

EMPLOYMENT RELATIONS TRIBUNAL

ERT/RN/131/2015

ORDER

Before:

Shameer Janhangeer	Vice-President
Ramprakash Ramkissen	Member
Rajesvari Narasingam Ramdoo (Mrs)	Member
Renganaden Veeramootoo	Member

In the matter of: -

Private Enterprises Employees Union

Applicant Union

and

Supercash Ltd

Employer

The *Applicant Union* is seeking an order for recognition as a bargaining agent on behalf of a bargaining unit of workers employed by Supercash Ltd. The bargaining unit for which the present application has been made is in respect of the categories of commercial traveler; clerk; pre-ordering clerk; attendant; cashier; lorry assistant; and storekeeper who are situate at the Camp du Roi, Rodrigues outlet of the *Employer*. The *Employer* is resisting the present application.

The *Applicant Union* was represented and assisted by its trade union advisor, Mr M.R. Chuttoo, whereas the *Employer* was assisted by Counsel.

The *Employer* in its written Grounds of Objection has stated having three outlets in Mauritius and one in Rodrigues. It has notably averred that the trade union cannot have more than 30 per cent support of its workers. The Rodrigues outlet that it operates represents only 22 per cent of its workforce of 81 workers. It has also been averred that the Camp du Roi, Rodrigues outlet cannot be construed to be a distinct entity and/or bargaining unit by reason of its geographical location and that the law does not provide for any such distinction.

Mr Chuttoo adduced evidence on behalf of the *Applicant Union*. The trade union has 13 members out of the bargaining unit of 18 members. The workers in the union's defined bargaining unit are based in Rodrigues which is a different geographical location. Be it they are in the same categories, their conditions of work are not totally the same. The opening hours in Rodrigues are not the same as in Mauritius. He cannot see why they should be depend on the units in Mauritius. He referred to *paragraph 89 and 91 of the Code of Practice of the Employment Relations Act* in support. A bundle of 13 membership forms were produced (Document A).

Upon questions from Counsel, Mr Chuttoo also stated that he has met with the employees on three occasions when in Rodrigues having conducted meetings with them. Regarding the operations of the outlets, he stated that he is only aware that the opening and closing hours are not the same as in Mauritius, where the closing time is much after. He could not say if the work conditions were more favourable in Rodrigues but they are different. He does believe that the workers in Rodrigues and in Mauritius are employed by Supercash Ltd who is also the licensee of the operations. The bargaining unit of 18 workers excludes those with managerial powers. He agreed that the business operation of Supercash Ltd was to sell on a retail and wholesale basis to the general public.

Mr Arvin Saddul, Manager at Supercash Ltd, was called to depone on behalf of the *Employer*. He notably confirmed the contents of the grounds of objection submitted on 27 August 2015. He also stated the Rodrigues outlet closes at 4 in the afternoon and the work culture is not the same as that for Mauritius.

Mr Saddul further enlightened the Tribunal in stating that the categories of workers of the bargaining unit applied for also exist in the Mauritian outlets. They have the same terms and conditions except for their hours of work as the working culture is different in Rodrigues. In the categories applied for, there are 45 workers based in Mauritius. There are

no issues of discrimination between the employees in Rodrigues and in Mauritius nor has he received any complaint from the employees in Rodrigues.

The present application rests on the support of 13 workers members of the *Applicant Union* in the bargaining unit situated at Camp du Roi, Rodrigues as stated. The *Employer* has claimed that its Rodrigues outlet represents only 22 per cent of its workforce of 81 employees. This would equate to about 18 workers in the bargaining unit.

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 has not been disputed that employees forming the bargaining unit are in the same categories as employees of the same employer in Mauritius. However, the evidence adduced from both sides has shown that the working hours of the employees concerned are not similar to their Mauritian counterparts.

On the issue of hours of work, the Tribunal has noted from the hours of operation of the different Supercash Ltd outlets as stated on its official website that the opening hours of the Camp du Roi outlet are 8am to 4.30pm during weekdays and 8am to 1pm on Saturday. This is different from the opening hours of the outlets located at Pont Fer, Phoenix and Quay D, Port Louis. It may even be noted that the Royal Road, Rose-Belle outlet has different hours of operation (9am to 7pm during weekdays and Saturdays and 9am to 12.30pm on Sunday) from the two other Mauritian outlets.

Although, it is trite law that hours of work constitute an essential condition of the contract of employment (vide *Ramsurrun v Floreal Knitwear Ltd* [2006 SCJ 287]), the inherent power of the *Employer* to organise his business should be borne in mind. The significance of this power in relation to the employees' hours of work has been illustrated in *Hong Kong Restaurant Group Ltd v Manick* [1997 SCJ 105]:

The change in the number of hours of work is a substantial one in the present case and this cannot be done unilaterally. However, we hasten to add that nothing prevents the employer from modifying those hours for the better running and exigencies of the business provided he pays for the overtime.

Coupled with the right to change the number of hours of work, there is also the right of the employer to modify the time at which work must start. But this does entitle the employer to fix odd hours of work unless the concern has odd business hours. It must be borne in mind that the employer has the inherent power of administration and he can organise his business according to the exigencies of the service but within the labour law and its remuneration orders (vide: Encyclopédie Dalloz: Droit du Travail – Verbo Contrat de travail (Modification) notes 32 and 34).

Likewise, in *Dyers and Finishers Ltd. v Permanent Arbitration Tribunal & ors.* [2010 SCJ 176], it was stated that:

It is settled law in France, from which we inspire ourselves in matters of labour law, and in Mauritius, that the employer is at liberty to organise his enterprise in the best interests of that enterprise. But he must also comply with the law of the country with respect to the rights of the employees.

Despite the different working hours of the employees in Rodrigues, it cannot also be overlooked that the employees in Mauritius do not have the same hours of work, as per the opening times noted, across the Supercash Ltd outlets in Mauritius. Moreover, in view of the legitimate power of the *Employer* to organise his business, it cannot be said that the workers should be treated distinctly by reason of the different operating hours of their outlet.

The Tribunal has noted the trade union representative is relying on *paragraphs 89 and 91* of the *Code of Practice* to be found in the *Forth Schedule* of the *Act* in support of his contention that the bargaining unit in Rodrigues may be treated separately and that they should not depend on their Mauritian counterparts. The *Code of Practice* it must be recalled serves to guide the protagonist in their conduct of employment relations and to promote good and harmonious employment relations at the workplace.

It is also apposite to note that the *Code of Practice* discourages the formation of unduly small bargaining units. Indeed, *paragraphs 90 and 91* state the following in relation to the extent and scope of a bargaining unit:

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.*

(The underlining is ours)

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 cannot therefore find the application to be in order inasmuch it has not considered nor included the other workers employed by Supercash Ltd who are entitled to be part of the bargaining unit for being in the same job categories for which recognition is sought by the *Applicant Union*.

The application is therefore set aside.

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

**SD Ramprakash Ramkissen
(Member)**

**SD Rajesvari Narasingam Ramdoo (Mrs)
(Member)**

**SD Renganaden Veeramootoo
(Member)**

Date: 21st September 2015