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ON COMPETITION BETWEEN UMBRELLA EMPLOYER ORGANIZATIONS IN ISRAEL

In July 2023, the Israeli National Labor Court delivered its decision in a case that dealt with a strange and neglected legal structure in Israeli labor law - the employer organization and its legal status[1]. The National Labor Court addressed the need to regulate competition between umbrella employer organizations and clarify the representation model of the employer organization under Israeli labor law. A brief legal background is followed by the context of the case and its summary.

I - BRIEF LEGAL BACKGROUND

According to the Israeli Collective Agreements Act, two types of collective agreements can be signed between the parties to labor relations or by their organizations[2]. The first is a special collective agreement, to be signed by a representative union and the employer. The second is a general collective agreement to be signed by a representative union and by an employer organization. Those two types of collective agreements reflect the mixed collective bargaining pattern in Israel, which involves decentralized bargaining at the firm level, using special collective agreements, alongside some traditional sectors, in which centralized, multi-employer bargaining still prevails[3].

One of the unique principles of the collective labor laws in Israel is that of exclusive representation. According to this principle, only a single trade union can represent employees in a designated bargaining unit. This principle was imported in the 1950s, with some modification, from the North American model of labor representation, by the founders of labor law in Israel. At the same time, European concepts, such as extension orders, were also adopted by the Israeli labor law regime[4].

To become exclusive, a union must be classified as a representative organization. The requirements for representativeness depend on the type of collective agreement and are governed by law. At least one-third of the bargaining unit's employees must

1 See Collective Agreements Act-1957; E. Eshet, « Labor Law », *Israeli Legal System* Walter, Medina, Scholz, Wabnitz (eds.). 2018.

2 See Collective Agreements Act-1957, section 3.

3 G. Mundlak, « Fading Corporatism », *Israel's Labor Law and Industrial Relations in Transition*, 2007; J. Preminger, « Labor in Israel », *Beyond Nationalism and Neoliberalism*, 2018.

4 For the exclusive representation model in force in Israel, see E. Eshet, « Coercion and Freedom in Labor Law: American, Canadian, and Israeli Perspectives », *International Journal of Comparative Labor Law and Industrial Relations*, vol. 33, no. 4, 2017, p. 489.

be members of the union for it to be considered a representative union for a special collective agreement. For a general collective agreement to be representative, it must acquire more members from the bargaining unit than did other unions.

The law also obligates the employer to negotiate with the representative union for signing a special collective agreement in an initial organization[5]. In Israel, the collective agreements are reinforced through extension orders[6].

The Israeli Collective Agreement Act defines trade union representativeness, but it does not define the legal status of the employer organization or its legal characteristics, creating a legal gap. According to the common law tradition in Israel, the National Labor Court is tasked with developing and shaping collective labor law. In the last 50 years, the Knesset has been reluctant to reshape and develop collective labor law. Thus, given the changes in the labor landscape since then, the Israeli National Labor Court has been at the forefront of reshaping and crafting new legal rules to regulate collective labor agreements in the face of new challenges, such as rising competition between unions and the legal status of key collective players, including employer organizations.

Until recently, employer organizations in Israel did not attract much legal attention. From the establishment of the State of Israel, most employer organizations were under a single umbrella organization called the Presidency of the Business Sectors (later, the Presidency of the Business Sectors in Israel)[7]. But in 2020, some main employer organizations, including the manufacturers' organization (one of the most important employer organizations, representing the industrial sector) withdrew from that umbrella organization and established a competing employer umbrella organization, called the *Presidency of the Employers and Businesses* in Israel[8].

II - THE CASE OF THE UMBRELLA EMPLOYER ORGANIZATION

On July 9, 2023, the National Labor Court issued its decision in the umbrella employer organization case under a statutory requirement that collective labor

5 See Collective Agreement Act (1957) sec. 33h1.

6 See Collective Agreements: Extending Labour Protection (Edited by Susan Hayter and Jelle Visser), ILO (2018).

7 See https://bizisrael.org. According to its website, the umbrella organization consists of 12 employer organizations that represent some 600,000 businesses and employ some 2,000,000 workers.

8 Among its main members is the Manufacturers Association of Israel, which has been the sole and exclusive representative of all the industrial sectors in Israel, according to its website, representing 1,500 enterprises that employ 400,000 people. See https://industry.org.il/presidency

disputes involving general collective agreements be adjudicated by the National Labor Court as a first and last instance[9].

