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SOUTH RIDING POINT HOLDING LTD. v. McINTOSH

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Citation # BS 1998 CA 31

Country The Bahamas

Court Court of Appeal

Judge Zacca, J.A. | Carey, J.A. | Hall, J.A.

Subject Industrial law

Date July 22, 1998

Suit No. Civil Appeal No. 13 of 1993

Subsubject Wages - Overtime payment - Appeal against tribunal that the respondents "general purpose seamen" were entitled to overtime payment - Whether the tribunal erred in holding that the respondents were entitled to overtime under their contract of employment and under the fair Labour Standards Act - Whether the respondents' contract excluded overtime pay - Whether the respondents were seamen - Fair Labour Standards Order 1970 - Statutory interpretation - Whether Fair Labour Standards Act applied to seamen Held: Under contract the respondents were not entitled to overtime pay. The respondents would only be so entitled if they were not seamen within the context of the Fair Labour Standards Act. This Act does not define seamen. In coming at a decision the court looked at the contracts in which the respondents were all described as "general purpose seamen". While that provided guidance attention was paid not only to the title under the contract but to the duties performed by the respondents. The Tribunal accepted that the respondents performed some duties similar to those of seamen but held they must be regarded as employees who merely worked on tug-boats and launches and not as conventional seamen. It was not accepted that only those persons who perform duties on the high seas or are away for extended periods can be classified as seamen. If they are performing the duties of seamen then they surely were seamen. Appeal allowed.

Full Text Mr. Harvey Tynes Q.C. and Mr. Hal Tynes for appellant.

Mr. Fred Smith and Mr. Sean Callender for respondents.

ZACCA, J.A.: This is an appeal from the award of an arbitration tribunal in which the tribunal held that the respondents were entitled to overtime pay.

The five respondents were employed by the appellant at its oil transhipment terminal at South Riding Point in Grand Bahama. In its award the tribunal stated:

"...The tribunal unanimously agreed the Messrs. Bruce McIntosh, Denzil Roberts, Leyland Laing, Wellington Ingraham and William Roberts were not conventional seamen during the time of their employment with South Riding Holdings Ltd. and as such, they were entitled to be paid under the terms of their contract with South Riding Point Holdings Limited and the Fair Labour Standard Act..."

As a result of a request by the respondents for clarification of the award, the tribunal handed down a majority and a minority report.

Mr. Tynes for the appellant submitted that the tribunal erred in holding that the respondents were entitled to overtime pay by reason of their contract of employment and under the Fair Labour Standards Act. He argued that the appellant is entitled to appeal on a point of law.

It is conceded that this Court may intervene where the facts found are such that a tribunal directing itself properly as to the relevant law could not reasonably make such a determination as it did. Edwards v. Baristow [1955] 3 WLR 410; Kevin O'Shea v. Grand Bahama Hotel, Civil Appeal No. 23 of 1985. Mr. Tynes submitted that the respondents' contract of employment excluded the payment of overtime and that the respondents were seamen and therefore exempted under the Fair Labour Standards Act.

The respondents performed shift work, working fourteen days on and fourteen days off. They were on call twenty four hours per day. It was for the period during the shift work that the respondents claimed they were entitled to overtime pay for work done in excess of 42(hours weekly under the contract or over 48 hours under the Fair Labour Standards Act.

The respondent Denzil Roberts was hired on April 10, 1986. His letter of employment contains the following provision for the payment of overtime pay:

"Overtime is payable for hours actually worked in excess of the posted rosters for shift employees on 42(hours a week for day workers. Overtime pay wil' be paid in accordance with the procedures described in the manual". In respect of the other four respondents who were hired on April 2, 1987 there is also a provision for the payment of overtime: "Based on a 42(hour week. Normal Overtime - time and a half. Public holidays and Sundays (not part of a regular shift) - double time".

Mr. Smith for the respondents all but conceded that they were not entitled to overtime by reason of their contract of employment. They were, however, he stated, entitled to overtime pay because they were not seamen and so were eligible under the Fair Labour Standards Act.

I have no difficulty in holding that the contract of employment excluded the respondents from overtime pay. The tribunal was, therefore, in error in holding that the respondents were entitled to overtime pay under the terms of the contract.

