

**EMPLOYMENT RELATIONS TRIBUNAL**  
**ORDER**

**ERT/RN 20/2013**

**Before:**

<b>Shameer Janhangeer</b>	-	<b>Vice-President</b>
<b>Soumarain Ramana</b>	-	<b>Member</b>
<b>Desire Yves Albert Luckey</b>	-	<b>Member</b>
<b>Khalad Oochotoya</b>	-	<b>Member</b>

**In the matter of:-**

**Catering Industry Workers Union**

**and**

**Sugar Beach Hotel (Sun Resorts Ltd)**

The Catering Industry Workers Union (the "*Applicant Union*") has made an application before the *Tribunal* for an order under *section 44* of the *Employment Relations Act* (the "*Act*") following the refusal of Sugar Beach Hotel (the "*Employer*") to enter into a check-off agreement. The *Employer* has put in a statement of case wherein it is objecting to the application for the reasons given therein.

Both parties were represented by Counsel in the matter. No evidence was adduced on behalf of the parties and Counsel have each put in written submissions in law on the issue at hand.

Counsel for the *Applicant Union* has notably submitted on *section 43* of the *Act*. In relying on *section 43(2)* of the *Act* stating that the employer is bound to enter into a check-off agreement if *section 45 (a)* is complied with, that is, any deduction of trade union fees from the wages of a worker shall only be made if the worker consents to in writing. It has also been submitted that the issue of recognition has no bearing on the check-off agreement and this issue is dealt with in a separate section of the *Act* with a specific criteria and cannot be linked together. Counsel has also argued that there is no necessity for a trade

union to have recognition for a member to join the trade union, which would allow the worker to take advantage of other fringe benefits such as loans at preferential rates, scholarships for their children, medical schemes and retirement pension schemes.

Counsel for the *Employer* has, on the other hand, in her submissions contended that the issues of recognition/negotiating rights/check-off deductions cannot be dissociated and must be taken into account in the interpretation to be given to *section 43* of the *Act*. She has notably stated that the legislator's intent would be defeated if a simplistic interpretation were to be given to the aforesaid section. Counsel has also relied on the Supreme Court case of *Mauritius Free Zone & Secondary Industries Employees Union v Mauritian Woollen and Worsted Mills Ltd [1989 SCJ 410]*. It has been submitted that *Part V* of the *Act* must be read as a whole and that *section 43* cannot be read as a stand-alone clause. It is submitted that whilst an employer cannot restrict a worker's right to join a trade union, similarly, a worker cannot impose upon an employer the implied acknowledgement of the existence of a Union which the employer has not recognised. The proper interpretation of *section 43* would be for it to be read in conjunction with the other sections relating to collective bargaining under *Part V*, thus check-off deductions cannot be effected until a Union has been recognised by an employer. The Respondent has also submitted that the issue of check-off only arises when the membership of a worker to a trade union is opposable to the employer and this cannot be so unless the employer has recognised the union thus giving it legal existence in the eyes of the employer. Counsel has also cited *paragraphs 34* and *35* of the *Code of Practice* in stating that if a trade union cannot represent its members against an employer, it does not fulfill its aim of fulfilling its member's interest and cannot aid in the promotion of good industrial relations.

The present application has been made pursuant to *section 44 (1)* of the *Act*, which reads as follows:

**44. Order for check-off agreements**

(1) *Where an employer refuses to enter into a check-off agreement under section 43, a trade union of workers may make an application to the Tribunal for an order that a check-off agreement shall have effect between the trade union and the employer and, on hearing the application, the Tribunal may make such order as it deems fit.*

The aforesaid *section* allows a trade union to make an application for an order that a check-off agreement shall have effect between itself and the employer. However, this is conditional upon the employer refusing to enter into a check-off agreement under *section 43* of the *Act*.

