

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMERCIAL DIVISION
2010/COM/lab/00001

BETWEEN

LAWRENCE MCINTOSH	GIOVANNI GIBSON	RAY GIBSON
LAVARD WILSON	ANDREW SMITH	TIMAYNE JOHNSON
SYLVESTER KNOWLES	PATRICK TAYLOR	JAMENE ARMBRISTER
TREVOR ROLLE	KEN STUBBS	STEVE BOWE
GODFREY HALL	ANTHONY ROLLE	EDWARD ARMBRISTER
LESLIE GRAY	CARDINAL ROBERTS	TRAVIS DEAN
PRINCE BRICE	SWEYN CAMPBELL	ALFRED H. SYMONETTE
JEFFREY SMITH	DONALD HIGGS	STEPHEN CURTIS SR.
RANDOLPH FARRINGTON	LEONARD WILLIAMS	VINCENT HENFIELD
FLINT BETHEL	DYSON SMITH	TREVOR RUSSELL
PATRICK ROLLE	WILLIAM MCGILLION	SHONEL WILLIAMSON
CLINTWOOD ROLLE	FREDERICK BULLARD	DAVID ROBERTS
CARLTON MCINTOSH	DESIMON HIGGS	ANASTACIA BECKLES
VAUGH SAUNDERS	ROBERT SWAIN	ELKENO BOWLEG
KENDRICK FORBES	DEVLIN LEWIS	SAMANTHA GIBSON
TROY ROLLE	JEROME MUNROE	PATRICE MCPHEE
STACEY PINDER	KENYATTA LEWIS	MONIQUE SEARS
DREXEL RUSSELL	SONNY FLENELUS	JARRID SAUNDERS
PETE MOXEY	ELVIS RILEY	SYLVESTER KNOWLES
JENESE PINDER	MAX POITIER	*JEROME HALEY
ANTHONY FOWLER	STEVE MEADOWS	MIKE CAREY

CLINT KNOWLES	PETER HALL	ALEX MAJOR
JOHN ROLLE	YORIC LOWE	BRIAN WILLIAMS
DAVID RODGERS	DENNIS ROLLE	RALPH WILLIAMS
KEITH ANDERSON	BRADLEY FRITZ	JAMAAL CLEARE
PATRICK SMITH	DEREK DELANCY	MARLIN FERGUSON
BRUCE WATSON	RINALDO J. ROLLE	KEITH DUNCOMBE
*JEROME HALEY	KELCIE BURNSIDE	RUDOLPH MUSGROVE
KEVIN SOLOMON	SERGIO ARMALY	STEPHEN MEADOWS
MICHAEL RILEY	SALATHIEL MCBRIDE	ANDREW CLARKE
HUBERT STUART	RAYMOND CAMPBELL	JASON DARVILLE
JAMAL LIGHTBOURNE	DEON RODGERS	PAUL FERRETTE
MARVIN BROWN	LYNDEN GARDINER	NATHAN PEARSON
DECARLO ROLLE	RON MARSHALL	LEONARDO CHARLES
ALFRED BASTIAN	HENRY PINTARD	JERVIS JOHNSON
THOMAS CURRY	MICHAEL GUILLORY	GENO JONES
BERNARD HANNA	FLOYD DELANCY	ELON ANDERSON
BRENVILLE MARSH	WANDEL SIMMS	STANLEY LOWE

Plaintiffs

AND

FREEPORT CONTAINER PORT LIMITED

Defendants

BEFORE The Honourable Mrs Justice Estelle G. Gray Evans

APPEARANCES: Mr Alonzo Lopez for the plaintiffs

Mr Robert K. Adams and Mr Dwayne Fernander
for the defendants

8 July 2010; 8 November 2010; 9 May 2011

JUDGMENT

Gray Evans, J.

1. The plaintiffs, all of whom are, or were at various times during the period 15 October 2001 to January 2009 (“the relevant period”) full-time employees of the defendant as part of four gangs of shift workers referred to as Gangs “A”, “B”, “C” and “D”, say that by virtue of the 4 Gang Shift Pattern utilized by the defendant during the relevant period, they were required by the defendant to work seven “straight” days without the mandatory hours of rest or the appropriate compensation for overtime.