The issue, therefore, on appeal is whether the respondents were seamen. If they were, then they are not entitled to overtime pay under the provisions of the Fair Labour Standards Act. They can only be entitled to overtime pay if they are not seamen.

Section 5 of the Fair Labour Standards Act provides:

"5(1) Except as otherwise provided by or under this Act, no employer shall cause or permit any employee to work in excess of eight and one-half hours in any day or forty-eight hours in any week (in this Act referred to as the standard hours of work) without the payment of overtime pay in respect of any such excess in accordance with

Section 7.

(2) The standard hours of work in a week shall be reduced by eight hours for every public holiday occurring in that week.

(3) Where by reason of the nature of any employment the hours of any employee for the purposes of such employment are required to be irregular, the standard hours of work in a day or week of any such employee may be calculated in such manner and in such circumstances as may be prescribed as an average over a period of two or more weeks.

(4) ...

(5) ...

(6) Except as otherwise provided by or under this Act, the hours of work in any employment shall be so arranged that each employee has at least one day in the week on which he is not required to work, and that day is in this Act referred to as the day off.

(7) 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** 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, on one and one-half times his regular rate of **wages**, and any **wages** paid are to be as required by this section and in this Act referred to as overtime pay.

By section 3(2) the minister is empowered to make orders exempting classes of persons or employments from the operation of the Act. The Fair Labour Standards (Exceptions) Order was made by the minister and became effective on May 1, 1970. Paragraph 5 of the Order exempted any person employed as a **seaman**.

The letter of employment of respondent Roberts states his position as "mate". In respect of the other four respondents their position is stated as "deck hand". All five respondents were notified that each was to be referred to a as "general purpose seamen".

In holding that the respondents were not seamen, the majority report stated:

"...In respect of the complainants' classification as seamen, while the duties performed were in some cases similar to those of seamen, the intent contemplated by the Fair Labour Standards Act Exemption Order was not fulfilled. The exemption is clearly intended to apply to those seamen whose duties would remove them from proximity to land for extended periods. Examination of the authorities presented by counsel support this view by restricting the seamen description to individuals operating vessels on high seas as opposed to the manning of vessels on rivers and waterways. The complainants must be regarded as employees who merely worked on tugboats and launches while performing duties similar to that of seamen and do not enjoy the exemption privilege of the Fair Labour Standards Act...".

In my view there is no assistance to be gained from the Act itself. Reference is made to authorities. The Court has not been referred to any authorities by counsel.

The Act does not define '**seaman**'. There is no evidence that the tugboats or launches operated on rivers and inland waters.

The minority report made the following finding in relation to the meaning of **seaman**:

"...The Merchant Shipping Act (Chapter 246) defines **seaman** as every person (except a master or an apprentice duly contracted or indentured and registered) employed or engaged in any capacity on board any ship. The complainants are all clearly captured within this definition both in name and nature of duties performed. (my emphasis) Another authority presented, Stroud suggests a possible exclusion of these individuals from the **seaman**'s net, reserving the classification for those operating vessels on the high seas while excluding operators of vessels in rivers, inland waterways, etc. The clear intent of this authority is to reserve the classification to those operating vessels away from land for extended periods. A ruling based solely on Bahamian law would favour the respondents. (my emphasis) The differentiation offered by other authorities was likely introduced to preclude persons whose seafaring duties occur in close proximity to land from enjoying special exemptions reserved for those unable to reach shore at will..."

There appears to be conflicting findings in the above quote from the minority report. It is correct that the respondents were not operating vessels away from land for extended periods. In my views, this fact does not give the answer to the meaning of seamen.

The respondents were employed in the marine department of the appellant's oil transhipment terminal located at South Riding Point on the Island of Grand Bahama. The terminal included a jetty located approximately one mile off shore. Services were provided to ocean-going vessels which included the berthing and unberthing of those vessels, the supply of cargo and the transportation of crews from those vessels to shore. Other general duties were performed by the respondents.

I accept that calling an employee a **seaman** does not of itself make him a **seaman**. However, guidance can be derived from the stated position of the employee in the contract of employment and the reference to "general purposes seamen", in determining whether or not the respondents were seamen. The duties of the respondent may also be considered. The respondents were on call twenty-four hours per day which is similar to a **seaman**'s duties on the high seas for extended periods. They too did not return home during their twenty-four hour shifts.

