



ADVISORY AWARD

Commissioner: Maureen de Beer
Case No.: WECT768-23
Date of Award: 3 March 2023

In the matter between:

UCTEU obo Members

Union/Applicant

and

University of Cape Town

Respondent

Details of hearing and representation

1. This matter was set down for Conciliation on 26 January 2023 and 14 February 2023 at the CCMA in Cape Town. The case was referred as a refusal to bargain dispute in terms of section 64(2) of the Labour Relations Act 66 of 1995, as amended (LRA).
2. The applicant, being the trade union, University of Cape Town Employees Union (UCTEU), acting on behalf of its members, was represented by its union officials, Mr. Tsebo Letabe and others. The respondent, the University of Cape Town (UCT), was represented by the Employee Relations Specialist, Mr. Yaseen Moolatjie and the Employee Relations Director, Ms. Barbara Mopara.
3. At the first Conciliation hearing I requested the parties to make written submissions, in respect of an advisory award I was supposed to issue. Prior to me issuing the award, the respondent raised a special plea of *Lis Pendens*, alleging that the CCMA had no jurisdiction to hear this matter based on another referral by the applicant under case number WECT18892-22, which dispute related to an interpretation and/ or application of a collective agreement. The latter case was then withdrawn by the applicant. The respondent then withdrew its *Lis Pendens* jurisdictional point but raised another point *in limine*, stating that the CCMA lacked jurisdiction to entertain this dispute. The respondent made written submissions. Both parties made oral submissions on 14 February 2023. I considered the submissions and issued a written ruling on or about 24 February 2023. I ruled that the CCMA has jurisdiction to entertain the Conciliation.
4. I further determined that the applicant party was *dominus litis* and thus determined how it wanted to deal with a dispute. Should the applicant wish to proceed with the matter as a refusal to bargain dispute, it may do so. I also determined that jurisdiction to determine whether or not a strike is protected or not, lied with the Labour Court and not the CCMA. I further also found that the matter was not prematurely referred; and that whether or not the matter was that of a refusal to bargain, will be dealt with in respect of this advisory award.
5. I have now considered the initial written submissions of the parties in respect of this advisory award.

Issue to be determined.

6. I am required to make a written recommendation to the parties giving them guidance to resolve their dispute.

Survey of submissions

Submissions by the applicant

7. In respect of background information, the applicant submitted that UCTEU membership was solely based within the University of Cape Town (UCT). The parties concluded the recognition agreement in 2004, which was amended in 2011. UCTEU had organizational rights for staff members at UCT in the pay class levels 2 to 12. The UCTEU also has

membership in the pay class 13; but it was alleged that UCT has consistently refused to add the latter pay class to the Recognition Agreement. UCTEU was recognised for bargaining rights if it held a membership of 30% in a pay class and a 50% plus 1 signed-up members in a set of pay classes.

8. During 2016 UCT insourced staff in the cleaning, gardening, security, transport, catering and residence services. The insourced staff had their own preferred trade unions. None of the represented trade unions at UCT had a member majority of 30% in any of the pay classes 2 - 6. The UCTEU retained the member majority of 30% in pay classes 7 - 12 and satisfied the 50% plus 1 signed-up members in the set of pay classes (7 - 12) for bargaining rights. The latter remained the same in 2023.
9. UCT established and recognised the Coalition of Unions with respect to bargaining rights, which included UCTEU, NEHAWU, DETAWU and UAWU. Academic (teaching) staff are represented by the UCT Academics Union (UCTAU). Since 2017 there were three (3) bargaining units (2-6; 7-12; and 13).
10. UCT recognised UCTEU as the sole bargaining representative for pay classes 7 - 12. UCTEU has repeatedly requested UCT to commence with bargaining for the 2023 period; but UCT has consistently failed to accede to the request. On 10 January 2023 this dispute was referred to the CCMA. It is alleged that UCT acted in bad faith and frustrated the dispute resolution procedure. It was submitted that UCT failed to schedule the dispute resolution hearing, as per clause 10 of the parties' recognition agreement.
11. Pay classes 7 - 12 are classified as "Skilled technical and academically qualified" and "Professionally qualified and mid-management". Pay classes 2 - 7 are categorized as "Unskilled" and "Semi-skilled". It was argued that the latter groups of classes of workers are unique and vastly different in the roles they play within the workplace. The Professional, Administrative and Support Service Staff (PASS) is in alignment with bargaining with each class (2-6 and 7-12) in two separate bargaining forums. It was argued that the model is not different to the class of worker that UCT ascribes to academic staff members.
12. UCT wishes to engage in a single bargaining forum. It was submitted that UCTEU was informed by UCT management that the Remunerations Committee of UCT resolved that there must be a single bargaining forum for the University employees. UCTEU understood that the single bargaining forum would be comprised of all employees.
13. UCTEU believed that it cannot trust UCT to bargain in good faith on multiple bargaining units. It was submitted that for the 2022 pay increase UCT made a final offer of 5% to the UCTEU bargaining unit but a final offer of 6.2% were made to the Coalition of Unions bargaining unit. UCTEU was barred from the Coalition of Unions as well as UCT for the 2022 bargaining season. It was thus argued that UCT acted in bad faith. It was further alleged that UCT was guilty of subverting the objective of promoting labour peace, social justice, and democracy in the workplace as prescribed by the LRA.

