COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Commercial Law Division

2013/COM/lab/37/38/39/40/41/42/43/48/51/52/53/54/55/56/57/58

B E T W E E N

1. ~~**MONIKA STUBBS**~~
2. **BRADFORD ROBERTS**
3. **MARVIN JAMES**
4. **KEITH LOUIS**
5. **JEFFERY TURNER**
6. **BRIAN DAVIS**
7. **DEVON EMMANUEL**
8. **BERNARD PAUL**
9. **TERRELL KELLY**
10. **JEROME TAYLOR**
11. ~~**LUBIN BERNADIN**~~
12. ~~**GLEN BETHEL**~~
13. **TERRENCE BRENNEN**
14. **ELRON MUNROE**
15. **DANIEL SEARS**
16. ~~**ANGELO BROWN**~~

Plaintiffs

AND

ZAMAR GROUP COMPANIES LTD.

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Obie Ferguson QC and Mrs. Alva Stewart-Coakley for the Plaintiffs
Mrs. Lakeisha Hanna of Harry B. Sands for the Defendant

Hearing Dates: 28, 29, 30 September, 1 October 2020, 16 November 2020, 8 March 2021, 8 April 2021, 5 May 2021, 22 February 2022

Employment law – Whether Plaintiffs are entitled to overtime and vacation pay – Whether Plaintiffs were in managerial or supervisory positions – Stare decisis – Statutory interpretation – Canons of construction –— Unfair Dismissal – Unilateral variation of contract - Employment Act, Ch. 321 ss. 8, 10

These actions were commenced by a Specially Indorsed Writ of Summons, filed by each of the Plaintiffs, on 1 August 2013. By an Order of Evans J (as he then was) dated 19 May 2014, the claim of each of the Plaintiffs was consolidated into one action. The action

of the First Plaintiff, Monika Stubbs ("Mrs. Stubbs"), was heard on 12 and 13 May 2015. In a written Judgment rendered by Evans J on 22 February 2016, Mrs. Stubbs' claim for Wrongful Dismissal and Overtime Pay was dismissed with costs.

Prior to the trial of Mrs. Stubbs, the Eleventh Plaintiff, Mr. Lubin Bernadin, the Twelfth Plaintiff, Mr. Glen Bethel and the Sixteenth Plaintiff, Mr. Angelo Brown withdrew their actions against the Defendant.

The remaining (12) Plaintiffs (1) the Second Plaintiff, Bradford Roberts; (2) the Third Plaintiff, Marvin James; (3) the Fourth Plaintiff, Keith Louis; (4) the Fifth Plaintiff, Jeffrey Turner; (5) the Sixth Plaintiff, Brian Davis; (6) the Seventh Plaintiff, Devon Emmanuel; (7) the Eighth Plaintiff; Bernard Paul; (8) the Ninth Plaintiff, Terrell Kelly; (9) the Tenth Plaintiff, Jerome Taylor; (10) the Thirteenth Plaintiff, Terrence Brennen; (11) the Fourteenth Plaintiff, Elron Monroe and (12) the Fifteenth Plaintiff, Daniel Sears, alleged that they are either supervisors or managers and entitled to overtime pay, overtime pay and vacation pay, or they have been unfairly dismissed.

HELD: Finding that the Plaintiffs (i) Bradley Roberts; (ii) Keith Louis; (iii) Brian Davis; (iv) Bernard Paul; (v) Terrell Kelly; (vi) Terrence Brennen and (vii) Marvin James were either managers and/or supervisors and were therefore not entitled to overtime pay. Finding also that the Plaintiffs, Jeffery Turner and Devon Emmanuel were line staff and were therefore entitled to overtime pay and that the Plaintiffs, Jerome Taylor, Elron Munroe and Daniel Sears were not unfairly dismissed but were all entitled to notice pay, severance pay, vacation pay as well as overtime pay.

1. The Court is now at large to consider who is a manager and/or supervisor and can even resort to dictionary meaning, no doubt, looking at the surrounding facts and circumstances and the evidence as a whole. **Commonwealth Brewery Ltd. v Patrice Ferguson** Ind. Trib. App. No. 86 of 2021 (Judgment delivered on 25 November 2021) applied. The Court of Appeal in **Duran Cunningham v Baha Mar Development Co. Ltd** SCCivApp No. 116 of 2010 not followed.

2. On a balance of probabilities, the Court preferred the evidence of the witnesses for the Company to that of the Plaintiffs and their witness. The Court therefore found that the following Plaintiffs with the exception of Jeffery Turner and Devon Emmanuel were managers and/or supervisors:- (i) Bradley Roberts; (ii) Keith Louis; (iii) Brian Davis; (iv) Bernard Paul; (v) Terrell Kelly and (vi) Terrence Brennen. The Court also found that Marvin James who insisted that he was not a Manager was a Manager. Therefore, each of these Plaintiffs, having been

unsuccessful in their respective claims, will have to pay costs to the Company taxed at $7,500 each.

3. There are also three Plaintiffs namely (i) Jerome Taylor; (ii) Elron Munroe and (iii) Daniel Sears who alleged that they were unfairly dismissed. They were not unfairly dismissed but they are all entitled to notice pay, severance pay, vacation pay as well as overtime pay. With respect to costs, the Court orders that each party bear their own costs. The Court also makes a similar costs order with respect to Jeffery Turner and Devon Emmanuel. The Company conceded that they were not Managers.

JUDGMENT

Charles J:

Introduction

[1] These actions, grounded in employment contracts, concern four main issues namely (i) whether eight of the Plaintiffs were managerial or supervisory employees; (ii) if they were not, whether they have proved that they are entitled to overtime pay; (iii) whether one of the Plaintiffs is entitled to overtime and vacation pay and (iv) whether three of the Plaintiffs were unfairly dismissed by their former employer, Zamar Group of Companies ("the Company").

[2] The actions were commenced by a Specially Indorsed Writ of Summons, filed by each of the Plaintiffs, on 1 August 2013. By an Order of Evans J (as he then was) dated 19 May 2015, the claim of each of the Plaintiff was consolidated into one action.

[3] The action of the First Plaintiff, Monika Stubbs ("Mrs. Stubbs"), was heard on the 12 and 13 May 2015. In a written Judgment rendered by Justice Milton Evans (as he then was) on 22 February 2016, Mrs. Stubbs' claim for Wrongful Dismissal and Overtime Pay was dismissed with costs to be taxed if not agreed. At taxation, costs were agreed in the amount of Forty Thousand Dollars ($40,000.00), which remain due and outstanding from Mrs. Stubbs.

[4] Prior to the trial involving Mrs. Stubbs, the Eleventh Plaintiff, Mr. Lubin Bernadin ("Mr. Bernadin"), the Twelfth Plaintiff, Mr. Glen Bethel ("Mr. Bethel") and the Sixteenth Plaintiff, Mr. Angelo Brown ("Mr. Brown"), withdrew their actions against the Defendant. On 20 May 2020, a Notice of Discontinuance was filed with regard to these respective matters.

[5] The remaining (12) Plaintiffs are (1) the Second Plaintiff, Bradford Roberts ("Mr. Roberts") in Action No. 2013/COM/lab/00038; (2) the Third Plaintiff, Marvin James ("Mr. James") in Action No. 2013/COM/lab.00039; (3) the Fourth Plaintiff, Keith Louis ("Mr. Louis") in Action No.2013/COM/lab/00040; (4) the Fifth Plaintiff, Jeffrey Turner ("Mr. Turner") in Action No. 2013/COM/lab/00041; (5) the Sixth Plaintiff, Brian Davis ("Mr. Davis") in Action 2013/COM/lab/00042; (6) the Seventh Plaintiff, Devon Emmanuel ("Mr. Emmanuel") in Action No. 2013/COM/lab/00043; (7) the Eighth Plaintiff, Bernard Paul ("Mr. Paul") in Action No. 2013/COM/lab/00048; (8) the Ninth Plaintiff, Terrell Kelly ("Ms. Kelly") in Action No. 2013/COM/lab/00051; (9) the Tenth Plaintiff, Jerome Taylor ("Mr. Taylor") in Action 2013/COM/lab/00052; (10) the Thirteenth Plaintiff, Terrence Brennen ("Mr. Brennen") in Action 2013/COM/lab/00055; (11) the Fourteenth Plaintiff, Elron Monroe ("Mr. Munroe") in Action No. 2013/COM/lab/00056 and (12) the Fifteenth Plaintiff, Daniel Sears ("Mr. Sears") in Action No. 2013/COM/lab/00057. Each of these Plaintiffs have filed separate actions as reflected above.

[6] For present purposes, it is useful to categorize the Plaintiffs into 3 categories namely: (1) Group 1: those who claim overtime pay; (2) Group 2: those who claim overtime and vacation pay and (3) Group 3: Those who alleged that they were unfairly dismissed.

The issues

[7] The parties have agreed that the following issues arise for determination namely:

1. Whether or not the eight Plaintiffs namely (1) Mr. Roberts, Mr. Louis, Mr. Turner, Mr. Davis, Mr. Emmanuel, Mr. Paul, Ms. Kelly and Mr. Brennen have proved that they are entitled to overtime pay?

2. Whether or not these eight Plaintiffs (above) were managerial or supervisory employees?

3. Whether or not the Plaintiff, Mr. James has proven that he is entitled to overtime and vacation pay?

4. Whether or not the Plaintiffs, Mr. Taylor, Mr. Munroe and Mr. Sears were unfairly dismissed?

The law

[8] The Employment Act, Ch. 321A ("the Act") came into force on 1 January 2002. Part II of the Act deals with standard hours of work.

