EMPLOYMENT RELATIONS TRIBUNAL

RULING

ERT/ RN 89/18

Before

Indiren Sivaramen **Vice-President**

Vijay Kumar Mohit **Member**

Eddy Appasamy **Member**

Parmeshwar Burosee **Member**

In the matter of:-

Private Sector Employees Union (Applicant)

And

Froid des MascareignesLtd (Respondent)

The present matter is an application for an order "for Recognition of a Trade Union under Section 37(4)(b) of the Employment Relations Act 2008". The Applicant has by way of a letter dated 19July 2018 made an application to the Respondent for recognition as sole bargaining agent as per section 36 of the Employment Relations Act 2008 ("the Act") in relation to abargaining unit consisting of the categories of manual workers and operative staff up to supervisory level. The Applicant lodged the present application on 26 July 2018. The Respondent was assisted by counsel whilst Applicant was represented by its Negotiator.

The Respondent has filed a Statement of Case which basically raises issues of law and paragraphs 11 and 12 of the said Statement of Case read as follows:

"*SUBMISSIONS OF FDM*

11. It is humbly submitted that the Applicant has misconstrued the provisions of the EReIA, namely the process which ought to apply in matters of trade union recognition and, more particularly, it has overlooked the letter and spirit of all these relevant provisions – including but not limited to S 36 EReIA – which, to all intents and purposes,

*(i) are not only meant to confer rights to new trade unions but also to safeguard the rights of trade unions who have already been granted recognition [in the present matter, **PLMEA**].*

(ii) are meant to afford any employer with a fair opportunity to objectively assess and take a reasoned stand with regard to any new application for recognition.

(iii) cannot be read in isolation, i.e. independently of each other.

12. In their address before the ERT, counsel for FDM shall accordingly endeavor to demonstrate that,

(i) S 36 EReIA entails a statutory and obligatory 'decision time frame of 60 days', duly afforded by the legislator to any employer.

(ii) As in the present case, where there is already an existing union, the 'decision time frame of 60 days' bears all its importance and relevance.

(iii) The provisions of the EReIA are couched in such a way that,

(a) A trade union – including the Applicant Union – is precluded from entering an application for recognition before the ERT prior to the expiry of the 60 day delay, during which timeframe the Employer may either consent or object to the said application.

(b) A trade union – including the Applicant Union – ought to accordingly await the expiry of a maximum period of 60 days before triggering any judicial process and therefore, any application under S 37 (4)(b) prior to the expiry of this time frame is premature and cannot stand in law.

(c) S 37(4)(b) EReIA would only find its application in the case that there is dispute between unions as regards the support each would claim to enjoy and there is objection by an existing union to a new union being granted recognition by an employer.

(iv) The present application flouts the provisions of the EReIA and ought to be accordingly set aside.

Alternatively, should the ERT take a contrary view as regards the applicability of S 36 EReIA and overrule the preliminary objection in law – and which, it is submitted, would be wrong in law – counsel for FDM shall then submit that the Applicant Union cannot proceed with the present application, as couched, inasmuch as the other union, i.e. PLMEA, has not been joined as a party in the present proceedings."

The Applicant has filed, besides his application a Reply to the Statement of Case of Respondent and paragraphs 3 to 11 of the said document read as follows:

"***The legal basis of the application for recognition***

3. Section 37(4)(b) of the ERA provides for procedures for an application to Tribunal where a new trade union has the support of more than 50% in the Bargaining Unit and where application for recognition has been made to the employer.

4. In that respect, in view of obtaining recognition as sole bargaining agent, where recognition has been granted to an existing trade union under subsection 37(1), a new applicant union <u>may</u> follow the provisions of the law under section 37(4)(b) which reads (sic) as follows:

> *"Where a trade union has been grated recognition under subsection (1) and –*
>
> *(a) …..*
>
> *(b) a new trade union which has the support of more than 50 percent of the workers in the bargaining unit applies to the employer for recognition in respect of the 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. When the Respondent received the application by way of letter dated 19 July 2018 from the Applicant, Respondent could also have applied to the Tribunal under section 37(4)(b) for its determination.

6. Section 36(3) set (sic) down procedures that shall be followed <u>by the employer</u> when application for recognition is received under section 36(1).