14. They want UCT incorporate all employees into one single bargaining forum instead of ring-fencing three sets of bargaining units (i.e., pay classes 2 - 12 staff; pay class 13 staff; and academic staff). UCTEU demands full inclusivity of all staff/ or employees of the University into a single bargaining unit. It was submitted that UCT failed to give any constructive response to this demand; and also refused to share the Remunerations Committee's deliberation and recommendation of the concept of the single bargaining unit.
15. It was also submitted that in respect of a report by a facilitator relating to a private mediation process, it was clear that there was a wide consensus of distrust of management. A copy of the report was submitted. It reflected that the issues discussed were Management and union relationship; Inter-union relationships/ or coalitions; and A single bargaining unit for pay classes 6 - 12. It was further submitted that UCT has also failed to comply with its obligation as contained in the report, to provide feedback by 12 or 13 December 2022 in respect of the points raised.
16. The UCTEU mentioned that other universities, such as Free State and Rhodes had successful models for 'a single bargaining unit'. It was argued that the proposed model by UCT for a single bargaining unit (i.e., three separate bargaining units, being staff in pay classes 2 - 12, staff in pay class 13 and academic staff) was not sustainable; was untenable; against the principles of transformative justice; and against fiduciary relationships. It was submitted with examples that past UCTEU negotiations for employee benefits has translated to academic staff and staff in pay class 13 benefitting from such. UCTEU debunked UCT's statement that conditions of employment are not equal.
17. It was alleged that UCT has misrepresented itself in terms of its PASS staff promotions in its Employment Equity plan to the Department of Employment and Labour. It also alleged that UCT's alignment to supporting career development of PASS staff was false. It was thus requested that the CCMA reject UCT's argument that "transformation" was the driver for the single bargaining unit.
18. In further arguments it was submitted that UCT gave notice of the termination of the Recognition Agreement (on 18 January 2023) after the UCTEU declared a dispute. It was submitted that such was done in bad faith and subverted the LRA objective of labour peace. It was also alleged that such termination was not in accordance with clause 10 of the recognition agreement. It was further argued that UCT should have opted for a variation of the recognition agreement. It was also added that the latter issue does not form part of this dispute.

Submissions by the respondent

19. In respect of background on this matter the UCT submitted that The University of Cape Town (UCT) currently has two separate bargaining forums dealing with pay classes 2-12. In terms of the recognition agreement which existed between the parties, UCTEU was recognised as the sole bargaining agent for the 7-12 pay class. The executive management of UCT approved and mandated the introduction of a single PASS Bargaining Forum for all PASS employees in pay classes 2-12. This was introduced to all recognised union's within UCT during June 2022. It was submitted that UCTEU declined to give input and referred disputes to the CCMA.

20. It was further submitted that UCT gave notice of termination of the recognition agreement to UCTEU on 18 January 2022, which was effective within 45 days, as per the agreement. It was argued that UCTEU will not have a contractual entitlement to be recognized as the sole bargaining agent for pay classes 7 to 12 and to negotiate separately in its own bargaining forum.
21. It was submitted that UCTEU, in terms of its referral document, demands that UCT commences bargaining for the 2023 period for pay classes 7 to 12 with immediate effect. It was argued that this demand failed to consider the private facilitation process conducted during November and December 2022. As a result of the facilitation, the parties (including UCTEU) entered into an agreement, which was contained in the facilitation report in the following terms:
- “45.1 In order to cater for salary increases, management should impose a discretionary salary increases.*
- 45.2 Management should/could proceed with legal steps in establishing a single bargaining unit and give timelines for doing so.*
- 45.3 Once the decision on a single bargaining unit has been made via legal avenues, the parties are at liberty to negotiate above the discretionary increment as stated in 45.1. Nothing precludes the parties from discussing the issue of a single bargaining unit whilst the legal process unfolds; and*
- 45.4 Management will respond in writing by no later than 12/13 December on the three above points.”*
22. It was argued that the latter agreement had the effect of agreeing to UCT’s discretionary salary increase while the legal process relating to a single bargaining forum unfolds; and to negotiate above the discretionary increment can only take place once the decision on a single bargaining unit has been resolved via legal processes.
23. UCT implemented a 6% salary increase for employees. It was submitted that in terms of the agreement as per the facilitation report, nothing prevented UCTEU from bargaining for a higher salary increase for its members once the single bargaining unit decision was resolved. It was further argued that the fact that UCTEU relied on the recognition agreement as the basis for its claim, the dispute must be deemed as a rights dispute and not a matter of mutual interest.
24. It was argued that UCT was always willing to bargain. Its proposal or intent was however, to bargain in a single bargaining forum for pay classes 2-12 as opposed to the request of UCTEU to remain in a separate bargaining forum for pay classes 7-12. It was indicated that UCTEU will not lose its exclusive bargaining rights in the single bargaining forum as it would be bargaining for its members in pay classes 7-12. The single bargaining forum would simply include other unions that would also bargain for their respective members. Therefore, there has never been a refusal to bargain as stipulated by UCTEU.
25. UCT argued that UCTEU cannot proceed with strike action on the basis that:
- (a) UCT has never refused to bargain.

