LabCDA 5445-01-22

Handed down on August 30, 2023

The Histadrut- General Organization of Workers – The Employees Unionization Department

The Appellant

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1. **Super Pharm (Israel) Ltd.**
2. **Yossi Goldhammer Ltd. and 203 others**
3. **Bardugo Eli Co. Ltd. And 14 others** **The Respondents**

Before President Varda Wirth Livne, Deputy President Ilan Itah, Judge Sigal Davidov Motola, Judge Hanna Ghendler-Ofek, Judge Ilan Soffer

Public Representative (Employees) Ms. Haya Shahar, Public Representative (Employers) Mr. David Kempler

On behalf of Appellant Adv. Maya Tzahor Aviram, Adv. Sivan Radian, Adv. Elad Peleg, Adv. Miri Malki

On behalf of Respondent 1 Adv. Nahum Feinberg, Adv. Orly Aviram, Adv. Michal Feinberg Doron, Adv. Rotem Isaac

On behalf of Respondents Goldhamer et al Adv. Asher Halad, Adv. Michal Levanon Porat, Adv. Sazi Cohen, Adv. Bar Yamin

On behalf of the Respondents Bardugo et al Adv. Dror Gal

Judgment

President Varda Wirth-Livne

1. We have before us an appeal against the judgment of the Tel Aviv Regional Labor Court (Judge Hofit Gershon-Israeli and public representatives Ms. Shosh Baruch and Mr. Zvi Stern; LabCD 9187-07-20 (hereinafter: the "**Judgment**" (in which the

appellant's party's application had been rejected (hereinafter: the "**Histadrut**"). The judgment ruled that in light of the fact that respondent 1 (hereinafter: "**Super Pharm**" or the "**Company**" or the "**Chain**") is not the employer of the pharmacists, who work for respondents 2-3 (hereinafter together: the "**Franchisees**" or the "**Members**"), did not have the duty to conduct collective bargaining with the Histadrut in accordance with the provisions of the Collective Agreements Law, 5717-1957 (hereinafter: the "**Law**" or the "**Collective Agreements Law**").

2. The proceedings raise a new issue regarding the economic model of a franchiser company and raises the question of the right of the franchisees' employees to unionization *vis-à-vis* the franchiser. The franchising model raises additional questions, however, as the question before us concerns the employees' right to unionization in the aspect of conducting collective bargaining *vis-à-vis* the franchiser only, we were not required to address the other questions that arise regarding labor law in general and collective labor relations in particular, and therefore I did not address them as part of my opinion.

A. The Background for the Appeal

3. Super Pharm is a company that sells medications, cosmetics and other health-related products and operates nationwide. The company has 256 branches nationwide which are operated by franchisees (respondents 2-3) unionized through separate companies, as each franchisee operates between one and several individual branches.

4. The Histadrut is a workers' union that unionizes the largest number of employees in Israel. *Inter alia*, the Pharmaceutical Association of Israel, which unionizes the pharmacists and assistant pharmacists in public service, operates under the Histadrut.

5. The following are the main facts and the sequence of events relevant to our case, as specified in the judgment, and are not in dispute between the parties:

   5.1. On 2.6.2020 a letter was sent by the Pharmaceutical Association of Israel to the company's CEO in which it was stated that the pharmacists working at branches operating under the Super Pharm brand (hereinafter: the "Pharmacists") had unionized at the Histadrut under the Pharmacists Association, pursuant to the provisions of the Collective Agreements Law. Later, two additional letters were sent informing on the number of pharmacists who joined the Histadrut ranks.

   5.2. On 10.6.2020, the company sent a response letter stating that since Super Pharm is not the pharmacists' employer, as they are employed by the franchisees, it has no duty to bargain with the Histadrut pursuant to the Collective Agreements Law. Additionally, it was stated that in any event, the data that were delivered to the company indicate that the Histadrut has failed to

meet the provisions of the Law as the signatures of a third of Super Pharm's pharmacists had not been obtained.

5.3. On 5.7.2020, an application was filed by the party to these proceedings as part of this appeal, as part of which the Histadrut petitioned for a declarative remedy stating that Super Pharm is the pharmacists' employer for the purposes of the Collective Agreements Law. Later, the franchisees joined the proceedings per their application that was filed through proceedings at the Regional Court.

5.4. As part of the proceedings at the Regional Court, two main questions requiring ruling upon were raised: One, whether Super Pharm should be considered to be the pharmacists' employer for the purpose of the Collective Agreements Law; the second, do the pharmacists constitute a separate bargaining unit in accordance with case law on the issue.

5.5. On 26.11.2020 the Regional Court ruled that at the initial stage the Court would rule only on the first question, and only should this be answered in the affirmative the Court would examine the second question.

B. The Parties' Arguments at the Regional Court

6. **The Histadrut argued** that Super Pharm is the one that dictates the terms of the pharmacists' employment, and this due to the characteristics to which the appellant referred as part of the proceedings at the Regional Court, mainly: The company dictates the conduct of the franchisees in accordance with the members' agreement that was signed between the company and the franchisees as well as the procedures Super Pharm publishes to the franchisees, and constitute part of the agreement (the agreement and procedures shall be hereinafter referred to together as the: "**Members Agreement**"); the company dictates a uniform employment contract with the pharmacists; the company dictates the pharmacists' employment and dismissal procedures; the company controls trainings of pharmacists and their professional level; the company controls management of the branches in practice, and more.

7. In light of the above, the appellant argued that the company should be considered to be the pharmacists' employer for the purpose of the Collective Agreements Law, so that the company has the duty to conduct collective bargaining for signing a special collective agreement pursuant to the Law.

8. In so, the appellant argued that the indirect employer (meaning- Super Pharm) should be obliged to conduct collective bargaining given the purpose of the Collective Agreements Law, which is intended to enable employees to unionize aiming at improving the terms of their employment in this manner. According to them, this purpose requires a flexible interpretation of the term "employer" that appears in the Collective Agreements Law.

9. Additionally the Histadrut argued that the pharmacists should be considered to be a separate bargaining unit in light of the rule that was set out in case law setting flexibility in examining the boundaries of the bargaining unit as part of the initial unionization. According to it, the pharmacists have "common interests" and are employed in a similar position, at similar terms, at similar work surroundings, and the like.

10. **Super Pharm argued, on the other hand**, that the identity of the employer should be examined in accordance with the tests set forth in LCH (National), 22/3-142 Hassan Al-Harinat-Kfar Ruth, IsrLC 24 535 (hereinafter: the "Kfar Ruth case"), which lead to the conclusion that the pharmacists' employers are the franchisees, including: The employment contract is signed between the pharmacist and the franchisee; the franchisee is responsible for hiring and termination of the pharmacists' employment; the franchisee sets the pharmacists' terms of employment; the franchisee manages the pharmacists' daily routine; the pay slips and reports to the tax authorities indicate that the franchisee is the employer, and more.

11. According to Super Pharm, the Histadrut's arguments concerning commercial sections that were set in agreements between the franchisees and Super Pharm should not be addressed, so is the same regarding the franchisee' line of profit and the manner in which Super Pharm intervenes in the franchisee's work as these sections do not concern the pharmacists' terms of employment and hence are irrelevant for ruling on the questions that are required to be ruled upon in our case.

12. Furthermore, even should it be ruled that Super Pharm is to be considered to be a joint employer, the duty to conduct collective bargaining cannot be imposed on a joint employer as it deviates from the definition under the Collective Agreements Law, which imposes this duty solely on the direct employer.

13. Finally, Super Pharm argued that there is no room for splitting the bargaining unit of each franchisee so that the pharmacists would be acknowledged as a separate bargaining unit. According to Super Pharm, this deviates from the rule set in case law that a large bargaining unit should be preferred. According to it, that which is common is greater than that which is different between the pharmacists and the other employees at the franchisees so that there is no justification for splitting the bargaining unit.

14. **The franchisees** joined Super Pharm's arguments regarding the question of control of the pharmacists' employment and too argued that the control is in the hands of the franchisees. Additionally, the franchisees argued that the procedures the Histadrut referred to are irrelevant to our case, so for example the procedure for prevention of sexual harassment, as according to them this is not an unusual issue as these procedures constitute basic conduct procedures, which do not define Super Pharm's control over the pharmacists' terms of employment.

15. In addition, the franchisees joined the argument that the commercial terms set between the parties should not constitute a consideration in ruling on the question of who the pharmacists' employer is. At the same time, the franchisees argued that even had this argument been of any substance, the commercial sections set in the members' agreement do not prove that Super Pharm has control over managing the franchisees' branches.

16. The franchisees joined Super Pharm regarding their arguments as for the question of separating the pharmacists and acknowledging them as a separate bargaining unit for conducting collective negotiations.

C. Judgment of the Regional Court

C.1. The Employer's Identity

17. The Regional Court ruled that in accordance with the customary tests of the Labor Courts' case law for determining labor relations, the employers of the store's employees, including the pharmacists, are the franchisees rather than Super Pharm.

18. In its ruling the Regional Court relied on the tests set forth in the Kfar Ruth case, which constitutes the guiding judgment on the question of who is an employer, so according to the judgment. In so the Regional Court ruled that:

    18.1. Hiring employees is largely and intrinsically in the hands of the franchisee, as the company's involvement is only marginal;

    18.2. Engagement in the employment contract is between the employees and the franchisees, and the latter are also those stated on the pay slip and on reports to the tax authority and the National Insurance Institute;

    18.3. Most of the pharmacists' salary components are set directly between them and the franchisee, including the basic salary, the rights and benefits, meaning the components that constitute the main part of the pharmacists' salary is set by the franchisees.

    18.4. Ongoing supervision of the pharmacists' work is conducted only by the franchisee;

    18.5. Finally, also the decision to terminate employment is given to the franchisee, as the chain's involvement in this was not proven to be binding.

19. In so it was ruled that it had not been proven that Super Pharm constitutes a joint employer.

C.2. Obligating the Chain to Take Part in Collective Negotiations

20. The Histadrut's argument that the chain is to be considered as the "employer" for the

purpose of the Collective Agreements law, which is based on the argument that Super Pharm has complete financial control over branches and their budgets had been rejected.

21. The Regional Court reasoned the rejection of the argument while placing an emphasis on the uniqueness of the case at hand compared to those the Histadrut mentioned and on which it based itself: While the other cases discussed the individual rights of employees, the relations in our case are collective, and therefore are ongoing in essence. Moreover, the nature of the dispute is forward-looking and thus finds continuous expression in everyday life. Thus, acknowledgment of an employer that is limited to the purpose of the Collective Agreements Law and does not apply to other issues may establish an artificial and undesirable separation, which could raise many practical problems.

22. Additionally, according to the Court, the applicant's argument according to which the nature of the relations between Super Pharm and the franchisees is not compatible with franchise relations, intervenes excessively in the manner in which the parties defined the commercial relations between them. Moreover, the Histadrut's argument relied on the opinion of the expert on its behalf, which according to the Regional Court's ruling is based on his personal knowledge and less on information originating from the field of expertise, and this contrary to the expert opinion submitted on behalf of Super Pharm.

23. Thus, given the set of relations that were established by the facts and the experts' opinions, the Regional Court did not see fit to obligate Super Pharm to take part in collective bargaining regarding the rights of the franchisee companies' employees.

C.3. Pharmacists as a Bargaining Unit

24. As the Regional Court ruled that Super Pharm should not be considered to be the pharmacists' employer, the hearing on the question of the bargaining unit became unnecessary. However, beyond the necessary, the Court noted that it does not consider the pharmacists to be a bargaining unit. It based its ruling on the financial preference of a bargaining unit relying on an enterprise basis over a bargaining unit relying on a professional basis (LabCDA (National) 59352-10-13 **Yediot Internet Ltd. (Registered Partnership) - The Histadrut- General Organization of Workers - The Union of Journalists in Israel** (21.08.14)), and hence its belief that no special interest justifying unionization of the pharmacists on a professional basis had been proven: The characteristics common to them are not unique to them nor are they uniform among all members of the 'group' at all the chain's branches. The fact of the strength of the population was also noted, and in light of this splitting the pharmacists from the other stores'/ chain's employees to an independent bargaining unit may weaken the power of all employees *vis-à-vis* the employer in the event of a future attempt to unionize.