[9] Section 8 (1) (b) of the Act provides that the standard hours of work are forty hours in any week after 1 February 2003. Section 10 deals with overtime pay. It states:

> " **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."**[Emphasis added]

[10] The category of workers who are exempted from receiving overtime pay as outlined above are those who hold a Managerial or Supervisory position. This is provided for in section 8(4) of the Act which states:

> **"(4) This Section shall not apply to a person who holds a Supervisory or Managerial position."**

[11] The words "supervisory" or "managerial" were not defined in the Act. However, in the Bahamian case of **Duran Cunningham v Baha Mar Development Co. Ltd.** SCCivApp No. 116 of 2010, which was based on the Fair Labour Standards (Exceptions) Order (which had been repealed in 2009), Allen P. in delivering the Judgment of the Court at para 13 stated:

> "**Admittedly, the Fair Labour Standards Act (Ch. 295), under which the Order was made was repealed in its totality by the Fair Labour Standards Act 2001 (Ch. 321A). However, by virtue of Section 33 of the Interpretation and General Clauses Act, such an Order is deemed to continue after the repeal of the Act under which it is made, so far as it is not inconsistent with the provisions of the repealing Act. "**

[12] The learned President essentially held that the definition of "Supervisory" or "Managerial" survived the repeal of the Fair Labour Standards Act. Therefore, to come within the definition of "Manager" or "Supervisor" the employee must have the authority to hire, lay off, promote, transfer or exercise disciplinary power over persons employed at an establishment on behalf of and independently of his employer.

[13] On 25 November 2021, a differently constituted Court of Appeal in the case of **Commonwealth Brewery Ltd. v Patrice Ferguson** Ind. Trib. App. No. 86 of 2021 (Judgment delivered on 25 November 2021) held that (i) the Court is entitled to place its own definition on the terms, managerial and supervisory, having due regard to the facts disclosed in the circumstances of each case before it and (ii) whether or not an employee will be found to fall within the category of a manager or a supervisor will depend on the actual duties and functions carried out by that

individual in the organisation and not necessarily on the nomenclature used in his contract of employment.

[14] The facts of **Patrice Ferguson** were that the respondent commenced employment with the appellant's predecessor in 1991. Her duties included the managing of all staff in the department. In 2006, the respondent was transferred to another department but says that her managerial status was not affected. In 2007, she was again transferred to another department where she had less power but was assured by the department manager that her managerial status remained the same. In 2016, the appellant presented the respondent with a new contract by which she was demoted from managerial status to line staff. However, the respondent said that her duties and responsibilities were that of a supervisor. The appellant said that the respondent's position was non-managerial and non-supervisory which the Tribunal accepted. However, in 2017, the respondent accepted a new position, which because of her duties and responsibilities, the Tribunal accepted was a supervisory position.

[15] The appellant appealed on the ground that the Tribunal was bound by the definition of "supervisory" and "managerial" as enunciated by the Court of Appeal in **Duran Cunningham** and was not at liberty to depart therefrom. The appellant submitted that had the Tribunal followed this decision, it would not have found that the respondent was in a supervisory position.

[16] Isaacs JA, in delivering the Judgment of the Court said at paras 33 -34:

> **"33. As presently advised no Order has been made by the Minister. Thus, there is no definition or managerial and supervisory as provided in the Order to be found in the Employment Act.**
>
> **34. The VP resorted to the dictionary meanings of the words "managerial" and "supervisory" in concluding that the respondent fell within the category of a supervisor. The appellant that she was wrong to have done so and ought to have followed the definition provided by this Court, differently constituted, in *Duran Cunningham*. They rely on the doctrine of stare decisis; simply put, an inferior court is obliged to follow a decision made by a court of superior jurisdiction. Although this may seem incongruous in the present**

circumstances, I agree with the submission of the appellant that the VP ought to have had regard to the decision of this Court in *Duran Cunningham*; and to have applied the definition of "managerial" and "supervisory" supplied in that case".

[17] He continued, at paras 51 and 53:

"51. In my view, the definition of "managerial" and "supervisory" found in the Order obviously referred to persons occupying positions high on the corporate ladder, to wit, they could "... on behalf of, and independently of, his employer to hire or lay off or promote or transfer or exercise disciplinary power over persons employed by his employer or to adjust the grievances of such persons". An employee supervising others as understood in the dictionary definition of "supervisory" would not fall within the definition found in the Order. This may explain why there is now no definition contained in the Employment Act thereby introducing a level of flexibility. Under the Employment Act the courts are no longer hamstrung by the rigidity of the Order."

…

"53. That being said whether or not an employee will be found to fall within the category of a Manager or Supervisor will depend on the actual duties and functions carried out by that individual in the organization and not necessarily on the nomenclature used in his contract of employment."

[18] At paras 39 – 42, Isaacs JA continued:

"39. Notwithstanding that I have found favour with the appellant's grounds 2 and 3, I am satisfied that the Order was not in effect when *Duran Cunningham* was decided. I am satisfied also, that the definition used in the First Schedule of the Order has not been replicated in the Employment Act. In the premises it is entirely open for the Court to find that the conclusion arrived at by the VP using her process of reasoning, to wit, the respondent occupied an entry level supervisory position, was correct.

40. The appellant complains that the VP adopted a flawed criteria to ascertain who is a Manager/Supervisor. The basis of this complaint it seems to me stems from the appellant's contention that the VP was wrong not to have followed the Court's decision in *Duran Cunningham* and the definition given therein.

41. As I have indicated above, the Court in *Duran Cunningham* was influenced by the definition contained in the Order. Inasmuch as that Order had been repealed, had that been known by the Court, it is

entirely possible that the decision in *Duran Cunningham* may have been differently determined.

42. <u>Now that the true position is known, the issue of who is a supervisor or manager, in my view, is at large</u>."[Emphasis added]

[19] Thus, the Court is entirely at large to ascribe a meaning to the issue of who is a supervisor or manager in the context of each case. Put differently, the Court does not have to rely on the definition given by the Court of Appeal in **Duran Cunningham**.

[20] Resorting to the Collins Dictionary, the word "supervisor" means "*a person who manages or supervises*". "Supervise" means "*to direct or oversee the performance or operation of", "to watch over so as to maintain order*". Manager is defined as "*a person who directs or manages an organization, industry, shop etc*."

[21] Simply put, if a person leads an organisation or department and is aware of it upon taking up his assigned position, he may be considered a "supervisor" or "manager". A person may be deemed a supervisor if he supervises a person or an activity especially workers. A manager is a professional who takes a leadership role in an organisation and manages a team of employees. Often times, a manager is responsible for managing a specific department in their company. A manager is responsible for leading a team of employees to meet the goal and achieve performance metrics. Managers are often the line of communication between a company's employees and its high-level executives. It does not mean that that person must have the ability to hire or fire or discipline to make him a "supervisor" or a "manager". A boss or a leader would do.

[22] In considering whether the following 8 Plaintiffs were "supervisors" or "managers", I shall bear these meanings in mind.

The evidence

[23] The following eight (8) Plaintiffs claim that they were not managers or supervisors and are therefore, entitled to Overtime pay only, namely: (1) Mr. Roberts; (2) Mr.

Louis; (3) Mr. Turner; (4) Mr. Davis; (5) Mr. Emmanuel; (6) Mr. Paul; (7) Ms. Kelly and (8) Mr. Brennen.

[24] Before I concentrate of the evidence of these Plaintiffs, I should firstly deal with the evidence of Mrs. Stubbs who was called to give testimony on behalf of the Plaintiffs and Dorothy Coakley ("Ms. Coakley"), the Director of Property Operations, and Sarvesh Parmarthi, Financial Controller who testified on behalf of the Company.

Monika Stubbs

[25] Monika Stubbs filed a witness statement on 15 November 2017 which stood at her evidence in chief. She commenced her employment with the Company on or about 9 November 2009 as Senior Technical Service Operation Manager. She was terminated after 3 years on or about 21 December 2012. She gave evidence as a witness on behalf of all of the Plaintiffs.

[26] She prepared spreadsheets for all of the Plaintiffs which were exhibited to their respective Statements of Claim. According to her, the spreadsheets were created from a variety of sources, for example, the sign-in sheets and swipe clock. She further asserted that the spreadsheets came from her payroll which she kept.

[27] Mrs. Stubbs stated that the Plaintiffs, Mr. James, Mr. Louis, Mr. Davis, Mr. Emmanuel, Mr. Kelly, Mr. Brennen, Mr. Munroe and Mr. Sears reported directly to her and she was responsible for preparing these Plaintiffs' schedules and their time sheets. According to her, there Plaintiffs had no supervisory or managerial powers since they could not hire, fire or discipline anyone on their own. They never attended any managers' meetings only production meetings.

[28] Mrs. Stubbs stated that there was a period when the time clock was not working for a long time. In addition, the Company's computer was not working so she used her own personal computer.

[29] Additionally, she would record overtime for the following Plaintiffs namely: (1) Mr. Roberts; (2) Mr. Turner; (3) Mr. Paul; (4) Mr. Taylor and (5) Mr. Brown as they were under her supervision and had no supervisory or managerial authority.

[30] Mrs. Stubbs testified that the Company listed most of their employees as managers or supervisors to elude paying overtime but they were not empowered to act as managers.

[31] She was extensively cross-examined as to the contents and accuracy of the spreadsheets. She repeatedly stated that without the actual sign-in sheets and the swipe clock reports in front of her, she was unable to verify the accuracy of the times.

[32] The Company submitted that the spreadsheets are a mere outline of the amount claimed by the various Plaintiffs and it is not evidence that the Plaintiffs in fact worked those hours.

[33] She stated that Mr. Roberts was a supervisor or “lead” as he had apprentices that worked under him.

Dorothy Coakley

[34] Ms. Coakley was called by the Company to testify on its behalf. She gave a witness statement which was filed on 1 June 2017. It stood as her evidence in chief. She has been employed by the Company for over 20 years and she is the Director of Property Operations.