7. Section 37(4)(b) set (sic) down procedures that <u>may</u> be followed by either the applicant union or the employer when application is made for recognition <u>as sole bargaining agent</u> to the employer from a new trade union, in a bargaining unit where recognition has already been granted to another trade union.

8. Section 36 of the ERA has not been read independently from Section 37 of the ERA or any other provision of law.

9. The Applicant humbly submits that Section 38(4) specifies the action that shall be taken by the Tribunal, where an application is made to the Tribunal under section 37(4)(b) in view of the making of an order for recognition as follows:-

> *"Where an application is made to the Tribunal under section 37(4)(a)(iii) or (b), the Tribunal shall organise and supervise a secret ballot in the bargaining unit in order to determine which trade union the workers in the bargaining unit wish to be their bargaining agent."*

10. The applicant did not join the union as a party leaving it to the Tribunal to decide based on its own opinion as per Paragraph 6 (d) of the Second Schedule of the Employment Relations Act 2008.

11. The Respondent was also in a position to move for the PLMEA to be joined as party to the present matter, if it deemed fit.

CONCLUSION

In view of the above, the Applicant humbly prays the Tribunal to organise a ballot and to subsequently make an order as to which Trade Union is to be recognised as Sole Bargaining Agent in the bargaining unit."

The matter was fixed for Arguments and the Tribunal heard submissions of Counsel and the statements made by the Negotiator. The Tribunal has examined the application and the Statement of Case and Reply to the Statement of Case filed and the arguments of both parties. The crux of the matter is whether an applicant has to wait for the expiry of the maximum period of 60 days under section 36(3) of the Act before making an application to the Tribunal. Sections 36 and 37 of the Act read as follows:

36. Application for recognition

(1) 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.

(2) An application under subsection (1) shall be accompanied by –

> *(a) a copy of the certificate of registration of each trade union;*
>
> *(b) a copy of the agreement between or among the trade unions in the case of a group of trade unions acting jointly; and*

(c) the number and category of members that each of the trade unions has in the bargaining unit.

(3) An employer shall, within 60 days of receipt of the application, inform the trade union or group of trade unions in writing whether he –

(a) recognises the trade union or the group of trade unions as a bargaining agent; or

(b) refuses to recognise the trade union or group of trade unions as a bargaining agent and state the reasons thereof.

37. Criteria for recognition of trade union of workers

(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) Where there is no recognised trade union in an enterprise or industry and a trade union or group of trade unions, which is not entitled to recognition under subsection (1) or (2)(b), applies for recognition to an employer, the employer may voluntarily grant recognition to the trade union or group of trade unions having obtained the highest percentage of support from the workers in the bargaining unit of the enterprise or industry.

Section 38 of the Act (relevant parts for the purposes of this case) provides 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.

(2) On an application made under subsection (1), the Tribunal shall —

(a) subject to subsection (3), issue an order that the trade union or group of trade unions be granted recognition where the Tribunal is satisfied that that trade union or group of trade unions has produced evidence that it is eligible for recognition in accordance with section 37;

(b) organise and supervise a secret ballot in a bargaining unit in an enterprise or industry, in order to determine which trade union the workers in the bargaining unit wish to be their bargaining agent in accordance with section 37, where —

(i) a trade union or group of trade unions already has recognition in respect of that bargaining unit; and

(ii) the Tribunal is satisfied that the applicant trade union or group of trade unions, has produced evidence that it is eligible for recognition in accordance with section 37;

(c) …;

(d) set aside the application where it is satisfied that a trade union or group of trade unions has not produced evidence that it is eligible for recognition in accordance with section 37.

(3) The Tribunal may organise and supervise a secret ballot in the bargaining unit before —

(a) making an order under subsection (2)(a); and

(b) setting aside an application under subsection (2)(d).

(4) Where an application is made to the Tribunal under section 37(4)(a)(iii) or (b), the Tribunal shall organise and supervise a secret ballot in the bargaining unit in order to determine which trade union the workers in the bargaining unit wish to be their bargaining agent.

(5) In a situation not covered in subsections (1) to (4), where an application is made to the Tribunal in a matter relating to recognition of a trade union or group of trade unions, the Tribunal may organise and supervise a secret ballot in a bargaining unit in order to determine which trade union the workers in the bargaining unit wish to be their bargaining agent in accordance with section 37.

