

EMPLOYMENT RELATIONS TRIBUNAL

ORDER

ERT/RN 192/2015

Before:

Shameer Janhangeer	-	Vice-President
Esther Hanoomanjee (Mrs)	-	Member
Rajesvari Narasingam Ramdoo (Mrs)	-	Member
Renganaden Veeramootoo	-	Member

In the matter of:-

Private Sector Employees Union

Applicant Union

and

Fibre Marine Limited

Employer

The Private Sector Employees Union (the "*Applicant Union*") is seeking an order for recognition as a bargaining agent in relation to employees of Fibre Marine Limited (the "*Employer*") under *section 38 (1)* of the *Employment Relations Act* (the "*Act*"). It wishes to solely represent a bargaining unit consisting of Carpenters, Painters, Inox Welders, Fibre Glass Makers, Fibre Glass Cutters, Helpers, Gel Coaters, Electricians, Store Helpers, Welders, and Fibre Glass Moulders. Enclosed with the application are 32 admission forms of the workers admitted as members of the *Applicant Union*. The Union in its application contends that there are 59 employees working in the bargaining unit and that it meets the criteria for sole recognition under *section 37 (2)* of the *Act*.

Both parties were represented by Counsel for the purpose of the hearing. The *Applicant Union* was assisted by Mr Y. Ramsohok, who appeared together with Mr I. Hematally. The Employer was assisted by Mr Y. Hein, who appeared together with Mr R. Bhookhun.

The *Employer* is objecting to the present application. It has put forward the following grounds of objection:

1. *The union is not sufficiently representative of the employees of the company;*
- 1(a). *The bargaining unit extends to other category of employees*
2. *Industrial relations have always been amicable at the company; and*
3. *No complaints regarding industrial relations made.*

Mr Devianand Narain, Secretary of the *Applicant Union*, was called to adduce evidence in support of the application. He produced a copy of the application form (Document A) wherein the Union is asking for sole recognition in respect of the bargaining unit applied for. He also produced a bundle of 13 admission forms (Document B) of workers belonging to the Union. He confirmed having annexed 32 admission forms together with the application. With 13 members, they have over 50 per cent support being entitled for sole recognition. If there are workers in a particular category who are not members of the Union, it would not be possible for the Union to sign a collective agreement on their behalf.

In response to questions from Counsel for the *Employer*, Mr Narain stated that as per the application there are 32 Union members out of 59 employees. The company deals in fibre glass products, e.g. boats, water tanks. He has never been to the factory; workers have explained this to him. It is possible to have other workers forming part of the bargaining unit. He agreed that everybody works hand in hand on the shop floor in

producing boats. He agreed that the production process involves a number of category of employees from start to finish, e.g. the Painter, the Fibre Glass worker, the Upholster. Even the Manager is involved in the process, but he cannot put him in the bargaining unit. He does not agree that all the employees have the same hours of work. He has received complaints against the company at the Union. Workers have informed him that there were cases reported to the Ministry of Labour. He stated that industrial relations at the company are neither amicable nor courteous. Some workers have been harassed once they have joined the Union. He does not agree that the categories of Upholster, Helper cum Cleaner, Fibre Glass cum Upholster, Foreman, Manager, Secretary and Purchasing Officer should form part of the bargaining unit. They are not members of the Union and the Union cannot defend them. It is for the Trade Union to decide on the bargaining unit. The employer cannot decide on the bargaining unit, it is the worker who decides.

Mr Gerard Ducray, Managing Director at Fibre Marine Ltd, was called on behalf of the *Employer*. He stated that the company exists since 30 years and is involved in the production of boats and reservoir (tanks). He explained how the company takes orders from clients, the process of manufacturing the boat that follows and the categories of workers involved. This involves the Foreman, the Welder, the Upholsters, the Purchasing Officer and the Storekeeper. Everybody works together to manufacture the boat. At the start there is the mould made by everybody together. The Foreman with a group of 'Moulderers' mould the hull of the ship together. After, the Carpenters get involved as do the Welders. The Painters do different paints and a design as well. The Upholsters make the seats. In the meantime, the client comes to see the boat, with the Manager or the Salesgirl or the Secretary. It is a small company, everyone has his hand (in the process). The Purchasing Officer is important as he has to see what part needs to be purchased and he follows the production of the boat. The Foreman spends his day on the shop floor. The Salesgirl places the order on the floor with the Foreman or with the persons concerned who will do the work. She also brings the client and caters for the licencing of the boat. As for himself, he spends a lot time on the shop floor, about 30 per cent. The workers are flexible and they can work in other sections. The Upholster, when not making the seats, can also work the fibre glass. The role of the Cleaner, who is also a Helper, is also important in the process.