[35] She stated that Mr. Roberts, Mr. James, Mr. Louis, Mr. Turner, Mr. Davis, Mr. Paul, Ms. Kelly, Mr. Bernadin and Mr. Brennen were all employed in a supervisory and managerial position and they all received termination pay to which they were entitled on their respective dates of termination.

[36] Ms. Coakley gave her evidence in a clear and straightforward way which I accepted.

Sarvesh Parmarthi

[37] Mr. Parmarthi also testified on behalf of the Company. He has been employed as the Financial Controller of the Company since 2007. As the Financial Controller, he has access to the personnel records of all the Plaintiffs which he has reviewed. He also stated that he is responsible for all staff payroll and as such, he has complied the record with regard to the carious claims of the Plaintiffs.

[38] Having seen, heard and observe the demeanour of these witnesses, on a balance of probability, I prefer the evidence adduced by the witnesses for the Company to that of Mrs. Stubbs. Overall though, Mrs. Stubbs came across as an intelligent, strong-willed and a dominant individual. On the whole, I am satisfied that she was telling me what she thought to be the truth although in some respects I am sure that she had persuaded herself of the correctness of what she said. I therefore took what she said with a pinch of salt.

[39] Both Ms. Coakley and Mr. Parmarthi gave their evidence in a clear and straightforward manner. Mr. Parmarthi struck me as a person who takes his job seriously and, in my opinion, brought a degree of objectivity to the proceedings. He was convincing and I accepted his evidence, as truthful.

[40] I find that the spreadsheets prepared by Mrs. Stubbs are inaccurate because both herself and Mr. Parmarthi agreed that employees are not paid for a lunch hour and Mrs. Stubbs included a lunch hour in her calculations of overtime. Additionally, she was unable to indicate to the Court whether the time on the spreadsheets indicated whether a plaintiff arrived early or late.

[41] As I indicated earlier, Mrs. Stubbs' evidence has to be taken with a pinch of salt as it became evident, under cross-examination, that she was not pleased that the Company terminated her and, to my mind, she embarked on a mission to vilify the company. The fact that she still had the records of the Company is also very disturbing.

Group 1: Plaintiffs who claimed overtime pay

[42] The following 8 Plaintiffs claim overtime pay only namely:

1. Bradford Roberts;
2. Keith Louis;
3. Jeffery Turner;
4. Brian Davis;
5. Devon Emmanuel;
6. Bernard Paul;
7. Terrell Kelly and
8. Terrence Brennen

[43] The Company asserted that all of these Plaintiffs with the exception of Jeffery Turner and Devon Emmanuel were managers and/or supervisors and were not entitled to overtime pay.

Evidence, analysis and findings

Bradford Roberts

[44] In his Specially Indorsed Writ filed on 1 August 2013, Mr. Roberts seeks damages for overtime worked and was not paid in the sum of $11,508.79. He filed a witness statement on 4 December 2014 which stood as his evidence in chief.

[45] Mr. Roberts commenced employment with the Company as a full time AV Technician under a written contract. He earned a salary of $500.00 weekly. His contract was for 2 years from 9 May 2011 to 8 May 2013. The standard hours of work for Mr. Roberts were 40 hours per week; five (5) days per week. Clause 6 of the contract of employment expressly provides that Mr. Roberts "*shall not be entitled to any payment for such overtime worked….In such cases, you will be given a day off, to be taken at such time as the Company shall consider most convenient having regards to the requirements of the Company's business provided that you worked a minimum of four (4) hours on that day. To further clarify: If a public holiday falls on the seventh day, you will be given a day off, as mentioned above, only for that seventh day.*"

[46] He also stated that on or about 9 May 2013, he failed to sign a new contract with the Company and his employment was terminated. Under cross-examination, he agreed that his contract of employment was for a fixed term and it expired by effluxion of time. In other words, he was not terminated but his contract was not renewed.

[47] Mr. Roberts alleged that, on 8 February 2013, his Counsel, Mr. Obie Ferguson QC wrote a letter to Mr. Ferron Bethell QC, Attorney at Law for the Company, enclosing spreadsheets detailing the calculations of overtime worked for each affected worker of the Company. He further stated that, at the time of termination, the Company owed him the sum of $11, 508.79 on overtime pay for the period 9 May 2011 to 12 November 2012. He alleged that as a result of the Company's failure to pay his overtime, he has suffered loss and damage.

[48] He agreed that when he signed the contract, his weekly salary was $400.00 and it increased to $500.000 after about a year but he could not recall the exact date. He said that the salary increase had nothing to do with being a manager or supervisor but because of his good work ethics and punctuality at work. He stated that the contract was a piece of paper. He stated that he was never a supervisor but the oldest person on the shift and he had to ensure that everyone is good and then reports to the Manager. He said that Ms. Coakley, Mr. Stubbs and Calvin were above him. He also had individuals below him.

[49] He insisted that he was not a supervisor; that it is only on paper. He said that the employees came to him because he was the strongest person in audio. He did not tell the individuals what to do but how to do it. He said that he could say that he was a "lead" but he was not a supervisor as he could not fire anyone or send them home. He said that he did not mange Brandon Stubbs, Jeffery Turner and Joey Butler who worked along with him. They all had to report to one person. He reiterated that he was not a manager or a supervisor but leader of the shift.

[50] Under further cross-examination, Mr. Roberts said it is a fact that when he worked overtime, he received days off with pay since he was on a fixed salary. He agreed that if he worked two days a week, he still received his full weekly salary.

[51] Mr. Roberts could not recall whether, for the year 2011, when he was entitled to 15 days off that he took 19 days and was paid. Nor could he recall whether for 2012, he took 12 days off with pay when he had earned 11 days. Although he disagreed with the statistics put to him, he was unable to assist the Court with regard to how many days he had earned in those years. He relied on the spreadsheets which was prepared by Mrs. Stubbs.

[52] During further cross-examination, Mrs. Hanna questioned him whether he was claiming $11, 508.79 for overtime pay (as alleged in his Statement of Claim) or $7,969.13 as stated in his Overtime Calculation Claim compiled by Mrs. Stubbs. He retorted that he will go with his Statement of Claim.

[53] In my considered opinion, Mr. Roberts has not proved his case that he is entitled to overtime.

[54] In any event, the Company asserted that Mr. Roberts was a supervisor. If he was, he would not be entitled to overtime as expressly stated in his contract of employment.

[55] In cross-examination Mr. Roberts vehemently denied that he was a supervisor and stated that he could not hire or fire anyone and he had persons who worked over him. Mr. Roberts also stated that he was the lead on various jobs of the Company and he could tell fellow employees how to do a job but he could not tell the employees what to do on a job.

[56] Mrs. Stubbs, in cross examination, contradicted Mr. Roberts' assertions and stated that Mr. Roberts was in fact given a supervisory title in the AV/Lighting Department. Mrs. Stubbs also contradicted Mr. Roberts' statement that he could tell fellow employees how to do a job but he could not tell them what to do. Mrs. Stubbs

described Mr. Roberts' position/title as a "Lead" and when asked to describe the word "Lead", she said:

> **Q. That's not the question I asked you, you said he was lead, what is a lead?**
>
> **A. The lead means that anyone that is working under him because his job is technical, it's very hands on. The other persons who work with him, he leads them on what their chores are to.**
>
> **Q. So he supervises these individuals he was able to tell them what to do, when to do it, how to do it, go here, go there, he did that?**
>
> **A. Pretty much because they are his apprentices, yes.**
>
> **Q. So who were the other leads as you called them because you said they were not managers and supervisors, who were the other leads in the Company?**
>
> **A. Glen Bethell was one, Brian was one. I think at some point Bradford was given a supervisory title.**
>
> **Q. In which department?**
>
> **A. I think it was AV/lighting I think they used to share him between both.**
>
> **Q. Okay"**

[57] Based on the admission of Mrs. Stubbs and the definition she gave for an individual who performed the role as a "Lead", the Company submitted that Mr. Roberts was a supervisor based on his rank and title and the role he performed.

[58] The Company further submitted that, the evidence of Ms. Coakley (at paragraph 8 of her Witness Statement) supports the fact that Mr. Roberts had the authority to exercise disciplinary control over employees who worked under him. Moreover, when the Company hired Buy-Outs, Mr. Roberts was able to supervise the Buy-Outs and if need be, discipline them by removing them from a job if they were not performing. He was empowered to so this in the exercise of his independent judgment and it was naturally expected that Mr. Roberts would do so in the Company's interest.

[59] Furthermore, I had the added opportunity of seeing, hearing and observing the demeanour of Mr. Roberts and I did not believe his evidence that he was not a supervisor. He very well knew that, as a supervisor, he was not entitled to overtime as is expressly stated in his contract so he came to court and changed his account.

[60] Mrs. Stubbs, Mr. Roberts and the Company all agreed that Mr. Roberts worked overtime but he was given days off which is in conformity with his contract of employment.

[61] Based on the above findings and the law that the Court is at large to look at all the surrounding facts and circumstances to determine whether an employee is a manager or a supervisor, I conclude that Mr. Roberts was a supervisor. I also find that he very well knew that he was a supervisor and he led other employees in that department. He was also aware of that from the date of his employment. In his contract of employment, it provided, at Clause 6, that he will not be entitled to overtime.

[62] For all of these reasons, I will dismiss the claim made by Mr. Roberts in its entirety.

Keith Louis

[63] At paragraph 2 of his Statement of Claim, Mr. Louis averred that at all material times, he was employed by the Company as a Lighting Technician and earned a salary of $600.00 per week. At paragraph 3, he alleged that he was unfairly dismissed. At paragraph 4, he alleged that at the time of termination, the Company owed him the sum of $15,121.60 for overtime hours that he worked for the period of 9 May 2011 to 7 January 2013.