(6) Where a secret ballot takes place under this section, a worker shall not vote for more than one trade union or group of trade unions.

…

(9) Where a trade union has been recognised as a sole bargaining agent, or a group of trade unions has been recognised as a joint negotiating panel, it shall replace any other trade union or group of trade unions as the bargaining agent of the workers.

(…)

The Tribunal has no difficulty in finding that once an applicant makes an application in writingto an employer for recognition, he has to wait for the reply of the employer within a delay of 60 days of receipt of the application. Any other interpretation would not make sense and would render section 36 of the Act nugatory. In fact, the reply of the

employer who has by law to state the reasons when he refuses to recognise the trade union is essential and will determine how the matter will unravel. In the present case, there was no reply (yet) from the employer.

If the employer statesthat he has no qualms on the representativeness claimed by the new trade union (more than 50 per cent of the workers in the bargaining unit) but cannot accede to the application of the union because of an already recognised trade union (as bargaining agent), any one of thenew trade union or the employer may apply to the Tribunal under section 37(4)(b) of the Act. This will be for a determination as to which trade union is to be recognised and by virtue of section 38(4) of the Act, the Tribunal does not need to be satisfied first that the trade union has produced evidence that it is eligible for recognition before proceeding for a ballot exercise. The present application under section 37(4)(b) of the Act contains alast paragraph which reads as follows:

"(c) The Union is prepared to submit satisfactory evidence to the Tribunal during the hearings, that it is representative in accordance with Section 37(4)(b) of the Employment Relations Act."

This appears superfluous in an application under section 37(4)(b) of the Act when under section 38(4), the Tribunal shall (as opposed to 'may') organise and supervise a secret ballot in the bargaining unit in order to determine which trade union the workers in the bargaining unit wish to be their bargaining agent. The Tribunal is of the opinion that applications may be lodged under section 37(4)(b) of the Act only where the representativeness as alleged by the applicant union is not challenged. The issue then has more to do with the other trade union which has been granted recognition. Section 38(4) of the Act thus caters for the secret ballot to be organised. But if the representativeness of the new trade union is challenged by the employer itself and the latter is refusing to grant recognition to the applicant trade union, then it would appear that only an application under section 38 of the Act can be made to the Tribunal. This is what section 38(2)(b) of the Act (see above) caters for in the specific case where a trade union already has recognition in a bargaining unit and an application is made by a new trade union to the Tribunal under section 38(1) of the Act for an order for recognition in the same bargaining unit. The Tribunal here shall organise a secret ballot in the bargaining unit where the Tribunal is satisfied that the applicant trade union has produced evidence that it is eligible for recognition in accordance with section 37.

The reply of an employer under section 36 of the Act is crucial and an applicant union cannot just make an application under section 36 (as in the present case) and then decide not to wait for the reply of the employer and come directly before the Tribunal. This appears to us to be common sense and even the statement made by the Negotiator that the Applicant union could decide to apply to the Tribunal (without waiting for the response of the employer) notwithstanding the fact that the employer shall reply

to the union shows the fallacy in this argument.In fact, this opportunity given to the employer may already pave the way to a quicker resolution of the matter between or among all parties. In recognition matters, including and if not more specially in cases where recognition has already been granted to another trade union, bargaining units are very important. The reply from the employer may throw light on the relevant bargaining units.

Also, in this particular case, the application has been wrongly entered as an application for an order for recognition of a trade union when if indeed Applicant wanted to proceed under section 37(4)(b) of the Act, it should have applied for a determination/order as to which trade union is to be recognised.

Lastly, the Tribunal will leave open the question whether an application under section 37(4) of the Act was in any event open to the Applicant union given that the other trade union was granted sole recognition as per Annex A to the Statement of Case of Respondent. Indeed, section 37(4) of the Act starts with "Where a trade union has been granted recognition under subsection (1) …" (underlining is ours) and not simply "Where a trade union has been granted recognition".

For all the reasons given above, theTribunal finds that the Applicant should have waited for the reply from the employer or at most for the expiry of the delay granted to the employer under section 36(3) of the Act before entering the present application. The present application is not in order and is thus set aside.

Indiren Sivaramen

Vice-President

SD

Vijay Kumar Mohit

Member

SD

Eddy Appasamy

Member

SD

Parmeshwar Burosee

Member

SD **21st September 2018**