When the respondents complained about not receiving overtime pay they were told to take it or leave it. No reference was made to the contract or the Fair Labour Standards Act. It cannot be said then in the absence of evidence that the Fair Labour Standards Act was not in the contemplation of the appellants.

Subsequent to the hearing of this appeal I became aware of the case of Corbett v. Pearce [1904] 2 K.B. 422 during my research. Counsels for the appellant and the respondent were informed about the case. They were requested to make written submissions if they so desired. Counsel for the appellant supplied the Court with written submissions in which he relied on that case in support of his contention that the respondents were seamen.

In Corbett v. Pearce [1904] 2 K.B. 422 it was held that a split-sail barge on the Thames is a ship. In that case an action was brought to recover damages under the Employers Liability Act, 1880 for an injury sustained by the plaintiff while working on board the defendants split-sail barge "Alexandra". The barge was of a burthen of 38 (tons. The plaintiff, acting under the orders of one Naylor, the captain, assisted in navigating the barge, though his main duty was to assist in loading and unloading her. It was held that the plaintiff was not a **seaman** and judgment was entered for the plaintiff.

On appeal it was held that the plaintiff as a **seaman** was excluded from the operation of the Employers Liability Act, 1880. Section 13 of that Act provided that "this Act shall

not apply to seamen".

Lord Averstone, C.J. at page 42, stated:

"... So that the effect is that seamen are excluded from the operation of the Employers Liability Act, 1880 and the question is whether the plaintiff was a **seaman**. It must be borne in mind that in the same year as that in which the Employers and Workmen Act, 1875, was passed another act was passed, the Conspiracy and Protection of Property Act, 1875, which also expressly excluded from its operation "seamen and apprentices to the sea service" and the reasons for the exclusion of those persons from the operation of those acts is to be found in the fact that there was then in force an elaborate code of legislation specially dealing with those persons, namely the Merchant Shipping Act, 1854. The term "seamen" must be assumed to have been used in the same signification in all these Acts. And as neither of the Acts of 1875 contain a definition of that term, we must seek its definition in the act of 1854...".

At page 426 Lord Alverstone, C.J., said:

"...The plaintiff here was a man who was one of the crew of a vessel registered as a ship, which carries cargo from the estuary of the Thames to other parts of the river, and which might go, as f daresay similar vessels are constantly going for a coasting voyage of a greater or less distance ...In my opinion the man is clearly for the purposes of this legislation a **seaman**. The vessel is navigated in tidal waters; it is not propelled by oars, and the man is engaged upon the vessel to do navigation work... we would be straining the language of the Act if we were to hold that he was not a **seaman**...".

Wills, J. at page 426 said:

"Whether the question is considered from the point of view that the word "**seaman**" in the Employers and Workmen Act ought to receive the same construction as it was given by definition in the Merchant Shipping Act, or whether it is considered from the point of view that the word "**seaman**" is to be understood in it natural and ordinary signification, in my opinion this man was a **seaman** and is consequently excluded from the benefits of the Employers Liability Act".

After stating that the word "**seaman**" should receive the same construction in the act of 1875 that it did in the Merchant Shipping Act, 1854, Wills J states at page 427:

"and it seems reasonable that when the Act of 1875 excludes seamen from its operation, but does not define the term seamen, one should turn to the extensive code to ascertain who were the persons intended to be excluded. But supposing that were not so, what is usually understood by the term **seaman** in its ordinary acceptation. It seems to me that a correct definition was given in the case, to which we have been referred, of Reg v. City of London Court...It was there said "The rights to proceed in rem for services rendered on board a ship apparently extends to every class of person who is connected with the ship, as a sea going instrument of navigation, or of transport of cargo from one place to another, and to services rendered by such persons in harbour just as much as to services rendered by them at sea...He as a deck-hand, there were only two of them; He must have been employed in trimming sails and in doing all the work of navigation which could not be done by the other man at such time as the services of both were required. The vessel was employed in navigation on a tidal river, and was propelled by sails, and the duties which a man engaged in the navigation of such a craft must perform necessarily

involve a certain knowledge of sea faring matters. I think it would be a perversion of language to say that a man so engaged was not a **seaman**."

