

LEGAL ANALYSIS OF MANAGERIAL EMPLOYEES RIGHT TO JOIN OR BECOME MEMBERS OF A TRADE UNION IN ZIMBABWE. A COMPARATIVE ANALYSIS WITH OTHER JURISDICTIONS

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Labour rights are among the codified and justiciable rights in Zimbabwe. Section 65 brings this emphasis wherein it spells out Labour rights in Zimbabwe. There is high possibility that legislators sought to reinforce these rights following the massive violations that existed within employment relationships from time immemorial. Labour law in Zimbabwe accords legal protection of both individual rights and collective rights. This is a realization that, if a Labour stakeholder fails to act for themselves, a collective group can act on their behalf. That is why we notice the allowance of the right to form, join, associate and participate in collective groups at the workplace. The Constitution of Zimbabwe allows freedom of association to all, provided that no person may compel any other person to join an association or to attend a meeting or gathering. Except for those in security services, workers are allowed to form unions and to participate in the lawful activities of those unions and organizations.²

It is important to also understand that employees at the workplace differ, and in particular we have ordinary employees as well as managerial employees, essential and

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² <https://www.bing.com/search?q=right+to+form+a+trade+union+zimbabwe&form=EDGTCT&gs=PF&cvid=9fc94dcb10724533915a2215748ccb10&refig=195f9e97ac644bf4bbff7b3b054bb0a1&cc=ZW&setlang=en-US&plvar=0> Accessed on 16 May 2022

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and non-essential employees. Some differences in the nature of employee one is emanate from the nature of contract in which they are engaged in.

The difference in the type of employee one is has a bearing in each employee's entitlement in terms of labour rights, in other words, some employees enjoy certain labour rights with limitations and some do not enjoy certain rights in totality. For example, Section 23 of the Labour Act [Chapter 28:01] sets out that employees employed by any one employer may appoint or elect a workers committee to represent their interests provided that no managerial employee shall be appointed or elected to a workers committee, nor shall a workers committee represent the interests of managerial employees, unless such workers committee is composed solely of managerial employees appointed or elected to represent their interests. Another example is the right to engage in collective job action as set out in section 104 (3) (i) which sets out that no collective job action may be recommended or engaged in by any employees, workers committee, trade union, employer, employers organisation or federation if the persons concerned are engaged in an essential service. This paper is premised on the rights of managerial employees to form and join trade unions as well as enjoy trade union rights with specific reference to the right to negotiate collective bargaining agreements.

Who is a managerial employee?

The interpretation clause of the Labour act gives a definition of a managerial employee as follows:

“managerial employee” means an employee who by virtue of his contract of employment or of his seniority in an organisation, may be required or permitted to hire, transfer, promote, suspend, lay-off, dismiss, reward, discipline or adjudge the grievances of other employees.

The given definition has been a subject of disputes in many cases. Most organizations have taken a simplistic approach of declaring all employees within National

Employment Council coverage as non-managerial. Such an approach is risky in that there are many employees who are graded as non-managerial employees but following the legal definition they are managerial employees.¹

Unpacking the definition is not all that simple as employees can be managerial employees by virtue of their contract of employment, others can be managerial employees by virtue of their seniority in the organisation and others may be managerial employees due to the nature of tasks they perform. One has to go into case law to get clear meaning of each.² In the case **Ngulube vs ZESA SCS2/2006**, Ngulube, a managerial employee was elected into the non-managerial workers committee and the employer ordered him to relinquish his position and he refused to do so. He was dismissed. He appealed to the Supreme Court arguing that his right to freedom of association had been infringed. The Supreme Court ruled that his rights were not infringed upon as he was free to form or join a managerial workers committee as provided at law in terms of section 23(1) of the Labour Act. There is a need to recognise that some rights are not absolute.³ One of the heavily contested areas has been discipline handling and which code of conduct is applicable. In the case of **Almini Metal Industries LTD vs Chinowaita SC8/03**, the Supreme Court dealt with the applicability of the NEC code of conduct to managerial employees and showed clearly when the NEC code of conduct cannot be extended to managerial employees. It therefore follows that it is not the grade of the employee that determines whether one is a managerial employee or not but the nature of contract, seniority in the organisation or nature of duties. However, some grading methods can easily separate managerial from non-managerial employees thus grading can be used as a general guide in such cases.

Do managers in Zimbabwe have a right to form a trade union?

¹ Labour Column Davis Ndumiso Sibanda

² Ibid

³ Ibid

Banking Association of Zimbabwe vs. BFMUZ & Registrar of Labour SC 15/2019

The above-mentioned case is very crucial to this paper as it illustrates the inception of the right to form and join trade unions by managerial employees. Managers in the banking, finance and allied industry, formed a trade union and when they sought to register it with the Registrar of Labour in terms of Section 45 of the Labour Act, Banking Association of Zimbabwe opposed it. The ground of opposition was that BFMUZ was not allowed to be registered as a union by virtue of section 45 (1) (b) of the Labour Act. The Registrar rejected this ground and registered the union as he did not see anything at law barring registration of such a union. BAZ appealed to the Labour Court and lost.

