COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

IndTribApp No. 94 of 2023

BETWEEN

WATER AND SEWERAGE CORPORATION

Appellant

AND

EDNEL ROLLE

Respondent

Before: The Honourable Sir Michael Barnett, P
The Honourable Madam Justice Charles, JA
The Honourable Mr. Justice Smith, JA

Appearances: Mr. Dion Smith with Mr. Ryan Williamson, Counsel for the Appellant
Mr. Obie Ferguson, KC, with Mr. Sidney Campbell, Counsel for the Respondent

Hearing Dates: 17 October 2023, 22 January 2024

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Civil Appeal – Employment Law – Vacation Pay – Employment Act, sections 4, 12 and 13 – Refusal to Proceed on Mandated Leave – Attendance at Work When Mandated by the Employer to Proceed on Vacation Leave – Water and Sewerage Corporation and Water and Sewerage Management Union 2010-2013 Industrial Agreement, Articles 1.02, 51.07 and 72.03

JUDGMENT

The respondent ("Mr. Rolle") was required by his then employer, the Water and Sewerage Corporation ("WSC") to proceed on 17 days' vacation leave. He refused to take vacation and attended work for the 17 days. He was paid his regular salary for that month. Subsequently, Mr. Rolle retired and he was not paid for the 17 days' vacation.

In response, he instituted a grievance procedure against WSC pursuant to the WSC-WSMU 2010-2013 Industrial Agreement ("IA"). After Mr. Rolle's retirement, he filed a Trade Dispute alleging that his vacation leave was not paid and that this was a statutory right pursuant to the Employment Act ("EA"). The trade dispute was then referred to the Industrial Tribunal ("Tribunal"). The Tribunal found that although it was within WSC's discretion to schedule vacation leave for Mr. Rolle, WSC permitted him to work during those days earmarked as mandatory vacation by not preventing him access to its premises. The Tribunal ruled that WSC was obliged to pay him the 17 days of vacation pay. WSC has appealed that ruling.

Held: Appeal allowed. No order as to costs.

Per Charles, JA:

The Vice President erred in law by finding that Mr. Rolle's enactment of the grievance procedure motivated WSC to take further actions against him because there was no evidence to support this finding.

Article 51.07 of the IA creates a policy that employees are only allowed to accumulate a maximum of three (3) years vacation. Despite the expiration of the IA, this policy was still in effect when Mr. Rolle retired. Pursuant to Article 51.07, vacation in excess of three (3) years will be forfeited unless an employee's application for vacation leave was refused because of the exigencies of the service.

The Vice President erred in law by finding that Mr. Rolle had earned the benefit of vacation which could not be forfeited. Mr. Rolle was mandated to go on vacation but refused to do so. There is no right to accumulate vacation under the EA; it is distinguishable from working overtime and the employer's policy not to pay for overtime, which is clearly a breach of the EA.

Mr. Rolle's refusal to proceed on vacation mandated by WSC cannot be stated to constitute ineffective management. It is unrealistic to expect WSC's management to police this mandatory instruction, physically remove Mr. Rolle from the premises, or bolt the doors to prevent him from accessing his work station. Accordingly, the Vice President erred in law by finding that WSC's management did not effectively manage its operations and employees.

The EA is silent on the "roll-over" of vacation leave from year to year. Section 12 of the EA expressly states "*annual vacation*", which portends that vacation leave must be taken annually.

Section 4 of the EA means that if an employee has a contract that provides for better terms and conditions of employment than what is required by the EA, those more favourable terms continue to apply and cannot be diminished by the EA. The Vice President, having found that the EA is silent on the issue of accumulation of vacation, erred when she found that Article 51.07 of the IA attempts to limit the accumulation of vacation contrary to section 4 of the EA.

An industrial agreement's terms may be incorporated into an employee's contract of employment either expressly or impliedly, once it is done during the currency of the industrial agreement. Although the IA had expired, and a new agreement had not been consummated, by Article 72.03, those benefits (the three-year or 81 days' leave accumulation) had either expressly or impliedly been incorporated into Mr. Rolle's contract of employment.

