EMPLOYMENT RELATIONS TRIBUNAL

ORDER

ERT/RN 104/16

Before:	**Indiren Sivaramen**	**-**	**Vice-President**
	Vijay Kumar Mohit	**-**	**Member**
	Rabin Gungoo	**-**	**Member**
	Renganaden Veeramootoo	**-**	**Member**

In the matter of:-

Private Sector Employees Union (Applicant)
And
Mauritius Oil Refineries Ltd (Respondent)

in presence of: Food and Beverages Industry Employees Union (Co-Respondent)

The Applicant has made an application under section 38(1) of the Employment Relations Act (the "Act") for an order directing the employer, that is, Respondent to recognise Applicant as a bargaining agent for the bargaining unit consisting of manual employees and administrative staff excluding management under employment at Respondent. The Respondent is objecting to the application and the grounds of objection as expatiated in the Statement of Case of the Respondent read as follows:

(i) There is already a registered trade union representing the interest of employees at Respondent.

(ii) There are regular meetings between management and employees through Works Council meetings as per Social Accountability International Standards (SA 8000) and a harmonious relationship prevails at all levels.

(iii) It is not sufficiently representative of the employees.

The Co-Respondent, that is, the union referred to as the registered trade union under paragraph (i) of the grounds of objection of Respondent, was joined as a party in the present matter in the interests of justice.

The Applicant and Respondent were assisted by counsel whilst the representative of Co-Respondent was not assisted by counsel.

Mr Narrain, the secretary of the Applicant deposed before the Tribunal and he stated that the Applicant made an application to Respondent seeking recognition for a bargaining unit consisting of manual employees and administrative staff excluding management. The Respondent replied to the Applicant in writing as per a letter dated 4 August 2016 (Annexure B to Doc A). Mr Narrain stated that management did not give details on the other trade union or on the bargaining unit of that union. When the Applicant made the present application before the Tribunal, the Applicant did not know who the other trade union was. Mr Narrain produced 97 alleged admission forms of workers in the bargaining unit for which the Applicant was seeking recognition (Docs B to B96). He stated that as per his information, there are 174 workers in the said bargaining unit. He averred that the Applicant has sufficient representativeness to be recognised by the Respondent.

In cross-examination, it was put to Mr Narrain that there were in fact 170 workers in the bargaining unit now and he stated that this was possible and he would have no issue with that figure.

Mr Smith, HR Manager at Respondent then deposed and he stated that he replied to the application made by Applicant. He stated that there was a trade union which was already "représenté" at the Respondent. He produced a copy of a collective agreement dated 21 August 2009 entered into between the Respondent and the Co-Respondent (Doc C). He added that there are 170 workers in the bargaining unit *in lite,* comprising of 135 manual operators and 35 staff members. He stated that the Respondent did not receive any application for the revocation of the recognition of Co-Respondent. The Respondent is not agreeable to recognise Applicant.

In cross-examination, Mr Smith stated that Doc C was the last collective agreement that was entered into between Respondent and Co-Respondent. He conceded that the last official meeting between Respondent and Co-Respondent took place some 6 to 7 years

back. He was not aware if 97 workers are members of the Applicant. He could not say if the Co-Respondent had any members at Respondent. In re-examination, Mr Smith stated that the collective agreement (Doc C) is still effective and that there had been no revocation of recognition of Co-Respondent. Doc C concerned only manual workers and not administrative staff.

Mr Ramasamy, the Negotiator for Co-Respondent, deposed to the effect that some two years after the Co-Respondent had entered into the collective agreement (Doc C), almost all workers withdrew from the Co-Respondent. He stated that the Co-Respondent has no objection for recognition of the Applicant union. In cross-examination, Mr Ramasamy agreed that there had been no application for "derecognition" of his union.