2. By an Originating Summons filed on 12 January 2010 the plaintiffs now seek a determination of the questions as well as the relief set out hereunder:

- (1) Whether the 4 Gang Shift Pattern 2008 of the Freeport Container Port Limited used between October 2001 and January 2009 by the defendant company for the full time employees is illegal or not?
- (2) Whether the overtime hours worked by the full time employees of the Freeport Container Port Ltd. under the 4 Gang Shift Pattern 2008 are to be paid at double time for the day off?
- (3) A determination that the defendant breached the contracts of employment of the plaintiffs and each of them by requiring them to work eight hours per day (8 hrs/day) for seven consecutive days without a day off?
- (4) An Order that the defendant do pay the plaintiffs and each of them unpaid overtime wages for the overtime hours worked under the 4 Gang Pattern 2008 the quantum of wages to be assessed as part of the damages owed to each plaintiff;
- (5) An order that the defendant do pay each of the plaintiffs damages for breach of contract such damages to be assessed;
- (6) Interest, costs and such further or other relief as the Court deems just.

3. This is not a representative action. However, there are one hundred and fourteen (114) named plaintiffs and they rely on the affidavit of the first-named plaintiff, Lawrence McIntosh, filed on 12 January 2010, in support of the originating summons.

4. According to his affidavit, Mr McIntosh was formerly employed by the defendant as a Straddle Operator. He commenced such employment in August 1999 but he does not say when such employment ceased. However, according to the defendant's witness, he was dismissed from the defendant's employ on 23 June 2004.

5. The plaintiffs also rely on the documents exhibited to the affidavit of Marvin Hudson, one of the defendant's witnesses.

6. In his said affidavit, the contents of which he alleges are true and correct to the best of his knowledge, the first-named plaintiff deposes that he along with the other plaintiffs were at some point during the relevant period in full-time employment with the defendant; that he began working with the defendant in August 1999 at which time he was "put to work on a 12-hour shift each day." He continues with the following averments at paragraphs 4 through 11 of his affidavit:

- (4) In October 2001 the defendant unilaterally changed its shift pattern of work for its permanent full time employees requiring them including me (who are all in one of four groups called Gangs A, B, C and D) "to work seven straight days without a day off and without overtime unless the hours worked were in excess of eight hours in one day." As evidence of that, the first-named plaintiff exhibits a copy of the 4-Gang Shift Pattern 2008 roster to his affidavit.
- (5) The aforesaid illegal work pattern continued until 1 January 2009 when the present system was implemented in line with the law.
- (6) The terms of the contract of the employees of the defendant company are all subject to the Employment Act which requires them to have a day off meaning 24 consecutive hours of rest must be given to the workers.
- (7) Further, the terms of the contract contained an implied term under the Employment Act that where the worker was employed for eight hours then he would have sixteen hours of rest during that day of work; and where he was on a twelve hour shift he would have twelve hours of rest for that day.
- (8) The employees have been on an eight hour shift from October 2001 and have consequently been entitled to sixteen hours of rest in every work day.
- (9) The employee is by the terms of his contract entitled to work forty hours in the work week so that there is required to be two days off in every seven days when the shift is for eight hours.
- (10) The Employment Act requires the employer to pay double time for overtime worked on a day off and as workers were not given this extra day off in the standard hours of work the defendant has breached the work contracts of the plaintiffs based on the Act.
- (11) Further, workers are only paid for the time actually worked and consequently there is no pay for the day off; neither me nor any of

the plaintiffs have received pay for the day off between October 2001 and January 2009.

Exhibited to the first-named plaintiff's affidavit is a copy of the 4-Gang Shift Pattern 2008 schedule.

7. The defendant's evidence in opposition to the plaintiffs' application was provided by Lucian Laing and Marvin Hudson in their respective affidavits filed on 29 October 2010.

