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COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp No. 46 of 2016

BETWEEN

BAHAMAS INDUSTRIAL MANUFACTURERS AND ALLIED WORKERS UNION

Appellant

AND

MORTON BAHAMAS LIMITED

Respondent

Coram: **The Hon. Mr. Justice Sir Hartman Longley, P**
The Hon. Mr. Justice Jon Isaacs, JA
The Hon. Mr. Justice Sir Michael Barnett, JA (Actg.)

Appearances: **Mr. Obie Ferguson, Counsel for the Appellant**
Mr. Oscar Johnson Jr with Mr. Audley Hanna, Counsel for the Respondent

Dates: **7 February 2018; 28 February 2018**

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Civil Appeal – Labour Law – Employment Law - Industrial Tribunal – Time Off – Day Worker – Shift Worker – Double Time – Overtime – Work Week – Contract – Terms – Unilateral Change – Employment Act, Ch. 321A

The Respondent and the Appellant were parties to an Industrial Agreement which covered the period 1 June, 2002 to 20 September, 2005. In July 2002 the Respondent notified its maintenance employees that, in accordance with the Industrial Agreement, their work schedule would be adjusted. In response to this adjustment the appellant indicated that it viewed the adjustment of the work schedule as a unilateral variation of the contract of employment of its relevant members and therefore unenforceable. The adjustment went into effect. Subsequently, in 2008, the appellant queried overtime payments earned by certain of its members between July, 2002 and October, 2005. Unable to arrive at an agreement on both issues the matter was referred to the Industrial Tribunal for determination.

Held:- appeal dismissed, no order for costs

per Barnett, JA (Actg.)

Under section 10 of the Employment Act double time is only required to be paid where an employee is required to work on a public holiday or his statutory day off under section 9. If an employee is otherwise

required to work over the standard hours, that employee is only entitled to be paid at the rate of one and a half times his rate of pay. It is common ground that the employees in question with respect to overtime pay fell into the category of "day or shift workers". In the result they were only entitled to double time if they worked on a Sunday. They clearly were not entitled to double time if they worked on a Saturday.

Article 32.3 of the Industrial Agreement expressly gives Morton the right to alter or extend existing shift arrangements. All Morton was required to do was to consult with the Union prior to implementing such a change. The Tribunal has found that Morton did consult with the Union and that finding by the tribunal has not been challenged on this appeal. Article 32.3 clearly reserves to Morton the right to unilaterally "alter or extend existing shift Working Arrangements". Article 4.8 does not in any way modify this contractual right given to Morton. In any event, there is no evidence that existing terms were better than the altered terms. The fact that they may be altered or modified does not without more make them less favourable than the terms that existed before alteration.

The other grounds set out in the Amended Notice of Appeal were all reformulations of grounds 1 and 2. Dealing with them generally, it is our judgment that the Tribunal was entitled to accept the evidence of Mr. Bannister that some of the workers did not show up for work. Indeed, given that there was an industrial dispute with the employees that finding appears to be perfectly reasonable. The claim that the Minister had to play a role before Morton could change the standard hours from 8 to 12 is not sustainable. Morton clearly falls within the definition of an "industrial, construction, manufacturing or transshipment enterprise". It has a statutory right to provide that the standard hours of work in any one day be up to 12 hours. It did not require Ministerial intervention to do so.

Wandsworth London Borough Council v D'Silva [1998] IRLR 193 mentioned

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REASONS

Decision delivered by The Honourable Sir. Michael Barnett, JA (Actg.)

1. This is an appeal by the Bahamas Industrial Manufacturing & Allied Workers Union ("the Union") against a decision by the Industrial Tribunal in a dispute that the Union has with Morton Bahamas Limited ("Morton").

2. At the conclusion of the hearing we dismissed the appeal and agreed to set out or reasons in writing. This we now do.

3. The Union was in a trade dispute with Morton over a number of issues. However, the Union and Morton agreed to submit only two issues to the Tribunal for determination namely the payment of overtime and the ability of Morton to unilaterally change the schedule of workers. This

agreement is noted in paragraph 4 of the Decision by the Tribunal delivered on the 19th February, 2016.