The Tribunal has examined all the evidence on record including documents produced and the submissions/arguments offered by both Counsel. Counsel for Respondent has first raised issues in law in relation to the present application and we propose to deal with them now. Counsel for Respondent argued in law that the present application had been wrongly entered since it was made under section 38(1) of the Act instead of section 37(4)(b) of the Act. Alternatively, he suggested that an application ought to have been made first under section 39 of the Act for revocation of recognition of Co-Respondent. Counsel also argued that ex facie the application, the application made to the Respondent was wrong as the application should have been made under section 37(2)(a) of the Act instead of section 37(1) of the Act. Counsel for Applicant submitted that the Applicant was not debarred from making an application under section 38(1) of the Act. He suggested that it was not necessary for the Applicant to apply first for the revocation of recognition granted to Co-Respondent. Counsel for Applicant also suggested that the Tribunal should not be unduly technical and set aside an application based on a mere technicality. He referred to the Privy Council case of **Margaret Toumany and John Mullegadoo v. Mardaynaiken Veerasamy [2012] UKPC 13**. He also relied on section 97 of the Act in relation to the principles to be applied by the Tribunal including the principles and best practices of good employment relations.

To deal with the points in law, the Tribunal must first consider the status of Co-Respondent. The unchallenged evidence before us, including evidence from Mr Ramasamy, Mr Smith to the effect that up to now there has not been any application for revocation of recognition of the Co-Respondent and the collective agreement entered into between Respondent and Co-Respondent for manual workers, indicates that Co-Respondent is a recognised trade union at Respondent. Far from approving or condoning any arrangements which currently exist at the Respondent in relation to the Co-Respondent, the fact remains that Co-Respondent has been recognised by Respondent since the nineteen-nineties as averred by Mr Ramasamy.

The present application to the Tribunal has been made under section 38(1) of the Act which reads as follows:

*"**38. Order for recognition of trade union of workers***
(1) Where an employer refuses to grant recognition to a trade union or group of trade unions in accordance with section 37, the trade union or group of trade unions may apply to the Tribunal for an order directing the employer to recognise the trade union or group of trade unions."

Section 37 of the Act bears the heading "***Criteria for recognition of trade union of workers***" and provides as follows:

"(1) Subject to subsections (2) and (3), a trade union shall be entitled to recognition as a bargaining agent for a bargaining unit in an enterprise or industry, where it has the support of not less than 30 per cent and not more than 50 per cent of the workers in the bargaining unit of the enterprise or industry.
(2) Subject to subsection (3) —
(a) a trade union which has the support of more than 50 per cent of the workers in a bargaining unit in an enterprise or industry shall be entitled to recognition as the sole bargaining agent of the bargaining unit of the enterprise or industry;
(b) 2 or more trade unions which have each the support of not less than 30 per cent and not more than 50 per cent of the workers in a bargaining unit in an enterprise or industry, shall be entitled to be recognised as a joint negotiating panel of the bargaining unit of the enterprise or industry.
(3) Where a trade union or group of trade unions has been granted recognition as a sole bargaining agent or joint negotiating panel, respectively, for a bargaining unit in an enterprise or industry, no other trade union shall be entitled to recognition for the bargaining unit except by virtue of an order or determination of the Tribunal under section 38.
(4) Where a trade union has been granted recognition under subsection (1) and —
(a) one or more new trade unions, having the support of not less than 30 per cent and not more than 50 per cent of the workers in the bargaining unit, apply to the employer for recognition —
(i) the employer may grant recognition to the trade unions altogether as a joint negotiating panel of that bargaining unit;
(ii) the employer may not grant recognition to any of the new trade unions which refuses to form part of a joint negotiating panel; or
(iii) the employer or one or more of the new trade unions may, where the existing trade union refuses to form part of a joint negotiating panel, apply to the Tribunal for an order directing the existing trade union to form part of the joint negotiating panel;
(b) a new trade union which has the support of more than 50 per cent of the workers in the bargaining unit, applies to the employer for recognition in respect of that bargaining unit, the employer or the new trade union may apply to the Tribunal for its determination as to which trade union is to be recognised and the Tribunal shall make an order to that effect.

(5) …."

The Tribunal is not satisfied that the present application should have been made under section 37(4)(b) of the Act. There is no evidence before us that the Co-Respondent has been granted recognition under section 37(1) of the Act. The Co-Respondent was granted recognition in the nineteen-nineties. The Tribunal finds that at best and by virtue of section 108(3) of the Act, the Co-Respondent "*shall be deemed to have obtained recognition under this Act*."