25. Finally, the Regional Court noted that its ruling is not to block the employees' way to unionize at each franchisee separately.

Thus the appeal before us.

D. The Parties' Arguments in the Appeal

D.1. The Histadrut's Arguments:

D.1.a. Financial Control over the Branches and Dictation of the Work Terms

26. The Histadrut argues that the Regional Court had erred in accepting the respondents' arguments according to which the franchisees are the entity financially controlling the branches and set the pharmacists' work terms while ignoring the evidence indicating that the chain has clear control over them.

27. The same, concerning financial and business control, it had been argued, *inter alia*, that setting the budget, the gross profit rate and the branch expenses are in the hands of Super Pharm; Super Pharm is the sole party bearing the financial risks involved in establishing and operating the branch; it is the one that controls the purchase and sale prices of the branch products; it has control over the accounting and legal management of the franchisee companies, as the latter are obliged to withdraw from any legal liability.

28. As for the pharmacists' wages, it appears that indeed it is determined per the franchisee's discretion, however setting the wages is performed as part of a uniform range/standard determined by the chain, and subject to its approval. Additional involvement of the chain in salary terms is evident in dictating a fixed minimum for additions to wages for night work; the mix of monthly and quarterly bonuses for pharmacists who are division managers; a strict procedure regulating employee loans and more.

29. Additionally, regarding dictating the pharmacists' work terms, the Histadrut argues that Super Pharm dictates the work terms through "procedures". These concern, *inter alia*, definition of hiring and human resources at the branches, the manner of examining the candidates, conducting trainings, and more. However, the decision of whether to hire a particular pharmacist for work at a specific branch is in the hands of the member.

30. The chain dictates a uniform employment contract, including the terms of employment, the format of work in shifts, the manner of hourly employment, entitlement to dental insurance, entitlement to discounts at branches, a pension arrangement and the right to an advanced study fund, as part of which the franchisees do not have the authority to change the provision rates. In addition, the chain dictates and conducts promotion procedures and professional training for pharmacists.

31. The chain also dictates the pharmacist's obligations towards the franchisee, as part of a document specifying the uniform work arrangements applying to the

pharmacists at the company, including the employee's consent to perform a polygraph; general consent for performing a search in bags and personal belongings; rules of obtaining and returning equipment; undertakings to participate in professional trainings Super Pharm organizes; definition of the appearance required of the employee; branch entry and leaving procedures; as well as instructions regarding hourly reports, breaks, absences and coordination thereof.

32. In respect of all these, the Histadrut insists that the 256 branches lack independent ability to maintain real collective labor relations.

D.1.b <u>The Issue of the Bargaining Unit</u>

33. The Histadrut argued that the Regional Court had erred by not examining the question of a bargaining unit pursuant to the rules related to a bargaining unit in initial unionization, including the rules set out in LabCDA (National) 41357-11-12 **The Histadrut- General Organization of Workers - Electra Consumption Products (1951) Ltd.** (15.01.2013). According to it, the Regional Court should have, by its definition of the bargaining unit, acted for unionization and implementation thereof, as well as examine the special interest for acknowledgment of the bargaining unit as part of the initial unionization in a flexible manner. According to the Histadrut, the result of applying the case law ruling is that the terms for acknowledgment of the pharmacists as a bargaining unit within the framework of the initial unionization hold true.

34. In addition, it had been argued that Super Pharm is structured, operated and managed in practice as a single administration, which constitutes a single bargaining unit. Thus, the split into 256 bargaining units are 256 branches of the Super Pharm chain, deviates from the case law ruling in this regard, which prefers one large administrative unit, and hence Super Pharm should be acknowledged to be an "employer" for the purpose of the Collective Agreements Law.

35. In so, the Regional Court's ruling is contrary to the principles that the rule is "one bargaining unit for one enterprise" seeks to realize," nor does it settle with Super Pharm's conduct in practice as "a single large bargaining unit". Additionally, as part of its ruling the Regional Court examined who the formal employer is, without considering the case law ruling according to which the term "a single enterprise" in the context of a separate bargaining unit that differs from the question of the formal employer.

36. Finally, the ruling according to which there are 256 bargaining units eliminates unionization of the pharmacists in the substantive and practical aspects, and impairs their bargaining power. In accordance with LabCDA (National) 36937-04-19 **The National Labor Federation in Eretz-Israel - The Histadrut - The General Organization of Workers** (13.06.2019), it is required to set the bargaining unit in the aspect of the ability to maintain real collective labor

relations, and its boundaries should be identical to the boundaries of the administrative and organizational structure of the enterprise, unnecessarily being identical to the manner of the enterprise's unionization. Accordingly, as in practice the members lack independent existence for conducting collective bargaining, conducting such *vis-à-vis* them would be futile. This also violates the right of all the chain's employees to unionize later.

D.1.c. Additional Arguments

37. The Regional Court had erred as it had not examined the question of acknowledgment of the Super Pharm chain as an employer for the purpose of the Collective Agreements Law, in accordance with the purpose of the Law. Alternatively, its reliance on the **Kfar Ruth** case law ruling is irrelevant to our case, as the Histadrut did not seek to "identify the correct employer" from among several "alleged employers" since there is no dispute that the franchisees are the pharmacists' employers, but rather the argument that Super Pharm should be acknowledged as their employer for the purpose of a specific law.

38. The Court's ruling, according to which the chain is not a joint employer should be overturned, as this question had not been in dispute and no remedy was requested for it. In so, the Regional Court had erred in basing its conclusion, according to which the duty of bargaining should not be imposed on the chain, on rejecting the Histadrut's argument according to which "the engagement between the chain and the members is incompatible with franchise relations", as this had not been argued by the Histadrut at all.

39. The Regional Court had erred as it failed to address arguments and considerations concerning comparative law rules, which regulate imposition of the duty of bargaining on an indirect employer in triple employment. According to these, as indicated by the rules set forth in American law, Super Pharm should be considered to be an employer for the purpose of the Collective Agreements Law.

D.2. Super Pharm's Arguments:

D.2.a. The Franchisees are the Pharmacists' Employers

40. According to the chain, the franchisees are the pharmacists' employers and they are those who control their work terms, and accordingly the chain is not operated as "a single enterprise" and should not be considered to be an employer pursuant to the Collective Agreements Law.

41. In so, Super Pharm argues that the process of screening and hiring is conducted by the franchisee, as the franchisee is the one responsible for conducting an interview and conducting bargaining on the work terms. In this regard it had been argued that assistance by the company in publishing wanted ads and marketing

campaigns for recruiting employees for the franchisees is not unusual in franchise relations. Also the process of dismissal of an employee is under the sole control of the franchisee, and does not require the chain's approval. The same is true regarding conducting a hearing prior to dismissal and receiving the dismissal letter, which are the sole responsibility of the franchisee. Furthermore, the employees' employment documents are exclusively held by the franchisees, the franchisee is the registered employer on the pay slip and on reports to the tax authorities, and also bears all its employees' salary and employment costs.

42. As for control over the pharmacists' work terms, the chain argues that this is held by the franchisees, and this does not concern a "uniform contract" or "uniform terms" In so, the employment contract, in which it is explicitly stated that the franchisee is the employee's employer, signed between the franchisee and the employee, indicates that franchisees make changes in the notification to employee form and in the procedures booklet; the work terms and salary components, including refund of travel expenses, holiday grants, bonuses, loans to employees and dental insurance, are set between the franchisee and the employee following the bargaining conducted with the employee; requests for salary increases are referred to the franchisee and he has the power to decide on these; the ongoing supervision over the pharmacists' work is conducted by the franchisee, who has the final power on the issue of management of the staff at his store; the franchisee is the one who decides on the promotion of employees or moving them from one position to another; and he is the one who decides on maintaining the seniority of a pharmacist who moves to his store from another franchisee.

43. In terms of the chain's involvement, it was argued that few guidelines are given regarding the work terms at stores, which are perceived as only recommendations, and are implemented by the franchisees at their discretion. This is the case also regarding the guideline for granting benefits to employees; regarding an advanced education fund; regarding added payment to a pharmacist at night hours; regarding bonuses to the department's managers; regarding holiday gifts and more.

44. The same is true regarding "recruitment and hiring" procedures," "computerized test procedure" and "loan procedure", to which the Histadrut referred. As for the latter, indeed the chain sets the maximum sum for extending a loan to an employee, however, the franchisee is the one who signs the loan agreement with the employee, and he has the discretion whether to extend a loan, its sum, as also indicated by the franchisees' testimonies that as part of their discretion they sometimes extend loans over the maximal sum.

45. In this regard, the chain emphasizes that its examination of the budget is only general and it does not examine each detail separately, and accordingly a uniform standard for the pharmacists' wages is not dictated.

46. Regarding the pharmacists' moving between branches, the chain argues that insofar as this concerns a substitute employee, the issue is arranged directly by the pharmacist and the franchisee to whom he is moved, and this is to be decided by the pharmacist. In such a case, although the salary for the shift he performed as a substitute appears on the employee's regular paycheck (meaning, not paid directly by the franchisee for whom he performed the shift), however this is a technical matter, as the franchisee at whose store the position substitute is performed is the one who bears the pharmacist's wages. Moreover, the franchisee to whose store an employee moves permanently, is the one who decides on maintaining the seniority of the latter.

47. Super Pharm argued that as the Histadrut's argument that the company should be acknowledged as a joint employer of the pharmacists had been rejected, there is no room for acknowledging the company as the employer for the purposes of the Collective Agreements Law only, pursuant to the case law rule of "violation of universality", meaning acknowledgment of an employer for a specific purpose. According to the company, such acknowledgment exists only in extreme cases that do not exist in our case.

D.2.b. <u>The Commercial Relations between the Parties are Irrelevant to the Proceedings</u>

48. Super Pharm reiterated its argument it raised also in the proceedings at the Regional Court, that the commercial relations between the parties are irrelevant for ruling on the case at hand. In so, the company argues that it had been ruled as a factual finding, contrary to the Histadrut's argument, that the franchisees are not "upgraded branch managers," meaning, they have the power to manage their branches without the company's intervention.

49. As part of this, the company argued that the Regional Court was correct in ruling that the franchise relations between Super Pharm and the franchisees are authentic franchise relations. In this regard, Super Pharm referred to the opinions submitted by the Histadrut and the company and referred to the structure of a franchise engagement, attempting to convince that the case before us meets the definition of franchise engagement. Super Pharm noted that the Regional Court preferred the version that appeared in the opinion the company submitted and this ruling constitutes a factual ruling the appellate court does not usually intervene in it.

50. Notwithstanding its argument that the commercial issue should not be addressed as part of the proceedings, Super Pharm extensively addressed the Histadrut's argument on the matter, as *inter alia*, the company explained the economic logic of structuring a joint budget with the franchisees; determining the franchisees' profit line; setting a minimal profit line for the franchisees and more. The company argued that all these components are components that are customary in the structure of a franchise engagement.

D.2.c. <u>Pharmacists Should Not Be Acknowledged as Being a Separate Bargaining Unit</u>

51. Super Pharm argues that pharmacists should not be acknowledged as being a separate bargaining unit pursuant to the case law rulings that were set at the labor courts on the

matter. According to it the pharmacists have no uniqueness, characteristics, or material differences that justify their separation as a bargaining unit from the other employees at the branches.