Despite its expiry, both parties utilized the IA. While Mr. Rolle had no entitlement to accumulate vacation leave under the EA, he could have accumulated three (3) years vacation leave under the IA. His attempt to accrue a further 17 days' vacation leave was not an entitlement under either the EA or the IA.

By not considering Article 72.03 of the IA, in conjunction with Article 1.02(b) of the IA, the Vice President erred; had she done so, she would have concluded that Mr. Rolle's greater benefit was under the IA and not the EA.

The evidence before the Tribunal included an employee who exceeded his three-year entitlement by 40.75 vacation days; he was ordered to take those days before his pre-retirement leave. That employee died with 18.20 days' vacation leave remaining and his estate was paid for those days. However, there was no evidence before the Tribunal to explain why that employee's estate was paid. This isolated instance was insufficient to show an established custom or practice at WSC on accumulation of vacation. The finding of the Vice President that there was an established custom or practice at WSC with respect to the accumulation/accrual of vacation leave was an error in law and unsupported by the evidence. Further, the Vice President erred in law by finding that for the duration of the Industrial Agreement, WSC did not limit the accrual of vacation to three years.

There is no statutory entitlement that permits an employee to 'roll over' vacation leave from year to year; only an express provision in the employment contract allows unused vacation to be rolled over.

After finding that the EA is silent, the Vice President proceeded to find that the Act does not prevent accrual of vacation. This is inconsistent with her finding, and the authorities on which she relied, that there is no statutory entitlement that permits any employee to 'roll over' his vacation days from year to year.

Per Barnett, P:

An employer has the right to determine when an employee shall take vacation. An employee does not have the right to take vacation at his convenience or refuse to take vacation when directed by his employer to do so.

When an employer has directed an employee to take vacation, the employee must do so; his refusal to do so constitutes gross misconduct.

The EA does not itself give an employee a right to accumulate vacation from year to year. The ability to accumulate vacation pay year to year is not by statute, but by agreement

between an employer and employee. The EA gives the employee the right to receive all contractually earned vacation pay upon the termination of his employment.
An employee cannot claim a right to vacation pay under the EA for a vacation which he refused to take notwithstanding that his employer directed him to take vacation.

Alexander Brown and Grand Bahama Power Company Ltd SCCivApp & CAIS No. 175 of 2017; mentioned
Bahamas Airline Pilots Association v Bahamas Air Holdings Ltd 2006/CLE/GEN/01014; applied
Bahamas Industrial Engineers Managerial and Supervisory Union v Grand Bahama Power Company Limited and anor 2010/CLE/gen/FP00162; applied
Claude Leach v The Development Corporation of Saint Vincent and the Grenadines and The Attorney General High Court Civil Claim No. 46 of 2002; mentioned
Jacklyn Conyers v Central Bank of the Bahamas 2018/CLE/gen/00923; mentioned
Leon Cooper v Grand Bahama Power Company Ltd. SCCivApp. No. 178 of 2017; mentioned
Morley v Heritage Plc [1993] IRLR 400; mentioned
Westech International Security v Jason Noel Tynes IndTribApp. No. 131 of 2021; distinguished
Witty v Stamps Solicitors Employment Appeal Tribunal Appeal No. EAT/35/97 21st March 1997; mentioned

Judgment delivered by the Honourable Madam Justice Charles, JA:

1. This appeal originates from the Industrial Tribunal. It raises the broad issue of whether the respondent ("Mr. Rolle") who was required by his then employer, the Water and Sewerage Corporation ("WSC") to proceed on 17 days' vacation leave, which he refused to take but attended work instead, is entitled to be paid vacation pay.

Background facts

2. I have relied on the facts outlined by the then learned Acting Vice-President ("the Vice President"), in her Ruling to which there is no dispute.

3. Mr. Rolle commenced employment with WSC on 5 September 1998 and retired on 21 January 2021. Prior to retirement, he held the position of Senior Manager in the Sewerage Services and Mechanical & Electrical Maintenance Department. He was also a former President of the Water and Sewerage Management Union ("WSMU") and a signatory to the WSC-WSMU 2010-2013 Industrial Agreement (the "IA").

