COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 161 of 2011

B E T W E E N

(1) LAWRENCE MCINTOSH
(2) DENNIS ROLLE
(3) LAVARD WILSON
(4) CLINTON ROLLE
(5) DREXELL RUSSELL
(6) JENESE PINDER
(7) CLINT KNOWLES
(8) JOHN ROLLE
(9) KEVIN SOLOMON
(10) DYSON SMITH
(11) ROBERT SWAIN
(12) KENYATTA LEWIS
(13) MAX POITIER
(14) ELVIS RILEY
(15) BRADLEY FRITZ
(16) DEREK DELANCY
(17) LYNDEN GARDINER
(18) HENRY PINTARD
(19) RAY GIBSON
(20) STEPHEN CURTIS
(21) ANNASTACIA BECKLES
(22) ELKENO BOWLEG
(23) ANDREW CLARKE

Appellants

AND

FREEPORT CONTAINER PORT LIMITED

Respondent

BEFORE: **The Honourable Dame Anita Allen, P**
The Honourable Mr. Justice Conteh, JA
The Honourable Mr. Justice Adderley, JA

APPEARANCES: **Mr. Alonzo Lopez, Counsel for the Appellants**
Mr. Robert Adams, with Mr. Dwayne Fernander, Counsel for Respondent

DATES: **9 January 2014; 16 January 2014; 25 March 2014; 20 December 2017**

Civil appeal – Employment law – Employee contract – Overtime – Days off – 48 hours of rest in every 7 day period - Section 9 of the Employment Act

The respondent company operates business 24 hours per day, 7 days per week and therefore placed their full-time employees on a shift pattern and divided them up into 4 Gangs. Each gang was allowed two or three days off at the end of each seven day week. The issue for determination in the court below was whether the 4 Gang shift pattern contravened the respondent's statutory obligation to allow each employee 48 hours of rest in every seven day period. The judge found that the system did not contravene section 9 of the Employment Act (the Act) and was not illegal nor was it in breach of the employees' employment contracts. The employees, aggrieved by the decision, appealed the judge's decision.

Held: appeal dismissed. No order as to costs.

Section 9 of the Act provides that in every seven day period an employer shall allow each employee at least forty-eight hours of rest with not less than 24 of such hours being consecutive.

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 section 9, was satisfied as concluded by the learned judge. 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.

REASONS FOR DECISION

Judgment delivered by the Honourable Dame Anita Allen, P:

1. This was an appeal from the decision of the Honourable Justice Estelle Gray Evans delivered on 9 May 2011, where she held that the 4 Gang Shift Pattern, implemented by the Defendant/Respondent did not contravene section 9 of the Employment Act and was not illegal nor in breach of the plaintiffs' employment contracts. The basis for the judge's decision was that the 48 hour rest period, as mandated by section 9 of the Employment Act was satisfied in that the employers gave at least one day off after every seven-day work period, as well as periods of 24 hour rest between the end of one shift and the beginning of another, within those seven days.

2. On 25 March 2015, the Court unanimously dismissed the appeal, and upheld the decision of Gray-Evans J. We promised to deliver our reasons, and do so now.

Background

3. The Respondent is a container transshipment company in Freeport, Grand Bahama, conducting its operations 24 hours per day, seven days per week. Between October 2001 and January 2009, the Respondent utilized a shift pattern for its full time employees, whereunder the employees were divided into 4 Gangs: Gangs "A", "B", "C" and "D", and were required to work varying shift hours for seven consecutive days. They were allowed two or three days off at the end of the seven days. Each gang had a designated pattern of work, and shifts were organized in terms of day "D" (8am – 4pm); evening "E" (4pm – 12am); and night shifts "N" (12am – 8am). The employee's off days were signified by an "O" in the schedule. Hence, a shift pattern for a gang in a fourteen day period could appear as "O, O, D, D, E, E, E, N, N, N, O, O, D, D".