52. In its summary arguments, Super Pharm referred to the Regional Court's ruling and argued that the Court was correct in its ruling that the correct starting point is the preference of an enterprise or sectoral bargaining unit over a professional bargaining unit, and thus there is no room for separating the pharmacists from the other branch employees. In this regard, the company referred to LabCDA (National) 8676-02-17 **Maccabi Health Services - The National Labor Federation in Eretz-Israel** (28.12.2017) where the pharmacists at Maccabi Health Services' pharmacies were not separated from the other pharmacy employees. Separating them may weaken the other employees who to begin with are weaker.

D.3. <u>The Franchisees' Arguments:</u>

53. For the sake of convenience I shall present the arguments of all the franchisees together although they were represented as two separate groups in the proceedings before us and the proceedings at the Regional Court.

54. The franchisees argued, similar to Super Pharm's arguments, that it had been proven at the Regional Court, in accordance with the factual rulings that were set in those proceedings, that the employers of Super Pharm' pharmacists are the franchisees. This ruling was issued according to the tests customary in case law, as also the pharmacists addressed the tests that were set forth in the Kfar Ruth case, and argued that the Regional Court was correct in the manner of applying the tests to our case.

55. In so, the franchisees argued that they are responsible for determining the terms of the pharmacists' wages; recruitment and hiring them to work; termination of the pharmacists' employment; granting social terms; the pharmacists' terms and social terms are determined through bargaining with the franchisees; daily management and supervision, training and certification courses, and more.

56. The franchisees argued that there is no connection between the commercial terms that were set between the franchisees and Super Pharm and ruling on the question of who the pharmacists' employer is. In so, the franchisees addressed the Regional Court's ruling that the salary budget that is set in collaboration between the franchisees and Super Pharm, is controlled by the franchisee and he may change it during the year per his discretion and according to his needs.

57. As for the Histadrut's argument that Super Pharm should be acknowledged as being the pharmacists' employer for the purpose of the Collective Agreements Law pursuant to the principle of "violation of universality," the franchisees argue that this principle is the exception to the rule rather than the rule, and the Court would tend to make use of this principle in extreme cases only. According to them, this case law ruling is intended for cases in which disadvantaged employees were not given cognitive rights and in order to protect those employees, as in our case according to the franchisees this is not

the same case, as there is no dispute that the pharmacists obtain their rights in full and since this does not concern disadvantaged employees.

58. Additionally, the franchisees argue that the principle of "violation of universality" cannot deny the franchisees' proprietary right to their businesses. Ruling that Super Pharm is the one that would bargain that in fact would bind the franchisees, as being the pharmacists' employers, would expropriate the franchisees' proprietary right to their businesses.

59. According to them, the wording of the Collective Agreements Law explicitly states that the one empowered to conduct collective bargaining in accordance with the Collective Agreements Law is an "employer" rather than any other party. According to them, the Histadrut seeks to deviate from the explicit wording of the Law without any legal justification.

60. As for the question of the bargaining unit, the franchisees first argued that there is nothing to prevent the franchisees' employees unionize at each franchisee separately, as it was argued that the Histadrut had unionized in the past at businesses at which only 20 employees are employed. In addition, the franchisees argued that there is no room for acknowledging the pharmacists as being a separate bargaining unit pursuant to the reasonings specified in the Regional Court's judgment.

Discussion and Ruling

61. I shall first state that after I have considered the parties' arguments in writing and orally I have arrived at the conclusion that the appeal is to be rejected, and this as shall be detailed below.

E. Normative Background

E.1. The Franchise Model

62. Before discussing the legal issues before us in these proceedings, I would like to dedicate a few words to the business model before us - it being the franchise model. The franchise model is a different and unique business model from a standard business-employment model, the status of which had not been yet discussed in case law concerning labor law and at least concerning the question discussed in these proceedings, the question of the applicability of the Collective Agreements Law to this model.

63. I should note that as part of the proceedings at the Regional Court two opinions were submitted regarding the business model of franchise relations, one by Accountant Yitzhak Slovodiansky, which was submitted on behalf of the Histadrut and the other by Prof. Yossi Spiegel, which was submitted on behalf of Super Pharm. The Regional Court addressed the credibility of the opinions and ruled that it placed greater trust in Prof. Spiegel's opinion. Regardless of the question of the credibility of either of the opinions I should note that some of the information presented in this chapter is

supported by legislation and articles that were mentioned in the opinions rather than by the analysis each of the experts conducted in respect of the proceedings on their merits.

64. Franchising is a common business model that allows chains to expand commercially, while reducing the financial risk to which they are exposed. The model is structured in such a manner that the franchiser grants the franchisee permission to make use of its products, its reputation, its trademarks and more, in return for payment from the franchisee's profit (setting the profit line and setting the payment to the franchiser varies from case to case as shall be specified below). As part of the model, the franchisee benefits from integration into an existing business and reliance on accumulated reputation, and the chain benefits from reduction in financial risk and the administrative burden involved in expansion.

65. The franchiser's and franchisee's work as part of the franchise relations is integrated and prolonged. Usually a significant initial investment is required of both parties: On the part of the franchisee - renting a building and adapting it to the chain's design, and on the part of the franchiser - training the franchisee and his employees.

66. Key elements in franchise relations is the franchise's ongoing supervision over the franchisee, the ongoing supply of the chain's products and the mechanism of the franchisee's payment to the franchiser according to the accrued profits, in a manner that reflects sort of interdependence between the parties (see: Adi Eyal "Antitrust Risk in Franchise Agreements: Exemption Notwithstanding" **Hapraklit** 52, 5773, p. 7 (hereinafter: "**Antitrust Risk in Franchise Agreements**"). This is different from other corporate structures, which are based on ownership or subordination relations. Thus, the uniqueness of franchise relations compared to other corporate structures is mainly the independent status of each party to the contract.

67. It is important to note that this business model necessarily establishes restrictions on the franchisee and limits him and his business activities in certain areas, whether in setting the price of certain products, choosing uniform for employees, branch design, etc. Relevant to this issue are the statements presented in the article **Antitrust Risk in Franchise Agreements** (p. 4 of the article):

> **"Despite the great benefit of franchise agreements, the terms of most franchise agreements make them restrictive arrangements, subject to the Antitrust Law, 5748-1988 (hereinafter: the "Law"). Prominent examples are the franchisee's obligations towards the franchiser in all concerning the price at which the products would be sold to the public; determination of exclusive marketing areas, and the called for determination prohibiting other franchisees to market outside a certain area; a franchisee who is required to buy from the franchiser combined products (such as: coffee with cups and napkins, or clothes with unique hangers for hanging them); non-competition stipulations during and after the franchise. The business logic of these limitations is clear: Franchise is an area**

within which the franchiser is often a company that operates a chain, and the chain's reputation relies on the provision that the branches would "look similar and function at a uniform level".

68. The definition of the franchise model has also found its place in legislation. Section 1 of the Economic Competition Rules (Block Exemption for Franchise Agreements) (Temporary Provision), 5761-2001 defines a franchise as follows:

> **"Franchise - granting rights to use intellectual property or industrial knowledge, whether they are protected by a trademark, service mark, copyright, patent, sample rights or other protection of intellectual property, or are characterized as a commercial name, unique designs or models, all where granting the rights is required for the sale of the goods to end consumers and constitutes in the consumer's view a substantial part of the value of the sold goods;"**

And a "Franchise Agreement" as follows:

> **"Franchise Agreement - a contract according to which a franchiser or chief franchiser grants the franchisee the right to make use of the franchise for marketing purposes of certain goods or types of goods, and includes all of the following:**
>
> **(1) Use of a uniform trade name or a trademark or a uniform service mark, and uniform characteristics of the sold goods or of the sale and execution thereof, which are essential for marketing and sale of the goods;**
>
> **(2) Delivery of knowledge from the franchiser to the franchisee that is material for marketing and sale of the goods;**
>
> **(3) Providing commercial or technical assistance by the franchiser to the franchisee, during the term of the agreement;"**

69. Unlike in Israel where franchise agreements are ordinary agreements in the sense that they are not subject to regulatory supervision (in light of the temporary provision specified above, which sets an exemption from obtaining the Competition Court's approval upon meeting the terms specified in it) in the United States franchise agreements are subjected to the supervision of the Federal Trade Commission, FTC. In 1978 the latter defined a franchise engagement by the "Franchise Rule", as an engagement that meets three cumulative provisions (FTC, Franchise Rule 16 C.F.R Part 436, Compliance Guide, May 2008):

69.1. An undertaking on the part of the franchiser to grant the franchisee rights of use of a trademark or other trademark or other commercial symbol belonging to the franchiser;

69.2. An undertaking on the part of the franchiser to exercise significant control of the business or to provide significant assistance in operating the business;

69.3. The franchisee is required to pay at least $500 during the first six months of the business's activities. The minimum amount required is updated every four years according to the mechanism set in the rule. Commencing June 2020, the amount stands at $615.

70. Indeed, it may be seen that the franchise model has many faces, and there is difficulty in determining and stating what are the franchise' boundaries. In order to understand the different manners in which companies operate the franchise model, several empirical studies were conducted, mainly in the United States, which examined through different categories that define the franchise model the difference in operating the companies.

71. It may be seen that among the various companies operating through this model there is a large variation in the initial investment sum invested by the franchisee, as the average sum stood at approximately USD 20,000 (see: Lafontaine, F., & Blair, R. D. (2008) The Evolution of Franchising and Franchise Contracts: Evidence from the United States. Entrepreneurial Bus. LJ 3, 381). It was also found that there is a large difference in the royalties and in the percentage of income the franchisee is entitled to and in the percentage of income the franchisee invests in advertising and marketing (see: Sen, K. C. (1993). The use of Initial Fees and Royalties in Business-Format Franchising. *Managerial and Decision, Economics*, 14(2), 175-190).

72. Additionally, in a comprehensive study conducted in the1990s in the United States at fast food companies operating through franchises, it was found that there is a difference in the powers given to the franchisee and in the scope of action he is given. Thus, it was found that the franchisees are supervised and guided by "franchisee consultants"; the franchisees set the prices of the products in their stores; the franchisees are responsible for hiring employees at their stores, and in so may deviate from the ordinary format of employees in any position at the restaurant; the franchisees have the right to conduct marketing and advertising campaigns through the various channels, subject to the chain's approval; the franchisees have some freedom in setting menus.

73. At the same time, there are branches owned by the company operating under central management, where there is dictation of procedures for almost all operations, and the definition of clear standards regarding the proper performance of these; the salary of store managers consists of a fixed salary and a small bonus, less than half of which is based on financial goals, and the rest on personal goals; decisions regarding personnel are made by the network. Store managers do not have the power to hire or dismiss employees, or to set their salaries; the prices are set centrally by the chain; there are almost no differences in the food store menus (see: Bradach, J. L. *Franchise Organizations* Harvard Business Press, (1998)).

74. As may be seen, although there are boundaries to the definition of the franchise model, in practice two franchise agreements are not necessarily similar. It is also important to note that in our case no argument had been raised, and naturally not proven , that Super Pharm's business model does not constitute an authentic franchise model, and the

background presented above serves only as a general background for understanding the franchise model and the flexible manner of implementation thereof.

E.2. The Duty to Conduct Collective Bargaining Pursuant to the Collective Agreements Law

75. Section 33h1(a) of the Collective Agreements Law prescribes the employer's duty to conduct collective bargaining with the representing workers' union, as the wording of the section:

> **"An employer is required to bargain on matters listed in section 1 with a representing workers' union under section 3, upon initial unionization at the employer's workplace; the provisions of this section do not require an employer to sign a collective bargaining agreement with a labor union upon initial unionization".**

76. However, similar to other legislation, the Law does not define who the employer is for the purpose of the Law. This question arises in our case, as the parties are in dispute on the question of to whom applies the duty to conduct collective bargaining with the representing workers' union (as at this stage we are not addressing the question of whether this concerns a representing workers' union). The Regional Court's judgment examined this question as stated in light of the tests that were set in the Kfar Ruth case and therefore I shall address these tests and examine whether it is appropriate to examine this question as stated in light of these tests.