The Fair Labour Standard Act does not define "seamen". The Merchant Shipping Act Ch. 246 defines ship as including every description of vessel used in navigation not propelled by oars, and in parts ii and vii includes every description of lighter, barge or like vessel however propelled.

The Act defines **seaman** as including every person (except a master or pilot or an apprentice duly contracted or indentured and registered) employed or engaged in any capacity on board any ship.

These definitions are similar to the definitions in the English Merchant Shipping Act. One should therefore turn to the Merchant Shipping Act Ch. 246 to ascertain the meaning of a **seaman**. It can be assumed that the word **seaman** was used in the same signification in both the Fair Labour Standard Act and the Merchant Shipping Act Ch. 246. In my view the respondents were engaged on a ship having regard to the definition of 'ship" which included "every description of vessel".

The Tribunal report accepts that the respondents performed some duties similar to those of seamen, but must only be regarded as employees who merely worked on tug boats and launches. Also, that they were not conventional seamen. Is it being said that they were seamen. If the respondents were not seamen, then what were they.

I do not accept that only those persons who perform duties on the high seas and are away for extended periods can be classified as seamen. If they are performing the duties of seamen, then surely they are seamen.

I am of the opinion that on the evidence, the tribunal properly directing itself, cannot be said to have reasonably determined that the respondents were not seamen.

I hold that the respondents were seamen and, therefore, were exempted under the provisions of the Fair Labour Standard Act and were not entitled to be paid overtime.

I would allow the appeal and vacate the Order of the Tribunal.

CAREY, J.A.: When are marine crewmen not seamen? The answer to that question as determined by an Arbitration Tribunal under the Industrial Relations Act is, when they are "not conventional seamen". The other question which agitated the minds of that Tribunal was, assuming they were not seamen, whether they were entitled to overtime pay either in accordance with their contract and/or pursuant to The Fair Labour Standards Act? The Tribunal by its award of 19th February 1992 ruled as follows:

"...The Tribunal unanimously agreed that Messrs. Bruce McIntosh, Denzil Roberts, Leyland Laing, Wellington Ingraham and William Roberts were not conventional seamen during the time of their employment with South Riding Point Holdings Limited, and as such, they were entitled to be paid under the terms of their contracts with South Riding Point Holdings Limited and the Fair Labour Standard Act".

In response to representations from all sides, the Tribunal issued a clarification on 10 November, 1992 expressed in these terms:

"In respect of the Complainants' classification as seamen, while the duties performed were in some cases similar to those of seamen, the intent contemplated by the Fair Labour Standards Act (Exemption) Order was not fulfilled. The exemption is clearly intended to apply to those seamen whose duties would remove them from proximity to

land for extended periods. Examination of the authorities presented by counsel support this view by restricting the seamen description to individuals operating vessels on high seas as opposed to the manning of vessels on rivers and inland waterways".

An appeal on behalf of South Riding Point Holding Ltd (SRPHL) was not lodged until 6 April 1993, a matter upon which I propose to comment hereafter. That appeal relates to both questions which were determined in favour of the respondents.

The five respondents were employed by SRPHL as "general purpose seamen" to serve as part of the marine crew in connection with SRPHL'S oil shipment facility at South Riding Point on the Island of Grand Bahama. They each signed contracts which (inter alia) recorded their particular status and stated their salary in terms of a monthly figure. I desire to note for accuracy, that the position of Mr. Denzil Roberts was stated in the contract as "Mate" while that of Mr. Wellington Ingraham was given as "Deck hand". The contracts of the other respondents do not form part of the record of the proceedings before the Tribunal. It is sufficient to point out that save for Mr. Ingraham, the rest were advised by SRPHL that whatever their designation prior to 2 April 1987, they would thereafter be referred to as "general purpose seamen". In the case of contracts of all respondents save Mr. Denzil Roberts, it was provided in respect of overtime as follows:

"Based on a 42 (hour week. Normal overtime - Time and a half. Public Holidays and Sundays (not a part of a regular shift) - double time". With respect to Mr. Denzil Roberts' entitlement to overtime, this was provided in the following terms under "Salaries" -

"Salaries are paid monthly, bi-weekly or weekly in arrears and are subject to National Insurance deductions. Overtime is payable for hours actually for day workers. Overtime pay will be paid in accordance with the procedures described in the Policy Manual".