4. The trial court Judge considered the issue of whether the 4 Gang Shift Pattern contravened the defendant's mandatory statutory obligation to allow each employee at least 48 hours of rest in every 7-day period in the manner prescribed under section 9 of the Employment Act, 2001. She therefore construed the meaning of "every seven day period" under section 9. In her judgement, Gray-Evans J. stated:

> **"42. I am therefore of the view that in relation to shift workers using the 4-Gang Shift Pattern, the start of every seven-day period is, as the plaintiffs contend, variable, in that it begins to run at the time that each Gang is scheduled to begin its shift pattern after a day off, identified as "O" in the pattern. In this regard I accept Mr. Lopez's submission on behalf of the plaintiffs that as the Act does not specify when the seven day period should begin, the onus is on the employer to ensure that there is no period in which the employee is scheduled to work seven consecutive days without the mandatory 48 hours of rest."**

Gray-Evans J. then noted,

> **"46. ... in light of my finding as to the meaning of "every seven day period at paragraph 43 above, that on its face the 4-Gang Shift Pattern roster does not allow the employee at least one day off, represented by an "O" in those seven-day periods.**
>
> **47. However, I note on a closer examination of the roster, that there are, in fact two periods of 24 consecutive hours of rest allowed within the apparent seven consecutive days in the shift pattern..."**

5. She explained that one period was rostered right before the first day of work, identified by an "O", and the other period began when an employee completed a shift at 4pm and was not required to return to work until 4pm the following day. Gray-Evans J. further stated:

> **"49. So, it appears that whether applying the meaning of "every seven day period" contended by the plaintiffs or that contended by the defendant, workers affected by the 4-Gang Shift Pattern utilized by the defendant during the relevant period were afforded the requisite mandatory 48 hours of rest in every seven day period"**
> **"I therefore find that the 4-Gang Shift Pattern does not contravene section 9 of the Act and is not illegal.**
>
> **50. Consequently, I am unable to find that the defendant has breached the contracts of employment of the plaintiffs by requiring them to work eight hours per day for seven consecutive days without the requisite hours of rest."**
>
> **51. I note here that even if I had found for the plaintiffs that the 4-Gang Shift pattern was in contravention of the Employment Act, 2001, or if I am wrong in my conclusion that it does not, the plaintiffs provided no evidence of their work hours on their alleged "days off" in respect of which they say they were not compensated at twice their normal hourly rate of pay.**
>
> **In the result I dismiss the originating summons….."**

The Appeal

6. By Notice of Appeal filed on 4 November 2011, the appellants challenged the decision of the judge on 17 grounds. However, in the grounds of appeal for the appellants and before us, it was stated that there were only two real issues to be decided, namely:

> i) whether there was sufficient evidence to find that the Respondent's 4 Gang Shift Pattern for its workers between October 2001 and 1 January 2009 violated the Employment Act, 2011; and
>
> ii) whether the court had the power to make an Order requiring the matter to be sent to the Registrar for an assessment as requested in paragraphs 4 and 5 of the prayer for relief.

7. As to the first issue, section 9 of the Employment Act provides that:

> **"In every seven day period, an employer shall allow each employee at least forty eight hours of rest with not less than 24 of such hours being consecutive and a period of twenty-four hours rest is in this Act referred to as a day off."**

8. Section 10(a) provides:

> **"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."**

9. It was argued for the appellants that the trial judge erred when she confined the issue of legality to the interpretation of s.9 and failed to consider the Act as a whole. Mr. Lopez said that s.9 was to be interpreted in light of s. 10(a), which defined a "day off" as payable by double time. Counsel further argued, that the 24 hour interstitial periods between shifts should have appeared on the schedule as off days, represented by an "O", and that since they were not, none of the 24 hour rest periods in between shifts, could constitute a rest period that was in conformity with the Act. According to Mr. Lopez, the fact that it was not represented on the schedule as a designated off day, had the effect of limiting the overtime rate of pay to time and a half rather than double time. He argued that after 5 days of work (40 hours), any period that was scheduled as a work period should have been scheduled as an "O", and paid double time because it exceeded the standard hours of work. Counsel submitted that these practices were in violation of the employees' rights.

10. Mr. Lopez sought to rely on the evidence of Mr. Lavard Wilson, whose time cards and pay sheets for 2008 were exhibited by the respondents. At trial, he contended that there were instances where the appellants worked during their 24 hour rest periods in between shifts, but were not paid the requisite double time, which is payable when an employee works on a day off. However, Mr. Adams, in taking the court through the evidence, demonstrated that Mr. Wilson's work hours, as recorded in the time sheet, were consistent with the shift pattern of members of Gang D, and evidenced no occasions where he worked during any of the 24 hour off periods.