77. Alternatively, it has been argued that even if it cannot be ruled that Super Pharm is the pharmacists' employer, Super Pharm should be acknowledged as their employer for the purposes of the Collective Agreements Law, in accordance with the "breaking universality" principle established in case law. This is, in fact, the Histadrut's main argument, which, as I mentioned above, did not dispute the fact that the franchisees are the pharmacists' employers and did not claim that the use of the franchising model in this case is a sham for the purpose of evading certain provisions of the Law.

78. For this purpose, I shall first address these two issues before I discuss the case before us on its merits.

E.3. Who is an "Employer"?

79. As is known, the two main "players" in the world of labor law are the employees and the employers, however, as stated, although the definition of who these players are is critical for discussing the applicability of the various laws in labor law, in most legislation in Israel there is no definition of these two terms.

80. Hence, case law set various tests for examining the definitions. As for the identity of the employer, the starting point customary in case law is that the ruling regarding the matter is based on objective data, rather than on the definition of the parties themselves in the employment contract. In the Kfar Ruth case, on which the Regional Court relied in its judgment, two significant foundations were set in ruling on the identity of the employer. First, a presumption that may be refuted had been ruled upon, according to

which the employer is the user in whose business the work is performed, as in the wording of the judgment:

> **"By nature it would be the premise that the employee and the user of his work are the real parties standing on opposite sides of the employment contract, and one seeking to refute this assumption and argue that the third party is the correct employer, is required to prove his argument; and he would be able to prove it should he be able to show that on two levels there is a legal engagement (explicitly or implied) for providing work per consideration: Between the third party and the employee and between the third party and the one using the work." (Para. 16 of the judgment in the Kfar Ruth case).**

81. **Second**, it had been ruled that in employment arrangements where, in addition to the employee and the user of his work, a third party is involved, the question of who is the "legal" employer would be ruled upon by the question of between which parties "**explicit or implicit legal relations were established concerning provision of work in exchange for remuneration**" (para. 15 of the judgment in the Kfar Ruth case)

82. In order to simplify this central question, 12 ancillary tests were set, on which the Regional Court relied upon in its ruling, which may assist in identifying the "real" employer". However note, accumulation of even some of the tests could tip the scales in favor of the correct employer, on whom the legal duties towards the employee would be imposed:

    82.1. **How the parties viewed the relations between them and how they defined it;**

    82.2. Who has the power to dismiss the employee and before whom he would be required to resign;

    82.3. **Who hired the employee and who determined and regulated the terms of his hiring.** Who assigns him to his workplace and who transfers him from one position to another within the organizational structure of the user of his work;

    82.4. **Who determines the entirety of the employee's work terms**, including the amount of his salary and those related to his salary;

    82.5. **Who is required to bear the payment of the employee's salary**. It is not a question of who makes the payment technically, but rather who bears the legal obligation to pay the employee his salary;

    82.6. **Who grants vacations to the employee** and from whom should he seek approval for his vacations;

    82.7. **How did the parties report to the tax authorities regarding the employee's work**, how had they declared and registered with the National Insurance Institute, and with other authorities where a declaration is required

of who the employer is;

82.8. **The totality of the relations and affinities** between the user or the official employer and the employee;

82.9. **Who owns the equipment**, materials, or tools the employee uses in his work;

82.10. Is the work for which the employee was hired **carried out within the scope of the user of the work's primary business**, and in which the employee is integrated, or had the employee been hired to carry out a side project that requires special skills that are not of the type of skills ordinarily required for his primary occupation;

82.11. The duration and continuity of the relations between the user and the employee;

82.12. Does the third party have its own business in which the employee is integrated, who provides his services to another.

83. In the **Hassidim** case (LabA (National) 478-09 **Yitzhak Hassidim - The Jerusalem Municipality** (13.01.2011)). The refutable presumption established in the Kfar Ruth case had been abandoned, however the test methodology outlined in that case remains intact, and new employee-focused auxiliary tests have been added, which relate to employment relations aspects as well as psychological and sociological aspects:

83.1. Does the employee lose organizational representation as a result of the employment model in which he works;

83.2. Does the employment model mean exclusion of the employee from the application of expansion orders or collective agreements;

83.3. Does the employment model impair the employee’s dignity by his seclusion and impairment of his sense of belonging;

83.4. Does the employment model impair the employee's opportunities for promotion and professional development;

83.5. Does the employment model impair the employee's ability to maintain personal and human relations with his employer, in a reasonable manner depending on the type of occupation in question.

84. Hence it appears that the concrete tests are those that were set in the **Kfar Ruth** case are the ancillary tests that were added in the **Hasidim** case, revolve around a number of focuses. They seek to uncover whether the complex engagement is **authentic** and whether it is **legitimate** or perhaps contradicts labor law principles. They also seek to point out the party to whom the employee is **subordinated** and who **controls** the employee's work terms;

> **"Thus, the identity of the employer would not be determined according to the definitions of the parties themselves or on the basis of formalistic tests, but rather based on distinguishing between an authentic and legitimate engagement with a subcontractor**

and an attempt to disguise the employment relations between the employee and the user, thereby infringing the employee's rights." (Para. 25 of the judgment on the Hassidim case).

85. Accordingly, case law has emphasized that the overarching tests that should be applied when examining the identity of the employer, namely the tests of **authenticity and legitimacy,** as the examination is conducted in a manner that identifies between whom authentic and legitimate employee-employer relations exist, and it is not sufficient that the relations between the employer and the service user are authentic and legitimate [see, for example: LabA (National) 33542-11-12 **Ben Gurion University - Prof. Dina Pilpel** (4.3.2014); LabA(national) 16612-10-11 **Katili Padua - The State of Israel** (20.8.2015); LabA (National) 24256-06-17 **Minrav Engineering and Construction - GOITOM TWELDE** (9.6.2020) According to these tests, the identity of the employer is determined based on the distinction between an authentic and legitimate engagement with a third party and an engagement that is not authentic or legitimate, which is intended to evade the service user's duties as an employer, and within which the employee's rights are violated Hence currently, the overarching tests are the tests of **legitimacy and authenticity,** while the concrete tests established in case law serve as auxiliary tests for their examination:

> **"Thus, the axillary tests do not stand alone and should not be applied in a technical manner, but rather their purpose is to reveal the true identity of the employer in order to fulfill the purpose of labor laws, taking into account the unique characteristics of complex employment relations."** (The **Hassidim** case, para. 28).

86. Alongside the jurisprudential development, different positions emerge in literature regarding the manner in which the employer should be identified According to one of these positions, as presented in Prof. Guy Davidov's article, 'Indirect Employment,' Avoda, Hevra Ve'Mispat, 12, 191, some of the Kfar Ruth tests are still relevant today, however, even those that are relevant should only be used as axillary tests, as the central examination should rely on the existence of **dependency and subordination** between the employee and the employer. Thus, the party in the relations *vis-à-vis* whom the employee is in a situation of dependency and subordination, is the one serving as his employer in legal terms and on whom the duties are imposed as follows:

> **"Labor relations are characterized by democratic shortages (subjected to the decisions of others, without the possibility to participate in their making during the period of work (as well as the employee's dependence in the labor relations - both economically as well as for fulfillment of psychological and social needs). This dependence is reflected in the inability to disperse risks). The main purpose of labor laws is to cope with this inherent disadvantage of the employee, to minimize it to the extent possible, and prevent the resulting consequences that are unacceptable to us**

as a society. Accordingly, my approach is that legal liability of an "employer"
should be imposed on the entity towards whom the employee is in a position of dependency and subordination. Such an interpretation would lead to the conclusion that some of the tests outlined in the Kfar Ruth case are appropriate and suitable, while others are not at all relevant." (*Ibid*, p. 196)

87. In Prof. Hila Shamir's article, Unionizing *Subcontracted Labor*, 17 Theoretical Inquiries P. 229 (2016) (hereinafter: "Prof. Shamir's Article") she argues that labor law in the current bilateral model does not constitute a solution that suits the multilayer work models, including franchise. In its place, she proposes a multilateral model, in which all entities with control over the work terms of employees would be responsible for employee rights. This will ensure the possibility of exerting pressure on employers at the different contractual layers:

> **"...the bargaining model needs to be reimagined as a..." multilateral (lead company, employer and union) model, rather than the current bilateral (employer and union) model, in order to guarantee that the lead company will sit at the bargaining table. The lead company needs to be more than a residual bearer of obligations, asked to step in when the subcontractor fails to fulfil its minimum obligations, but reconceived as a party to collective bargaining and to an eventual collective agreement with direct obligations under labor law**" (*ibid*, p. 251).

88. In addition to this proposal, she presents several intermediate solutions under which the leading company would participate in collective bargaining, including the doctrine of joint employers and redesign of the bargaining units. These solutions, as well as her proposal to apply a multilateral model, revolve around a purposive view of employment relations, examining the **actual control** of each party over the employees and the **authenticity** of the multi-layered engagement.

89. It should be noted that in her article, Prof. Shamir mentions the 2014 resolution of the National Labor Relations Board (NLRB) in the United States, according to which McDonald's should be considered a joint employer with its franchisees.

90. However, since then, there have been developments in the American discourse on this issue (with a particular focus on the question arising in the context of franchise relations) and in the standard of involvement and control, the most recent and significant development for our purposes is the NLRB's announcement from September 2022.

91. The announcement proposes to repeal and replace the law regulating the status of the joint employer ("Joint Employer Status Under the National Labor Relations Act"), published in February 2020. According to the new proposal, the threshold requirements for determining whether employers are joint employers in multi-layered employment

models would be lowered, so that two employers would be considered joint employers whenever they jointly make decisions ("Share or Codetermine") on matters that regulate the essential terms of employment of the employees.

92. A "joint decision" is defined by the proposed law as holding or exercising the power to control, whether directly or indirectly, the essential employment terms of employees (§ 103.40 (b) of the proposed rule):

> "for an Employer To Possess the Authority To Control (Whether Directly, Indirectly, or Both), or To Exercise the Power To Control (Whether Directly, Indirectly, or Both), One or More of the Employees' Essential Terms and Conditions of Employment".

93. As for the employees' essential employment terms, the new law expands the list and defines it as an open list. This is to ensure that the new standard for joint employers would be able to accommodate changes of circumstances at the workplace, while acknowledging the shortcomings of the 2020 law in view of the COVID-19 pandemic at the time. The proposed list, which as stated is an open list and not exhaustive, includes the following conditions (§ 103.40(d) of the proposed rule):

> "wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance."

94. When assessing the suitability of the aforementioned judicial foundation for the employment model at the heart of this judgment, taking into account the American literature and the proposed legislation on the issue, it is possible to divide the discussion into the concrete tests, and the rationales based on which these tests rely, them being legitimacy and authenticity, as well as control, and dependency.

