

EMPLOYMENT RELATIONS TRIBUNAL

ERT/RN 51/2018

ORDER

Before: -

Shameer Janhangeer	Vice-President
Raffick Hossenbaccus	Member
Rabin Gungoo	Member
Parmeshwar Burosee	Member

In the matter of: -

Tusk Contracting Limited

Applicant

and

Syndicat des Travailleurs des Etablissements Privés

Respondent

The Applicant is seeking an order for the revocation of the recognition of the Respondent trade union pursuant to *section 39 (1) (b)* of the *Employment Relations Act 2008* (the "Act"). As per its Statement of Case, the Applicant avers that the Syndicat des Travailleurs des Etablissements Privés has ceased to hold 30% support of the workers in the bargaining unit. The Respondent is resisting the application.

Both parties were assisted by Counsel. Mr T. Saminaden appeared for the Applicant. Whereas, Mr B. Ramdenee appeared for the Respondent. Both parties have submitted a Statement of Case in the present matter.

Mr Olivier Rouillard, Managing Director, adduced evidence in support of the application. He notably stated that the Applicant employs twenty-one people in different departments – waterproofing, flooring, store and ventilation. Two employees are members of the Respondent union and the company contributes check-off on their behalf. He produced a copy of two payslips of the two employees concerned (Documents A and B). He received a claim for check-off in respect of two other employees, who subsequently informed him that they were not members of the union. He produced two letters from these employees (Documents C and D) to this effect. He also produced a document showing the contribution made for the two existing members for the months of March 2018 and April 2018 together with a remittance advice (Documents E, E₁ and E₂). The members represent 9.5% of the workforce. Even if the other two were added, it would not amount to 30%. This is why he is asking the Tribunal to revoke the recognition of the union.

Upon questions from Counsel for the Respondent, the Applicant's representative notably stated that his sole ground is that the union does not have the support of at least 30% of the workers. The employer has based itself on the list of workers and the existing check-off agreement to determine representativeness. He is not aware of other means by which an employee can contribute towards the union. There is no procedure agreement between the parties.

Mr Atma Shanto, Negotiator, adduced evidence on behalf of the Respondent trade union. He confirmed the truth of the contents of the Respondent's Statement of Case. He does not agree to the employer's contention that the union lacks representativeness and that recognition should be revoked. There is no procedure agreement between the parties despite the union always asking the employer to draw up same. Workers sometimes may not want to let the employer know that they are members of the union and directly pay their contributions to the union.

In response to questions from Counsel for the Applicant, Mr Shanto notably stated that that the only time he asked to enter into a procedure agreement is in this year. He does not agree that there are only two workers' members of his trade union and that the union does not represent 30% as the law provides.

Counsel for the Applicant has notably submitted that the application is being made under *section 39 (1) (b)* of the Act. From his reading of the aforesaid section, there are two possibilities:

default of the law and failure to comply with the provisions of the procedure agreement. The Tribunal grants recognition under *section 37 (1)* of the *Act* to a trade union with not less than 30% support. Reference was made to *section 28 (1) (a)* of the *Interpretation and General Clauses Act* as a tool of interpretation. Counsel submitted that the Tribunal has the right to revoke the recognition of the trade union, which does not have 30% support, in accordance with *section 39 (1) (b)* of the *Act*.

Counsel for the Respondent has, on the other hand, submitted that an employer cannot make an application to revoke the union's recognition due to a change in representativeness. Under *section 39 (1) (a)* of the *Act*, a trade union or a group of trade unions may apply on the ground that there has been a change in representativeness. Under *section 39 (1) (b)* of the *Act*, an employer may apply pursuant to a default or failure to comply with any provisions of the procedure agreement. The sole reason why the employer is seeking the revocation of recognition is because of an alleged change in representativeness. This course of action is not open to the Applicant under *section 39 (1) (b)* of the *Act*. Moreover, Counsel has notably relied on the past orders of the Tribunal in *Galvabond Ltd and Chemical Manufacturing and Connected Trades Employees Union (ERT/RN 37/15)* and *Compagnie Sucrière de Bel Ombre Ltd and Syndicat des Travailleurs des Etablissements Privés (ERT/RN 122/16)*.