Before the respondents, except Mr. Denzil Roberts, signed their contracts, they raised the question of overtime payment in relation to shift work and were told explicitly that they were not entitled to any payment in respect of such overtime and they could "take it or leave it". They all signed, faced as they were with the prospect of being jobless. Plainly, if unfortunately for them, it was no longer open to them to maintain that they were entitled to overtime when they were rostered for shift work. In the event, when so rostered, they were required to work for a period of 14 days, i.e. to be on call for 24 hours per day during the shift and thereafter, they were allowed off for 14 days. Mr. Denzil Roberts, it is accepted, was similarly affected. Mr. Smith, learned counsel for the respondents, frankly conceded that he could not argue that the respondents were entitled to payment for overtime work under the terms of the contract.

There is therefore one solitary issue which remains for consideration on this appeal, viz.:

(i) Whether the respondents were seamen for the purposes of the Fair Labour Standards Act and therefore excepted from its protection.

If the respondents are entitled to overtime, it can only be so on the basis that they are not seamen and accordingly, come within the provisions of the Act. Section 5 of the Fair Labour Standards Act (so far as material) is in the following terms:-

"5.(1) Except as otherwise provided by or under this Act, no employer shall cause or

Permit any employee to work in excess of eight and one half hours in any day or forty-eight hours in any week (in this Act referred to as the standard hours of work) without the payment of overtime pay in respect of any such excess in accordance with section 7. [Emphasis supplied]

(2) The standard hours of work in a week shall be reduced by eight hours for every public holiday occurring in that week.

(3) Where by reason of the nature of any employment the hours of any employee for the purposes of such employment are required to be irregular, the standard hours of work in a day or week of any such employee may be calculated in such manner and in such circumstances as may be prescribed as an average over a period of two or more weeks.

(4) ...

(5) ...

(6) Except as otherwise provided by or under this Act, the hours of work in any employment shall be so arranged that each employee has at least one day in the week on which he is not required to work, and that day is in this Act referred to as the day off.

(7) 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 to public holiday or day off, twice his regular rate of **wages**;

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

and any **wages** paid or to be paid as required by this section are in this Act referred to as overtime pay".

The minister acting under powers conferred by the Act [section 3(2)] made an Order exempting "any person employed as a **seaman**" from the operation of the Act. See paragraph 5 of the Fair Labour Standards (Exceptions) Order.

Having regard to the award of the Tribunal, it is plain that it made a finding that the respondents were not seamen, and thus were entitled to overtime notwithstanding the terms of their contracts which it is now accepted, disentitled them to payment for overtime when rostered for shift work. The question which an appellate Court must ask itself in these circumstances, where it is being asked to interfere with the award of a Tribunal, is, would the Tribunal directing itself rightly in law as to the attributes of a **seaman**, come to the determination which the Tribunal did? It is only if this Court comes to the conclusion that no tribunal properly directing itself could reasonably make such a determination, that we can interfere. The question is one of law. What meaning is to be given to the word "**seaman**" in the Order. Did the Tribunal get it wrong? Did they draw the correct inferences from the facts presented in the evidence? Edwards (Inspector) v. Bairstow [1955] 3 WLR 490.

I venture to suggest that none of the parties had in mind the Fair Labour Standards Act as it related to seamen when the contracts were signed. The appellants never drafted the agreements in terms which demonstrated that these employees were being "employed as seamen" the category of persons in the contemplation of the Act. They were considered employees who at the behest of the appellants were obliged to perform tasks on shore or near shore; hence the nomenclature "general purpose **seaman**". When the men complained about the non-payment of overtime, they were

never told that as seamen they were not entitled to overtime, but imperiously that they could take the contract or leave it, and as has been noted the contract did not provide for the payment of overtime when they were rostered for the 14 day shift. It is not perhaps surprising that these employees were unaware of the protecting provisions of section 5 quoted earlier in this judgment.