95. In examining the suitability of the concrete tests in our case, it is required to address the characteristics of the judgments in light of which they were set: **Kfar Ruth** and **Hasidim**. In both of these judgments, the courts examined the relationship between an **individual and his former employer after the termination of his employment.** Furthermore, these judgments examined the triangular relations between the employee, the employer, and the user. It is possible that the tests adapted for this triangular relationship may not align precisely with all forms of complex employment and layered employment methods, including franchiser-franchisee-employee relationships, subject matter of our discussion

96. Similarly, the discussion extends to other significant characteristics relevant to our case, as the examined relationships involve **a group of employees**, rather than a single employee, and the examination is conducted **during the course of their employment** rather than upon its termination The difficulty arises from the fact that some of the aforementioned auxiliary tests are personal tests that should be examined at the level of the concrete relations between two parties, and their examination is problematic

concerning a large group of employees, for example, the question regarding the duration of the relations between the parties, as this obviously varies from one employee to another

97. Similarly, in our case, this does not concern only multiple employees but rather also multiple employers. It is possible that there are variations between the different franchisees in respect of the aforementioned tests, which could lead to different conclusions

98. However note, despite the differences, it is clear that the relationships we are discussing, involving two entities with certain relationships with the employee, raise complexities similar to those arising from case law. Thus, **it is possible that the rationales behind the development of auxiliary tests in case law, some of which have even evolved into primary tests for determining who the employer is, remain important for examining employment relations in the franchising model, even if it is not self-evident that the concrete tests designed for employment relations in the model of 'classical' triangular employment, meaning, employer and service provider, are suitable for determining the employer in the model in our case.**

E.4. "Breaking Universality"

99. A basic rule in our legal system is that certain terms could have different interpretations, in accordance with the purpose of the law (see: HCJ 7029/95 **The Histadrut - The General Organization of Workers v. The National Labor Court et al** (27.1.1997); HCJFH 4601/95) **Sarussi v. The National Labor Court et al** (14.10.1998) (hereinafter: the "**Sarussi Case'**). Similarly, with regard to the term 'employer' (which was previously called 'patron'), it was previously ruled in CA 502/78 **The State of Israel v. Yeruham Nissim** (2.11.1981) that this question should be examined in accordance with the purpose of the relevant law to that matter:

> **"The terms "employer" and "employee" appear in a long list of laws. The principled point of origin, which must guide us, is that these expressions have no universal meaning, unless the meaning they have is closely related to the context in which these expressions appear. In other words: There is no single definition that serves as a criterion for determining employer-employee relations, there are many diverse definitions, all depending on the context where the question is raised. Thus, it would be a natural phenomenon that John Doe would be considered to be an employee for the purposes of one law, however would not be considered an employee for the purposes of another law. The Tort Ordinance [New Version] defines "employer" and "employee" pursuant to the absolute control test (see: CA 426/63, p. 302). The Ordinance does not examine neither the integration test, nor the organizational test, nor any other test, unless these may be**

considered part of the principle of absolute control (see: CA 582/71 599 (LA 191/71, 192) p. 654). Hence, it is possible that a person is an employee for the purposes of the Tort Ordinance [New version], as we would not consider him an employee for other purposes, in which additional tests are exercised. Similarly, a person could be considered an employee for some purposes, without being an employee for the purposes of vicarious liability in torts."

100. Over the years, case law has extensively addressed this principle and expanded it in a manner that allows for a different interpretation of the definition of 'employer' also within the framework of labor and social security law, while ruling that this principle should be used sparingly. Case law has defined various situations in which this principle would be used, including concerning unusual employment formats or non-standard employment arrangements, and where there is financial dependence between the employee and the alleged employer for the purposes of a particular law (see: LabA (National) 568/06 **Shushan - Kal Vacation and Tourism Ltd.** (3.1.2008); LabA (National) 300021/98 **Trainin, Attorney - Harish and the Labor Party** IsrLC 37 (2000) 433).

101. Use of this principle also carries risks, which is why it was ruled that it should be used sparingly Overuse of the principle of breaking universality may establish legal uncertainty regarding the legal rights of employees or those seeking to be acknowledged as employees. While one of the primary goals of labor law is to protect the cogent rights of employees, it is crucial to ensure that this protection does not establish an overly broad loophole that could lead to ambiguity in the legal status of the parties to employment relations or those claiming such relations exist. Therefore, we are required to exercise the necessary caution when making use of these tools.

102. However, in order to examine whether it is correct to apply the principle of breaking universality, beyond the provisions of section 101 we are required to examine two aspects: **First**, whether the application of the principle fulfills the purpose of the relevant law, and in our case the Collective Agreements Law; **second**, whether application of the principle is necessary in our case, as the starting point for this matter is that application of the principle is generally required in exceptional cases in which there is an unusual format of employment.

103. Regarding the purpose of the Collective Agreements Law, in HCJ 1181/03 Bar-Ilan University v. The National Labor Court, 64(3) 204 (2011), as follows:

"The fundamental purpose of the Collective Agreements Law and the Labor Disputes Resolution Law is to protect employees' rights *vis-à-vis* their employers through the collective workers' union." (para. 64 of the judgment).

104. In addition, it has been ruled in the past that as part of the range of considerations, considerations of desirable social policy LabA (National) 300274/96 **Shaul Zadka -**

The State of Israel - Gali Tzahal, 36 (2001) 625, 644 (2001)) should also be considered. It is important to note that upon examining this it is required to consider the rights available to each of the parties and may be violated from a ruling in these proceedings: the **employees**, the right to unionization; **Super Pharm and franchisees**, the proprietary right to their businesses and the freedom of contracts that grant them the right to enter into a contract as they see fit (subject to the existing restrictions under the Law). In examining these rights, we are required to examine also whether rejection of the appeal would violate the employees' right to unionization and whether accepting the appeal is a violation of the Respondents' proprietary right to their business.

105. In conclusion, should it be ruled that Super Pharm is not the pharmacists' employer we shall be required to examine whether it should be considered as such for the purposes of the Collective Agreements Law, taking into account the tests mentioned above and the purpose of the Law as outlined above.

F. From the General to the Particular

106. First, I shall note that the tests that were set in the Kfar Ruth case and the subsequent judgments concerning the question of who is an employer are irrelevant in our case, for the reasons that I listed above: In light of the nature of the proceedings (collective as opposed to individual); the manner of engagement between the parties (franchising as opposed to triangular employment); and the nature of the dispute (the question of whether Super Pharm is obligated to engage in collective bargaining as opposed to proceedings related to an employee's cogent rights upon termination of his employment)

107. Additionally, I should note that, in my opinion, the Regional Court erred upon its examining the issue before us according to the tests used to determine whether a user should be considered a joint employer. This, *inter alia*, since the argument that Super Pharm should be considered a joint employer, in fact had not been raised by the appellant, and thus the Court is not required to address it. The appellant's argument had been that Super Pharm should be considered to be an employer only for the purpose of Collective Agreements Law.

F.1. Should Super Pharm be Considered to be the Pharmacists' Employer for the Purpose of the Collective Agreements Law?

F.1.a. The "Substantive Impact" Test

108. As aforementioned, in accordance with the principle of "breaking universality", it is possible to consider one who is not the employee's direct employer, to be an employer for the purpose of specific law, and in our case the Collective Agreements Law. This stems from the fact that the Collective Agreements Law has a distinct purpose compared to the set of laws regulating employees' rights. The Collective Agreements Law is designed to enshrine the financial decision-making process through the looking

glass of organizational democracy principles, while reducing the power relations between the individual employee and his employer. Therefore, it is possible to justify breaking universality in respect of the employer's definition. In addition, this is a break in the specific context of collective labor relations, and hence its impairment of legal certainty is more limited, so that the benefit embodied in breaking universality in this regard exceeds the damage. This means that should Super Pharm be acknowledged to be the pharmacists' employer for the purpose of the Law, it would be possible to obligate it to bargain for signing a collective agreement, this pursuant to the provisions of the Law.

109. In my opinion, it is indeed possible to acknowledge a party other than the direct employer as an employer for the purposes of this Law, provided that it had been proven that such party has a **substantive impact** on the terms of the employee's employment. Meaning, in our case we are required to examine whether Super Pharm's impact on the terms of the pharmacists' employment has a **substantive impact** in a manner that obligates it to conduct collective bargaining.

110. It should be noted that a **substantive impact** may be expressed in two main aspects: **First**, similar to the proposed legislation in the United States presented above, is in cases where the franchisee and franchiser make joint decisions, which set the terms of employment for the franchisee; **second**, where the franchiser affects the terms of the employees' employment in practice, this through the commercial agreements between the parties in the relationship, which set the terms of the employee's employment, meaning, by dictating the terms of employment by the franchiser. A substantive impact in both aspects could be established also where the franchiser's involvement concerns only some of the work terms, and thus the issues should be examined substantively as a whole.

111. This conclusion, that it is possible to acknowledge one who is not an employer as an employer for the purpose of the Law, is called for also in light of the review we conducted above on the existing difference between various companies regarding the manner of managing the franchise model. This variance requires a specific and careful examination of the manner in which the company and the franchise are managed in practice and it is insufficient to state that a franchise model leads to one or other conclusion in ruling on the questions before us.

112. This may be further evidenced by the variations in the manner in which companies implement the franchise model in their operations. While some companies set a uniform salary or a salary range, others leave the decision to be made by the franchisee; some companies set specific wage components to be granted to employees while others do not; some companies take an active part in hiring employees while others do not, etc. Each of these variables individually and all together may change the conclusion the Court would arrive at in each case, as one component alone cannot affect one or other conclusion, and the entirety of the variables should be examined as a whole.

113. If we take as an example the McDonald's case, which was heard in the United States and which we addresses above, it was *prima facie* indicated that in that case indeed the company had been acknowledged as having a **substantive impact**, and this *inter alia* that since in that case it was found that McDonald's set or at least took part in setting the employees' wages; affected setting the employees' working hours; affected the manner of hiring the employees and even took part in the processes of hiring senior employees at the branches and more. Each of these layers, and all together, indicate that the company has **a substantive impact** on setting the terms of employment of the employees. In my opinion, and in accordance with this test, the matters indicate that McDonald's is the one who should bargain on a collective agreement.

114. The examination of **a substantive impact** is actually derived from the rationale found in the tests set out in the judgments that discussed the question of who is an employer, and its goal is to establish a test that is appropriate for examining the questions before us per the same principles that are customary in labor law. Examination of the employment model through the looking glass of the term '**substantive impact**' aims to determine whether there is, in practice, a relationship of dependence and subordination between the employee and the franchising company, and whether the engagement model is authentic and legitimate, as it is required that both of these aspects would be examined together and in parallel, and a ruling on one aspect alone is not sufficient to rule on the question. In fact, the test is designed to align with the reasoning found in case law, literature, and different legal systems when an answer to this question is required." This test effectively neutralizes the inadequacy of the classic tests to examine the question of who is an employer and adjusts them to such situations.

115. **A substantive impact** could be expressed on all kinds of levels, however in order for one claiming such (and in our case - the Histadrut) to prove that there is indeed **substantive impact**, it is required that the degree of impact is sufficiently substantive, amounting to a situation where bargaining with the employer would be in fact futile and meaningless, as the means of financial control is *de facto* held by another party.

116. To examine this question, we are required to examine the points of contact between the pharmacist and Super Pharm throughout the duration of the pharmacist's employment (including hiring and termination of his employment) at franchisee stores operating under the Super Pharm brand These points of contact are, in fact, the very issues that are typically regulated under collective agreements. Therefore, they are the relevant points for examining this issue.

117. It is important to note that when examining these points of contact and determining whether there is **substantive impact**, a simple arithmetic scheme of these points cannot lead to one or other a conclusion. Each of the points that would be presented may have different weight in the overall examination of the relations between the parties For example, the impact on employee wages may have a broader impact than determining the amount of a holiday gift or setting hiring criteria. In

essence, it is necessary to analyze the interplay between these aspects, with the central issue being whether there exists a critical mass of points indicating **a substantive impact** in setting terms of the employees' employment.

F.1.b. Hiring

118. This phase is actually divided into two parts: The recruitment stage, meaning publication of the position and determination of the requirements for obtaining the position; and the stage of obtaining the position, that is, who makes the decision on hiring the employee.

119. Regarding publication of the position, it appears that the main responsibility rests on the shoulders of the franchisees. The Regional Court ruled that the position postings are made through the company's website, however also by the franchisees '**in local media, through want ads at the stores and other means the franchisee uses** (para. 86a of the judgment). These issues are indicated also by Super Pharm's "Recruitment and Staff Management Procedure" (Appendix 10 to Exhibit 2 of the appeal) (hereinafter: "**Staff Procedure**"), which specifies the manner of publishing pharmacists' positions.

120. However, it should be noted that most of the publications for the positions, also those made by the franchisees, are made using the Super Pharm logo and other identifying symbols of the company, and may be interpreted as positions published by the company itself (Appendix 7 to the party's application filed with the Regional Court).