8. Messrs. Laing and Hudson are former Labor Coordinators in the defendant's Operations Department. Mr Laing held that position during the period March 1999 to December 2001 and Mr Hudson during the period January 2002 to June 2008. At the date of their respective affidavits Mr Laing was the defendant's Terminal Operations Manager and Mr Hudson was the defendant's Terminal Coordinator.

9. The defendant admits that the 4-Gang Shift Pattern was implemented in October 2001. However, the defendant denies that the plaintiffs were required to work "seven straight days without a day off and without overtime pay unless the hours worked were in excess of eight hours in a day."

10. The defendant contends that over a 4-week period, the aforesaid 4-Gang Shift Pattern gave the employees concerned two calendar days off each week save for one week in which they were entitled to one calendar day off. Further, Mr Laing, for the defendant, avers that "the 4-Gang Shift Pattern did not require any of the plaintiffs to work every day in a week", while Mr Hudson's evidence is that "employees to whom the 4-Gang Shift Pattern applied were never required by that shift pattern to work 7 days straight without a day off."

11. As evidence of that Mr Hudson exhibited 4-Gang Shift Pattern rosters for the period January 2002 to December 2008, samples of which for a 15-day period are shown below:

2002	Mo	Tue	We	Th	Fr	Sa	Su	Mo	Tu	We	Th	Fr	Sa	Su	Mo
Jan		1	2	3	4	5	6	7	8	9	10	11	12	13	14
A	O	D	D	E	E	N	N	N	O	O	D	E	E	E	E
C	E	N	N	O	O	D	D	D	E	E	N	N	O	O	O

2008	Su	Mo	Tue	We	Th	Fr	Sa	Su	Mo	Tu	We	Th	Fr	Sa	Su
Dec			1	2	3	4	5	6	7	8	9	10	11	12	13
B	O	O	D	D	E	E	N	N	N	O	O	D	D	E	E
D	E	E	N	N	O	O	D	D	D	E	E	N	N	O	O

12. The scheduled shifts and days off are designated on the rosters as follows: "D" for the shift that begins at 8 a.m.; "E" for the shift that begins at 4 p.m.; "N" for the shift that begins at midnight; and "O" for days off, that is 24 consecutive hours of rest.

13. Mr Hudson avers further that "in circumstances where the employees to whom the 4-Gang Shift Pattern applied were required to work in excess of the standard hours in a day or in a week, they were paid overtime pay as required by the Employment Act, 2001."

14. Similarly, the defendant's witnesses say, and this is not disputed by the plaintiffs, that if the plaintiffs were required to work on their scheduled day off or on a public holiday, they were paid overtime pay as required by the Employment Act.

15. According to Mr Laing:

- (1) The defendant maintained a system of recording the hours actually worked by the employees that worked on the 4 Gang Shift Pattern. In particular, time cards were kept of the hours worked by each employee and hours recorded on the employee time cards were provided to the payroll department for the purposes of determining the amount of wages payable to the employee in respect of the relevant pay period. The plaintiffs were no exception. Each of them had time cards. If the plaintiffs worked in excess of the standard hours of work in a day or in a week because of the needs of the operation, the plaintiffs were paid overtime as required by the Employment Act, 2001. Similarly, if the plaintiffs were required to work on their scheduled day off or a public holiday, they were paid overtime pay as required by the Employment Act, 2001.
- (2) In addition to receiving the wages due and owed for the relevant pay period, the defendant provided the plaintiffs with a statement showing the amount of normal hours worked and the amount of overtime hours worked (if any) for the relevant pay period. Further, the statement showed the rate at which (each) plaintiff was paid for normal hours of work and overtime hours of work (if any) respectively. Indeed, each plaintiff was able to personally track his/her wages for each pay period as each of them was provided a pay statement for each pay period.
- (3) The plaintiffs have allowed a substantial period of time to elapse before commencing these proceedings. In fact, these proceedings have been commenced approximately 7 years after I ceased to hold the post of Labor Coordinator. Typically, the defendant does not store time cards and pay statements beyond the period mandated by the provisions of the Employment Act, 2001. Therefore, the time cards and pay statements for the period October 2001 to December 2001, which is the period I served as Labor Coordinator, are unavailable.