Also, section 37(4)(b) of the Act must be read in conjunction with section 37(1) of the same Act, and one requirement for an application to be made under section 37(4)(b) of the Act, is for the new trade union to be making an application for recognition in the same bargaining unit as the other union which has already been granted recognition. There is no evidence that such is the case in the present matter the more so that Doc C was entered into for manual workers only.

The Tribunal also rejects the submission of Respondent that Applicant should have first made an application for revocation of the recognition of Co-Respondent. There is no such requirement in the law. On the other hand, there was clearly a refusal on the part of Respondent to grant recognition to the Applicant as per Respondent's letter of 4 August 2016 (Annexure B in Doc A). The Tribunal thus finds nothing wrong for the Applicant to have made his application to the Tribunal under section 38(1) of the Act. This first point in law raised by the Respondent is thus set aside.

The Tribunal will now address the issue whether the basis of the application of the Applicant to the Respondent should have been section 37(2)(a) of the Act instead of section 37(1) of the Act. The Applicant has averred in his letter dated 7 June 2016 that as at that date, 97 out of 174 workers in the bargaining unit were members of the union. The Applicant was thus in fact averring that he had as members (and thus even the more so the support of) more than 50 per cent of the workers in the bargaining unit (55.7%). The Applicant nevertheless deliberately applied for recognition as bargaining agent (and not sole bargaining agent) for the bargaining unit. In his letter of 7 June 2016, the Applicant does not refer to having the support of more than 50 per cent of the workers in the bargaining unit but referred to having the support of more than 30 per cent of the said workers. Mr Narrain maintained before the Tribunal that the Applicant met the criteria to be recognised as a bargaining agent. Both the terms "bargaining agent" and "sole bargaining agent' have been specifically defined under section 2 of the Act.

Fundamental changes have been brought to the Act in 2013 in relation to Part V - "Collective Bargaining" of the Act and more particularly its sub-part B – "Negotiating Rights". Irrespective of the statements made by Mr Ramasamy, the validity of the recognition of Co-Respondent has so far remained unaffected.

Section 37 (subsections (1) and (2)) of the Act (as amended) is being reproduced anew for ease of reference:

"(1) Subject to subsections (2) and (3), a trade union shall be entitled to recognition as a bargaining agent for a bargaining unit in an enterprise or industry, where it has the support of not less than 30 per cent and not more than 50 per cent of the workers in the bargaining unit of the enterprise or industry.
(2) Subject to subsection (3) —
(a) a trade union which has the support of more than 50 per cent of the workers in a bargaining unit in an enterprise or industry shall be entitled to recognition as the sole bargaining agent of the bargaining unit of the enterprise or industry;
(b) 2 or more trade unions which have each the support of not less than 30 per cent and not more than 50 per cent of the workers in a bargaining unit in an enterprise or industry, shall be entitled to be recognised as a joint negotiating panel of the bargaining unit of the enterprise or industry."

It is apposite to compare section 37(1) (2) of the Act with the corresponding provisions which existed prior to the 2013 amendments. Indeed the then section 37 read as follows:

"***Criteria for recognition of trade union of workers***

(1) Subject to subsection (2), a trade union shall be entitled to recognition as a bargaining agent for a bargaining unit in an enterprise or in an industry, where it has the support of not less than 30 per cent of the workers in the bargaining unit of the enterprise or of the industry.

(2) Where a trade union has the support of more than 50 per cent of the workers in a bargaining unit in an enterprise or in an industry, it shall be entitled to recognition as sole bargaining agent of the bargaining unit of the enterprise or of the industry.

……."

The legislator does not legislate in vain and in our opinion the amendments brought to these provisions are in line with the other changes brought to the Act (as discussed below) by the 2013 amendments.

Applicant's case is based right from day one and before the Tribunal on his main averment that he has as members 97 out of 174 employees in the said bargaining unit. Yet, the Applicant deliberately makes an application to the Respondent based on section 37(1) of the Act (and not section 37(2)(a) of the Act) and simultaneously puts forward that he has the support of (only) more than 30 per cent of the workers in the bargaining unit. This is in our view one of the causes for various practical difficulties

which the legislator has tried to avoid with the amendments brought to the Act in 2013. Such a difficulty may arise, for example, where there is already a recognised trade union in an enterprise in a slightly different bargaining unit. Following the 2013 amendments, section 29 of the Act (with a new section 29(1A)) now reads as follows:

29. Right of workers to freedom of association
(1) Every worker shall have the right –
(a) Subject to subsection (1A), to establish or join, as a member, a trade union of his own choice, without previous authorisation and without distinction whatsoever or discrimination of any kind including discrimination as to occupation, age, marital status, sex, sexual orientation, colour, race, religion, HIV status, national extraction, social origin, political opinion or affiliation;
……
(1A) A worker shall have the right to join only one trade union, of his own choice, in the enterprise where he is employed or his bargaining unit.