[64] In his witness statement filed on 4 December 2014, Mr. Louis asserted that, sometime on or about 2 May 2011, he commenced employment as a Lighting Technician with the Company pursuant to a written contract of employment and, on 1 May 2013, the Company unfairly and in breach of contract terminated his contract of employment. He asserted that the Company owes him the sum of

$15,121.60 in respect of days in lieu pay for hours worked in excess of his regular hours.

[65] In its Defence filed on 27 January 2014, the Company puts Mr. Louis to strict proof of the allegations made in his Statement of Claim and by their witness, Mrs. Stubbs.

[66] Under cross-examination, Mr. Louis admitted that he was on a 2-year fixed term contract which ended on 3 May 2013. He hastened to add "…*but they did not renew the contract.*" He agreed that he was paid a weekly salary of $600.00 and his duties under Clause 3 were of a technical supervisory nature. He agreed that no matter how many days he worked his salary remained the same. However, he added that he also worked overtime. He asserted that he was never a supervisor as he did not have the authority to hire or to fire anyone.

[67] It was suggested to Mr. Louis that he received lieu days for the days when he worked overtime and he was paid in full. He disagreed with the suggestion and stated that there were times that he worked 80 hours per week. He relied wholly on the evidence of Mrs. Stubbs with regard to his claim for overtime pay and stated that Mrs. Stubbs *"would have all the knowledge of these times leaves and any information that I can ever give you".*

[68] Mrs. Stubbs, in her evidence, stated that Mr. Louis was not paid overtime from 31 October 2010 to 18 November 2012 totalling $18,412.12 including vacation. She also stated that Mr. Louis did not attend any manager's meetings and he was not a supervisor in the meaning of the Act and the Court of Appeal decision of **Duran Cunningham**. She stated that lieu day is a consequence of overtime and Mr. Louis' contract of employment cannot oust the jurisdiction of section 8 and 10 of the Employment Act ("the Act").

[69] According to Ms. Coakley, Mr. Louis agreed to lieu days. In paragraph 31 of his witness statement, Mr. Parmarthi stated that Mr. Louis was given lieu days (a day off with pay) as agreed in his contract. Moreover, for the period claimed by Mr.

Louis, he had earned 37 days but in fact he took 46; 9 days over his entitlement. Mr. Louis has not therefore proved his entitlement to overtime.

[70] Even if I were wrong to come to this conclusion, in my opinion, Mr. Louis was a supervisor in Lighting. During his cross-examination, there were at least seven occasions when he stated that he was not a supervisor. He stated that the Lighting Department had no supervisor which is so unreal for a company which is involved in production. On a balance of probability, I did not believe Mr. Louis. As I stated, it appeared that he came prepared to say that he was not a manager or a supervisor since he could not hire or fire or discipline no doubt, very cognizant of the Ruling of the Court of Appeal in **Duran Cunningham**.

[71] In accordance with Clause 6 of his contract of employment, Mr. Louis was entitled to lieu days when he worked a minimum of 4 hours, on the seventh day in any week and on public holidays.

[72] With respect to his allegation that his contract of employment was unfairly terminated, Mr. Louis was on a fixed term contract for 2 years which had commenced on 2 May 2011 ended on 3 May 2013 by effluxion of time. This claim also fails.

[73] Mr. Louis' claims fail in its entirety. The Company, being the successful party, is entitled to its costs. I shall order that Mr. Louis' claim be dismissed with costs.

Jeffery Turner

[74] By an Amended Writ of Summons indorsed with Statement of Claim filed on 1 August 2013, Mr. Turner alleged that he was employed by the Company as a Warehouse Technician and earned a salary of $250.00 weekly. He alleged that, on or about 31 May 2013, the Company unfairly breached and terminated his contract of employment. At the time of termination, the Company owed him the sum of $7,266.79 in respect of overtime hours worked by Mr. Turner for the period 3 January 2012 to 17 June 2012, a little over 5 months. He alleged that as a result

of the Company's failure to pay him for overtime worked, he has suffered loss and damage.

[75] In his witness statement filed on 4 December 2014, Mr. Turner stated that he earned a weekly salary of $250.00 (later increased to $350 weekly) and on or about 31 May 2013, the Company unfairly breached and terminated his contract of employment.

[76] It is not disputed that Mr. Turner commenced employed with the Company in May 2011 and entered into a contract of employment on 30 January 2012 as a Technician which according to the contract of employment, was a technical supervisory position. Clause 1 states that, effective 6 February 2012, his salary which is paid weekly in arrears, will be $350.00 less deductions for National Insurance contributions. Clause 2 of the Contract provides that:

> **"The duties to be performed under this Agreement are of a technical supervisory nature. Accordingly, you will not be entitled to overtime pay. Your hours are based on the standard hours of work (40) plus the hours required to fulfil your duties and responsibilities."**

[77] Clause 5 deals with overtime and public holidays. It provides that Mr. Turner is not entitled to overtime but he will be entitled to lieu days when he worked a minimum of 4 hours, on the seventh day in any week and on public holidays.

[78] Under cross-examination, it was suggested to him that there were some weeks when he did not work a full week i.e. from Monday to Friday but he was still paid for the entire week and he said "no". He insisted that he was never given any days off. He said that he was given two days off a week which are the 2 legal days.

[79] When questioned as to whether he was given one month's pay in lieu of notice and one month for each year of service totaling $3,719.57, Mr. Turner said that he cannot confirm it. He acknowledged that he was paid on termination (in instalments). He denied that, upon termination, he was given salary in lieu of one month's notice of $1,515.67. Eventually, he stated that he got his notice pay and

severance pay in instalments but he could not recall how much money he received. It was suggested to him that he was paid $1,515.67 in notice pay as a manager. He stated that he was never a manager or a supervisor. He categorically denied receiving one month's notice pay. He also denied having received $3,719.57 as severance pay and notice pay. He stated that he was employed by the Company for about 2 to 3 years.

[80] The Company admitted that Mr. Turner was not a supervisor or a manager. In other words, he was a line staff. It was suggested to him that if he were not a manager or supervisor but a line staff and he worked (using the maximum of 3 years), then he would be entitled to a severance of 2 weeks per year or 6 weeks in total. He agreed. He did not agree that he was over compensated either in notice pay or severance pay.

[81] He acknowledged that he did not compile the spreadsheet which is attached to his Statement of Claim. According to him, Mrs. Stubbs did it.

[82] With respect to Mr. Turner's allegation that his contract of employment was unfairly breached and terminated by the Company, the Company denied the allegation and averred that at the date of Mr. Turner's termination, he was paid one month's notice and one month's severance as a manager as provided for in Clause 13 of his contract of employment. Mr. Turner could not recall how much he was paid in notice and/or severance pay but denied that he was paid the amount stated in the termination letter.

[83] Since Mr. Turner has not made a claim for notice and severance pay and the only evidence as to what was paid came from the Company, I will dismiss his claim that the Company unfairly breached and terminated his contract of employment.

[84] With respect to Mr. Turner's claim for overtime from 3 January 2012 to 17 June 2012, Mrs. Stubbs' evidence, which Mr. Turner solely relied upon, baldly stated that she did not accept Ms. Coakley's account of Mr. Turner; in essence that he

received the termination pay to which he was entitled to as a manager namely one month's notice pay and two and a half (2 1/2) months' severance pay.

[85] Mrs. Stubbs stated that Mr. Turner is entitled to overtime when he worked it and no contract of employment could oust the statutory benefits in sections 8 and 10 of the Employment Act.

[86] The Company refuted the Table used by Mr. Turner to calculate the alleged overtime (the table prepared by Mrs. Stubbs). Mr. Turner has no recollection of anything stated in the spreadsheet and could not verify the hours which he claimed in his Statement of Claim that he had worked overtime.

[87] In the circumstances, I dismiss the claim brought by Mr. Turner in its entirety.

Brian Davis

[88] By Amended Writ of Summons indorsed with a Statement of Claim which was filed on 1 August 2013, Mr. Davis, a Lighting Technician, alleged that the Company unfairly breached and terminated his contract of employment. He further alleged that, at the time of termination, the Company owed him the sum of $51,119.37 in overtime hours which he worked for during the period 31 October 2010 to 6 January 2013; in other words, for approximately 2 years and 2 months. The Company puts him to strict proof of his claim.

[89] In his witness statement filed on 4 December 2014, Mr. Davis stated that he commenced employment with the Company in May 2007 in the capacity of Lighting Department Manager at a weekly salary of $1,350.00. He acknowledged that the terms and conditions of his employment was governed by a written contract. He alleged that, by letter dated 13 January 2013, the Company unfairly and in breach terminated his contract of employment without paying him his entitled benefits.

[90] Mr. Davis averred that, at the date of his termination, he was owed $51,119.37 in respect of days in lieu for hours worked in excess of his regular hours of work for approximately 2 years and 2 months. He alleged that he suffered loss and damage.

[91] Ms. Coakley asserted that, at the date of Mr. Davis' termination, he was in a supervisory and managerial position. According to her, he held the most senior role in the Lighting Department and was paid one of the highest salaries in the Company. She alleged that Mr. Davis was responsible for a team of employees and he had the authority to exercise disciplinary control over employees who worked under him and to discipline them by removing them from their job if they were not performing. She stated that Mr. Davis was the immediate supervisor of the Company and trained Mr. James, Mr. Louis and Mr. Bernadin. At the date of his termination, he received the termination pay as a manager.

[92] Mrs. Stubbs stated that she does not accept Ms. Coakley's account of Mr. Davis. According to her, he was not a manager within the meaning of the Ruling of the Court of Appeal in **Duran Cunningham**. Furthermore, she stated that Mr. Davis did not attend any manager's meetings and that all suspensions and terminations had to be approved by Mr. Davis' supervisor. She fell short of saying who that person is/was.

