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Unions, membership and the right to representation

By Bradley Workman-Davies

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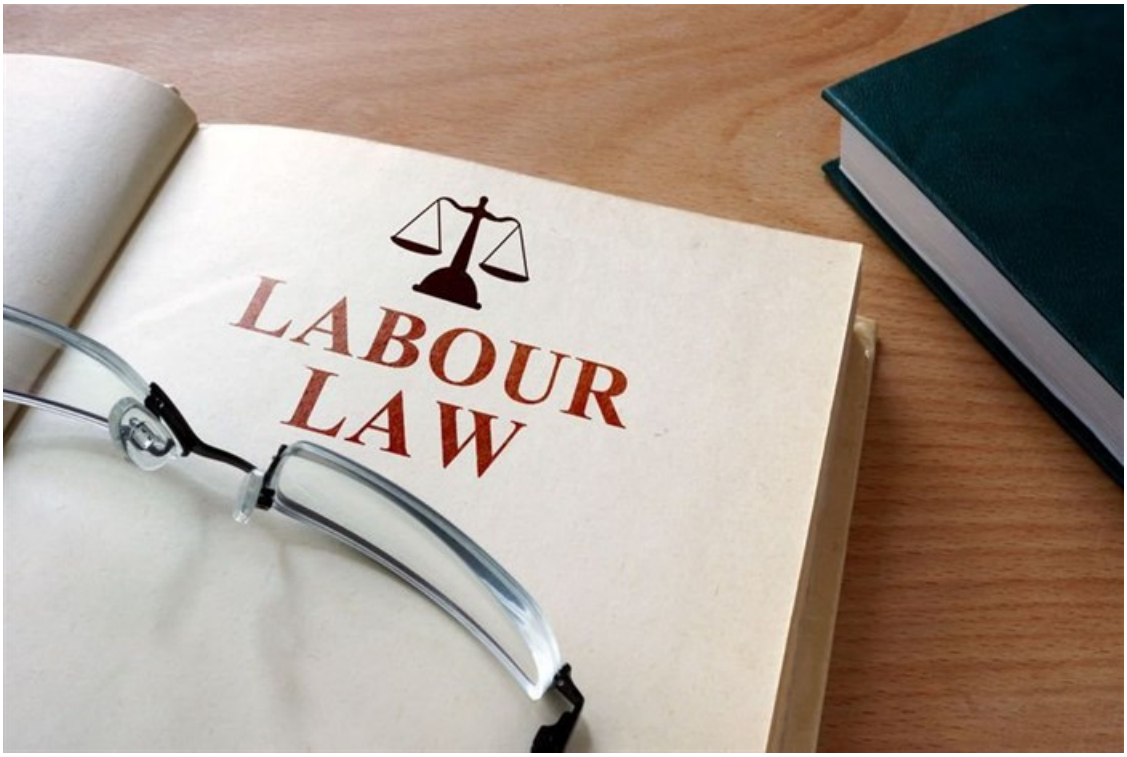
Unions worldwide play an essential role in protecting the rights and interests of employees, particularly at lower income levels where individuals may not have recourse to legal services and representation. Correcting the power imbalance between employer and employee is often a critical function performed by unions. As such, the right of unions to exist and to represent their members is a critical and constitutionally protected right, and the way in which unions organise themselves internally and in their relations with employers is a highly regulated sector of labour law.



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However, as with all regulated areas, the devil is in the detail and employers who wish to ensure that unions comply with the roles mapped out for them in legislation, as well as adopted by their own constitutions, should be aware of recent cases which have clarified when unions can act for employees, and when their right to represent employees may be constrained.

A starting point for considering the right of a union to represent its members is the scope of industry in which the union operates; for example, the scope for the National Union of Mineworkers is self-explanatory, and employers have often assumed that if a union carves a place for itself in a particular industry, that it is constrained to operating in that industry alone. The extent of the scope of the union is usually self-imposed, and is to be found in the constitution of the union.

Since the general principle in relation to the establishment of trade unions is that the union is bound by its constitution, it follows that if the constitution of the union sets out a limited scope, the union cannot exceed the powers it has given itself, by representing employees who are employed in industries outside of that scope. Although a union may allow such membership, the courts and employers would be expected to be entitled to disregard such members when considering the rights of the union when engaging in collective bargaining.

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For example, in the 2019 case of *Lufil Packaging v Commission for Conciliation, Mediation and Arbitration and others*, the National Union of Metalworkers of South Africa (Numsa) attempted to compel Lufil to grant it organisational rights. Numsa admitted at the outset of the proceedings that Lufil, which manufactures printed and plain paper bags and associated paper or paper-derivative-based packaging products, was not an employer in the scope of the union, which even though quite broad, generally relates only to the Iron, Steel, Engineering and Metallurgical Industry, the Electrical Engineering Industry, the Plastics Industry, the Automobile Manufacturing Industry, and the Motor Industry. In counting the number of employees who could be taken into account for determining if Numsa was sufficiently representative within Lufil's workplace, the Labour Court found that

> *"the correct legal position, therefore, is that Numsa had to showthat it was sufficiently representative. The employees on which it relied in alleging it was sufficiently representative could not be and thus were not, in lawmembers of Numsa, as they did not fall within the scope of the union in terms of Numsa's constitution. As such, Numsa was not sufficiently representative of the employees at the workplace and therefore was not entitled to any organisational rights."*

Since the employees were employed by an employer which did not operate in any industry that fell within the union's scope, they were not lawful members for the headcount which the union relied upon. They could be members of the union, but the union could not treat them as members for the purposes of asserting a claim to organisational rights, and the employer was entitled to disregard these members. The scope of the industry for the union is therefore of critical importance, and the union will be held to the limits of such scope, which it has taken upon itself.

However, in the recent case of *National Union of Metalworkers of South Africa and others v Afgri Animal Feeds*, the Labour Appeal Court had already held that it is not the business of an employer to concern itself with the relationship between individual employees and their union in matters which do not involve collective bargaining.

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In this case, Afgri dismissed approximately 100 workers, and when the union attempted to represent these workers on the basis that they were its members, Afgri objected. This objection was on the basis that these workers were employed in a sector which fell outside of the scope of the industries in which the union was entitled to represent its members, under its own constitution. On the basis of the Lufil case, this point seemed likely to succeed.

However, the Labour Appeal Court has held that a trade union is a voluntary association and that if a union accepts a person as a member outside of the prescribed scope of its constitution, it can do so in order to represent that person in the

particular dispute and in order to ensure adequate access to justice for that person. The Labour Appeal Court consequently held that the union could represent these workers, even if they were employed in an industry which fell outside the scope of the unions constitution.

As such, when an employer assesses the right of a union to represent its members, the issue must be distinguished: organisational rights disputes, such as disputes over wages, changes to terms and conditions of employment, the establishment of the required levels of representivity required in a workplace or bargaining unit in order to determine whether a union is sufficiently representative, a majority union, or otherwise, must be distinguished from disciplinary issues. A trade union, according to the Labour Appeal Court and *Afgri Animal Feeds* case, can represent whomever it chooses in disciplinary matters; it is only when it seeks rights against an employer, based on its membership, that adherence to the scope of its constitution when assessing membership numbers will be enforced.

ABOUT THE AUTHOR

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