121. Regarding the threshold requirements for employment, this issue too is mainly regulated under the Staff Procedure. This procedure indicates that Super Pharm requires pharmacists to take a company-mandated test. However, it is important to note that the procedure indicates that the results do not lead to a binary outcome requiring acceptance or rejection of the employee's application for work. In practice, the results fall within a range, providing the franchisee with some leeway in deciding whether to hire the employee.

122. Also pursuant to the factual rulings in the judgment (section 68a of the judgment) the pharmacists are required to pass a test at an external institute the company determines. The results are in fact divided into three categories, according to the company's "Computerized Screening Test" Procedure (Appendix 9 to Exhibit 2 of the statement of appeal): Passing grade - the employee may be hired; borderline grade - the franchisee has discretion after further clarification regarding the candidate; failing grade - the employee cannot be hired.

123. All other aspects are under the franchisee's powers: The work interview is conducted by the franchisee; the employment contract is signed between the employee and the franchisee; the notice to the employee is given by the franchisee and he is registered there as the employer; in the report to the tax authorities, the franchisee is registered as the pharmacist's employer etc. (Appendices A-C to the respondent's

response at the Regional Court)

124. I should note that the outcome could have been different if all publications had been made through platforms under the company's control, whether on the company's website or on social media groups or pages owned by the company The same is true regarding tests and threshold requirements as in our case the bar is flexible. Had there been stricter threshold conditions that effectively dictate who could be hired, it is likely that the outcome would have been different

F.1.c. Setting Salary Terms

125. This issue and the issue immediately following it are at the core of the dispute between the parties and are in fact the main issues concerning the pharmacists' terms of employment. Salary is undoubtedly the most influential factor on the terms of employment of employees, and determining salary levels is a significant factor in determining whether a particular factor affects the terms of an employee's employment.

126. The Regional Court had addressed this issue and ruled that the decision regarding determining the amount of the pharmacists' salaries is in the hands of the franchisees, as the judgment states: "**The main component of wages, the pharmacists' salaries, and the rate of travel fees are determined by the member franchisees, and also requests for raises are decided by them** [the franchisees - V.W.L]."

127. Notwithstanding this assertion, I believe it cannot be stated that the company has no influence whatsoever on determining the terms of the pharmacists' wages. As indicated by the material before us, at the beginning of each year, as part of budget discussions held with each franchisee, the franchisees and the company discuss the annual budget framework for each franchisee Within the budget framework established during these discussions, an annual payroll budget is also determined within which the franchisee may operate, all in accordance with the provisions of the members agreement signed by the franchisees and the company.

128. According to the Histadrut, by determining the budget, Super Pharm has the power in fact to determine the pharmacists' salaries. Indeed, it is clear that the franchisees may determine the pharmacists' salaries only within the framework of the set budget. However, in fact the parties are not in dispute that within the budget framework, the franchisee is empowered to determine the pharmacists' salaries, which are set through negotiations between the pharmacist and the franchisee, as Super Pharm is not a party to the negotiations, and the franchisee is not obligated to consult with or inform the company of the negotiation results or the agreed-upon salary.

129. In fact, the Histadrut itself notes that there are wage gaps among the pharmacists at the various branches and this reason is one of the main reasons for which the pharmacists began the attempted unionization under the Histadrut, as stated in the statement of appeal in the proceedings before us: "**The pharmacists expressed their concerns to Mr. Mahana mainly regarding their employment security in the chain, and described the large salary gaps in pharmacists' salaries between the**

different branches of the chain." (section 27 of the statement of appeal).

130. In other words, while it may indeed be stated that the company has some influence on the determination of pharmacists' salaries, in practice, there are salary gaps between the different branches, that is, between the different franchisees. Therefore, it may be determined that franchisees have control, even significant control over the determination of pharmacists' salaries, and the company's influence in this regard is limited, even if it exists

131. I should note that in order to meet the definition of **a substantive impact** in this regard, it would be expected to see significant control over the level of employees' salaries. For example, if Super Pharm were to dictate to franchisees a specific salary range within which they may set the pharmacists' salaries, it would be sufficient to establish **a substantive impact** in our case. Of course, this is only an example, and I am aware that there are many methods to influence employees' wages, however in our matter this is not the case.

F.1.d Setting Social Terms

132. According to the Histadrut, the company dictates certain components of the pharmacists' salary, so that the franchisees are obliged to pay them. For example, regarding section 14 of the Severance Pay Law, 5723-1963; contributions to a provident fund; night shift addition; granting benefits at the company's branches; and more. The Histadrut notes that payment of these terms is not at the franchisee's discretion, and all that remains at his discretion is the amount of provisions that he would pay.

133. The company and the franchisees argue that the components listed above are merely recommendations, and even if these components are mentioned in the relevant documents as obligatory payments to pharmacists, in practice, these instructions are not enforced, and all of these components are at the franchisee's discretion Additionally, it was argued that other components fall within the franchisee's discretion, such as reimbursement for toll road travel; payment for sick days commencing the first day of illness; vacation day quota, and more.

134. It should be noted that the Regional Court ruled in its judgment as a factual finding that the franchisees are not obligated to pay the aforementioned salary components (section 86d of the judgment), except for two salary components. This is the case regarding full severance pay contributions and provident fund contributions, as the amount of the contributions is at the franchisee's discretion.

135. It does indeed appear that the company has some influence on determining the terms accompanying the pharmacists' salaries, and especially regarding the main components, which are the social provisions that are allocated for employees. However, it is also evident that the franchisee maintains some discretion in determining the contribution rates for these components and providing additional comprehensive conditions that could significantly impact the terms of the employee's employment.

136. To establish that there is **a substantive impact** in this regard, it is required to prove that the weight in determining the terms is in the hands of the franchiser, meaning a ruling that this is the case for both the components and their amounts, even in general terms. It is not sufficient to simply state that a particular component is required to be paid to employees, but rather, it is required to demonstrate a general practice that shifts the center of gravity of impact over to the franchiser. In addition, there is great significance in proving that this practice is actually enforced, which has not been proven in our case and had even been ruled to the contrary at the Regional Court.

137. It's important to place the issues in the right context. The issue at hand is the question of who has the capacity to conduct genuine and effective bargaining for setting the terms of the pharmacists' employment under a collective agreement. It is highly probable that franchisees have the ability to determine the terms of the pharmacists' employment in a manner that indeed allows for collective bargaining on this issue. While it may be argued that the company does indeed have some influence, however a comprehensive examination of the totality of the matters does not change my conclusion that the company does not have **a substantive impact** on determining the terms of the employees' employment.

F.1.e. Mobility of Employees Between Branches

138. As part of the proceedings before us and at the Regional Court, the Histadrut argued that there is a mechanism for transferring employees between different franchisees in cases where there is a temporary shortage of staff at one of the branches. It should be noted that the Regional Court had not ruled on this matter, and therefore I am unable to rule on factual findings based on the evidence presented before the Regional Court. However, as is known, the appellate court may rule on factual findings based on documents submitted in which the trial court has no advantage, and thus, I shall address this issue based on this data alone

139. As may be inferred from the documents in the case, there is indeed an option to transfer an employee in the event of a specific staff shortage, with the employee's consent and agreement, and the parties are not in dispute in this regard. The main dispute on this issue concerns the company's involvement in such transfers. The Histadrut, on its part, argues that in the event of such a shortage, the assessment of whether a one-time employee transfer may be carried out is done through a coordinator on behalf of Super Pharm, while the company and the franchisees argue that in most cases the dialog takes place between branch managers and only in rare cases do the franchisees refer to the company (sections 171-176 of Super Pharm's summary arguments at the Regional Court and the references there).

140. Also, as can be learned from employee pay slips in cases where they were called to fill in a place at another branch, the payment for that shift is made through their regular pay slip, meaning, the payment is made through the pay slip issued by the franchisee who serves as that employee's employer, rather than through the branch at which he performed the work in that event (Appendixes 12-13 of the party's

application). The respondents argue that the payment method is chosen for efficiency reasons, and in practice there is a process of offsetting between the franchisees, so that in fact the payment is made by the franchisee for whom the work was performed (section 82 of respondent 3's summary arguments, sections 171-176 of Super Pharm's summary arguments at the Regional Court).

141. Indeed, this working method and the company's involvement in these cases establish a certain sense of a chain whose branches are owned by the company and managed through central management by the company, this due to both the assistance provided by the company as well as the method of payment to pharmacists for these shifts However, the question arises whether this fact is sufficient for tipping the scales in favor of the conclusion that Super Pharm should be considered to be the pharmacists' employer for the purposes of the Collective Agreements Law, and in my opinion, the answer is no, due to the various indications that Super Pharm does not have a sufficiently **substantive impact** on the terms of the pharmacists' employment.

142. I shall add that this auxiliary test could have been given greater weight in the overall examination had the Histadrut been able to show that there is central management on behalf of Super Pharm that is responsible for carrying out the transfers, or alternatively that the payment method is structured in such a manner that the cost or management of the transfers is imposed on Super Pharm. As aforementioned, the burden of proof to show that the company alleged to be the employer for the purposes of the Collective Agreements Law is imposed on the party making the claim, namely the Histadrut. Although as stated, the evidence presented in the case does establish a *prima facie* impression that Super Pharm has involvement in the issue of transfers, the Histadrut has failed to meet the burden of proof on this issue

F.1.f. <u>Termination of Employment</u>

143. The final issue related to the pharmacist's employment period concerns, in fact, the end of his employment, and specifically where the employer intends to terminate his employment. Regarding this issue, we learn from the material in the case that, in fact, the franchisee has the discretion to terminate the employment of a pharmacist, subject to two main limitations on his discretion in this regard:

143.1. The first regards a senior employee, as according to the Staff Procedure, it is required to **inform** the company in the event that there is an intention to dismiss this employee, this so that the chain would have the possibility to offer that employee to integrate into one of the other franchisees. It should be noted that the chain cannot force the franchisee to employ the candidate for dismissal, however it may propose that the parties engage between them.

143.2. The second limitation concerns the case in which termination of employment of an employee is considered due to a case of suspicion of theft from the employer (section 86 of the judgment). In such a case, the franchisee is required to **consult** with the company regarding continuation of the employee's employment, however in this case, too, the final

discretion regarding continuation of the pharmacist's employment is given to the franchisee.

144. In addition, as ruled in the judgment, the company provides franchisees with a suggested template for a hearing summons letter, however, it has not been proven that franchisees actually use this template, and in any event it cannot be inferred from this that the company has any influence due to this on the mere decision to terminate the employment of a particular employee.

145. In fact, in order to state there is **a substantive impact** on this matter, the Histadrut had been required to show that the company has a direct connection with the processes of termination of employees' employment at franchisees. It is not sufficient to show that the company is informed or consulted with only in exceptional cases. A **substantive impact** would be expressed in the event where the company has an active part in the process of termination of the employee's employment, even if it does not necessarily have the ability to make the final decision regarding the employee's employment.

146. As may be inferred from the foregoing, even if the company has some involvement, as stated only under exceptional and few circumstances, in the process of termination of employment of certain pharmacists, it may be stated that the decision to summon to a hearing and the decision to terminate the employee's employment are within the exclusive discretion of the franchisee. Thus, in my opinion, not only can it not be stated that the company has a **substantive impact** on termination of employees' employment, but rather it is doubtful whether it has any impact at all in this matter.

F.1.g. <u>Other Issues that Arose as Part of the Proceedings</u>

147. During the proceedings, the fact that the company is involved in extending loans to pharmacists came to light. In fact, the parties are not in dispute regarding the fact that the company's involvement in this matter is limited to determining the maximum amount of the loan, while the franchisee is the one who decides whether to extend the loan to the employee and the amount of the loan up to that maximum amount, in accordance with the Staff Procedure. This ruling too had been set as part of the judgment (section 86d of the judgment).