The case was brought by the *Presidency of the Employers and Businesses in Israel* (the applicant), the newly established employer umbrella organization, against the *New General Histadrut* (the dominant trade union in Israel) (as respondent no. 1) and against the traditional umbrella employer organization, the *Presidency of the Business Sectors* in Israel (as respondent no. 2).

The applicant sought a court decision obligating the *Histadrut* to bargain with it to sign general collective agreements with state-wide coverage. Second, it sought a declaration that the refusal of the *Histadrut* to do so should be unlawful and considered as a prohibited preference of another employer organization, and as a violation of its member employers' freedom of organization.

It argued for its application using two main legal arguments. The first was based on the applicant's freedom of organization. Drawing a parallel with the legal obligation to conduct collective bargaining imposed on an employer vis-à-vis its representative trade union, the applicant claimed that, to exercise the employer's right, the *Histadrut* is obligated to conduct collective bargaining with the applicant for signing a general collective agreement[10]. The second argument was based on the general requirement of good faith, which according to the applicant, required the *Histadrut,* as a dominant trade union, not to give preferential treatment to one employer organization over another[11]. The court acknowledged that the case was unusual and quite rare in the sense that it required the court to rule on competition between umbrella employer organizations[12]. The court presented the main attributes of the general collective agreement. It clarified that to sign a general collective agreement, a trade union is required to be a representative, but no such requirement was articulated regarding the association of employers[13]. It also stressed the fact that although one can find the term « a representative employer organization » in the collective common labor law of the country, there is no exclusivity on the employers' side of the collective bargaining, therefore, theoretically, a representative trade union can sign a general collective agreement with more than one employer organization in the same sector[14].

In its ruling, the court explained that the difference stems from the exclusivity principle, which the Israeli law adopted from the North American law of employee

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9 See NLC 20716-04-22 *Presidency of The Employers and Businesses in Israel v. General Histadrut and Others* (2023) (hereinafter: the case or the umbrella employer organization case). The decision of the court was delivered by Judge Davidov-Motola and joined by the President, Judge Wirth-Livne, the Vice President, Judge Ilan Itah, by the Lay Judges Haya Shachar and Sara-Zilberstein-Hipsh (employees) and Avraham Hocman and Dubbi Ram (employers).

10 See sec. 15 of the case.

11 See sec. 27 of the case.

12 See sec. 27 of the case.

13 See sec. 30 of the case.

14 See also E. Eshet, « Coercion and Freedom in Labor Law: American, Canadian, and Israeli Perspectives », *op. cit*.

representation[15]. As noted, the Israeli trade union represents not only its members but all the employees in a given bargaining unit. By contrast, the employer organization represents only its members: the employers who chose to join the organization[16].

The court further established that the founding fathers of Israeli labor law were aware of the problematic situation in which in the same sector, some employers were covered by a general collective agreement while others were not. Adopting the European-style extension order mechanism, mostly unknown in North American legal thinking, was their solution, as elaborated above[17]. By using the extension order, the Labour minister can extend the general collective agreement to other employers in the same sector, which chose not to join the employer organization[18]. The extension order mechanism reinforced the traditional centralized nationwide multi-employer collective bargaining scheme in Israel, which led to nationwide collective agreement coverage on various general topics such as pension entitlement.

Based on the above, the court outlined three pillars for the application of collective agreements in Israel. The first is a special collective agreement signed between a representative trade union and a single employer, which determines the working conditions at that particular employer. The second is a general collective agreement signed between a representative trade union and an employer organization that concerns a sector or a geographic area (and is often extended by the labour minister to apply to the entire sector or geographic area). The third is a general collective agreement signed originally to become a nationwide agreement, creating a uniform national standard on topics such as work hours and pension entitlements. Nationwide agreements have traditionally been signed between the dominant trade union in Israel (the *Histadrut*) and the dominant employer organization (until 2020, the *Presidency of the Business Sectors in Israel*), serving to consolidate the centralized collective bargaining scheme in Israel[19].

In its decision, the National Labor Court first clarified that there is no requirement for representativeness on the employer organization side to be eligible to sign a general collective agreement. The court explained that there was an asymmetry between the employees' and the employers' representation model. Whereas the former involved coercion but demanded representativeness and exclusivity, the second represented only its members, with no parallel demand for representativeness and exclusivity[20].