It later appealed to the SC and lost.⁴ From the grounds of appeal; Whether or not managers are allowed to register a trade union in terms of section 45 of the Labour Act; Whether or not it was unconstitutional to register such a trade union; Whether or not it was contrary to public policy to register such a trade union. The finding was that Section 45 (1) (b) (i) of the Labour Act provides that 'a trade union shall not represent employers' but it does not prohibit managers from forming or joining a trade union. Section 2 of the Labour Act defines, 'employer', 'employee' and 'managerial employee'-manager is a sui generis employer/employee.⁵ Section 4 of the Labour Act, gives every employee the right to belong to a trade union. Section 45 of the Labour Act must be read in line with the other provisions of the Labour Act. Section 45 is in line with Constitution of Zimbabwe and International Convention. It is not contrary to public policy.⁶

South African Perspective

⁴ Cephas Mavhondo, The Labour Watch, 'Do managerial employees have the right to form a trade union?'

⁵ Ibid

⁶ Banking Association of Zimbabwe vs. BFMUZ & Registrar of Labour SC 15/2019

Like Zimbabwe, South Africa realizes the right of all employees to join and participate in the activities of a trade union of their choice. The LRA (Labour Relations Act) prohibits any employer from discriminating against employees or job applicants for exercising this right. Any provision in a contract of employment which attempts to limit this right will be deemed invalid. Likewise, the interpretation adopted in **Banking Association of Zimbabwe vs. BFMUZ & Registrar of Labour SC 15/2019** can be adopted too because the Labour Relations Act in South Africa does not prohibit managerial employees from forming trade unions but it expressly gives the right to all employees. Managerial employees remain employees despite the fact that they sometimes represent the employer. To deny managerial employees the same rights that are accorded to ordinary employees will be miscarriage of justice. If the legislators has intended to do so, they would have expressly mentioned.

The United Kingdom

Trade unions and the law in the UK (2013) The law gives workers the right to join a trade union wherever they work. This right applies whether a union has been recognized or not. Workers are protected from being disadvantaged for being a union member.⁷ An employee has the right to join a trade union, and should not be refused a job, dismissed, harassed or selected for redundancy because they are a member of or wish to join a trade union.⁸ A member of a trade union has the right to take part in trade union activities, for example, recruiting members, collecting subscriptions and attending meetings. Trade union activities must take place either outside the employee's normal working hours or at a time agreed with the employer. An employee has no right to be paid for this time off work unless their contract allows for this.⁹

⁷<https://www.bing.com/search?q=right+to+form+trade+unions+United+Kingdom&form=EDNTHT&refig=6c447f50c49245d880c482ba921c9a6e&mkt=en-xl&msnews=1&sp=-1&pg=right+to+form+trade+unions+united+kingdom&sc=1-41&qsn&sk=&cvid=6c447f50c49245d880c482ba921c9a6e> Accessed on 15 May 2022

⁸ <https://wageindicator.co.uk/advice/trade-union-rights> Accessed on 10 May 2022

⁹ Ibid

The definition of a trade union is found in **s1 of the Trade Union and Labour Relations (Consolidation) Act 1992.**

It looks after their interests at work by doing things like:

- negotiating agreements with employers on pay and conditions
- discussing major changes like large-scale redundancies
- discussing members' concerns with employers
- going with members to disciplinary and grievance meetings¹⁰

Trade unions have a variety of rights, including the disclosure of information for collective bargaining, conduct collective bargaining on behalf of a bargaining unit. A method for the conduct of collective bargaining is specified by the Central Arbitration Committee. If a union is formally recognized by an employer, it can negotiate with the employer over terms and conditions of the employee's contract. This is known as 'collective bargaining'. For collective bargaining to work, unions and employers need to agree on how the arrangement is to operate.¹¹ They might, for example, make agreements providing for the deduction of union subscriptions from members' wages; who is to represent workers in negotiations and how often meetings will take place. Therefore, it follows that the existence of a trade union in the United Kingdom Labour market, entitles it to enjoying rights that flow from its existence.

The United Kingdom however limits the enjoyment of the right to form trade unions. The Court of Appeal has held that Deliveroo riders do not fall within the scope of the right to form and join a trade union under Article 11 of the European Convention on Human Rights (and therefore domestic law did not need to be construed to give the riders Article 11 rights).¹²

¹⁰ Section 229, 237 & 238 of Trade Union and Labour Relations (Consolidation) Act after amendment; Trade Union Act, 2016, Codes of Practice on Picketing, Industrial Action Ballots and Information to Employers)

¹¹ Section 70A-70C and 178 of Trade Union and Labour Relations (Consolidation) Act after amendment; Trade Union Act, 2016

¹² Herbert Smith Freehills LLP, UK: the right to form and join trade unions is restricted to 'employees' within the ILO Recommendation, July 8 2021

The Court confirmed that the question of whether Article 11 is engaged in this respect depends on the existence of an employment relationship, which is to be determined having regard to the International Labour Organisation Recommendation 198.¹³ This requires that work be carried out personally and therefore the Central Arbitration Committee had been entitled to conclude that the riders did not have an employment relationship within the ILO concept, given the riders' genuine and "virtually unlimited" right of substitution. The Court noted that how often a right of substitution is exercised will only be relevant to the question of whether the right is genuine.¹⁴ (**Independent Workers Union of Great Britain v Central Arbitration Committee**)

Conclusion

It can be said without disarray, trade unionism is evident across many jurisdictions in Africa and beyond. The right to form trade unions is open to all employees, thus managerial and non-managerial. The right is not absolute which is evident in all jurisdictions discussed in this paper. Therefore, the quest of segregation of managerial employees that has been evident in Zimbabwe before the Supreme Court judgment of Banking Association of **Zimbabwe vs. BFMUZ & Registrar of Labour SC 15/2019** which clarified that the Labour Act under section 45 (1) did not prohibit managerial employees from forming trade unions.

¹³ Ibid

¹⁴ Ibid