- (b) The Applicant's case is a rights dispute; and
- (c) The very same matter has already been referred to the CCMA as an interpretation/application dispute which is currently pending (the matter referred was withdrawn subsequent to these submissions being made).

Analysis of submissions

26. As per the background of this matter, as contained in paragraphs 3 to 4, it must be noted that the issue relating to whether this dispute constitutes a rights dispute, was already dealt with. The dispute under case number WECT18892-22, relating to an interpretation and/ or application of a collective agreement, was withdrawn. I have determined that the applicant was *dominus litis* and thus determines how it wants to deal with its dispute. I have issued a ruling that the CCMA has jurisdiction to Conciliate this matter.
27. In terms of section 64(2) of the LRA, when a dispute concerns a refusal to bargain, an advisory award must be made in terms of section 135(3)(c) of the LRA before notice is given to strike or lockout, in terms of section 64(1)(a) and (b) of the LRA.
28. In determining whether this dispute concerns a refusal to bargain, I have considered section 64(2) of the LRA, which states that a refusal to bargain includes-
- (a) a refusal-
 - (i) to recognize a trade union as a collective bargaining agent; or
 - (ii) to agree to establish a bargaining council.
 - (b) a withdrawal of recognition of a collective bargaining agent.
 - (c) a resignation of a party from a bargaining council.
 - (d) a dispute about-
 - (i) appropriate bargaining units.
 - (ii) appropriate bargaining levels; or
 - (iii) bargaining subjects.
29. UCTEU wants to negotiate wages on behalf of their members (being pay classes 7 – 12), as per the recognition agreement that existed between the parties. UCT indicated that it was not refusing to bargain with UCTEU but wants it to be part of a single bargaining unit, which includes other unions; and employees or members in pay classes 2 to 12. UCTEU opposed the latter. It was also further argued by UCT that UCTEU agreed that it will only enter into further

wage negotiations once a decision on a single bargaining unit was made via legal proceedings (as per the agreement reached between parties at private facilitation).

30. Although UCT is open to negotiate with UCTEU, such willingness is conditional. Based on the submissions, UCT is prepared to accept UCTEU as a collective bargaining agent for pay classed 7 to 12. Its only requirement is that UCTEU must negotiate on behalf of its members within a single bargaining forum with other unions, where pay classes 2 to 12 are represented respectively.
31. UCTEU submitted that they would only be willing to do that, should pay class 13 be included. This would ultimately mean all pay classes will negotiate wages collectively. In respect of the examples submitted by UCTEU in respect of Rhodes University, I have noted that there were different wage percentage increases agreed to in respect of the various pay classes or pay class groups. In respect of the University of the Free State, the union UVPERSA indicated that it represented academics, support services and service workers and that they negotiated for salary adjustments as a collective with NEHAWU. It appeared that a single percentage increase was agreed to in respect of the negotiations. It is not certain whether all work categories/ or pay classes were covered in respect of the latter agreement and whether there were more categories besides the mentioned three.
32. The parties to this dispute engaged in a private facilitation process prior to the referral of this matter. The first point under discussion was Management and Union relationship. The parties agreed that management will draft a document on the conducting of meetings, including time frames and sub-structures for comment by the parties. In respect of the second point under discussion it was noted that the relationship between the unions to the coalition appeared to have deteriorated. UCTEU described the coalition as abrupt and rude; and was unhappy with the test run done with the 2021 negotiations. The third point dealt with was the single bargaining unit for pay classes 6 to 12. At that time UCTEU's mandate was for separate bargaining units and that the coalition should be given observer status. The interim agreement between the parties is noted as per paragraph 21 above. In respect of one of the previous *in limine* points raised, I determined that the facilitator compiled a report in terms of what he purported the agreement between the parties were. I also indicated that such an agreement cannot be deemed as a collective agreement, limiting a party's right to strike. The facilitator also submitted on record that at the facilitation process the parties dealt with issue of a single bargaining unit. UCTEU was not in favour of it; but the other unions and management were. He also commented that negotiations were not dependent on a "single or double" bargaining unit.
33. It was UCTEU's stance that they were always against the single bargaining unit. Their demand is that UCT negotiate with them in respect of their members (being pay classes 7-12). UCT indicated that as per the agreement reached at facilitation, UCTEU agreed to wait for the issue of a single bargaining unit to be resolved first, before it engages in further negotiations. It must be noted that the agreement also stated that UCT was supposed to provide feedback on the issues raised by 12 or 13 December 2022; and that nothing precluded the parties from discussing the issue of a single bargaining whilst the legal process unfolded. It does not appear that any feedback was given by UCT, nor was feedback given in respect of the submissions on the route UCT decided on going forward.