Regarding the first argument about the allegation of infringement of the employers' right to organize, the court noted the importance of the employers' right to organize but distinguished between the collective and personal dimensions of

15 See note 5.

16 See sec.31, 32 of the case.

17 In some provinces in Canada, the legislation uses the accredited employer organization legal mechanism to achieve similar outcomes. For example, see Ontario Labour Relations Act, 1995, SO 1995, c 1, Sch A.

18 See sec. 25 of the Collective Agreements Act, 1957.

19 See sec. 34-36 of the case.

20 See sec. 28-31 of the case.

that right[21]. The court clarified that the case did not concern limitations in joining or leaving the employer organization but with the collective dimension of the employers' right to organize: the legal rights and obligations of the parties to the collective relationship.

The court dismissed the argument that there was a symmetry between a trade union's right and an employer organization's right to conduct collective bargaining. The difference stems from non-equivalent purposes that lead to unequal obligations. The trade union in Israel exclusively represents all the employees in a designated bargaining unit. The union's broad right to conduct collective bargaining and its natural obligations vis-à-vis the employer serves as a vital tool to fulfill its purpose, which is to overcome the well-known power asymmetry between employee and employer. By contrast, the employers' right to organize serves distinctive purposes and should be defined differently.

The court acknowledged that the employer organizations have the right to conduct collective bargaining vis-à-vis the representative trade union, but this right does not mirror that of the representative trade union, and its legal meaning and coverage depend on context and circumstances[22]. Although the court left for future consideration the exact contours of the right to collective bargaining of the employer organization, it decided that nothing in that right obligates the *Histadrut* to conduct collective bargaining for nationwide agreement with the applicant, as was argued.

Regarding the second "good faith" argument, the court acknowledged the general requirement that all parties involved in collective labor law act in good faith. However, the court was unwilling to recognize, based on the good faith requirement, the obligation of the *Histadrut* to conduct collective bargaining for a nationwide agreement with the applicant and not with other umbrella employer organizations. The court explained that autonomy should be granted to the collective parties in shaping the pattern of the collective relationships, therefore there was no justification to interfere with the decision of the *Histadrut* to continue to negotiate nationwide general collective agreements with the traditional umbrella employer organization, the *Presidency of the Business Sectors in Israel* (as respondent no. 2)[23]. Consequently, the court dismissed the arguments of the applicant and determined that the applicant had failed to prove that the decision of the *Histadrut* to continue bargaining with responded no. 2 for a nationwide general collective agreement infringed the applicant's or its member employers' right to organize or could be considered as acting in bad faith[24].

III- MOVING TOWARD A NEW INDUSTRIAL COMPETITION LAW

The umbrella employer organization case was not litigated in a vacuum. For about the past ten years, the National Labor Court has been required to adjudicate competition between trade unions, as part of the decentralization processes taking

21 See sec. 37 of the case.

22 See sec. 45 of the case.

23 See, sec. 52-57 of the case.

24 See, sec. 58 of the case.

place in Israel. The court developed, step by step, common law norms designed to regulate the emerging trade union competition while safeguarding the employees' right to organize and at the same time, to stabilize the collective relationships, given the harsh competition.

The court adopted various representation bars to achieve these goals in the areas of contracts, good faith collective bargaining, and union replacement[25]. The court also recently started to develop intra-union common law norms, for example, demanding that unions act in good faith toward other unions[26].

It was only a matter of time before questions about competition between employer organizations and umbrella employer organizations surfaced. In the case of umbrella employer organizations, the court laid down the first cornerstones in regulating competition between employer organizations in Israel and clarified the contours of the right of employer organizations to organize and bargain collectively. We may be advancing toward an innovative industrial competition law in Israel.

25 For a summary of those representation bars see: NCL 59397-12-21 *Power to The Workers – National Histadrut and Tnofa Transportation Solutions* (2022).

26 See NLC 53086-05-23 *National Histadrut – General Histadrut* (2023); NCL 58922-12-18 *General Histadrut V. National Histadrut and Maadanot* (2019); NCL 52997-08-18 *Power for The Workers v. General Histadrut and Dan South Transportation* (2019).