148. Additionally, it was argued that the company provides legal counsel to franchisees in the field of labor law and that franchisees are obligated to report to the company of any attempts of unionization under a labor union at the franchisees (Appendix 14 to the statement of appeal). The Histadrut argues that this demonstrates the company's involvement in labor law matters, in a manner that establishes the company's legal liability in these areas.

149. In my opinion, these issues do not lead to ruling that the company has a **substantive impact** on the terms of pharmacists' employment, since these are two relatively esoteric issues regarding determination of the terms of their employment, and

in any event, the influence of the company on these two issues is indirect and specific. Determining a loan amount ceiling as well as the duty to report in the event of employees unionization, although these establish some dependency of the franchisees on the company, do not grant power or shifts the discretion over to Super Pharm. In both cases, the discretion on how to act towards the employees remains with the franchisees.

F.1.h. **Is There a Substantive Impact?**

150. In light of the foregoing, in my opinion, the appellant had failed to meet the burden of proof to establish that Super Pharm indeed has a **substantive impact** on the terms of pharmacists' employment, in a manner that establishes an obligation for it, as stated in section 33h1(a) of the Collective Agreements Law, to conduct collective bargaining with the Histadrut.

151. As I noted, Super Pharm has an impact in determining the terms of the pharmacists' employment. So, *inter alia*: Super Pharm is involved in publication of pharmacists' positions; Super Pharm sets with the franchisees a budget framework for the pharmacists' salaries; Super Pharm dictates some of the pharmacists' social terms; there is a possibility of temporary mobility of workers among the various franchisees; Super Pharm is involved in some of the processes of pharmacists' dismissal.

152. However, although there is some impact on terms of employment, this impact does not amount to a **substantive impact**: Publication of the positions is mainly conducted by the franchisees; within the framework of the budget the franchisees conduct free negotiations with the pharmacists on their salaries - and it has been proven that the terms of pharmacists' employment differ between one franchisee to another; most of the social terms are at the discretion of the franchisee; as a rule the processes of termination of employment are conducted by the franchisees and at their discretion.

153. To summarize, the following table presents a comparison between the factors indicating the influence of Super Pharm on the terms of employment of the employees, and the factors indicating otherwise:

	Indications of Substantive Impact	**Indications of Non-Existence of Substantive Impact**
Recruitment	Setting standard condition for being hired by Super Pharm; a test prescribed by Super Pharm is required for every pharmacist unless they have previously worked in the chain.	Interviews by the franchisees; advertising a positions by the franchisees; discretion given to the franchisee at a certain level regarding whether to hire one even if he has failed to pass the test.
	Indications of Substantive Impact	**Indications of Non-Existence of Substantive Impact**

External Markers	—	Report to the authorities; pay slips - in the name of the franchisees
Wages	Super Pharm and franchisees collaborate to set the foretasted budget and in this manner the pharmacists salaries are set at the beginning of every year.	The franchisees determine the salary rate and travel fees in negotiations with the pharmacists.
Social Terms	Super Pharm requires: Provisions under section 14 of the Severance Pay Law, an addition for night shifts and an advanced study fund are dictated by the chain, the franchisee has partial discretion regarding the rate of the provisions.	At the discretion of the franchisee: Payment of sick pay commencing the first day; vacation days quota; refund for road 6 payment; the amount of their ancillary terms the franchisee is committed to under the franchisee's control.
Training	The chain conducts professional training for pharmacists approximately once a quarter.	The franchisee bears the cost of training and payment for the work time the pharmacists are entitled to during the training.
Employee mobility	There is a possibility of transferring employees between branches in the event of a lack of staff. Payment of the salary for filling in a vacancy in another branch is made through the pharmacist's usual pay slip.	The process of filling in a vacancy is conducted by the branch managers. Only rarely assistance by a coordinator on behalf of the chain is used. The payment is made through the regular pay slip however the franchisees offset the sums between them. The salary is paid according to the salary rate at the target branch.
Employee Loans	Limiting the sum of loans to employees and setting the terms of the loan.	The franchisee is the one who decides on whether to extend a loan and the sum of the loan .
Termination of Employment	Notice to Super Pharm prior to dismissing a senior employee and in the event of suspected theft.	The decision to summon for a hearing; conducting a hearing; deciding on dismissal – are under the power of the franchisee.

154. I have not lost sight of the appellant's arguments that the nature of the engagement between Super Pharm and the franchisees indicates that Super Pharm has significant control over the terms of the pharmacists' employment. *Inter alia*, the

Histadrut argued that the mere determination of the line of profit and setting various commercial terms by Super Pharm establishes a situation in which in practice the company is the one that affects the terms of the pharmacists' employment.

155. In this regard, and without expressing an opinion on the merits of the matter, I should note that I did not see fit to address the arguments regarding the commercial sections that appear in the agreements between Super Pharm and franchisees. Indeed, it is possible that these sections have some effect on the terms of employment of employees in general, however, I believe it is not possible to consider each commercial section or condition that is set between the parties. While it is true that any section in a commercial contract could potentially affect the terms of employees' employment , however, delving into such questions takes us into theoretical realms that I believe are not appropriate for discussion here.

156. Prior to the conclusion of this matter, I will emphasize that the manner in which the test of a **substantive impact** is implemented in these proceedings regard the specific circumstances of the case and the facts before us, and examination of the question should be conducted in each case on its own merits and in an individual manner relating to the uniqueness of the manner in which the parties entered into franchise relations, this is in light of the great difference that exists between different types of franchises as I have addressed extensively above. My ruling should not be interpreted as precluding acknowledgment of a franchiser as an employer for the purposes of the Collective Agreements Law, but rather that such acknowledgment is contingent upon meeting the test of a **substantive impact** using the auxiliary tests I have outlined, which too do not constitute a closed list.

157. Therefore, as aforementioned, I believe the appellant has failed to prove that Super Pharm has a **substantive impact** on the terms of the pharmacists' employment, and hence the appeal is to be rejected.

F.2. Do the Pharmacists Constitute a Separate Bargaining Unit?

158. In light of the result I have reached on the question of whether Super Pharm should be considered to be the pharmacists' employer for the purpose of the Collective Agreements Law, examination of the question of whether pharmacists constitute a separate bargaining unit among the franchisee's employees becomes redundant, and hence I have found no place for discussing this issue.

G. Before Conclusion

159. After I have written my opinion and before the judgment has been signed, I have read my colleague, Deputy President Judge Ilan Itach's opinion, and the comments of the panel members, and I join and agree with my colleague Judge Hanna Ofek-Ghendler's comments regarding the Deputy President's opinion.

H. Conclusion

160. As I have not found that the company has a substantive impact on determining the terms of employment of pharmacists, I believe that the appeal is to be rejected.

161. As is customary in collective proceedings, there is no order for expenses.

Deputy President Ilan Itah

1. I agree with my colleague President Varda Wirth-Livne that in light of the Regional Court's factual rulings, in which there is no justification to intervene, the appeal is to be rejected as stated in my colleague the President's comprehensive opinion. This, since the Histadrut has failed to prove that respondent 1 should be considered to be an "employer" as defined in section 33(1)(a) of the Collective Agreements Law, 5717-1957 (hereinafter - the Collective Agreements Law). However, my work would not be completed without mentioning the basic concepts whose purpose is to clarify that the outcome of the appeal does not in principle block the possibility of regulating collective labor relations under the model of the type of respondent 1's chain and its branches - respondents 2 and 3, operate (hereinafter jointly: the Chain), given the appropriate circumstances under the Law, whether regarding the entire chain in general or whether part thereof.

2. The proceedings before us actually raise the question of the limits of employees' freedom of unionization, and more precisely, and considering classification of the Hohfeldian rights[i], the question of under what circumstances employees' freedom of unionization and the complementary freedoms - the freedom to collective bargaining and the freedom to conduct unionized action - amount to a right which imposes on the "opposing party" a passive obligation to refrain from interfering in exercising the right, but rather imposes on it also an active obligation to enable it. Dr. Litor's statements are relevant to this matter[ii]:

> **"According to Hofeld's table of rights, there is a distinction between freedom, liberty and right liberty, liberty and right. Freedom does not establish, at the same time, the duty of another person to act. On the other hand, a person's right establishes at the same time also a person's duty to act for exercising the right. Thus, for example, insofar as the right to collective bargaining is a person's right, at the same time it establishes a duty for the employer to negotiate with the employees and join them around the negotiations table."**

3. As is well known, acknowledgment of employees' freedom of unionization is intended to balance the power gaps between labor and capital[iii] by way of "**power *vis-à-vis* power**"[iv], and thus contribute, *inter alia*, to promoting employment under fair terms. In this regard the statements Justice Zamir made in HCJ **Amit**[v]:

> **"The labor laws in Israel express a social concept, which stems from the history of labor relations, regarding the common**

relations and the proper relations between an employee and an employer. According to this concept, the common relations are not equal. The employee, himself, is in a position of weakness toward the employer. The employer may exploit this weakness and impose unfair terms of work on the employee. Such exploitation harms first and foremost the employee, however additionally, it may harm society at large. Thus developed the concept that society is required to act under law in order for the employee to receive fair terms of work . This concept, which was integrated into the welfare state's doctrine, has developed mainly in Europe. It was transferred from there to here, along with the immigrants from European countries to the State of Israel, was adopted by the Histadrut, and upon the establishment of the State, became the backbone of labor laws in Israel. since then up to date."

4. In the context of employees' freedom of unionization I should note that this freedom is not limited to unionization only through a [vi]workers' union. For example, section 2 of the Labor Disputes Resolution Law, 5717-1957 (hereinafter - **LDRL**) which had been enacted along with the Collective Agreements Law, prescribes that a labor dispute is not only one that arose "**between an employer and a workers' union or between an employers' union and an workers' union",** but rather **also one that "arose between an employer and its employees or some of them**...". At the same time, it should be emphasized that it is clear that employees' unionization through workers' unions is given primacy, so that where there is a representing workers' union, as a rule, an opposing collective representation would not be enabled. This primacy is learned both from the logic of the collective system customary in Israel, which emphasizes their importance and benefit - for all relevant parties - of a strong central labor union[vii] and the need for stability in labor relations, as well as from section 3 of the LDRL, which prescribes that "**the parties to a dispute are the employer and the representing labor union, which represents the majority of the employees affected by the dispute, and <u>in the absence of such a labor union-</u> the representation elected by most of these employees, whether in respect of any matter or in the labor dispute in question."** (emphasis added - I.I.)

5. Freedom of unionization does not stand alone, and in order to achieve the goals of balance between labor and capital, complementary freedoms were acknowledged[viii]. First and foremost, the freedom to conduct collective bargaining for regulating the employees' rights and duties.

   In this regard, too, I should note that the freedom to conduct collective bargaining is not limited to signing a collective agreement specifically, including its various benefits, notwithstanding the primacy such regulation of collective rights should be given. This conclusion arises first and foremost from the mere fact that a "labor dispute" is possible also where the employees do not have a "**representing**" workers' union (as I am not

addressing the question of whether it is required that the workers' union be "representing" as the meaning of this expression under the Collective Agreements Law). However also from the provisions of section 2 of the LDRL, where it has been prescribed that as part of the issues defined as a "labor dispute" indeed are listed issues of **"engaging in, renewal of, modification of or cancellation of a collective agreement**", however the following issues are included as well: "**Setting terms of work; hiring a person or not hiring him or termination of his work; setting rights and obligations arising from labor relations**". In other words, the section indicates that a labor dispute could mean collective regulation of the aforementioned issues, even if the regulation had not be set by way of a collective agreement.

6. An additional complementary freedom that has been acknowledged is the freedom to strike. That is, the possibility that employees are granted to conduct a unionized struggle aimed at exerting pressure on the "counterparty" (the employer, and under certain circumstances also third parties, including the sovereign), by coordinated collective deviation from the ordinary performance of work, for obtaining financial demands that would improve the employees' the terms of employment.