Mr G. Ducray also produced a list of 36 employees of Fibre Marine Ltd together with copies of the identity cards of the workers (Document C). He did not insist for the two Accounts Officers to be part of the bargaining unit. All employees work 8 hours per day and 5 day per week. According to him, the *Applicant Union* is not representative as it is not fair to represent only part of the workshop. Industrial relations before the Union episode have always been sound at the company. He does not recall any complaint made to the Ministry of Labour before the Union episode.

Mr G. Ducray, following questions from Counsel for the *Applicant Union*, stated that the Cleaner also works as a Helper and with the fibre glass. The Foreman gives instructions to employees. He is the best worker and knows the works better than most. The Storekeeper is not directly linked to the production of boats. The Purchasing Officer should form part of the bargaining unit as he works on the boat and without him nothing can be done. The Secretary spends a lot of time on the floor. The Manager does what he does. Fibre Marine Limited consists of a single premise made up of different sections. The Salesgirl works directly with the production; she is not a manual worker but has to sell the products manufactured. She is the liaison between the client and the product. He also confirmed that he spends more than 30 per cent of his time on the floor, he can even manufacture a boat and can even paint. He does not agree that there are only 25 employees who are directly linked to the manufacture of boats.

Counsel for the *Applicant Union* has notably submitted on the appropriateness of the bargaining unit referring to factors to be taken into account in establishing the appropriate bargaining unit quoting from English law and practice. He also referred to *paragraph 92* of the *Code of Practice* of the *Act* as to the factors to be taken into account in establishing a bargaining unit. He submitted that the categories or classes of workers forming part of the bargaining unit proposed by the Trade Union can be classified as manual workers. In this optic, he also submitted why the grades of Managers, Salegirls, Purchasing

Manager and Foreman should not form part of the bargaining unit. In referring to *paragraph 92*, he notably submitted on the “general wishes of the workers concerned” stating that if workers do not wish to be members of the union, it would be against their wish to include them in the bargaining unit and to proceed to make a collective agreement on their behalf.

Counsel for the *Employer*, on the other hand, mainly submitted that the Trade Union has not reached the required threshold of proving its case. He pointed out that this is an application under *section 37 (2)* where the Union must have over 50 per cent and not under *section 37 (1)* where the Union must have 30 per cent. In referring to the categories of workers forming the bargaining unit, he stressed on the polyvalence of the workers and their overall involvement. He could not see how other categories could be excluded from the bargaining unit whether they were manual workers or not. He has also pointed out that extent of the bargaining unit is to be determined by the Tribunal.

The present matter has revolved around the extent of the bargaining unit. The *Employer* has argued that the whole of the 36 employees as per its list should form part of the bargaining unit.

The *Applicant Union* on its side has contended that it represents 25 of the employees according to the list of employees as per the categories of the bargaining unit it has applied for.

From a perusal of the 32 forms submitted with the application, the Tribunal found that there were 13 names of which appear on the *Employer’s* list. Furthermore, during the course of the hearing, the representative of the Union submitted a bundle of 13 matching forms.

The *Applicant Union*, in the process of seeking recognition, initially wrote to the *Employer* on 25 August 2015 applying for sole recognition in respect of the categories it has listed as its bargaining unit. It received no reply from the *Employer*. It has now applied to the Tribunal, by way of its application dated 8 December 2015, for an order for sole recognition in respect of the bargaining unit made up of the same categories.