Under *section 2* of the *Act*, a check-off agreement is one made between an employer and a trade union for trade union fees to be deducted from the wages of the worker by the employer and paid to the trade union. Furthermore, *section 43* of the *Act* provides as follows:

**43. Check-off agreements**

- (1) *No trade union shall claim or receive any trade union fee, unless it is registered.*
- (2) *An employer whose workers are members of a registered trade union shall not refuse to enter into a check-off agreement with the registered trade union.*

Although it cannot be contested that as per *section 43 (2)* of the *Act* it has been provided that an employer whose workers are members of a registered trade union shall not refuse to enter into a check-off agreement, the *Applicant Union* has contended that an employer is bound to enter into a check-off agreement if *section 45 (a)* is complied with.

However, this cannot be the case in as much as *section 45* of the *Act*, which is headed *Provisions relating to check-off agreements*, finds its use where a check-off agreement is in force which is not the situation the *Applicant Union* finds itself in, the more so there is no check-off agreement between the parties at present.

The Respondent for its part has strongly submitted that *section 43* of the *Act* cannot be read in isolation being under *Part V* of the *Act* which is titled *Collective Bargaining* and that it should be read in conjunction with the other sections relating to collective bargaining under *Part V* of the *Act*, thus check-off deductions cannot be effected until a union has been recognised by an employer.

The *Tribunal* cannot agree to this argument put forward by the Respondent. From a perusal of *Part V* of the *Act*, the legislator has made provisions for matters of negotiating rights (which includes matters of and relating to recognition of a trade union as a bargaining agent by an employer), check-off agreements and agency shop orders, bargaining process and collective agreement. Although these matters have been grouped under the same *Part* of the *Act*, the provisions relating to check-off agreements are to be found in a sub-division (i.e. *Sub-Part C*) of *Part V* of the *Act*. Furthermore, it may be noted that the legislator has not expressly inserted the term “recognised” in relation to a trade union in either *section 43* or *44* of the *Act* as is the case for some of the other *sections* of the law in *Part V* of the *Act*.

It can also be noted that nowhere in *Part V* or in the *Act* has the legislator provided that an employer cannot refuse to enter into a check-off agreement with a trade union which it has not recognised as a bargaining agent representing its workers.

It may be appropriate to note what was stated by *Rt. Hon. Lord Bingham of Cornhill* in *The Sixth Sir David Williams Lecture* delivered on *The Rule of Law* on 16 November 2006:

*First, the law must be accessible and so far as possible intelligible, clear and predictable. This seems obvious: if everyone is bound by the law they must be able without undue difficulty to find out what it is, even if that means taking advice (as it usually will), and the answer when given should be sufficiently clear that a course of action can be based on it. There is English authority to this effect (Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG [1975] AC 591, 638; Fothergill v Monarch Airlines Ltd [1981] AC 251, 279), and the European Court of Human Rights has also put the point very explicitly:*

*“... the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case ... a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”*  
*(Sunday Times v United Kingdom (1979) 2 EHRR 245, 271, §49)*

It may be noted that the case of *Sunday Times v United Kingdom* was affirmed by the *Judicial Committee of the Privy Council* in *Ahnee v DPP* [1999 MR 208] (at page 219).

The *Tribunal* cannot therefore read into a *section* of the *Act* and imply it mean and include what has been provided for in other *sections* of the *Act* when the lawmaker has a duty to formulate laws with sufficient clarity and precision to enable the citizen to regulate his conduct.

Moreover, the *Tribunal* does find some support from the case of *Government Teachers’ Union v Permanent Secretary, Ministry of Education and Science* [1992 MR 241], where the *Supreme Court* had to decide whether a check-off agreement (under the then *Industrial Relations Act*), being in the nature of a collective agreement, can only be entered into by an employer with a union which has been granted recognition i.e. negotiating rights. The *Supreme Court* went on to state the following in relation to *section 62 (2)* of the *Industrial Relations Act*:

*We are accordingly unable to read section 62 (2) of the Act which says that “an employer may at any time, enter into a check off agreement with a trade union of employees” as though it contained words such as “a trade union of employees which has negotiating rights”.*

