

# EMPLOYMENT RELATIONS TRIBUNAL

## ORDER

ERT/RN 42/15

<b>Before:</b>	<b>Indiren Sivaramen</b>	-	<b>Vice-President</b>
	<b>Vijay Kumar Mohit</b>	-	<b>Member</b>
	<b>Rajesvari Narasingam Ramdoo</b>	-	<b>Member</b>
	<b>Renganaden Veeramootoo</b>	-	<b>Member</b>

**In the matter of:-**

**Organisation of Hotel, Private Club & Catering Workers Unity  
(Applicant)**

**And**

**VLH Ltd – Heritage Awali (Respondent)**

The Applicant has made an application under section 44(1) of the Employment Relations Act (the “Act”) for an order that a check-off agreement shall have effect between Applicant and Respondent. The Respondent is objecting to the application and the ground of objection as expatiated in the Statement of Case of the Respondent is that a check-off agreement can only apply to a trade union which is registered and has been granted recognition. Both parties were assisted by counsel and the Tribunal proceeded to hear the matter.

The representative of the Applicant, Mr Shanto, deposed before the Tribunal and he averred that 104 employees of the Respondent are members of the Applicant which is a registered trade union. He produced a copy of a certificate of a change of name for the trade union (Doc A), a copy of the rules of the trade union (Doc B) and copies of letters (with copies of advice of receipt) which were sent to the Respondent (Docs C, C1, D and D1) whereby the Applicant requested for a check-off agreement to be entered into between the Applicant and the Respondent. There was no reply from the Respondent despite the written requests and an application was finally made to the Tribunal. In cross-examination, Mr Shanto conceded that the Applicant had not sought recognition

from Respondent. He maintained that the Applicant could nevertheless defend the interests of its members. Recognition will only be a further step whereby a procedure agreement and a collective agreement can then be put in place. According to Mr Shanto, the Applicant can still act in line with its rules and regulations. The question of representativeness did not arise in this particular case and he did not agree that he had to make an application for recognition instead.

The Respondent chose not to adduce evidence and Mr Shanto's testimony has not been challenged. The Tribunal has examined carefully the submissions made by both counsel. Section 44(1) of the Act 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 evidence adduced by Mr Shanto in relation to the letters sent to Respondent and the stand of Respondent in his Statement of Case and as communicated to us by counsel indicate clearly that the Respondent is refusing at least at this stage to enter into a check-off agreement with Applicant.

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.*

Section 43(2) of the Act leaves no doubt as to the intention of the legislator in relation to who can benefit from a check-off agreement. Indeed, this is even clearer when we consider the old corresponding provision which existed under the repealed Industrial Relations Act (IRA). Indeed, section 62 of IRA provided that:

**62. Conditions for check-off agreements**

*(1) Subject to subsection (2), no employer shall refuse to enter into a check-off agreement with a trade union where-*

*(a) the trade union has negotiating rights;*

- (b) *the trade union has a membership of not less than 200 persons and has had that membership for a period of not less than one year immediately preceding the date on which the request to enter the check-off agreement is made; and*
  - (c) *the employer employs not less than 10 members of the trade union.*
- (2) *An employer may, at any time, enter into a check-off agreement with a trade union of employees.*

The law has been amended and the Act which came into force on 2 February 2009 has repealed the IRA. Nowhere in section 43, 44, 45 or 50 (which falls under **Sub-Part C – Check-off agreements and agency shop orders**) of the Act is there mention that a trade union has to be recognised before he can benefit from or enter into a check-off agreement. Section 49 of the Act (under the same Sub-Part C) confirms *a contrario* that check-off may apply to a registered trade union which has not been granted recognition by the employer. Indeed section 49 of the Act reads as follows:

#### **49. Operation of agency shop agreements or orders**

*Where a trade union of workers or a joint negotiating panel ceases to be recognised, an agreement under section 46 [Agency shop agreements] or an agency shop order shall cease to have effect.*

The legislator has deliberately excluded a check-off agreement or order under section 49.

The issue of whether a check-off agreement can apply to a trade union which has not been recognised has already been considered before a different panel of the Tribunal in the case of **Catering Industry Workers Union and Sugar Beach Hotel (Sun Resorts Ltd), ERT/RN 20/2013**. The Tribunal stated the following:

*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 not been impressed by the submissions of counsel for Respondent that the unavoidable conclusion after analyzing the various provisions in the Act including the Code of Practice is that a check-off agreement can only apply to a trade union which is registered and has been granted recognition. Though there is much emphasis on collective bargaining in the Act, this certainly does not authorise an employer whose workers are members of a registered trade union to refuse to enter into a check-off agreement with that registered trade union. In fact, entering into a check-off agreement may foster good employment relations and in an appropriate case may lead to a formal recognition of the trade union without the need for a balloting exercise or dispute resolution process. Also, such a stand on the part of the employer would be in line with the constitutional rights of workers to join a trade union of their choice.

The law is clear and there is absolutely no need to read into section 44(1) or 43 of the Act the additional requirement that the trade union must also be recognised by the employer. Even though the law is clear and that there is no need for interpretation by having recourse to the “*travaux préparatoires*” leading to the enactment of the Employment Relations Act, the Tribunal will refer to an extract of Hansard of 19 August 2008 only for the sake of completeness. The then Minister of Labour, Industrial Relations & Employment who introduced the bill to Parliament had this to say on check-off:

*“Mr Speaker, Sir, it is a fact that trade unions of workers rely on the subscription payable by their members to financially sustain their activities. Presently, under the IRA, a check-off agreement is possible only where - firstly, the trade union has negotiating rights; secondly, its total membership was not less than 200 during the one year period preceding the date of the application for check-off and, thirdly, at least 10 of its members are employed by that employer. These conditions will no longer be applicable. A trade union will now be able to claim check-off as soon it is registered.”*

The evidence of Mr Shanto to the effect that some 104 workers of the Respondent are members of the Applicant has not been challenged for the purposes of the present application for check-off. Also, there is evidence that the trade union is contemplating other agreements in due course or as Mr Shanto has put it “dans ene 2<sup>eme</sup> le temps”. The Tribunal observes that a check-off agreement may benefit the trade union but also the members who will not have to make alternative arrangements for their monthly

payments. For all the reasons given above, the Tribunal orders that a check-off agreement shall have effect between Applicant and Respondent as per section 44 of the Act. Parties have to act expeditiously so that the check-off agreement shall come into force within the shortest delay whilst the time limits provided under sections 44 and 45 of the Act are met.

**SD Indiren Sivaramen**

**Vice-President**

**SD Vijay Kumar Mohit**

**Member**

**SD Rajesvari Narasingam Ramdoo**

**Member**

**SD Renganaden Veeramootoo**

**Member**

**1 July 2015**