4. Mr. Rolle was placed on mandatory vacation for a period of 17 days, effective 17 December 2018. He asserted that WSC's Deputy General Manager unilaterally submitted and approved 17 days' vacation leave to be taken by him, without his consent. In defiance of the mandatorily imposed vacation, Mr. Rolle elected not to proceed on vacation leave but instead attended work for the entire period. He thereafter sought vacation pay for the 17 days.

5. Several months later, on 8 August 2019, Mr. Rolle commenced the grievance process mechanism under Article 10 of the IA by filing a Grievance Memo to WSC's Acting General Manager, Mr. Robert Deal, relative to WSC enforcing its policy on excess accrued vacation. In accordance with Article 10, Mr. Deal held a Stage 1 & 2 Grievance Procedure Meeting with Mr. Rolle on 13 August 2019. At that meeting, it was discussed that, according to Article 51.07 of the IA, employees are only allowed to accumulate vacation to a maximum of three (3) years vacation entitlement. Vacation in excess will be forfeited unless the employee's application for vacation has been refused because of the exigencies of the service. It was further discussed that Mr. Rolle was ordered to be placed on vacation effective 17 December 2018 for a period of 17 days, but he refused to follow management instructions and continued usual duties.

6. Additionally, by letter dated 13 August 2019, Mr. Deal advised Mr. Rolle that the excess vacation policy was clearly announced and he should proceed to Stage 3 of the Grievance Procedure, if desired. Mr. Rolle was also advised that, pursuant to Article 32.09(a) of the IA, his refusal to follow the manager's instructions constituted a major breach of discipline and amounted to gross insubordination. As a result of the insubordination, Mr. Rolle was reprimanded.

7. After Mr. Rolle's retirement, he filed a Report of a Trade Dispute with the Ministry of Labour on 2 September 2021, alleging at item (5) "*vacation leave not paid which is a statutory right pursuant to the* [Employment Act]."

8. In his Originating Application, dated 10 November 2021, Mr. Rolle alleged at item 11 that WSC appropriated 17 days' vacation leave to which he is 'statutorily' entitled.

9. WSC filed its Defence and resisted the claim. The thrust of WSC's claim is that according to Article 51.07 of the IA "*employees will be allowed to accumulate maximum 3 years vacation. The vacation he (Mr. Rolle) is claiming was in excess of 3 years and therefore to do so would violate the above article. To pay the excess is a clear violation."*

10. Primarily, the Vice President found that although it was within the discretion of WSC to schedule vacation leave for Mr. Rolle, WSC **permitted** him to work during those

days earmarked as mandatory vacation because it was open to them to refuse him access to its premises. She formulated her decision in this manner:

> **"To reprimand what you permit is not effective 'management'. By no means should any employee be penalized by reason of management's failure to effectively MANAGE its own operations."**

11. On 10 May 2023, WSC filed a Notice of Appeal challenging the Ruling of the Vice President. The Notice of Appeal disclosed ten (10) grounds of appeal setting out why the appeal should be allowed and why the Tribunal's award is erroneous in law and should be set aside.

The Ruling of the Tribunal

12. After summarising the brief facts of the case, the Vice President identified the salient issues to be determined as follows:

    i. Whether the management of WSC has the right to mandate vacation time for its employees?

    ii. Whether or not Article 51:07 of the IA contravenes Section 4 of the Employment Act ("EA") in that it specifically limits an accumulation or accrual of vacation for up to three years whereas the EA is silent on the issue?

    iii. What is the impact of the expired IA on Mr. Rolle's conditions of employment? and

    iv. Having earned the benefit of vacation pay, can the same be forfeited as set out in Article 51:07 of the IA?

13. The Vice President then addressed each issue under its specific sub-head. At paragraph 7 of the Ruling, she correctly expressed that there is sufficient legal basis to support the contention that an employer has a right to assign vacation to its employees. In this context, she referenced the case of **Bahamas Airline Pilots Association v Bahamas Air Holdings Ltd** 2006/CLE/GEN/01014 in which Sir Michael Barnett, then Chief Justice, stated that:

> **"8. … No employee has any contractual right to take vacation at a time chosen by him. <u>The time for taking leave must be approved by the employer</u>."** [Emphasis added]

14. At paragraph 9 of the Ruling, the Vice President concluded that the law establishes:

> **"the unfettered right of the employer to determine and assign vacation time for its employees, with the caveat, as stated by the learned Chief Justice, that it certainly makes "good commercial and business sense for an employer to build consensus with its employees" based on the needs of the operations."**

15. The Vice President then addressed the second issue of whether or not Article 51:07 of the IA, which specifically limits an accumulation/accrual of vacation leave up to three years, contravenes Section 4 of the EA which is silent on the issue. At paragraph 16, she found that Article 51.07 does in fact contravene the provisions of Section 4 of the EA.