The purpose for a Trade Union to seek recognition is primarily for the purpose of collective bargaining. This is clear from *section 2* of the Act:

“recognition” means the recognition of a trade union of workers, or a joint negotiating panel, by an employer for the purpose of collective bargaining;

A bargaining unit under *section 2* of the Act has been defined as follows:

“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;

The *Code of Practice* of the Act notably states as follows in relation to ‘*Bargaining Units*’:

89. *Collective bargaining in an enterprise is conducted in relation to defined groups of workers which can appropriately be covered by one negotiating process.*

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.

In this context, it would be apposite to quote from *Dr D. Fok Kan in Introduction to Mauritian Labour Law 2/ The Law of Industrial Relations (2000)*, p.52:

Recognition involves the determination not only of the bargaining agent but also of the bargaining unit.

It may also be noted that *paragraph 92* of the *Code of Practice* lists a number of factors to be taken into account in establishing a bargaining unit. According to *Dr Fok Kan (supra)*, p.53, *'These factors suggest that the main overall criterion is the community of interests of the employees covered by the unit'*.

In support of its contention that it is entitled to seek sole recognition as a bargaining agent for the bargaining unit applied for, counsel for the *Applicant Union* has relied on the case of *R (on application of Kwik-Fit (GB) Ltd) v Central Arbitration Committee [2002] EWCA Civ 512* as quoted from *Tolley's Employment Handbook*, § 49.30:

In R (on the application of Kwik-Fit (GB) Ltd) v Central Arbitration Committee [2002] EWCA Civ 512, [2002] ICR 1212, the Court of Appeal considered the approach to be adopted by the CAC when considering competing contentions by the union and employer as to the appropriate bargaining unit. Buxton LJ rejected the employer's contention that the CAC has a duty to treat on equal terms the unit proposed by the union and any alternative proposed by the employer. The recognition machinery is put in motion by a request from the union. Provided the CAC finds that the unit put forward by the union is 'appropriate' it need not go further and consider whether there is a more appropriate unit that might be identified. It must take into account the employer's views, but should not weigh up whether an alternative unit put forward by the employer might be better than that proposed by the union, provided that that proposed by the union meets the requirement of being 'appropriate'. The decision highlights the way in which the recognition process is essentially union-driven.

Although it is useful to be guided by judicial thinking in England with the aim to reach just solutions industrial disputes, we must not lose sight that English case law is based partly on specific statutory provisions and partly on the English common law (vide *Perriag v International Beverages Ltd* [1983 MR 108]). Indeed, the criteria for the determination of an 'appropriate bargaining unit' is to be found at *Schedule A1* of the *Trade Union and Labour Relations (Consolidation) Act 1992* in England.

The present application has only listed the categories of employees forming the bargaining unit at the workplace of Fibre Marine Ltd. In view of the strong objection taken by the *Employer* as to the extent of the bargaining unit, it would be incumbent on the *Applicant Union* to prove that the bargaining unit, as applied for, consists of workers or classes of workers on whose behalf a collective agreement may be made.

The application made speaks of a membership of 32 union members in a bargaining unit of 59 workers. It has eventually come to light that there are a total of 36 employees at the company. The bargaining unit itself as per the category of employees applied for amounts to about 25 workers. Furthermore, only 13 members of the 32 appear on the *Employer's* list.

Moreover, a scrutiny of the categories forming the bargaining unit on the list of employees show that the *Applicant Union* does not have any members in the categories of Inox Welders, Helpers, Electricians and Welders. It is therefore doubtful if it can fully claim to represent these categories of employees as part of the bargaining unit applied for.

The *Employer* has lengthily argued that other categories of workers in its employment are entitled to form part of the bargaining unit. It contends that all of the employees save for the Account Officers should form part of the bargaining unit.

The representative of the *Applicant Union* has in his evidence recognised that there are several category of workers involved in the production process at the company. He even admitted that the Manager is involved in the process, although he cannot be included in the bargaining unit. However, those who are not members of the Union cannot be included in the bargaining unit and the Union cannot defend their interests.