4. Morton is a company carrying on the business of the harvesting and manufacturing of salt on the island of Inagua. The Union is the recognized bargaining agent for the non-managerial employees at Morton.

5. As to the issue of the payment of overtime, it was the position of the Union that where employees are scheduled to work on a five day work week, Monday through Friday they are entitled to overtime pay equivalent to twice the rate of pay for any time that they were required to work on either the Saturday or Sunday. I set out the argument of the Union in full:

> **'8. The learned Vice President erred in Law in failing to recognize that the employees are given a statutory 2 days off per week and any of those days worked they are entitled to double time for the actual hours worked, as mandated by section 10 (a) of the Employment Act which says:**
>
> **"In the case of overtime work performed on any public holiday or day off, twice his regular rate of wages".**
>
> **9. Both the Employment Act and Article 31.3 of the industrial agreement mandate that overtime pay on Public Holiday and rostered day off shall be paid at the rate of double time for the hours actually worked and straight time for the public holiday or day off. The learned Vice President failed to recognize that fact and as a consequence he fell in error in not making that finding.'**

6. The Industrial Tribunal rejected that claim.

7. Sections 9 and 10 of the Employment Act provide:

> **9. In every seven-day period, an employer shall allow each employee at least forty-eight hours of rest with not less than twenty-four of such hours being consecutive and a period of twenty-four hours rest is in this Act referred to as a day off.**
>
> **10. Where an employee is required or permitted to work in excess of the standard hours of work, he shall be paid in respect of such work at a rate of wages not less than —**
>
> **(a) in the case of overtime work performed on any public holiday or day off, twice his regular rate of wages;**

(b) in any other case, one and one-half times his regular rate of wages:

Provided that an employee in a tipped category in the tourism and hospitality industry shall be paid at his regular rate of pay other than in respect of his second day off in any week, and any wages paid or to be paid as required by this section are in this Act referred to as overtime pay.

8. The Tribunal held that employees were only required to be paid double time for the mandatory twenty-four consecutive required by section 9 of the Employment Act.

9. We agree with the Tribunal.

10. Under section 10 of the Employment Act double time is only required to be paid where an employee is required to work on a public holiday or his statutory day off under section 9. If an employee is otherwise required to work over the standard hours, that employee is only entitled to be paid at the rate of one and a half times his rate of pay. This has recently been confirmed by this court in McIntosh et al v Freeport Container Port Limited No 161 of 2011. In that case a similar argument was made that workers were entitled to double pay if they worked at any time within the 48 hour break required by section 9 of the Employment Act. The court said:

> **"11. Section 9 bestows the entitlement of "a day off" to an employee, and prescribes the requisite period of time within which it is to take place. Section 10 merely indicates the rate of pay to which an employee is entitled when he works on his day off. The two sections import different ideas, which, in these circumstances do not necessitate the former to be read in light of the latter.**
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> **12. Moreover, it could not be said that section 10 "defines" "a day off". "A day off" is defined in section 9, which stipulates what is to constitute "a day off". In light of this, it was only section 9 which applied in determining the question of legality.**
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> **13. Notwithstanding, we agreed that the employees would be entitled to double time if they were required to work during those 24 hour rest periods, in between shifts. However, the evidence relied on by Mr. Lopez failed to support his contention that Mr. Wilson, as an example, worked during any of the 24 hour rest periods between shifts in 2008. <u>The workers got one day off, and then a 24 hour rest period between the end of one shift and the beginning of another shift. Hence, the 48 hour mandatory rest period required by s.9, was satisfied as concluded by Gray-Evans J.</u> We did not agree that any of**

the appellants' rights were violated, as there were no breaches in respect of section 9 by the respondent. In our view, the evidence was insufficient, and did not prove that the 4 Gang Shift Pattern violated the Employment Act."

11. The Union also relied upon Article 31.3 of the Industrial Agreement. It reads:

> **"31.3 After eight (8) hours actually worked in a day or forty (40) hours actually worked in a week, employees should be paid overtime at a rate of time and one-half. Day and Shift Workers working on Sunday shall be paid at the rate of double time for the hours actually worked on Sunday, other workers who work Sunday as a regular day of their schedule shall not be paid double time for Sunday, but will be paid double time for the hours actually worked on their rostered day off."**

12. It is common ground that the employees in question with respect to overtime pay fell into the category of "day or shift workers". In the result they were only entitled to double time if they worked on a Sunday. They clearly were not entitled to double time if they worked on a Saturday, as the Union has submitted.

