

# Representing employees in industries outside trade union's constitution

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Can a trade union represent employees in an unfair dismissal dispute before the Labour Court if the employees work in an industry that falls outside of the scope of the trade union's constitution?



Image source: [Sergii Ghatiuk – 123RF.com](#)

## Summary

Employees employed in a sector falling outside of the scope of a trade union's constitution, may still be represented by that trade union in dismissal disputes. However, as previously held by the Labour Court, such representation does not include an entitlement to bargain collectively with an employer on behalf of those employees.

## Facts

The above issue was considered by the Labour Appeal Court (LAC) in the case of *National Union of Metalworkers of South Africa (Numsa) and others v Afgri Animal Feeds (Pty) Ltd [2022]*. Following an unprotected strike in support of a demand for organisational rights, the striking employees were dismissed. The employees subsequently referred an unfair dismissal dispute. Numsa represented the employees in the dispute. As a preliminary point, the employer contested Numsa's standing to represent the employees. Specifically, it contended that, given that it conducted its business in a sector which falls beyond the sector of membership contemplated by Numsa's constitution, Numsa could not represent the dismissed employees. Numsa operates in the metal or metal-related industries whereas the employer in this matter, conducted business in the manufacturing of animal feeds.

## Labour Court findings

The LC, considered the judgment of the Constitutional Court in *National Union of Mineworkers of South Africa v Lufil*

*Packaging (Isithebe) and Others [2020]* (Lufil). The matter concerned the application of employees' right to representation in the context of the acquisition of organisational rights. The Court in *Lufil* found that a union may "only refer or represent a dismissed employee, if that union is registered and if the dismissed employee who is party to the matter, is a member of that union". The LC, relying on the principle in *Lufil*, confirmed that the employees in this matter fell beyond the scope of Numsa's constitution. Therefore, the employees' membership of Numsa had been invalid and void from the outset. The LC therefore found that Numsa held no standing to represent the employees.



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The employees appealed the LC's finding to the LAC. The employees took issue with the LC's reliance on *Lufil* as the matter concerned the acquisition of organisational rights and not whether Numsa could represent individual employees in unfair dismissal proceedings.

### LAC's findings

The LAC distinguished between the representation of individuals in unfair dismissal disputes and disputes concerning the acquisition of organisational rights. The LAC affirmed that employees enjoy a right to choose their own representatives in unfair dismissal disputes. The Court went further to state, that *Lufil* did not concern Numsa's suitability to "represent its employees" in unfair dismissal disputes.

The LAC found that in the context of a union wishing to represent an employee in an unfair dismissal dispute, an employer is not directly impacted by the employees' right to representation. Specifically, in determining whether an employee is entitled to be represented by a trade union in an unfair dismissal dispute, the employee's right to fairness and representation are relevant considerations. The LAC further found that when acquiring organisational rights in an employer's workplace, the employer holds an interest in holding a union to the union's constitution to limit the employee's right to representation.

The LAC upheld the appeal and found that Numsa held the requisite standing to represent the employees in the dismissal dispute.

### Importance of the case

A trade union may represent employees who are employed in a sector outside the union's constitutional scope in disputes relating to the fairness of the dismissal of the employees.

## ABOUT THE AUTHOR

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