The evidence of the representative of the *Employer* has focused on the production process at the company illustrating how different categories of workers are involved at different stages of the making of a boat. He also expounded on the over lapping of roles in certain categories, e.g. Upholster cum Fibre Glass worker, Cleaner cum Helper. In particular, he was at lengths to explain the importance of the role of the Foreman, Salesgirl, Secretary and Purchasing Officer in the manufacturing of a boat. He did not agree that only 25 workers of the list of 36 were directly involved in the manufacturing process.

It must be borne in mind in being guided by the *Code of Practice* that small bargaining units should be discouraged. In practice, it is the better interest that the bargaining unit covers as wide as a group of workers as possible. The more so when a sole Trade Union seeks to represent the workers of an employer. It cannot also be overlooked that the Union is not representative in all of the 11 categories making up the bargaining unit for which it has applied for.

The application in the present matter is furthermore vague as to the class of workers on behalf of which the Union seeks to be recognised. Although the categories have been listed, it is not clear whether the Union wishes to represent only the grades of manual workers at the company to the exclusion of those not involved in the production process. It is only at the stage of submissions that Counsel for the *Applicant Union* stated that the application was in relation to manual workers.

The evidence on record has borne out that there are other categories of workers involved in the production of a boat and that this is not necessarily limited to the floor workers. It involves managerial and clerical grades as well. It could therefore be said that the workers would have '*a substantial degree of common interest*' although they are not members of the *Applicant Union*.

The flexibility of workers in switching posts as revealed by the *Employer's* representative during the hearing is an important consideration as well. Although, this was not reflected in the categories of the workers forming the bargaining unit, it would also be fair to say that the list of employees submitted did not fully reflect this.

It is akin to note what was stated by the *Supreme Court* in *Private Enterprises Employees' Union v Industrial Relations Commission and Mauritius and New Zealand Dairy Enterprises Ltd [1985 MR 219]* in relation to a case of recognition under the then *Industrial Relations Act*:

It follows that, bearing in mind the fact that the provisions of the Code of Practice are meant for guidance only, while it would not be proper for the Commission to adopt, as a general principle applicable to all cases, a yardstick that recognition will never be granted unless the union has at least x% of employees on its books, there is nothing to prevent the Commission from saying, in a given situation, that a union which has only 18 members out of 63 workers in an enterprise and has no member at all in 4 out of 6 grades cannot qualify for full recognition under section 58 (4) (b) of the Act.

The Tribunal cannot therefore be satisfied that the *Applicant Union* is fully representative of all the workers in all of the categories it has applied for. The Tribunal is also not satisfied that the *Applicant Union* has demonstrated that it has applied for recognition on behalf of the whole of the class of manual workers at the company and that

it cannot represent related non-manual categories of workers in the bargaining unit who have an involvement in the production process.

As a matter of guidance from English Law, the Tribunal has found the following article submitted by Counsel for the *Applicant Union* most helpful as to the requirement of a Trade Union to determine the appropriate bargaining unit in the process of formally applying for recognition. The following extract by *Jared S. Gross, Recognition of Labor Unions in a Comparative Context: Has the United Kingdom Entered a New Era* 78 *Chi.-Kent. L.Rev.* 357, 365 states:

B. RECOGNITION OF LABOR UNIONS

During an organization drive, a union will limit itself to the portion of employees of a given employer that it feels it has the best chance of successfully organizing. The concept of an appropriate unit is critical because a union will commit its resources to organizing the largest unit that it thinks will succeed, and an election failure means that the union must wait an entire year before petitioning for a new election. Once a union determines the makeup of a potential unit, it will begin its organization drive, seeking to obtain pledges of support from the particular unit.

The union then has two routes it can take. First, the union can request recognition from the employer, but the employer will almost always reject the request for recognition. Second, employees, their representative, or an employer can initiate a representation case by filing a petition with the Board.

The present application is therefore set aside.

.....

SD Shameer Janhangeer
(Vice-President)

.....

SD Esther Hanoomanjee (Mrs)
(Member)

.....

SD Rajesvari Narasingam Ramdoo (Mrs)
(Member)

.....

SD Renganaden Veeramootoo
(Member)

Date: 5th February 2016