16. According to Mr Hudson:

- (1) Between October 2001 and July 2006, the defendant maintained a system of recording the hours worked by each employee in the Operations Department by time cards. In July 2006, however, the defendant implemented a new time keeping system that is referred to as the "Kronos" system. The Kronos system is a biometric time-keeping

system that allows employees to record the time they report to work by placing their right hand on a scanning device, which captures finger characteristics using a silicon-based sensor. Upon leaving work, the employee records the time of their departure by the same means.

- (2) The information recorded by the Kronos system is reviewed by the Time and Attendance Coordinator and thereafter forwarded to the Payroll Department for the employees wages for the relevant pay period to be prepared and processed. In addition to the preparing and processing of the wages payable, the Payroll Department produces a pay statement known as a Payroll Master sheet which contain particulars regarding the number of hours worked in the relevant pay period and rates at which the employee has been paid for such hours and deductions.
- (3) At the time the Kronos System was implemented, the 1st plaintiff, Lawrence McIntosh, was no longer employed with the defendant as he had been dismissed as an employee of the defendant on 23rd June 2004. Also, as more than 3 years had elapsed prior to the commencement of these proceedings, the time cards relating to the 1st Plaintiff are unavailable.
- (4) The records relating to the hours worked and wages paid to the 2nd Plaintiff, Lavard Wilson for the period 1st June 2006 to 31st December 2009 are available.
- (5) I refer to the records relating to Mr. Wilson by way of illustration. There is now produced and shown to me true copies of the following: (i) the time card print-out for Mr. Wilson for the period 1st January 2008 to 31st January 2008 marked as MH-2, (ii) the Payroll Master sheet for the period 1st July 2006 to 31st December 2009 marked as MH-3 and (iii) a copy of the 4 gang shift pattern control sheet for 2008 that indicates the gang to which Mr. Wilson was assigned marked as MH-4. Based on the control sheet, Mr. Wilson was assigned to the "D gang". It is important to note however, that periodically, employees would request to be moved to another gang for any number of reasons. Therefore, although this control sheet existed, it may have been the subject of many amendments during the course of the year.
- (6) A review of Mr. Wilson's time card and Payroll Master sheet for the same pay period shows that he did not work 7 days straight without overtime pay as asserted by the 1st plaintiff.

17. By agreement between the parties, none of the deponents was cross examined.

18. It is common ground that the 4-Gang Shift Pattern roster was implemented by the defendant in October 2001 and utilized through December 2008; that during the period October 2001 to December 2006 the pay period for the 4-Gang Shift Pattern was fourteen days or two calendar weeks and from January 2007 the pay period was changed to seven days or one calendar week.

19. It is also common ground that each pay cheque or pay statement issued to the plaintiffs during the relevant period related to the previous completed pay period. For

example, as I understand it, using the above sample rosters for January 2002, a payment made to the plaintiffs on 11 January 2002 related to the seven-day pay period completed on 6 January 2002.

20. The issues that arise for consideration are as follows:

- (1) Did the 4-Gang Shift Pattern contravene 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? And
- (2) Did the defendant fail to pay the plaintiffs for hours worked under the 4-Gang Shift Pattern on their "day off" at twice their normal hourly rate of pay as prescribed under section 10(a) of the Act?

21. For easy reference, I set out hereunder relevant portions of the Employment Act, 2001, namely sections 2, 8 and 10:

2. (1) In this Act:

"day" means a period of twenty-four hours;

"week" means a period of seven days;

8. (1) Except as otherwise provided by or under this Act, no employer shall cause or permit any employee to work in excess of eight hours in any day or forty hours in any week (in this Part referred to as the "standard hours of work") without the payment of overtime pay in respect of any such excess in accordance with section 10:

Provided that the standard hours of work shall be-

- (a) forty-four hours in any week for the period February 1, 2002 to February 1, 2003;
- (b) forty hours in any week after February 1, 2003.