Tusk Contracting Limited employs twenty-one workers within the company. The Syndicat des Travailleurs des Etablissements Privés is recognised as a bargaining agent by the Applicant since 2007. The present application for revocation of recognition of a trade union is being made under *section 39 (1) (b)* of the *Act*.

The main and only ground in support of the application is that of the Respondent's representativeness. The Applicant is contending that the Respondent only has a membership of two workers within its total workforce of twenty-one, which amounts to a support of 9.5%. The Applicant has based itself on the check-off it pays to the trade union in arriving at the figure of two workers. The Respondent has, however, denied that it only has the support of two workers in the bargaining unit and asserted that there are other means by which its members can honour their dues to the union.

In relation to the present application, it is pertinent to consider *section 39 (1)* of the *Act*. This provides as follows:

39. Revocation or variation of recognition of trade union of workers

- (1) Subject to subsection 38(10), the Tribunal may –
- (a) on an application made by a trade union or a group of trade unions, make an order to revoke or vary the recognition of another trade union where it is satisfied that there has been a change in representativeness; or
 - (b) on an application by an employer, make an order to revoke the recognition of a trade union or a joint negotiating panel for any default or failure to comply with any provisions of a procedure agreement.

As may clearly be seen from the above, the Tribunal, on an application from the employer, may make an order to revoke the recognition of a trade union *'for any default or failure to comply with any provisions of a procedure agreement'*.

It should be noted that the word *'default'* in section 39 (1) (b) of the Act does not refer to any default of the law as is being contended by Counsel for the Applicant. The word must be read in the whole of the sentence as *'... for any default or failure to comply with any provisions of a procedure agreement'* for it to be given its true significance within this particular subsection of the law. Nor can the word *'default'* be taken to be on its own or independent in the aforementioned section.

Indeed, the following may be noted from the order of the Tribunal in *Compagnie Sucrière de Bel Ombre Ltd and Syndicat des Travailleurs des Etablissements Privés (supra)*:

As an aid to interpretation, we may refer to the punctuation used. There is no semicolon (like in subsection 39(1)(a) just before the "or") or any comma after "default" which may suggest that "default" is to be read on its own and independently of "or failure to comply with any provisions of a procedure agreement."

On the contrary, it appears clear that both "default" and "failure" relate to the provisions of any procedure agreement existing between the parties. Likewise, the word "any" will apply to both "default" and "failure".

The Tribunal has further noted that Counsel for the Applicant has invoked *section 28 (1) (a)* of the *Interpretation and General Clauses Act (Act 33 of 1974)* as a tool of interpretation in his submissions. This particular section states:

28. Powers included in power to appoint

(1) *Where an enactment confers a power or imposes a duty to make an appointment or to constitute or establish any board, tribunal, commission, committee or similar body, the person having the power or duty may also—*

(a) *remove, suspend, dismiss or revoke the appointment of, and re-appoint or reinstate, any person appointed in exercise of the power or duty;*

The Tribunal cannot see how this section can come in aid of the application, the more so it is concerned with '*a power ... to make an appointment*', which is not the case in the present matter. The Tribunal has not been seized in the present application to make an appointment but to make an order to revoke the recognition of a trade union. The aforesaid section cannot therefore have any application to the present case.

It would also be apposite to note that the ground of change in representativeness, which is being forwarded by the Applicant, would only apply where the application for revocation of recognition of a trade union is being made by a trade union or a group of trade unions pursuant to *section 39 (1) (a)* of the Act.

It has not been disputed that no procedure agreement exists between the two parties in the present matter. The Applicant, being the employer, not having invoked any default or failure to comply with any provisions of a procedure agreement cannot therefore succeed in its application.

The application is therefore set aside.

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

**SD Raffick Hossenbaccus
(Member)**

**SD Rabin Gungoo
(Member)**

**SD Parmeshwar Burosee
(Member)**

Date: 23rd May 2018