Howsoever that might be, we are concerned to ascertain the intention of the draftsman for the word "**seaman**" to is not defined in the Order. All workers in the Commonwealth of The Bahamas are entitled to receive overtime pay when they work in excess of the standard hours of work. An exception is the category of worker known as a **seaman**. And the reasons for that, I am inclined to think, are not far to seek. He is a worker at sea. The nature of his occupation requires him to be on continuous call. He is not on land. He cannot often go home at the end of the day or week. He cannot take off weekends or public holidays. He may be away for weeks or months at a time. His avocation is altogether different from a factory worker, an office worker or other land-based employee. It would be extremely difficult to fit a **seaman** at sea into any of the permutations allowed by Section 5 to deal with the incidence of public holidays, irregular hours or days off, if such an event is possible.

It must also be noted that the fact that these employees performed on occasions such tasks as painting outside of buildings, acting as security, moving things from trailers to warehouse is not of great significance because the term **seaman** does not refer only to the navigating of a ship or boat. The waiter on the cruise-liner is as much a **seaman** as the man in the engine room or on the bridge. See for example, Thompson v. Nelson (H 8 W) Ltd. [1913] 2 K.B. 523 where it was held that a bartender and a ship's cook were seamen.

According to the Oxford Dictionary, '**seaman**' is defined as a person who is skilled in seafaring and seafaring is defined as working or travelling on the sea, especially as one's regular occupation. It is to be bourne in mind that these workmen were employed to work on boats which go to sea in that they were designated as 'mate' and 'deck hand'. The Court is also entitled to have regard to the legislative environment. There exists in this country a Merchant Shipping Act (Chapter 246) which defines **seaman** in these terms:

Seaman includes

"...every person (except a master or pilot or an apprentice duly contracted or indentured and registered) employed or engaged in any capacity on board any ship..."

"Ship" is defined as including:

"...every description of vessel used in navigation which is not propelled by oars, and in Parts II and VII includes every description of lighter, barge or like vessel however propelled..."

The definition of **seaman** contained in the Bahamian legislation is the ipssissima verba of the terms of the English Merchant Shipping Act. On the basis of the definition contained in the Act of this country, these respondents were employed on board a ship. It follows from what I have suggested that the employee aboard a ship which sails between Nassau and Andros is as much a **seaman** as the employee who is engaged in any capacity on a ship which ferries persons or goods between Paradise Island and Nassau.

I am persuaded to this view by Corbett v. Pearce [1904] 2 K.B. 422 where it was held that a crew man employed on board a barge to navigate her in the estuary and upper tidal waters of the Thames was a "**seaman**". The question for the Court was whether the plaintiff could sue to recover damages under the Employer's Liability Act for an

injury he sustained while working aboard the defendant's barge. If he was a **seaman**, he would have been excluded from the operation of the Employer's Liability Act. One of the arguments urged upon the Court in support of those contending he was not a **seaman**, was that the barge was not used in navigation to be understood as navigation on the high seas. The Court was not attracted by that argument. Wills J in his judgment had this to say at page 427:

"...what is usually understood by the term "**seaman**" in its ordinary acceptation? It seems to me that a correct definition was given in the case, to which we have been referred, of Reg. V. City of London Court (1), where it was held that a person whose ordinary duties led him to take part in the navigation of a seagoing ship was entitled to a remedy against the ship for his **wages**, although the services rendered by him consisted in superintending repairs to the ship while in port. It was there said: "The right to proceed in rem for services rendered on board a ship apparently extends to every class of person who is connected with the ship as a ship, as a seagoing instrument of navigation, or of transport of cargo from one place to another, and to services rendered by such persons in harbour just as much as to services rendered by them at sea..." [my emphasis]

All three judges in that case viz. Lord Alverstone, C.J. Wills & Kennedy, JJ. sought assistance from other legislation which referred to seamen without defining the term. Lord Alverstone, C.J. pointed out that there was an elaborate code of legislation dealing with such persons, namely the Merchant Shipping Act. By parity of reasoning, I am driven to conclude that when the draftsman excluded seamen from the operation of the Fair Labour Standards Act, he was well aware that there was a code dealing with such persons which defined the term.

This case the result of the researches of a member of this Court (Zacca, J.A.) was not brought to our attention by counsel, but we invited their views thereon.