16. From paragraphs 17 to 22, the Vice President addressed the next issue of the impact of the expired IA on Mr. Rolle's conditions of employment and found that *"the life of the Industrial Agreement is to be construed more that 'in honour' only, but binding only during the currency of the particular Industrial Agreement."* Thereafter, she concluded that the provision set out at Article 1.02 (b) of the IA has no binding effect save in honour only.

17. The Vice President considered the final issue of whether, having earned the benefit of vacation, it could be forfeited as set out in Article 51.07 of the IA. She referred to this Court's decision in **Westech International Security v Jason Noel Tynes** IndTribApp. No. 131 of 2021 which, according to her, guards against the notion of the statutory rights of any employee being signed away.

18. At paragraph 24, the Vice-President observed that *"just as overtime is a non-negotiable benefit that is statutorily protected and cannot be forfeited,* once earned, *so is vacation pay*". I agree with this reasoning.

19. After referencing Section 13 of the EA, at paragraph 25, she had this to say at paragraphs 26-30:

> **"26. <u>Once earned</u>, the employee has the reasonable expectation of enjoying the benefit of vacation pay, one way or the other. <u>Just as the Act does not specifically create the entitlement of the employee to accrue vacation indefinitely, so equally, it makes no provision whatsoever for such accruals to be forfeited, or to be limited, where the employer permits such accruals to accumulate.</u> In this**

regard, I accept the Respondent's concern that where a company allows its employees to accrue vacation for the entire period for their employment, it would be a liability. By way of recurring theme, I go back to the dicta of the Chief Justice when he stated thus: "*Managers must manage*!"

27. Bottom line, Vacation pay as set out in the Act is a statutory benefit which is earned and naturally, it will continue to accrue and accumulate if not managed. This is supported by the specific rubric of the sections that deal with Vacation, under the Employment Act. Section 13 of the Employment Act makes it clear that vacation pay is earned, such that, as much of it as is permitted to accrue or accumulate, the same, logically, having already been earned, the employee is entitled to the full benefit of, without fear of forfeiture. To be clear, the only time an employee would be permitted to accrue time out of hand, is when he is permitted by Management to do so.

28. …

29. As Counsel for the Respondent has contended, *Section 12 calls for an annual vacation, which suggests that it is to be taken annually* and it is the employer and its management team that must manage this, and at all times, vacation pay remains a mandatory provision that the employer is obligated to pay.

Additionally, the Tribunal further considers Sections 14 and 15 of the Employment Act, which specifically call for the payment of vacation pay thus ….

30. One (sic) again, *the Tribunal accepts the Respondent's assertion that there is no statutory entitlement to allow vacation to "roll over" or to accrue for employees to be paid in lieu of taking vacation. Having said this, this will continue to be the obvious and inevitable reality of managers who fail to effectively manage such contractual entitlements, which result in employees being paid in lieu of taking vacation. The Respondent cannot come to the Tribunal to assert its right to manage its operation, and in the same breath, fail to effectively do so*. It is clearly understood and accepted that there is no statutory provision that permits any employee to refuse to take vacation, and as asserted by Chief Justice Barnett (as he

> **then was), consensus certainly aids in this exercise. *Where there is no consensus however, the reoccurring theme that must apply in this instance is the obligation of management to manage the operations and to effectively do so."***
> [Emphasis added]

20. Even though the Vice President found that there is no statutory entitlement to allow vacation to "roll over" or accrue, she subsequently found that if managers fail to effectively manage their employees' vacation, the employees will be paid in lieu of taking vacation.