13. In the result the first ground failed.

14. The second issue raised related to Morton's ability to unilaterally vary the work schedule of employees. I set out the Union's submission on this ground:

> **"10. The 24 maintenance personnel mentioned in the General Manager's letter dated July 26th, 2002 Tab 2, page 13 of the Record of Appeal were working Monday to Friday in some instances 29 years and over. Article 4.8 of the Industrial Agreement says:**
>
> **'Any employee enjoying better terms and conditions other than those expressly provided for in this agreement are exempted from change provided that the conditions do not violate the Law'**
>
> **11.We submit that any change from Monday to Friday after some 29 years enjoying that, benefit must be agreed between the Union, the Employees and the Employer after which the change can only take effect once it is registered as mandated by S.52 of the Industrial Relations Act. The Respondent did not register the Unilateral Amendment of the workers shift from Monday to Friday which it is mandated to do by Law."**

15. This is not tenable.

16. Article 32.3 of the Industrial Agreement provides:

> **"It is recognized and agreed by the Union that it may be necessary for the Company at any time to alter or extend existing Shift Working Arrangements and hours of work of any group of employees. When the Company considers it appropriate to introduce wholly new shift Working Arrangements, consultation will take place between the Union and the Company."**

17. This provision expressly gives Morton the right to alter or extend existing shift arrangements. All Morton was required to do was to consult with the Union prior to implementing such a change. The Tribunal has found that Morton did consult with the Union and that finding by the Tribunal has not been challenged on this appeal.

18. In **Wandsworth London Borough Council v D'Silva [1998] IRLR 193** Lord Woolf at paragraph 31 said:

> **"The general position is that contracts of employment can only be varied by agreement. However, in the employment field an employer or for that matter an employee can reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party as part of the contract that this is the situation. However, clear language is required to reserve to one party an unusual power of this sort."**

19. It is our view that Article 32.3 clearly reserves to Morton this right to unilaterally "alter or extend existing shift Working Arrangements". Article 4.8 does not in any way modify this contractual right given to Morton. In any event, there is no evidence that existing terms were better than the altered terms. The fact that they may be altered or modified does not without more make them less favourable than the terms that existed before alteration. For those reasons ground two is also rejected.

20. The other grounds set out in the Amended Notice of Appeal were all reformulations of grounds 1 and 2. Dealing with them generally, it is our judgment that the Tribunal was entitled to accept the evidence of Mr. Bannister that some of the workers did not show up for work. Indeed, given that there was an industrial dispute with the employees that finding appears to be perfectly reasonable.

21. The claim that the Minister had to play a role before Morton could change the standard hours from 8 to 12 is not sustainable. Section 8(3) of the Employment Act provides:

> **"(3) Notwithstanding subsection (1), in any industrial, construction, manufacturing or transshipment enterprise or in any essential service within the meaning of section 72(2) of the Industrial Relations Act or law enforcement service the hours of employment of an employee for the purposes of such employment may exceed the standard hours of work in a day up to a maximum of twelve hours and the Minister may by Order include other enterprises or services within this subsection as he deems fit."**

22. Morton clearly falls within the definition of an "industrial, construction, manufacturing or transshipment enterprise". It has a statutory right to provide that the standard hours of work in any one day be up to 12 hours. It did not require Ministerial intervention to do so.

23. An industrial agreement is a contract. It is an employment contract. The Tribunal is entitled nay obliged to construe it in accordance with common law principles of contract law. The fact that it is given force by statute does not affect the way that the Tribunal must construe it. It is still an agreement. It is still a contract.

24. For these reasons we dismissed the appeal.

The Honourable Mr. Justice Sir Michael Barnett, JA (Actg.)

25. I agree.

The Honourable Mr. Justice Sir Hartman Longley, P

26. I also agree.

The Honourable Mr. Justice Jon Isaacs, JA