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:

1. As I understand the plaintiffs' case, their complaint against the defendant is that the 4-Gang Shift Pattern, or what counsel for the plaintiffs refers to as the defendant's "system of work", required them to work seven consecutive days without the requisite hours of rest or "days off" pursuant to section 9 of the Act and without the payment of overtime in lieu thereof pursuant to section 10(a) of the Act and is, therefore, illegal, in that it contravenes those provisions of the Act.
2. The defendant's denials that the 4-Gang Shift Pattern contravenes the Act as employees affected thereby, including the plaintiffs, are not required to work seven consecutive days without the mandatory hours of rest prescribed by the Act.
3. It is not disputed that by section 9 of the Act employees are entitled to a minimum of 48 hours of rest in "every seven-day period." Nor is it disputed that 24 of those hours must be consecutive and are referred to in the Act as a "day off".
4. What, however, is disputed is firstly, what is meant in section 9 by "every seven-day period"? and secondly, how the remaining 24 out of the 48 hours of rest are to be allowed.
5. The plaintiffs contend that the "seven-day period" to which section 9 refers commences on the day of the week on which each Gang is rostered by the 4-Gang Shift Pattern to begin their shift pattern of work, which would mean that the relevant seven-day period would be different for each Gang and would commence on a different day of the week.
6. Mr Lopez submits that as the Act does not stipulate when a "week" begins, an employer becomes legally bound to ensure that there is no period when an employee is required to work for seven consecutive days without the requisite mandatory 48 hours of rest, which he equates to two days off.
7. In his submission, therefore, every employee is required by section 9 of the Act to have "two days off" in a seven-day period using an 8-hour shift, meaning, as I understand him, in relation to the 4-Gang Shift Pattern, that two periods of 24 consecutive hours, represented by two "Os", should have been provided for within every seven-day shift pattern for each Gang in the 4-Gang Shift Pattern schedule.
8. On the other hand, the defendant says that the "seven-day period" is simply the calendar week and Mr Adams points out that only one period of 24 consecutive hours or one day off is mandated by section 9 of the Act.
9. Further, counsel for the defendant submits, section 9 aforesaid does not impose a specific duty on an employer to allow an employee to take 24 consecutive hours of rest twice within every seven-day period. In his submission, it must be presumed that if Parliament intended to impose a mandatory obligation on an employer to give an employee 24 hours of rest twice within a seven-day period, as contended by the plaintiffs, Parliament could readily have legislated that the mandatory forty-eight hours of rest should be allowed in two installments of 24 consecutive hours, that is two days off, which, he submits, Parliament did not.
10. In Mr Adams' further submission, the proper reading of the phrase "in every seven-day period" means that there has to be a "start" and a "stop" to the seven day count. In that regard, he submits that logically the seven-day periods should commence at the beginning of the year and the 4-Gang Shift Pattern rosters since January 2002 should be examined by looking at each seven-day period thereafter to see whether the employees were given at least one period of 24 consecutive hours of rest, that is, the

“day off” mandated by section 9 of the Act, and represented by “O” on the schedule and if they were, he submits, then there has been compliance.

11. In that regard, counsel for the defendant says that when one examines the 4-Gang Shift Pattern, although it appears that the employees were scheduled to work seven consecutive days, there has been no contravention of the Act as those days were not in the same calendar week. Further, he points out, in each calendar week or “seven-day period” there is at least one “O” representing the mandatory “day off” or 24 consecutive hours of rest as prescribed by section 9 of the Act.

12. As for the remaining 24 hours of rest, counsel for the defendant submits, as I understand him, that when one examines the 4-Gang Shift Pattern roster and exclude the time that employees were required to report to work for their respective shifts from the remaining hours in a calendar day, it is clear that over the course of the seven-day period employees were afforded more than the remaining 24 hours of rest, since, he argues, the Act does not say that those hours must be taken out of the normal work schedule.