…

This was the first time that the legislator had deemed it wise to impose a limit on the number of trade unions which a worker may join in his bargaining unit. The aim, it would appear, was to avoid, as far as possible, multiple trade unions bargaining separately within one and the same bargaining unit.

Amendments have also been brought to other relevant sections of the law dealing with "Negotiating Rights". Section 37 of the Employment Relations (Amendment) Act 2013 (Savings and transitional provisions) reads as follows:

" …..

(3) Subject to subsection (4), the validity of the recognition of a trade union of workers which obtained recognition before the commencement of this Act shall remain unaffected.

(4) (a) (i) Where 2 or more trade unions are already recognised in an enterprise or industry as bargaining agents only and the trade unions refuse to form a joint negotiating panel, the employer or any of the trade unions may make an application to the Tribunal, within 12 months of the commencement of this Act, for a determination as to which trade union the workers in the bargaining unit wish to be their bargaining agent.

(ii) Where 2 or more trade unions are already recognised in an enterprise or industry, and one of the trade unions has recognition as a sole bargaining agent, the employer or any of the trade unions may make an application to the Tribunal, within 12 months of the commencement of this Act, for a determination as to which trade union the workers in the bargaining unit wish to be their bargaining agent.

(b) For the purpose of determining an application under paragraph (a), the Tribunal shall organise and supervise a secret ballot in the bargaining unit in order to determine which trade union the workers in that bargaining unit wish to be their bargaining agent.
…"

We note the different approaches contemplated under sections 37(4)(a)(i) and 37(4)(a)(ii) of the Employment Relations (Amendment) Act 2013 depending upon whether one of the recognised trade union is a sole bargaining agent or not. This is in line with section 37(4) of the Act (above). Though this section does not fit exactly with the facts in the present case (for the reasons given above), yet it provides useful guidance as to the different procedures which would be available depending on whether a new trade union has the support of not less than 30 per cent and not more than 50 per cent of the workers in the bargaining unit at the time he applies to the employer for recognition (underlining is ours) as compared to a new trade union which has the support of more than 50 per cent of the workers in the bargaining unit.

Consequences flow naturally from the support enjoyed by a trade union in a bargaining unit at the time the union applies to the employer for recognition.

Section 36(1) of the Act provides that:

"A trade union or a group of trade unions of workers acting jointly may apply in writing to an employer for recognition as a bargaining agent, or as a joint negotiating panel, or as a sole bargaining agent, for a bargaining unit."

An applicant must thus state in clear terms whether he wants to be granted recognition as a bargaining agent or as a sole bargaining agent. Even the order emanating from the Tribunal has to clearly "*declare whether the trade union shall be recognised as a bargaining agent or a sole bargaining agent, or whether there shall be a joint negotiating panel.*" (section 38(8)(c) of the Act)

The Tribunal finds that given the facts of the present case the Applicant should have made his application to the Respondent based on section 37(2)(a) and not section 37(1) of the Act. This is fatal to the present application. Section 38(1) of the Act starts with "*Where an employer refuses to grant recognition to a trade union or group of trade unions in accordance with section 37,…"* and the Tribunal finds that the application to the employer was not in accordance with the criteria laid down under section 37(1) of the Act.

For the reasons given above, the Tribunal finds that the application made by Applicant to the Respondent was not in order and not in accordance with the Act. This is not a mere technicality. The point in law raised on behalf of Respondent on this issue is upheld and the case is set aside.

(sd)Indiren Sivaramen

Vice-President

(sd)Vijay Kumar Mohit

Member

(sd)Rabin Gungoo

Member

(sd)Renganaden Veeramootoo

Member

26 October 2016