[93] Under cross-examination, Mr. Davis admitted that he received one month's notice pay and one month's severance pay for each year of employment.

[94] If he were a manager, then he would have received the benefits that he was entitled to. If he were a line staff, then it appeared that he might have been overpaid. In any event, he did not claim notice pay and severance pay. In the circumstances, I will dismiss that aspect of his claim.

[95] Mr. Davis also claimed overtime pay from 31 October 2010 to 6 January 2013. Mrs. Stubbs produced, on Mr. Davis' behalf, evidence that he worked 4 hours of overtime.

[96] The question now is whether Mr. Davis was a supervisor and/or a manager. The Company's position is that he was a manager and therefore, he was not entitled to overtime pay.

[97] Mr. Davis' contract of employment was dated 29 December 2011. Clause 1 stipulates his salary and Clause 2 deals with the hours of work. It states:

> **"The duties to be performed under this Agreement are or a managerial nature. Accordingly, you will not be entitled to overtime pay. Your hours are based on the standard hours of work (4) plus the hours required to fulfil your duties and responsibilities."**

[98] Clause 3 deals with overtime and public holidays. It provides that "*due to the nature of the Company's business, it may be necessary for you to work on a scheduled day off or on a public holiday. However,… you shall not be entitled to any payment for such overtime worked."*

[99] Under cross-examination, Mr. Davis acknowledged that he commenced employment with the Company in 2008. At that time, he was the "lead" in the Lighting Department. He vehemently denied that he was a manager despite the clauses in his contract of employment. He asserted that he was not a manager because he could not hire or fire and he did not set the schedule or attend manager's meetings.

[100] In analyzing his evidence and observing his demeanour as he testified, I did not believe Mr. Davis when he said that he was not a manager. He knew very well that he was a manager or a "lead" as Mrs. Stubbs described him. He also gave the employees tasks to do and supervised them. His contract of employment is also very clear.

[101] Consequently, on the evidence adduced, I find that Mr. Davis was a manager and as such, he is not entitled to compensation for overtime. Again, this was very clear in his contract of employment.

[102] Mr. Parmarthi gave evidence that Mr. Davis was in fact given lieu days as agreed in his contract of employment. He stated that, for the period claimed, Mr. Davis had earned 40 days but he took 88 days – 48 days over his entitlement.

[103] In my opinion. Mr. Davis has not convinced me on what basis he claims $51,199.37 as compensation. In any event, I find that he was a manager and according to his contract of employment, he was not entitled to overtime.

[104] Accordingly, I will dismiss his claim.

Devon Emmanuel

[105] By Amended Writ of Summons indorsed with a Statement of Claim which was filed on 1 August 2013, Mr. Emmanuel alleged that the Company unfairly breached and terminated his contract of employment. He further alleged that he was employed by the Company as a Warehouse Technician and earned a salary of $250.00 weekly. He alleged that the Company owes him the sum of $5,577.73 in respect of overtime hours worked for the periods 18 October 2010 to 5 February 2012 as shown in his particulars of special damage.

[106] In his witness statement filed on 4 December 2014, Mr. Emmanuel averred that he commenced employment with the Company sometime in November 2010 and was paid a weekly salary of $250.00. Initially, he worked under an oral “Buyout Contract of Employment”. He was paid in cash and he was not paid for any overtime for hours worked in excess of his normal hours of work between the periods 18 October 2010 to 5 February 2012.

[107] Mr. Emmanuel stated that, on 16 April 2012, he entered into a fixed term contract for 2 years from 16 April 2012 to 15 April 2014. Sometime in April 2014, the Company terminated his contract of employment owing him $5,577.73 in respect of overtime for the period 18 October 2010 to 5 February 2012. He stated that, as a result, he has suffered loss and damage and is entitled to that sum.

[108] Mrs. Stubbs supported his claim that he is entitled to damages. She stated that Mr. Emmanuel was integrated in the work force and worked overtime for which he was not paid. She stated that Mr. Emmanuel was not a manager or supervisor and the Company conceded.

[109] Under cross-examination and re-examination Mr. Emmanuel stated that he commenced his employment with the Company on 14 November 2011.

[110] Pursuant to his contract of employment dated 16 April 2012, Mr. Emmanuel was employed as the Warehouse Technician: in a technical position for a fixed term of 2 years from 16 April 2012 to 15 April 2014. Clause 3 stipulates:

> **"…Accordingly, you will be entitled to overtime pay with your normal hours of work being based on a forty (40) hour work week, excluding meal times. As an employee you will be required to work overtime periodically. Overtime is classified as time worked in excess of forty hours in any week, excluding mean times. When overtime occurs, you will be paid at one and a half times your regular rate of wages."**

[111] Mr. Emmanuel's salary was $300.00 weekly. He claimed overtime pay from 18 October 2010 to 2 February 2012. However, he worked as a Buy-Out and/or an independent contractor ("Buy-Out") from 18 October 2010 to 13 November 2011. As a Buy-Out, he worked on a need-be basis and was not entitled to any employee/statutory benefits, sick leave, vacation pay, retirement benefits, health or disability benefits as stated in the preamble of his Buy-Out Contract Agreement.

[112] By a Buy-Out Agreement dated 14 November 2011, Mr. Emmanuel commenced his employment with the Company. Therefore, Mr. Emmanuel is entitled to overtime pay for the period 14 November 2011 (not 18 October 2010) to 2 February 2012. His overtime pay is based on the rate of $70.00 per day or $8.75 per hour.

[113] The Company conceded that Mr. Emmanuel is entitled to overtime pay in the amount of $390.61. Mr. Emmanuel was offered this amount but he refused to accept it.

[114] I accept the calculations of Mr. Parmarthi at paragraphs 65 and 66 of his witness statement as the true amount of overtime pay owed to Mr. Emmanuel.

[115] Mr. Emmanuel alleged that the Company unfairly breached and terminated his contract of employment. He has not proffered any evidence as to how the Company unfairly breached and terminated his contract of employment.

[116] In the circumstances, I shall order that the Company pays to Mr. Emmanuel the sum of $390.61.

Bernard Paul

[117] In paragraph 3 of his Statement of Claim filed on 31 July 2013, Mr. Paul alleged that, by letter dated 12 January 2013, the Company unfairly and in breach of contract terminated his contract of employment. He further stated that, at the date of his termination, the Company owed him the sum of $20,459.16 in respect of overtime hours between the period 9 January 2009 and 12 November 2012.

[118] In his witness statement filed on 4 December 2014, Mr. Paul stated that he commenced his employment with the Company on 26 November 2006 as a Warehouse Manager and earned a salary of $700.00 weekly.

[119] He alleged that, between 9 January 2009 and 12 January 2012, the Company owed him $20,459.16 for days in lieu of pay for hours worked in excess of his regular hours of work. He further alleged that, by letter dated 12 January 2013, the Company unfairly and in breach of contract terminated his contract of employment and failed to pay him.

[120] In support of his claim, he relied on the evidence of Mrs. Stubbs and the spreadsheet which she prepared. Mrs. Stubbs stated that she did not accept Ms. Coakley's account that Mr. Paul was a supervisor or manager as found in the case of **Duran Cunningham**.

[121] The Company denied this allegation and averred that at the date of Mr. Paul's termination, he was paid one month's notice and one month's severance pay for each year of employment as a manager, as stipulated in his Contract of employment.

[122] Under cross-examination, Mr. Paul admitted that he received one month's notice and one month's severance pay for each year of employment as per the

Employment Act. I therefore find that Mr. Paul's claim that he has been unfairly dismissed is meritless and must fail.

[123] Mr. Paul also claimed overtime pay from 9 January 2009 to 12 November 2012, which is approximately 2 years and 10 months. Neither Mr. Paul nor Mrs. Stubbs produced any evidence to demonstrate that he worked the overtime periods for which he claimed. As such, his claim to overtime is untenable and fail.

[124] Furthermore, Mr. Paul's pleadings are replete with admissions that he was a manager. At paragraph 2 of his Statement of Claim, Mr. Paul admits that he was an Operations Manager/Assistant Production Manager.

[125] At paragraph 1 of his witness statement, Mr. Paul admitted that he commenced employment as a Warehouse Manager and, under cross-examination, he admitted to supervising the employees in the warehouse during this time. Then, at paragraph 2 of his witness statement, he admitted to receiving a Job description for the position of Warehouse Floor Manager and, in cross examination, he admitted to supervising and training the employees during this time. At paragraph 3, he admitted to receiving a Job description for the position of Outside Lighting Manager and in cross examination he admitted to supervising and managing the employees during this time. Finally, he admitted under cross-examination to supervising, training and managing staff during this time.

[126] On the basis of the facts and the law, Mr. Paul was a manager and as such, not entitled to overtime but to lieu days which he received. Based on the Company's records, Mr. Paul's lieu days' entitlement for the period 9 January 2009 to 12 November 2012 were 33 days. Mr. Paul had taken 54 lieu days off: 21 days over his eligible entitlement. Mr. Paul therefore owes the Company 21 days of pay but the Company has not counterclaimed.

[127] In the circumstances, I will dismiss Mr. Paul's claim in its entirety.

Terrell Kelly

[128] By a Specially Indorsed Writ of Summons filed on 7 August 2013, Ms. Kelly seeks damages in the sum of $7,082.77 in respect of overtime hours worked for the period 16 July 2012 to 20 January 2013.

[129] Her evidence is contained in a witness statement filed on 4 December 2014 which stood as her evidence in chief. She stated that she commenced employment with the Company as a Production Assistant and earned a salary of $500.00 weekly. By letter dated 1 February 2013, she was warned by the Company that she was in breach of her duties in encouraging workers to join the General Workers Union. On or about 31 May 2013, the Company terminated her employment. She alleged that the Company owed her the sum of $7,082.77 in respect of days in lieu pay for hours worked in excess of her regular hours of work.