11. Having regard to Mr. Lopez's submissions, in light of the relevant provisions of the Employment Act, we saw no reason for interpreting section 9, in light of section 10. 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.

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.

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. 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. 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.

14. The question also arose as to whether Section 8(2) of the Employment Act, applied in the current matter, where the nature of the employment required persons to work irregular hours. Section 8(1) provides that employees are not to work in excess of 8 hours per day, or 40 hours per week without being paid for overtime. Section 8(2) states that:

> **"Notwithstanding subsection (1), where by reason of the nature of any employment the hours of any employee for the purposes of such employment are required to be irregular, the standard hours of work in a day or week of any such employee may be calculated as an average over a period not exceeding four weeks"**

15. Section 8(3) provides that notwithstanding subsection (1), the hours of work in, inter alia, a transshipment enterprise may exceed the standard hours, up to a maximum of 12 hours.

16. On this point it was argued by Mr. Lopez, and we agreed, that the appellants did not work irregular hours, but a set 8 hours on each shift. The evidence was that the workers were required to report to work for eight hour shifts, on seven consecutive days, and that this had been the practice for 8 years. An irregular pattern is seen in a job operation that requires employees to work, for example, three hours today, four hours tomorrow, and ten hours another day.

17. As to the second issue, Mr. Lopez stated in his grounds of appeal that the evidence submitted by the defendants in respect of Mr. Lavard Wilson (his Work Schedule, Master Sheet, and Time Control Card), for 2008 could be taken to illustrate that if Mr. Wilson was properly paid, then on a balance of probabilities the other workers were paid

properly. Likewise, if he was not properly paid, then they were not properly paid. He argued that the trial judge was wrong to consider the defence raised in respect of this issue, that the appellants were paid for the hours worked, and that a question seeking adjudication on an employee's entitlement to overtime pay for periods where they may or may not have worked was not to be considered.

18. He submitted that if this Court found that the trial judge erred, then an Order for assessment of damages should be made in respect of all of the appellants. Mr. Lopez argued that it was not necessary to produce evidence before the trial judge in respect of this issue, because the matter should have been referred to the Registrar for assessment, where the evidence would then have been properly supplied. He said that fresh evidence is supplied to the Registrar each time a matter goes there. He also contended that at best, the court could have referred the matter in relation to Mr. Wilson to the Registrar.

19. Mr. Lopez also relied on Order 37(1)(b) of the Rules of the Supreme Court, 1978 in advancing his argument that the learned judge should have referred the matter for assessment before the Registrar. Order 37(1)(b) states, so far as is relevant, that:

> **"Where judgment is given by the Court for damages to be assessed and in the judgment-**
>
> > **(b) no provision is made as to how the damages are to be assessed**
>
> **the damages shall, subject to the provisions of this Order be assessed by the Registrar..."**

20. It was noted, that under this rule a matter can only be remitted for assessment where the judge has made a determination as to liability. In the current situation, apart from the time card and pay sheet for Mr. Wilson, the appellants submitted no evidence in respect of the other plaintiffs. There was not even a calculation for the period for which the claim was being made for overtime, as was promised in Mr. Lopez's submissions. The learned judge could not refer the matter for assessment because the evidence did not show that the appellants in fact worked during those periods for which it had been established that they would have been entitled to double time.

21. A judge who is determining liability has a discretion as to whether he will refer a matter to the Registrar for assessment. The discretion could only be exercised if the court found in favour of the plaintiffs, but in this case she did not.

22. Further, the appellants could only have expected an award on quantum to be made in respect of Mr. Wilson, had the court decided in favour of the appellants.

23. For us to apply our sub-rule and refer the matter for assessment, the appellants would have to show why the trial judge was wrong in her decision. Here they have failed to do

that. Therefore, we found that while the court had power to make an Order requiring the matter to be sent to the Registrar for an assessment, she could not for the lack of evidence. The judge's decision in respect of assessment was therefore upheld, and the appellant's request for an Order was denied.

24. For the foregoing reasons, the appeal was dismissed. No order was made as to costs.

The Honourable Dame Anita Allen, P

The Honourable Mr. Justice Conteh, JA

The Honourable Mr. Justice Adderley, JA