The *Tribunal* has also noted that the case of *Mauritius Free Zone & Secondary Industries Employees Union v Mauritian Woolen and Worsted Mills Ltd* [1989 SCJ 410] does not find any direct application in the present matter. In the case, the *Supreme Court* had to decide on a *plea in limine litis* relating to the check-off agreement not satisfying the requirements of *section 63* of the *Industrial Relations Act* and in doing so went on to gather the intention of the legislator when enacting *section 63* in the context of check-off

agreements. However, it may be noted that in deciding on this issue the *Supreme Court* stated that:

*With a view to regulating the smooth running of trade unions in their relationship with employees, the system of check-off was introduced in order to give the necessary financial facilities to trade unions to operate. This was done not only in the interest of employees who, in the absence of a duly authorised mandate, could not interfere with the pay of a worker for the benefit of a trade union, but also in the interest of workers who could not be compelled to be members of a union and therefore liable to check-off.*

(The underlining is ours)

Counsel for the *Applicant Union* has further argued that there is no necessity for a trade union to have recognition for a member to join the trade union and that a worker may wish to join any trade union to take advantage of other fringe benefits such as loans at preferential rates, scholarships for their children, medical schemes and retirement pension schemes.

From the meaning of a trade union under *section 2* of the *Act*, it may be noted that it has as one of its objects the regulation of employment relations between workers and employers. Furthermore, from *K. Daniels in Employee Relations in an Organisational Context (2006)*, the following may be noted in relation to the purpose and existence of a trade union:

*Although the legal definition is important in understanding the role of the trade union, it does not allow us to explore the overall purpose of the trade union – particularly in terms of understanding why employees might decide to join. Salamon (2000) suggests that there are six distinct aspects of trade union activities:*

- *Power: The collective strength of the trade union acts protection and support for the individual, a force to counteract the force of the employer, and a pressure group.*
- *Economic regulation: To ensure that the members of the trade union receive the maximum level of wages and benefits possible.*
- *Job regulation: To have a system of working with the employer to ensure that employees are protected from arbitrary management decisions, and are able to participate in decision-making.*
- *Social change: To develop a society that reflects the social cohesion, aspirations and political ideology of the membership.*
- *Member services: To provide a range of benefits and services for members.*
- *Self-fulfilment: To allow members to work outside of the immediate confines of their job and become involved in decision-making processes.*

*Gennard and Judge (2005) suggest that the trade union has the primary purpose of protecting and enhancing the living standards of its members.*

In the present matter, although it cannot be disputed that a trade union may have as its objects other matters than the regulation of employment relations between workers and employers, the *Tribunal* cannot see for what reason the *Applicant Union* is seeking an order for check-off, the more so the union is not seeking or intends to seek recognition as a

bargaining agent from the employer which is a means of promoting and protecting the interest of its members nor has it been shown that the union intends to or is providing the services as stated by its Counsel in his submissions on the application.

The *Tribunal* would wish to remind the parties, more particularly the *Applicant Union* in this matter, that the rights of freedom of association of an individual as enshrined in *section 13* of the *Constitution* are meant for the protection of the individual's interests as can be clearly read from the aforesaid provision:

**13      *Protection of freedom of assembly and association***

(1)      *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 for the protection of his interests.*

The *Tribunal*, bearing in mind that an employer whose workers are members of a registered trade union shall not refuse to enter into a check-off agreement with a registered trade union, is under a duty to make any order as it deems fit after having heard the parties to the application in the present matter.

In the circumstances, having considered the interests of the persons immediately concerned in the present application (i.e. that of the members of the *Applicant Union* who are employed by the *Employer*) as well as for the reasons given above, the *Tribunal* declines to make an order for a check-off agreement to have effect between the Catering Industry Workers Union and Sugar Beach Hotel (Sun Resorts Ltd).

The application is therefore set aside.

**(Sd) Shameer Janhangeer**  
**(Vice-President)**

**(Sd) Sounarain Ramana**  
**(Member)**

**(Sd) Desire Yves Albert Luckey**  
**(Member)**

**(Sd) Khalad Oochotoya**  
**(Member)**

**Date: 18<sup>th</sup> April 2013**