[130] Mrs. Stubbs supported her claim for lieu days. She stated that, as coordinator, Ms. Kelly was in the same position as Mr. Duran Cunningham in the case of **Duran Cunningham** was as she had no authority to make independent decisions for and on behalf of the Company. According to Mrs. Stubbs, Ms. Kelly did not attend any manager's meetings. She was called a manager but she had no authority and, as such, she is entitled to overtime worked as stipulated in her particulars of claim. Mrs. Stubbs stated that lieu day off with pay is not overtime pay pursuant to sections 8 and 10 of the Employment Act and lieu days cannot be substituted for overtime pay.

[131] Ms. Coakley and Mr. Parmarthi alleged that Ms. Kelly was employed by the Company as the Program Coordinator. She worked from 30 March 2007 to 31 May 2013. As Program Coordinator, she reported directly to Mrs. Stubbs; the two were part of the Managerial Team of the Company.

[132] They both testified that this position was a supervisory and managerial position and, as a result, Ms. Kelly is not entitled to overtime pay. However, in accordance with Clause 3 of her contract of employment, Ms. Kelly was entitled to lieu days

when she worked a minimum of 4 hours, on the seventh day in any week and on public holidays.

[133] Under cross-examination, Ms. Kelly maintained that she was never left in charge. When interrogated as to how many lieu days the sum of $7,082 represents, she was unable to because she said that she was not responsible for the calculation. When shown the Company's bundle of documents which reflected that for the 6 month period that she claimed to be entitled to overtime pay, that, in fact, she earned 9 days and she took all 9 days, Ms. Kelly disagreed although neither herself nor Mrs. Stubbs produced any evidence that she worked the overtime period which she claimed. In other words, she has not proven her claim to overtime pay.

[134] In the circumstances, the Court is therefore not required to consider whether or not Ms. Kelly was a supervisor and/or a manager. But, I shall carry on.

[135] Ms. Kelly was paid the sum of $15,775.56 in notice and severance pay. Her salary was $500.00 weekly. Clause 2 of her contract of employment states:

> **"The duties to be performed under this Agreement are of a supervisory nature. Accordingly, you will not be entitled to overtime pay. Your hours are based on the standard hours of work (40) plus the hours required to fulfil your duties and responsibilities."**

[136] Clause 3 deals with overtime and public holidays. It states that due to the nature of the Company's business, it may be necessary for you to work on a scheduled day off or on a public holiday. However, as stated in Clause 3 (sic): "*you shall not be entitled to any payment for such overtime worked*…. In such cases, you will be given a day off…"

[137] Based on the Company's records, at the date of her termination, she had taken all of her lieu days off from 16 July 2012 to 20 January 2013. She is not entitled to full days off with pay (lieu days) and the additional payment of overtime.

[138] Although Ms. Kelly disagreed that she was paid $15,775.56 in notice pay and severance pay, I find that she was paid the sum of $15,775.56. She agreed that

she is entitled to overtime pay because she was a line staff. If she were a line staff, it meant that she was over-compensated: she should have received $6,165 in severance pay and $1,000 notice pay.

[139] Ms. Kelly insisted that she was not a manager. Eventually, she confirmed that she was paid as a manager when she was terminated.

[140] Under re-examination, she stated that the $15,475.66 was paid either every week or every two weeks and then once a month up to January 2014. She agreed to the payment in instalments.

[141] For all of the reasons stated above, I dismiss the claim in its entirety.

Terrence Brennen

[142] By a Specially Indorsed Writ of Summons filed on 7 August 2013, Mr. Brennen seeks damages for overtime worked in the sum of $28,203.64 for the period 25 October 2010 to 31 December 2012.

[143] Mr. Brennen filed a witness statement on 4 December 2014 which stood as his evidence in chief at the trial. He stated that he commenced employment with the Company in October 2010 under a contract of employment. He alleged that between the periods 25 October 2010 to 31 December 2010 (sic), he worked in excess of his regular hours of work as particularized in his Statement of Claim. He continued his employment until sometime on or about 12 January 2013 when the Company unfairly breached his contract of employment by terminating him and failing to pay the sum of $28,203.64 in respect of days in lieu pay.

[144] Mrs. Stubbs produced, on Mr. Brennen's behalf, a spreadsheet showing that he worked 14 hours of overtime.

[145] The issue which now arises is whether or not Mr. Brennen was a supervisor and/or manager.

[146] The Company's position is that Mr. Brennen was a supervisor and as such, he is not entitled to overtime as per his Contract of Employment.

[147] In her testimony, Mrs. Stubbs stated that when Mr. Brennen was hired on 28 February 2011 as Logistics Supervisor, he was a Buy-Out. As a Buy-Out, he was integrated in the work force and worked overtime from 25 October 2010 to 31 December 2012. She maintained that Mr. Brennen was not a manager and never carried out managerial functions as required in the case of **Duran Cunningham**.

[148] In his witness statement as well as his Statement of Facts and Issues, Mr. Brennen admitted to being a Logistics Supervisor. During the cross-examination of Mrs. Stubbs, she asserted that Mr. Brennen was a "Lead" and he supervised employees during strikes or breakdown of events.

[149] In addition, pursuant to Mr. Brennen's contract of employment, he was hired as a Logistics Supervisor. At Clause 3, it expressly provides that the duties to be performed are of a supervisory nature and that *"you will not be entitled to overtime pay.*" His contract of employment provided that he would receive a day off with pay whenever he worked on a seventh day in any week or on public holidays: Clause 5.

[150] In his witness statement at paragraph 111, Mr. Parmarthi averred that Mr. Brennen was in fact given lieu days (a day off with pay) as stipulated in his contract of employment. Moreover, for the period claimed by Mr. Brennen, he had earned 18 days but he took 40 days: 22 days over his eligible entitlement.

[151] In addition, at paragraph 3 of his witness statement, Mr. Brennen specifically claimed compensation for lieu days. Under cross-examination, he was asked how many lieu days he is owed by the Company and he said that he cannot give that statement because he did not keep track of the time.

[152] Be that as it may, I find that, based on the evidence including the contemporaneous documentary evidence and the applicable law, Mr. Brennen's claim fails because

he was a supervisor and he received time off in lieu as provided for in his contract of employment. I will therefore dismiss his claim in its entirety.

Group 2: Persons claiming overtime and vacation pay

Marvin James

[153] Mr. James is the only person falling under this category. By a Specially Indorsed Writ of Summons filed on 1 August 2013, Mr. James alleged that, he was employed by the Company as a Warehouse Technician and earned a salary of $425.00 per week. In paragraph 3, he alleged that, by letter dated 14 January 2013, the Company unfairly terminated his contract of employment and owed him the sum of $16,712.12 in respect of overtime hours which he worked for the period 31 October 2010 to 18 November 2012 as shown in the particulars of special damages.

[154] In paragraph 5 of his Statement of Claim, Mr. James alleged that the Company has unfairly and in breach of his contract of employment failed to pay the accrued sum of $18,412.12 which represents overtime hours worked ($16,712.12) plus accrued unpaid vacation of $1,700.00.

[155] Mr. James filed a witness statement on 4 December 2014 which stood as his evidence in chief at this trial. He averred that, on 15 June 2010, he commenced employment with the Company as a Warehouse staff at an hourly rate of $7.59 per hour. He worked under an oral Buy-Out contract of employment. He was paid in cash and was never compensated for overtime worked. He further stated that he worked for two and one half years and was given only two weeks' vacation and, on 13 January 2013, he was unfairly terminated by the Company and was not paid for time worked in excess of his regular hours of work for the period 31 October 2010 to 18 November 2012.

[156] Mr. James stated that, on the termination of his contract of employment, the Company failed to pay him for accrued vacation in the amount of $1,700. According to him, when his contract of employment was terminated, the Company

owed him $16,712.12 for overtime hours worked from 31 October 2010 to 18 November 2012. Overall, as particularized in his Statement of Claim, the Company owed an aggregate of $18,412.12.

[157] He also relied on the evidence of Mrs. Stubbs. Mrs. Stubbs stated that Ms. Coakley's explanation of Mr. James' job responsibilities reflects that of a manual labourer and not a manager. She attached a Schedule - Exhibit MS 1- which according to her reflects the position which he held on each shift.

[158] Under cross-examination, Mr. James admitted that, from 15 June 2010 to 1 May 2011, he worked as a Buy-Out. As a Buy-Out, he received no benefits from the Company which was a term of the agreement. He was cross-examined on the various dates that he worked as a Buy-Out according to the Company's record. Mr. James did not recall any of those dates.

[159] When asked whether, if he worked for 2 or 3 days per week, he was still paid the full weekly salary of $425.00, Mr. James stated that he never worked for 2 or 3 days but more like 6 to 7 days. It was suggested to him that for the year 2012, he had earned 16 lieu days and he had only taken 12 days so the Company admitted that it owed him lieu pay of $340, Mr. James said that "*That's not quite correct".*

[160] When questioned about two weeks' vacation which he allegedly took in 2 years, he stated that he never had any vacation and was never paid. He was cross-examined whether for the entire 2011 and 2012 he worked every day without a break Mr. James said that he would not say every single day. There were many times when he would be called to work in the night also and then he would ask Mrs. Stubbs for a half day which she gave to him.

[161] In spite of receiving severance pay as a manager, Mr. James insisted that he was not a manager.

[162] When questioned about the discrepancy with respect to overtime between his Statement of Claim and document called "Overtime Calculation Claim for Marvin

James in the Bundle of Documents, Volume 1 at Tab 35, he said that Mrs. Stubbs made up the time. She was in control of the hours and the time and he trusts that she did the right thing.