7. Over the years, and yet prior to the addition of section 33h1 had been added to the Collective Agreements Law, these freedoms had developed in case law, and had even been acknowledged to be part of the basic rights in Israeli law. *Inter alia*, in respect of them certain duties were imposed on the "counterparty". One of the case law developments, and in our case I shall focus on a certain aspect of the freedom to collective bargaining, concerned turning, under certain circumstances, the freedom to a right in the Hohfeldian sense - meaning, a right *vis-à-vis* which stands the duty of the "counterparty" to conduct collective bargaining[ix]. This was first ruled in the context of workplaces in which collective labor relations had been established following signing a collective agreement, and later - in the **Cinematheque** case, also at workplaces in which the employees had initially unionized under a representing workers' union, which demanded that the employer would conduct negotiations for entering into a collective agreement (hereinafter - **Initial Unionization**)[x]. The aforementioned case law development had even been enshrined in law, upon the enactment of section 33h1(a) under the Collective Agreements Law[xi]. By virtue of the ruling in the Cinematheque case, and section 33h1(a) aforementioned, under certain circumstances the freedom of collective bargaining, according to the Hohfeldian classification, became a right *vis-à-vis* which stands the "counterparty's" duty to conduct collective bargaining with the representing workers' union. Hence, a representing workers' union seeking to conduct negotiations with the "counter-party" regarding issues listed in section 1 of the Collective Agreements Law ("**issues of hiring a person or termination of his work, work terms, labor relations, rights and duties of the unions having the agreement, or some of these issues**"), is entitled to such- in the sense of a right *vis-à-vis* which a duty imposed on the "counter-party" to join it around the negotiations table, and this even if collective labor relations had not yet been established at the work place, meaning, under initial unionization. This duty imposed on the "counterparty" has facilitated to some extent the public of employees seeking to improve the terms of their work, as they had been spared of the need to take collective measures in order to convince

the "counterparty" to conduct negotiations with it.

It should be clarified to complete the picture, that the duty that was set in case law and law to conduct negotiations does not mean an obligation to sign a collective agreement. Hence, sometimes the way there may require a unionized struggle.

8. It should be noted that the case law development of the freedom to collective bargaining into a right *vis-à-vis* which stands the duty of the "counterparty" to conduct negotiations has not encompassed the full range of cases that are included under the freedom to collective bargaining. The circumstances under which freedom has become a right (*vis-à-vis* which stands a duty) has been designated for cases in which there are already collective labor relations with a labor union or for cases of initial unionization, in which the representing labor union seeks to bargain on issues set in section 1 of the Collective Agreements Law. Acknowledgment of the two types of cases aforementioned does not establish a negative arrangement regarding the other cases within the same spectrum, provided that there is no representing labor union (as then such opposing representation would not be enabled). Therefore, the freedom of collective bargaining, which as aforesaid complements the freedom of unionization, exists, for example, also for employees whose initial unionization is not represented by a representing labor union[xii].

9. So far, I have used the term "the counterparty." The rules laid down in case law and in the legislation concerning the above freedoms were established mainly in the traditional labor world – sometimes called the Fordistic model, in which economic activity, among its other characteristics, was directly owned by the counter party – the employer[xiii]. Accordingly, the duty that has been acknowledged in case law and in section 33h1(a) of the Collective Agreements Law was primarily directed at the employer. Over the years, along with the development of complex forms of employment, and in order to enable effective exercise of the employees' freedom of unionization, the recipients of these freedoms included not only the employer, but rather also third parties relevant to the direct labor relations between the employees and the employer. This is since the need for a balance between labor and capital has not ceased to exist, and it may be argued that it is even increasing, as the interaction between labor and capital takes place in a non-traditional employment format, rather than in a complex economic structure that involves, in addition to the direct employer, also a relevant third party. The need for a balance that would ensure fair work terms exists also where the employees are employed through a financial model that involves separate legal entities between which there is a substantive link (hereinafter - **Complex Employment**).

10. As my colleague, the President, noted in her comprehensive opinion, the change of times and the transition to non-traditional employment formats (Fordistic) including multi-layered employment formats, require adjustment of the collective labor law to the changing reality. At the same time, also the need to make adjustments sometimes encounters the law's lack of power In complex employment difficulty arises in legal involvement of the "counter-party" that is not the employer (hereinafter, as referred to

in my colleague the President's opinion - the **Indirect Employer**) with the direct employer in relations *vis-à-vis* the employees, as difficulty also arises in pointing at a legal solution that would enable collaboration of those separate legal entities - the direct employer (and in our case there is more than one) and the indirect employer.

In such complex cases, I believe that the examination outlined by my colleague the President for interpretation of the box "employer" in section 33h1(a) of the Collective Agreements Law, correctly balances the various considerations. This is since that even where there are no grounds for lifting the veil among the various legal entities involved in the complex employment - where the indirect employer (the franchiser) makes with the direct employer (the franchisee) joint decisions regarding the employees of the latter, or where the indirect employer has a substantive impact in practice on the terms of work of the direct employer's employees, for the purposes of collective labor law it would be possible and even justified to consider the indirect employer to be an "employer" for conducting collective bargaining. In such cases, naturally such acknowledgment would reflect the customary reality in which the indirect employer and the direct employer acted regarding the employees of the latter. Had they collaborated on matters relating to the to the employees' terms of employment under a labor relations regime that is not collective, there is no reason to prevent them from continuing to do so under a collective labor relations regime.

11. However, in cases where the indirect employer does not meet the conditions set in my colleague the President's opinion, there is difficulty in brining, in the legal sense, the indirect employer into the direct employer's areas of activity. For this would legally force a change in the state of affairs concerning the collaboration of these legal entities. This would require a change in the conduct of the two and force them to conduct legal collaboration that did not exist before. It is doubtful whether the court has the appropriate tools for its regulation and naturally enforcement of this collaboration. Since the variety of possibilities necessary for such collaboration is extensive, it is preferable to leave the outline of the collective bargaining and regulation on the financial activity level, all or part thereof, to the parties to the labor dispute themselves. While on the one hand the employees' freedom of unionization is maintained, including, and provided that the conditions for this are met, the freedom to engage in a unionized struggle to promote cross-employer collective bargaining, and on the other hand, the freedom of those legal entities is also preserved.

12. Therefore, and without expressing a position on the discussion above regarding the case before us, rejection of the appeal does not block the principled possibility that where the appropriate circumstances in law take place it would be possible to act for regulating collective labor relations in a complex employment format, all or part thereof, in such or other format, including, without limitation in a collective agreement or agreements.

Judge Sigal Davidov Motola

I agree with President Varda Wirth-Livne's extensive opinion, as well as with her

bottom line, according to which there is a principled possibility to acknowledge the franchiser as an "employer" for specific purposes, however, in this case it has not been proven that the company has a sufficiently substantive impact on the terms of the pharmacists' employment in a manner that justifies considering it to be an "employer" for the purpose of section 33h1(a) of the Collective Agreements Law, 5717-1957. I also agree with Deputy President Ilan Itah's comment, according to which the employees' freedom of unionization is broader than the legal duty to conduct collective bargaining, as there is no need for us to address the questions involved in so as part of these proceedings.

Judge Hanna Ofek-Ghendler

I agree with my colleague President Wirth-Livne's comprehensive opinion, including her rulings that where the franchiser has a significant impact on the terms of employment of the various franchisees' employees it may be considered to be an employer for the purpose of the Collective Agreements law, and that under the circumstances of this case such a substantive impact has not been proven. I do not rule out the possibility that there may be certain cases in which franchisee employees may have the possibility of taking unionized measures, however, since this question has not been clarified, I shall not express a position - one way or the other - on the questions involved, and I shall leave ruling on them for the appropriate case.

Judge Ilan Soffer

I join President Varda Wirth-Livne's comprehensive opinion according to which pursuant to the principle of "breaking universality," it is possible to consider one who is not the employee's direct employer, to be an employer for the purpose of specific law, and in our case for the purpose of the Collective Agreements Law. This, where it has been proven that the same entity has a substantive impact on the terms of employment of the employee. In the case at hand, the Histadrut has failed to meet the burden of proof to establish that Super Pharm indeed has a substantive impact on the terms of pharmacists' employment, in a manner that establishes an obligation for it, as stated in section 33h1(a) of the Collective Agreements Law, to conduct collective bargaining with the Histadrut.

Public Representative (Employees) Ms. Haya Shahar

I have read the judgment and I agree with its content and outcome, as well as with the ruling that Super Pharm did not have a significant impact on the terms of the pharmacists employment, and I hereby join the position of all the judges on the panel.

Public Representative (Employers) Mr. Doron Kempler

I agree with President Varda Wirth-Livne's comprehensive opinion, and the manner of its implementation in this case where it has not been proven that the company had a substantive impact on the terms of the pharmacists' employment so that the company could be considered to be an employer for the purpose of section 33h1(a) of the Collective Agreements Law, 5717-1957.

Conclusion

Agreed by all of the panel members, the Histadrut's appeal is rejected, so that Super Pharm is not obligated to engage in collective bargaining in accordance with the provisions of section 33h1(a) of the Collective Agreements Law.

Under the circumstances and as is customary in proceedings of this type - there is no order for expenses.

Handed down today, Elul 13, 5783 (August 30, 2023) in absence of the parties and shall be delivered to them.

Signature Varda Wirth-Livne, President, Presiding Judge	Signature Ilan Itah Deputy President	Signature Sigal Davidov Motola, Judge
Signature Hanna Ghendler-Ofek Judge		Signature Ilan Soffer Judge
Signature Ms. Haya Shahar, Public Representative (Employees)		Signature Mr. Doron Kempler, Public Representative (Employers)

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i. See, for example: FH 2401/95 **Nachmani v. Nachmani**, IsrSC 50(4), 661, 676 (1996).

ii L. Litor, **Strike, Law, History and Politics** (Lamda, 5779-2019, p. 112 (hereinafter: **Litor)**.

iii Hila Shamir, *Unionizing Subcontracted Labor*, 17 **Theoretical Inquiries** 229, 237 (2016) (hereinafter - **Shamir**); HCJ 1181/03 **Bar-Ilan University v. The National Labor Court** (28.4.2011) (hereinafter - **HCJ Bar-Ilan)**.

iv**. Litor**, p. 132.

v. HCJ 7029/95 **The Histadrut - The General Organization of Workers v. The National Labor Court**, IsrSC 51(2) 63 (1997) (hereinafter - **HCJ Amit),** section 25 of his judgment.

vi. The use of the term "workers' union" means a workers' union that could be a representing workers' union as defined in the Collective Agreements Law (see: HCJ **Amit**).

vii. Compare HCJ **Amit**, sections 25 and 27 in Justice Zamir's judgment.

viii. For further information see section 54 of the judgment on the **Pelephone** case: LabCDA (National) 25476-09-12, **The Histadrut - Pelephone Communications Ltd.** (2.1.2013), as well as HCJ **Bar-Ilan**.

ix On the distinction between the format of the right to collective bargaining as freedom and the format as a

right, see: Ben Israel, **Labor Law** (the Open University, 5762-2002), pp. 1079-1080. On the distinction between the format of the right to strike as freedom and its format as a right, see Ben-Israel, Strike and Lockout in the Mirror of Democracy (the Open University, 5763-2003) pp. 121-122.

x For a review see: LabCDA (National) 64/09 **Koach LaOvdim- Democratic Labor Union - Israel Film Archive-Jerusalem Cinematheque Association** (2.7.2009).

xi The Collective Agreements Law (Amendment No. 8), 5769-2009 (Book of Laws 2208).

xii See, for example: LabCD (Tel Aviv) 504/09 **Koach LaOvdim-Democratic Labor Union - The Davidson Institute of Science Education at the Weizmann Institute of Science** (23.3.2009), section 125 of the judgment.

xiii **Shamir**, p. 237.