13. Consequently, Mr Adams submits, it is also clear that the 4-Gang Shift Pattern for 2008 adduced by the first-named plaintiff as being representative of how the 4-Gang Shift Pattern operated from inception in October 2001 does not support the plaintiffs’ contention that employees that form part of Gangs “A”, “B”, “C” and “D” were required to work continuously, without the requisite 48 hours of rest in every seven day period, and therefore, contravened section 9 of the Act.

22. An examination of the sample of the 4-Gang Shift Pattern for 2002 set out at paragraph 12 above shows that during the calendar week which commenced on Monday, 31 December 2001, Gang A was scheduled to be off on the first day designated by “O”, then scheduled to work for the remaining six days of that week, 1 to 6 January 2002, as well as the first day of the next week, 7 January 2002, (“D”, “D”, “E”, “E”, “N”, “N” and “N, followed by two days off”). By my count, that is seven consecutive days.

23. Similarly, in the December 2008 roster, Gang D was scheduled to work the first four days of the calendar week which commenced on Sunday, 30 November 2008; off the next two days and then scheduled to work on the last day of that week (Saturday), and the first six days (“D”, “D”, “D”, “E”, “E”, “N” and “N”) of the next week. Again, by my count, seven consecutive days.

24. It appears, therefore, that by the 4-Gang Shift Pattern, employees affected thereby were scheduled to work seven consecutive days, or as the plaintiffs say, seven “straight” days.

25. The question then is whether or not the manner in which those seven consecutive days appear in the schedule is in violation of section 9 of the Act?

26. While I agree with Mr Adams that there has to be a start and a stop for every seven day period, I am not persuaded that those seven-day periods must necessarily coincide with a calendar week or the defendant’s work week. It occurs to me that, applying Mr Adams’ construction, there is nothing to prevent an employer from scheduling an employee to work eleven or even twelve “consecutive” days in a 14-day period provided he allows the employee a day off in each calendar week – say, one at the beginning of the first week and the other at the end of the second week. I do not believe that is a result intended by the legislators.

27. It also occurs to me that Parliament could easily have said "in every calendar week" or "in every work week" rather than in "every seven-day period" if it was intended that the seven-day periods could only relate to the calendar week or an employer's work week.

28. 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.

29. In my judgment, therefore, "every seven day period" referred to in section 9 of the Act for the purpose of the 4-Gang Shift Pattern means the period commencing on the first day in the pattern that each Gang was rostered to begin its shift.

30. However, I do not accept Mr Lopez's argument that the 48 hours of rest are to be given as two "days off". In that regard, I agree with Mr Adams that on a reading of section 9 aforesaid, the employee is to be allowed at least one day off, that is one period of 24 consecutive hours of rest but there is no requirement for an employee to be allowed two consecutive periods of 24 hours or "two days off" unless, as appears from section 10(2) of the Act, such employee were in a tipped category in the tourism and hospitality industry, which the plaintiffs in this case clearly are not. That does not, of course, mean that the employer may not allow the employee two days off; just that the Act does not mandate it.

31. I also note Mr Adams' submission that by allowing the employees at least one day off as represented by "O" in the 4-Gang Shift Pattern roster, the defendant has complied with the minimum mandatory requirement of section 9 of the Act. However, although the Act does not mandate two consecutive periods of 24 hours of rest, it appears to me that section 9 aforesaid does mandate the employer to allow the employee at least 48 hours of rest in every seven-day period. Therefore, in order to meet the minimum requirements of section 9 aforesaid, the 4-Gang Shift Pattern must, in my view, provide not only for the 24 consecutive hours of rest or "day off", but must also make provision for the remaining 24 hours of rest in that seven-day period, although I accept Mr Adams' submission that the second period of 24 hours of rest need not be allowed consecutively.