34. After the referral of this matter, UCT terminated the recognition agreement which existed between the parties. UCT refuses to bargain with UCTEU as per the provisions of that recognition agreement (which is in essence what UCTEU is seeking). UCT is open to bargain but attaches conditions to its proposal. It thus appears that UCT refuses to solely recognize UCTEU as a collective bargaining agent. I am thus satisfied that this dispute constitutes a refusal to bargain.
35. In the Code of Good Practice for Collective Bargaining, Industrial Action and Picketing, item 4(4) stipulates that there is no constitutional or statutory duty to bargain. Collective bargaining under the LRA is voluntary, and employers and trade unions are permitted to determine their collective bargaining relationship in the institutional form of bargaining councils at sectoral level or by way of a recognition agreement at multi-employer or workplace level. However, once having established a collective bargaining relationship in the form of a bargaining council constitution or a recognition agreement, the parties thus by agreement implicitly committed themselves to a duty to bargain and the duty to bargain under such circumstances does not arise statutorily but contractually.
36. In respect of clause 4 of the recognition agreement between the parties, the notice period applicable to the termination of the agreement is 45 days. The agreement also stipulates that a “day” means any day, excluding a Saturday, Sunday and Public Holiday. The recognition agreement is thus still of force and effect between the parties. Parties thus have a duty to bargain in respect of the peremptory provisions contained in the agreement up until the notice period expires.
37. The enforcement of a single bargaining unit/ forum, including all the relevant pay classes (as well as pay class 13), will be dependent upon bargaining between the parties. It is noted that the main purpose of the private facilitation was to bring parties together to remedy their relationship and to explore a single bargaining unit. The latter issue still remains unresolved between the parties. To date no legal remedy has been decided by UCT. UCT had unilaterally implemented a 6% increase. UCTEU must be allowed to negotiate a further increase, should its members be unhappy with the implemented increase. Such negotiations must take place prior to the expiry of the notice period (of the termination of the recognition agreement), as the parties are still bound by such agreement. The Code of Good Practice recommends that parties should remain open to continue negotiations even after a dispute has been referred. It is thus my recommendation that the parties (UCTEU and UCT) should engage in further wage negotiations.
38. It is a common cause that a wage agreement was concluded by UCT and UCTAU, in respect of another referral to the CCMA, where pay class 13 was concerned. Including pay class 13 into single bargaining unit/ or forum for 2023 wage negotiations will not have any effect. The parties should explore including all pay classes into the following year’s wage negotiations. Parties should be prepared to modify demands and responses during the course of negotiations; and must be open to new demands and suggestions. Inclusivity of all pay classes into a single bargaining unit could be to an advantage of all the parties. Structures should be put in place to manage the process and timelines of such negotiations.
39. It is noted that it appears that there is somehow a breakdown in the relationship between the current parties and other unions within the workplace. The latter was addressed in the private facilitation process. Parties are required to adhere to the principles of good faith bargaining and mutual respect. UCT, UCTEU and the other unions at the University

should engage and find a way forward in respect of the issue relating to a single bargaining unit. With Rhodes' example, it showed that mutually accepted agreements can be reached even if different conditions of employment exist or are agreed to.

Advisory Award

40. It is my determination that the dispute constitutes a refusal to bargain.
41. I recommend that the parties engage in further wage negotiations.
42. The parties should explore the possibility of including all pay classes into the following year's wage negotiations.
43. This award constitutes a recommendation to the parties and is non-binding. However, should the respondent not heed the advice given herein, the trade union shall be entitled to call its members out on a procedural protected strike, upon written 48 hours' notice to the respondent. The respondent has recourse to lock-out provided at least 48 hours' notice of commencement of the lock-out, in writing, has been given to the trade union that is the party to the dispute.
44. The certificate of outcome will only be issued once the picketing rules have been established. The parties may agree to picketing rules or approach the CCMA to establish the picketing rules.

A handwritten signature in black ink, appearing to read 'M De Beer', with a long horizontal stroke extending to the right.

Commissioner Maureen De Beer