In the result, I would answer the question which was before the Arbitration Tribunal, viz. whether these respondents were seamen within the intendment of the Fair Labour Standards Order in this way, that the term would include all those persons engaged in any capacity on board any ship whether it sails on the high seas or operates within the coastal waters of The Bahamas and also would include "unconventional seamen" and therefore the respondents were seamen.

I agree that this appeal must be allowed and the award of the Tribunal set aside.

Before parting with this appeal, I feel obliged to comment on the fact of the protracted delay which has dogged this matter. From the record, it appears that the hearings into this dispute took place in August 1990, an award was made in February 1992, and clarified in November, 1992. The appeal was not lodged until April 1993. I would have thought that the appeal was clearly out of time. See Teachers and Salaried Workers Co-operative Credit Union Limited v. Lockhart (unreported) 22 June 1990. But the respondents did not apply to have it struck out. The matter is before this Court some 8 years later. Such a delay is wholly unacceptable in any modern society. The reason for this delay has not been vouchsafed. But more fundamentally, it is unfair and unjust to the weaker parties, scilicet the respondents, who would have been deprived of the fruits of their judgment over these long suspenseful years. This sort of delay should not be allowed to recur. Reform in the appellate process in this regard is sorely called for I would think.

HALL, J.A.: The appellant operates an oil transhipment terminal on the island of Grand Bahama at which the five respondents were employed: what they were employed as is the only issue to be resolved in this appeal.

Consequent upon a complaint by the respondents, the relevant Minister, in accordance with the provisions of section 77 of the Industrial Relations Act, Chapter

296, and the Fourth Schedule thereto (which provisions have since been statutorily overtaken), appointed an arbitration tribunal which determined that the respondents were entitled to overtime pay.

The appellants approach this Court under the provision giving a right of appeal only on a point of law from decisions of an industrial tribunal. This Court has - in Kevin O'Shea v. Grand Bahama Hotel and Country Club Civil Appeal No. 23 of 1985 (unreported) - adopted the test propounded by Lord Radcliffe in Edwards v. Bairstow [1955] 3 WLR 410, 423 as to what might constitute a point of law:

"If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the Court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test... ".

Each respondent had claimed overtime pay under his contract of employment or, in the alternative, by virtue of the provisions of the Fair Labour Standards Act, Chapter 295 ("the Act"). They were employed in the appellant's marine department after the appellant had established that department to perform services previously contracted for by another company. The work involved the use of tugs for berthing and unberthing vessels and launches for transporting crews and other personnel between the shore and a "sea island" approximately one mile off shore. The respondents were rostered to perform either "day" work or "shift" work. Day work was 8:00 a m to 5:00 p m Monday to Friday and shift work was 14 days continuously on premises and 14 days off. The dispute is limited to whether they were entitled to overtime pay during the 14 days on shift.

The respondents claim that arithmetically this shift resulted in 336 hours over a 14 day period which was in excess of the 42 (hours per week provided for in their contracts, or the 48 hours per week provided for by the Act, after which overtime became payable. The respondent, Denzil Roberts, had signed a letter of acceptance of the offer of employment in April of 1986 which provided that: "overtime is payable for hours actually worked in excess of the posted rosters for shift employees or 42(hours a week for day workers".

A year later, the form of letter signed by each of the other respondents had provided in less precise language: "Overtime: Based on 42(hour week. Normal overtime - Time and a half. Public Holidays and Sundays (not a part of regular shift) - double time.".

The appellant disputes the respondents' claim to have been hired as "hourly" paid marine crewmen who worked 14 day shifts. Mr. Tynes Q C argues that neither formula contains a provision for overtime to be paid for hours worked within a rostered shift and that the evidence led before the Tribunal had established that shift workers were only paid overtime for hours worked in excess of the posted roster. Indeed, when the respondents had protested the issue on taking up their employment, they had been given a take-it-or-leave-it option by the appellant and, as my learned brother Carey, J.A. bluntly put it during the course of submissions, they took it.

The arbitrators had found unanimously that the respondents "were entitled to be paid under the terms of their contract...and the Fair Labour Standard (sic) Act". Mr. Tynes has demonstrated the apparent absurdity of the proposition that the contract provided for overtime within the shift period for hours in excess of 4(hours a week: it would

result in the respondent being entitled to overtime after working only half the hours which they were required to work while working days. Had this claim turned entirely on the contracts I would hasten to agree with Mr. Tynes, as Mr. Smith seems to have accepted, that the Tribunal's finding could not, as a matter of law, stand.