32. If, as contended by Mr Adams, the "O" in the 4-Gang Shift Pattern represents the mandatory "day off", it is clear on an examination of the rosters exhibited to Mr Hudson's affidavit that there is no "O" amongst the seven consecutive days for which each Gang is rostered to work. There is at least one "O" before the shift begins and at least one after the shift ends. It would appear, therefore, in the 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.

33. 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. One period at the end of the second "D" shift and the other period at the end of the second "E" shift. For example, using the rosters at paragraph 12 above, Gang A, on Wednesday, 2 January, 2002, would have completed the second "D"

shift at 4:00 p.m. on that date and was not required to report for work until the following day at 4:00 p.m. for the "E" shift. Then, on Friday, 4 January 2002, Gang A would have completed the second "E" shift at midnight and not required to report for work until the following day at midnight for the first of three "N" shifts.

34. As Mr Lopez argues that the Act does not say when the seven-day period should start, Mr Adams also argues that "a day" is simply defined in the Act as a period of 24 hours and there is no reference in the Act as to whether or not the period of 24 hours begins at 12:00 a.m. or at any other hour of the day.

35. 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.

36. I, therefore, find that the 4-Gang Shift Pattern does not contravene section 9 of the Act and is not illegal.

37. 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.

38. In the light of the decision at which I have arrived, it is not necessary for me to consider the other questions raised by the plaintiffs. However, 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. Even in respect to the "extra two days" in the "seven straight days" that the plaintiffs say they were scheduled to work, the plaintiffs provided no evidence to show that they did in fact work.

39. In response to counsel for the defendant's submission in that regard, Mr Lopez submitted that the defendant, by the affidavits of its witnesses, accepted that the plaintiffs were employees of the defendant and therefore the plaintiffs did not have to prove that they worked for the defendant. In my view, he misunderstood counsel for the defendant's argument which was not whether or not the plaintiffs were employees of the defendant, but rather, whether or not each of the plaintiffs who was scheduled to work did in fact work on one of the four gangs during the aforesaid period, and if so, for what part of that period and how, if at all, they were compensated.

40. Again, as Mr Adams pointed out, there may have been times during the relevant period when persons were scheduled to work and did not work and when they worked although they were not scheduled, as evident from the pay statements provided in relation to the second-named plaintiff.

41. It is the plaintiffs who have asserted that they have worked overtime hours for which they have not been compensated and it is, therefore, their burden to prove the existence of those facts on a balance of probability. The evidence of the defendant's witnesses, which is not disputed by the plaintiffs, is that each of the plaintiffs was provided with timecards and pay slips in relation to each pay period and I agree with counsel for the defendant that there is no excuse for the plaintiffs' failure to produce evidence to support their case, particularly having regard to the fact that in his written submissions filed on 6 November 2010, counsel for the plaintiffs indicated that "calculations" with respect to the double overtime which should have been paid during

the period January 2002 to January 2009 were to “be supplied at the hearing.” Although the trial of this matter did not occur until more than six months after 6 November 2010, no such calculations were supplied.

42. Further, I accept the submission of counsel for the defendant that as the first-named plaintiff was dismissed as an employee of the defendant since June 2004, his evidence with regard to matters occurring after that date are plainly hearsay and in relation to matters occurring prior to that date he could only speak to those matters that concerned him personally, so far as hours worked.

43. I also accept counsel for the defendant’s submission that, in any event, as this is not a representative action each of the plaintiffs was required to adduce evidence of hours actually worked on his or her day off as well as evidence that he or she was not paid twice the normal hourly rate of pay in relation to such days. He points out, and I agree, that the shift pattern schedule is only evidence of a schedule and not evidence of hours worked.

44. So, even if I accept the plaintiff’s submissions that the 4-Gang Shift Pattern of work is illegal, which I do not, the plaintiffs have still failed to prove firstly that they in fact worked on the days scheduled and secondly, how much, if anything, they were paid on those days, if worked, and consequently how much, if anything they would be owed.

45. In the result, I dismiss the originating summons, with costs to the defendant, to be taxed if not agreed.

DELIVERED this 9th day of May A.D. 2011

Estelle G. Gray Evans
Justice