.9% of the workers in the bargaining unit if they indeed have the support of 118 workers. Furthermore we note that there is a disparity with regard to the location of the bargaining unit as averred in the application and evidence ushered before the Tribunal.

The application not being in order, the need to organize and supervise a secret ballot does not even arise.

The application is accordingly set aside under Section 38(2)(d) of the Employment Relations Act.

(Sd) ***Rashid Hossen***
(President)

(Sd) ***Ramprakash Ramkissen***
(Member)

(Sd) ***Rajesvari Narasingam Ramdoo***
(Member)

(Sd) ***Triboohun Raj Gunnoo***
(Member)

13th December 2013