The nub of the question is whether the respondents were seamen for the purposes of the Act, section 5 of which requires employers to pay overtime for hours worked in excess of 48 hours per week and persons cannot contract out of the protection of the Act. The Act, however, empowered the minister to, by order, exempt classes of workers from the provisions of the Act and the Third Schedule to the Fair Labour Standards (Exceptions) Order, Chapter 295 (Subsidiary) ("the Order"), excludes "any person employed as a **seaman**".

However, the Tribunal found that the respondents, "were not conventional seamen" and so grounded their findings in favour of the respondents partly on the provisions of the Act. Mr. Tynes argues that this distinction between "conventional seamen" and "unconventional seamen" was ex facie bad in law.

While we do not have the benefit of the entire body of evidence which was before the Tribunal, we do have two "reports" - one from the arbitrator appointed by the appellant and the other from the chairman and the arbitrator appointed by the respondent - which had been produced after the parties had requested clarification of the Tribunal's finding. Both reports explain that the Tribunal had reached this finding after a consideration of the duties actually performed by the respondents rather than by what they were designated as by the appellant. As the "majority report" put it:

"The complainants must be regarded as employees who merely worked on tugboats and launches while performing duties similar to that of seamen and do not enjoy the exemption privilege (sic) of the Fair Labour Standards Act".

Mr. Smith poses the basic question as being whether the appellant had established that the Tribunal had taken into account the wrong criteria in arriving at their conclusion or whether they gave the wrong weight to one or more relevant factors. If the appellants cannot surmount this hurdle they have not properly brought themselves within the limited jurisdiction of the Court in this type of case: Tropigas Ltd v. Isaiah Robinson Rolle, Civil Appeal 13 of 1983 (unreported).

During any 14 day cycle the respondents could be called upon to do any number of chores: chipping rust, running launches and tugs, fire drills, painting, acting as security guards, ferrying pilots, cleaning and maintenance on land, among other duties. They had been variously described in their letters of employment as "deckhand" and "mate" and, in April of 1987, the appellant had reclassified them as "general purpose seamen". Mr. Smith submits that the classification created by the appellant is irrelevant.

As the appellant did pay overtime in respect of hours outside of the 14 day continuous period in dispute, they could not have regarded the respondents as falling outside the category of workers eligible for overtime, Mr. Smith submits. It seems to me, however, that this argument is of limited persuasion and points only to the consistency (or otherwise) of the appellant's practice. It would be entirely open to the appellant to provide terms more favourable than the requirements of the Act. The prohibition is against requiring employees to accept terms less favourable than the statutory minima.

It appears to me from the record that the exclusion under the Order was not within the contemplation of the appellant when the contracts of employment were drawn: were it otherwise, I would have expected that more thought and precision would have gone into the drafting of the letters. Reliance on the Order appears to have been an afterthought. Nevertheless, even ingenious and precise drafting would not necessarily have availed the appellant as, in any case where a dispute arises under the

provisions of the Order, it would be necessary for the relevant tribunal to find as a fact whether the employee is, according to the duties performed, excluded. The law would fail to afford to workers the protection which the Act purports to provide if by simple drafting legerdemain an employer could place workers into a category excluded by the Order.

Were the question free of authority, I would have considered inescapable the conclusion, advanced by Mr. Smith during the submissions, that the scheme of the Industrial Relations Act included having questions of fact decided by lay persons who were familiar with industrial and employment practices on the ground and that the arbitrators' unanimous finding of fact that the respondents were not "seamen", could not be said to be so unreasonable as to be bad in law.

However, I agree with my learned brothers that the holding in Corbett v. Pearce [1904] 2 K B 422 as to who is a "**seaman**" must be regarded as so firmly embedded in the lexicon of the legal draftsman and the legislative culture that, had the minister intended to exclude persons in the position of the respondents here, specific language would have had to be employed in drafting the order. Accordingly, I agree that this appeal must be allowed and the decision of the tribunal reversed.

ZACCA, J.A.: There will be no order as to the cost of this appeal.

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