[163] The facts as I find them are that Mr. James was employed by the Company on a fixed term contract for 2 years commencing 2 May 2011 and ending 1 May 2013. He was an All-Around Outside Lighting Technician. He was in a managerial position as evidenced by his contract of employment. By Clause 3 of his contract, he was not entitled to overtime pay. However, by Clause 5, he was entitled to lieu days when he worked a minimum of 4 hours, on the seventh day in any week and on public holidays. His salary was $425.00 weekly.

[164] Between the periods 31 October 2010 to 2 May 2011, Mr. James was a Buy-Out/Independent Contractor and he worked on a need-be basis. He was not entitled to any employee/statutory benefits as per the agreements. The Company did not make any National Insurance contributions for Mr. James as he was a Buy-Out/Independent Contractor.

[165] Based on the Company's record which I consider to be more accurate than that produced by Mrs. Stubbs (obtained from the time clock), Mr. James' lieu day entitlements for the period 2 May 2011 to 18 November 2012 were 22 days. However, he took 18. Therefore, the Company owes him 4 days of lieu days in the amount of $340 ($85.00 x 4 days).

[166] Mr. James also claimed vacation pay of $1,700. Under Clause 10 of his contract of employment, Mr. James was entitled to 2 weeks' vacation leave. At the time of his termination, he accumulated 3 weeks and 3 days of vacation. Mr. James took 2 weeks of vacation from 18 June 2012 to 1 July 2012 which he admitted in his Statement of Facts and Issues filed on 4 December 2014. Therefore, the Company owes him 1 week (5 working days) and 3 days of outstanding vacation which, when calculated, amounts to $680.00 ($85.00 x 8 days).

[167] In the aggregate, the Company owes him the following:

1.	4 days of lieu days at $85.00 x 4	$340.00
2.	8 days of outstanding vacation leave: $85.00 x 4	$680.00
	TOTAL	**$1.020.00**

[168] Applying the law and the facts to the present case, I find that, despite Mr. James' insistence that he was not a manager, he was and consequently, he was not entitled to overtime pay.

[169] At the date of the termination of his contract of employment, Mr. James was paid one month's notice pay and two months' severance pay as a manager.

[170] Mr. James was offered the sum of $1,020.00 but he has refused to accept.

[171] I will therefore dismiss Mr. James' claim for overtime in its entirely since he was a manager. The Company shall pay him the total sum of $1,020.00.

Group 3: Persons claiming unfair dismissal

[172] Three Plaintiffs alleged that they were unfairly dismissed namely:

1. Jerome Taylor;
2. Elron Munroe; and
3. Daniel Sears.

The Law

Unfair dismissal

[173] Section 34 provides that every employee shall have a right not to be unfairly dismissed by his employer, as provided in sections 35 to 40.

[174] Section 35 states that "*Subject to sections 36 to 40, for the purposes of this Part, the question whether the dismissal of the employee was fair or unfair shall be determined in accordance with the substantial merits of the case*".

[175] The case of **B.M.P. Limited d/b/a Crystal Palace Casino v Yvette Ferguson** IndTribApp App No. 116 of 2012 gives a broad overview to what may constitute

unfair dismissal. The Court of Appeal held, among other things, that (i) the Employment Act does not contain an exhaustive list of instances of what could be considered to be unfair dismissal; (ii) sections 35 to 40 contain what may be regarded as "statutory unfair dismissal" and section 35 provides for the determination of the question whether the dismissal of an employee is fair or unfair.

[176] At paragraph 36 of the judgment, Conteh JA stated:

> **"The expression "unfair dismissal" itself is not defined in the Act. What it provides for, in our view, is to itemize instances of what can be called "statutory unfair dismissal" such as provided for in section 36 (dealing with dismissal for trade union membership and activities of an employee); section 37 (dealing with dismissal on ground of redundancy); and section 40 (dealing with dismissal in connection with lock-out, strike or other industrial action).**

[177] At page 12, paragraph 39, the learned Justice of Appeal continued:

> **"Section 35, in our view, is the touchstone for the determination of whether in any instance of the dismissal of an employee outside of the provisions of sections 36, 37, 38 and 40, is fair or unfair. <u>And this question shall be determined in accordance with the substantial merits of the case</u>. All sections 36 to 40 do is to categorize instances which the Legislature deemed to be unfair cases of dismissal, and s. 34 provides that every employee has the right not to be unfairly dismissed as provided for in those sections. We do not think it was intended to foreclose the categories of unfair dismissal. Given the heterogeneity of circumstances in the workplace that could lead to the dismissal of an employee, it would, we think, be rash to spell out in advance, by legislation, what is or is not unfair dismissal of an employee. Can it seriously be said that an employee who is dismissed by his employer for no reason other than his or her appearance will not found a claim for unfair dismissal because that instance is not listed in Sections 36, 37, 38 and 40 of the Act?"** [Emphasis added]

Discussion

Jerome Taylor

[178] By a Specially Indorsed Writ of Summons filed on 7 August 2013, Mr. Taylor alleged that he was unfairly dismissed and at the time of termination, the Company owed him the sum of $11,825.97 as special damage which is particularized in his Statement of Claim.

[179] Mr. Taylor filed a witness statement on 4 December 2014 which stood as his evidence in chief. He stated that he commenced employment with the Company on 15 July 2011 and signed a contract of employment on 18 November 2011. He was paid a daily rate of $70.00 pursuant to the written Buy-Out contract. He was paid in cash but no overtime pay for the hours which he worked in excess of his regular hours of work.

[180] By letter dated 10 June 2013, the Company offered him a contract reducing the $70.00 to $50.00 per day. He refused to accept the unilateral variation which resulted in the Company terminating his employment on 17 June 2013.

[181] Mr. Taylor further averred that he was unfairly dismissed and the Company failed to give him reasonable notice of termination or pay in lieu of notice and severance pay in accordance with section 29 of the Employment Act. According to him, he is entitled to 6 weeks' reasonable notice.

[182] Mr. Taylor stated that when his contract was terminated, the Company owed him the sum of $11,825.97 in respect of notice pay, severance pay, unilateral pay reduction and overtime worked from 1 July 2011 to 17 June 2013.

[183] Under cross-examination, Mr. Taylor acknowledged that the Company had not disputed that it owed him two weeks' notice pay, 4 weeks' severance pay and two weeks' vacation pay totaling $2,800.00.

[184] Mr. Taylor disagreed that the Company owed him $1,199.95 instead of $3,598.02 which he claimed.

[185] In terms of unfair dismissal, Mr. Taylor was referred to Clause 14 of his contract of employment which states that "*[T]his Agreement is terminated in the following manner: (a) By the Company giving two weeks' notice or two weeks' basic pay in lieu of notice to the employee…."*

[186] With respect to the amount offered by the Company in the termination letter dated 17 June 2013, Mr. Taylor stated that he was never offered the amount stated therein.

[187] The facts as I found them are that Mr. Taylor commenced his employment on 18 November 2011 under a Buy-Out Agreement dated 14 November 2011. As a result of the Company paying his National Insurance Contributions, he became an employee of the Company. He was a Junior Technician and consequently, he was entitled to overtime pay. His overtime pay was based on a salary of $350.00 weekly or $70.00 daily or $8.75 per hour.

[188] Mr. Ferguson QC who appeared on behalf of the Plaintiffs submitted that there is no evidence to show that Mr. Taylor executed the contracts on 21 May 2013 or 10 June 2013. On 10 June 2013, the Company offered a fixed term contract of one year to Mr. Taylor. He did not accept the offer and his employment was terminated on 17 June 2013.

[189] Mr. Taylor claimed damages for the unilateral variation of his contract from 1 July 2011 to 17 June 2013. He seeks compensation of $100.00 weekly for that variation. By his own admission in his Statement of Claim and his Statement of Facts and Issues filed on 4 December 2014, he did not accept the unilateral variation which he was entitled to do. He was not unfairly dismissed. Besides, Mr. Taylor has not produced any evidence to demonstrate that he worked 40 hours during the period claimed and that there was a reduction in his salary during the said weeks by $100.00.

[190] Accordingly, Mr. Taylor's claim with regards to the unilateral variation is untenable and must fail.

[191] Mr. Taylor also claimed overtime pay from 1 July 2011 to 17 June 2013. The Company admitted that it owes Mr. Taylor $1,999.95 which represents 91.39 hours of overtime pay. Mr. Taylor cannot dispute this amount because he has not

produced any evidence with regard to the time worked in the spreadsheet at Tab. 62.

[192] My findings are that Mr. Taylor is entitled to the following sums:

1.	Notice pay ($350.00 x 2 weeks)	$ 700.00
2.	Severance Pay ($350.00 x 4 weeks)	$1,400.00
3.	Vacation pay ($350.00 x 2 weeks)	$ 700.00
4.	Overtime pay (91.39 hours x $13.13)	$1,199.95
	TOTAL	**$3,999.95**

Elron Munroe

[193] By Specially Indorsed Writ of Summons filed on 7 August 2013, Mr. Munroe alleged that he too was unfairly dismissed and, at the time of termination, the Company owed him the sum of $8,593.60 as special damage which is particularized in his Statement of Claim.

[194] Mr. Munroe filed a Witness Statement on 4 December 2014 which stood as his evidence in chief at the trial. He stated that, sometime on or about 27 September 2011, he commenced employment with the Company pursuant to a Buy-Out contract of employment as a Warehouse Associate earning $70.00 daily. He was paid in cash and he was not paid for overtime pay for hours worked in excess of his regular hours of work.

[195] He alleged that, in or about April 2012, the Company unilaterally varied his contract of employment by reducing the $70.00 per day to $50.00 per day which he refused to accept. This resulted in the Company terminating his contract of employment on 21 December 2012.

[196] Mr. Munroe alleged that he was unfairly dismissed and the Company failed to give him reasonable notice or pay in lieu thereof as well as severance pay as mandated by law.

[197] Mr. Munroe also stated that, during his employment, he worked overtime and he was never paid for the overtime. He now claims overtime pay in the sum of $2,567.57.

[198] Under cross-examination, Mr. Munroe acknowledged that his employment as a Buy-Out commenced on 16 November 2011.

[199] He agreed that from 16 November 2011 to 13 May 2012, his salary was $350.00 per week.

[200] On 11 May 2012, Mr. Munroe signed a contract of employment whereby agreeing to accept a salary of $250.00 per week as provided for in Clause 2. He agreed that Clause 14 speaks to termination and the Company is entitled to give 2 weeks' notice or in lieu of notice, 2 weeks' basic pay.

[201] By letter of termination dated 21 December 2012, the Company stated that "*any money due to you for the time worked will be paid to you upon return of the Company's property"*.

[202] The facts as I find them are that Mr. Munroe commenced employment with the Company on 16 November 2011 under a Buy-Out Agreement dated 16 November 2011. As a result of the Company paying his National Insurance Contributions, he became an employee of the Company.

[203] Mr. Munroe was paid a rate of $70.00 per day or $350.00 weekly or $8.75 hourly.

[204] By contract of employment dated 11 May 2012, Mr. Munroe agreed to a variation of the weekly salary from $350.00 to $250.00 on a fixed term contract of 2 years commencing 14 May 2012.

[205] He was terminated on 21 December 2012 before the contract expired.

[206] The Company admitted that Mr. Munroe is entitled to notice pay, severance pay, vacation pay and overtime pay. Learned Queen's Counsel Mr. Ferguson

acknowledged that Mr. Munroe is entitled to notice pay and severance pay based on his new salary of $250.00 weekly. However, one week's vacation should be $350.00 and not $250.00. According to Mr. Ferguson QC, Mr. Munroe is also entitled to be paid for the unexpired portion of his contract at a salary of $250.00 weekly for 17 months. In that regard, he referred to the case of **Caribbean Marketing Company v Robert Thurston** Civil Appeal No. 45 of 2000.

[207] Clause 14 of the contract of employment gives the Company the power to terminate Mr. Munroe's employment by giving two weeks' notice or two weeks' basic pay in lieu of notice. This is expressly stipulated in the contract which Mr, Munroe signed. I do not see on what basis he becomes entitled to salary for the unexpired portion of his contract.

[208] My findings are that Mr. Munroe is entitled to the following sums:

1.	Notice pay ($250.00 x 2 weeks)	$ 500.00
2.	Severance Pay ($250.00 x 2.16 weeks)	$ 541.67
3.	Vacation pay ($350.00 x 1 week) (not $250.00)	$ 350.00
4.	Overtime pay (83.78 hours x $9.38)	$ 785.86
	TOTAL	**$2177.53**

Daniel Sears

[209] By Specially Indorsed Writ of Summons filed on 7 August 2013, Mr. Sears alleged that he was unfairly dismissed and, at the time of termination, the Company owed him the sum of $10,200.11 as special damage which is particularized in his Statement of Claim.

[210] Mr. Munroe filed a Witness Statement on 4 December 2014 which stood as his evidence in chief at the trial.

[211] He stated that he commenced employment with the Company sometime on or about 1 June 2009 as a Warehouse Technician at an hourly rate of $7.50. Then on 16 November 2011, he entered into a Buy-Out Contract with the Company. He

was paid in cash and he was not paid for overtime for hours worked in excess of his regular hours of work.

[212] In or about June 2012, the Company unilaterally varied his contract of employment by reducing the $70.00 per day to $50.00 per day. He refused to accept the unilateral variation and it resulted in his termination on 9 January 2013.

[213] He alleged that the Company owes him the sum of $10,200.11 in respect of notice pay, severance pay, vacation pay, unilateral pay reduction and overtime hours.

[214] Under cross-examination, he accepted that, at the time of termination, he was employed for approximately one year and 2 months. He was unaware that the Company had agreed to pay him 2 weeks' notice pay, 2.33 weeks in severance pay and vacation pay of 2 weeks although he has already received an amount of $500.00 as severance pay from the Company.

[215] I accept the evidence adduced by the Company's s witness, Mr. Parmarthi whereby the Company has admitted that Mr. Sears is entitled to notice pay, severance pay, vacation pay and overtime pay.

[216] My findings are that Mr. Sears is entitled to:

1.	Notice pay ($350.00 x 2 weeks)	$ 700.00
2.	Severance Pay ($350.00 x 2.33 weeks)	$ 816.67
3.	Vacation pay ($350.00 x 2 weeks)	$ 700.00
4.	Overtime pay (12.73 hours x $13.13)	$ 167.14
	TOTAL	**$1,883.81**

[217] As already stated, Mr. Sears has already received $500.00 as severance pay so the sum that he is entitled to will be: ($1,883.81 - $500) = $1,383.81.

[218] Mr. Sears is not entitled to any sums of money for the alleged unilateral variation of his contract of employment. His contract was not varied and the Company continued to pay him at the rate of $350.00 weekly.

[219] Mr. Sears has also not provided any evidence that he was unfairly terminated.

Conclusion

[220] On a balance of probabilities, this Court preferred the evidence of the witnesses for the Company especially Mr. Parmarthi. As stated earlier, I found him to be a very convincing witness and I accepted his evidence. On the other hand, it was evident that Mrs. Stubbs had set out to malign the Company and even misled the Plaintiffs as most of them had very little knowledge of what was contained in the spreadsheets. In attempting to make a claim for the Plaintiffs who were managers and/or supervisors, she relied heavily on the Court of Appeal decision of **Duran Cunningham** which was not followed by the Court of Appeal in **Patrice Ferguson**. So, in her evidence, she stressed that the seven Plaintiffs who claimed not to be managers/supervisors could not hire, hire, lay off, promote or exercise disciplinary power over persons employed in the Company. At last, that is no longer the test as the Fair Labour Standards Act, upon which **Duran Cunningham** was based, was repealed.

[221] The Court is now at large to consider who is a manager and/or supervisor and can even resort to dictionary meaning, no doubt, looking at the surrounding facts and circumstances and the evidence as a whole.

[222] In doing so, I found that the Plaintiffs (i) Bradley Roberts; (ii) Keith Louis; (iii) Brian Davis; (iv) Bernard Paul; (v) Terrell Kelly; (vi) Terrence Brennen and (vii) Marvin James were either a manager and/or a supervisor and were therefore not entitled to overtime pay. Since these Plaintiffs have been unsuccessful in their respective claims, they will have to pay costs to the Company.

[223] Further, I found that the Plaintiffs, Jeffery Turner and Devon Emmanuel were line staff and were entitled to overtime pay.

[224] There were also three Plaintiffs namely (i) Jerome Taylor; (ii) Elron Munroe and (iii) Daniel Sears who alleged that they were unfairly dismissed. They were not but are all entitled to notice pay, severance pay, vacation pay as well as overtime pay. I have made the respective awards for each of them in the Judgment. With respect to costs, I will order that each party shall bear their own costs.

[225] I also make a similar costs order with respect to Jeffery Turner and Devon Emmanuel. The Company conceded that they were not managers.

Costs

[226] In civil proceedings, costs are always discretionary. A good starting point is Order 59, rule 3(2) of the Rules of the Supreme Court ("RSC") which states:

> "**If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.**"

[227] Then, section 30(1) of the Supreme Court Act provides:

> "**Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid.**"

[228] Order 59, rule 2(2) of the RSC similarly reads:

> "**The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the costs are to be paid, and such powers and discretion shall be exercised subject to and in accordance with this order.**"[Emphasis added]

[229] It is accepted that this discretion is not to be exercised arbitrarily but must be exercised judicially. Buckley LJ, in the Court of Appeal case of **Scherer and another v Counting Instruments Ltd. and another** [1986] 2 All ER 529 stated:

> **"The judge was required to exercise his discretion judicially, i.e. in accordance with established principles and in relation to the facts of the case and on relevant grounds connected with the case, which included any matter relating to the litigation, the parties' conduct in it and the circumstances leading to the litigation, but nothing else."**

[230] The principle to be applied by the Court or Judge when exercising this discretion is that of reasonableness. In **McPhee (as Administrator of the Estate of Thelma Mackey) v Stuart** [2018] 1 BHS J. No. 18 at para. 8, this Court enumerated some factors which would be reasonable for the Court to consider when deciding the issue of costs, namely:-

1. any order that has already been made;
2. the care, speed and economy with which the case was prepared;
3. the conduct of the parties before as well as during the proceedings;
4. the degree of responsibility accepted by the legal practitioner;
5. the importance of the matter to the parties;
6. the novelty, weight and complexity of the case; and
7. the time reasonably spent on the case.

[231] The general rule is that, in civil proceedings, the successful party is entitled to his costs. The Court may depart from this general principle if there are good and compelling reasons to do so.

[232] In the present case, there are no reasons to me to do so. Exercising my unfettered discretion, I shall make the following costs order:

1. The Plaintiffs (i) Bradley Roberts; (ii) Keith Louis; (iii) Brian Davis; (iv) Bernard Paul; (v) Terrell Kelly; (vi) Terrence Brennen; and (vii) Marvin James do pay costs in the sum of $7,500.00 each to the Company;

2. The Plaintiffs (i) Jeffery Turner, (ii) Devon Emmanuel, (iii) Jerome Taylor; (iv) Elron Munroe and (v) Daniel Sears shall bear their own costs.

Dated this 2nd day of March, 2022

Indra H. Charles
Justice