21. Between paragraphs 31 to 37 of the Ruling, the Vice President summarized the matter. Specifically, at paragraph 37, she acknowledged the legal principle that management has the right to set vacation times. However, she proceeded to qualify the present case in this way:

> **"…however – at the end of the day, there is no dispute that the Applicant in this case was entitled to seventeen days' vacation pay and the sum of the same, is also without dispute. It is the judgment of this Tribunal that the Applicant is to receive the sum of $5,590.38 for vacation days due to him, with interest of 10% to be applied as from the date of this ruling."**

Grounds of appeal

22. As already mentioned, WSC' Notice of Appeal disclosed ten (10) Grounds of Appeal which raise the broad issue identified in paragraph (1) of this Judgment. As can be readily seen, some grounds overlap and therefore they will be considered together.

Discussion and findings

Ground 1: Whether the Vice President erred in law by finding that Mr. Rolle's enactment of a grievance procedure motivated WSC to take further actions against him?

23. At paragraph 3 of the Ruling, the Vice President stated:

> **"Several months later, the Applicant on August 8th 2019, enacted the grievance process mechanism by filing a Grievance Memo to Mr. Robert Deal, on the Corporation's enforcement of its policy on excess accrued vacation. The Corporation however,**

maintained its position and was thereby motivated to (sic) further action against the Applicant."

24. The simple fact of the matter is that there was no evidence before the Tribunal on which the Vice President could make such a finding. This ground of appeal is allowed.

Grounds 2, 7, 8 and 9: Ineffective management and forfeiture of 17 vacation days under Article 51.07

25. Grounds 2, 7, 8 and 9 fall under the umbrella of ineffective management and forfeiture of vacation days under Article 51.07 of the IA. They will be considered together. For a better appreciation of this issue, I set out the grounds in full:

> "**Ground 2: The Vice President erred in law by finding that the management of WSC has the right to mandate vacation time but did not find that Mr. Rolle therefore in the circumstances forfeited the 17 vacation days claimed.**
>
> **Ground 7: The Vice President erred in law by finding that Mr. Rolle having earned the benefit of vacation the same cannot be forfeited as set out in Article 51.07?**
>
> **Ground 8: The Vice President erred in law by finding that as WSC did not refuse Mr. Rolle access to the premises and permitted him to work during the days earmarked as mandatory vacation, Mr. Rolle is entitled to be paid for the 17 days claimed.**
>
> **Ground 9: That Vice President erred in law by finding that the actions of WSC regarding vacation days claimed amounted to ineffective management."**

26. On these grounds, WSC complained that the Vice President, having found that WSC has a right to mandate vacation time, erred when she did not find that, in the circumstances, Mr. Rolle forfeited the 17 vacation days claimed. She found that, Mr. Rolle having earned the benefit of vacation, it cannot be forfeited under Article 51:07 of the IA and, in doing so, she relied on this Court's decision in **Westech** (supra); Mr. Ferguson KC, appearing as Counsel for Mr. Rolle submitted that **Westech**, supports the proposition that if statutory provisions are mandatory and are further underpinned by public policy, they cannot be contracted out of the statute.

27. On the contrary, Mr. Smith who appeared for WSC submitted that the Vice President erred in her application of **Westech** which, according to him, is clearly distinguishable from the facts of the present case.

28. On this issue, at paragraphs 23 to 25 of the Ruling, the Vice President stated:

> **"23. The finding of the Court of Appeal in *The (sic) Westech International Security v Jason Noel Tynes* guards against the notion of the statutory rights of any employee being signed away. In this case, which dealt largely with the issue of overtime, the Court of Appeal considered:**
>
> > **In 2001, in the exercise of its law-making power and in the interest of promoting fair and harmonious working conditions for Bahamian workers, the Bahamas Parliament passed the Employment Act. … As its long title clearly states, the Employment Act was enacted by the Parliament of The Bahamas to provide, inter alia, minimum standard hours of working and <u>vacation with pay</u> for Bahamian employees. (emphasis added)**
>
> **24. In this regard, <u>the Tribunal considers that just as overtime is a non-negotiable benefit that is statutorily protected and cannot be forfeited, once earned, so is vacation pay</u>. Indeed, one may well argue that the non-payment of vacation pay exposes the dilatory employer to an offence liable to a fine of five thousand dollars pursuant to Section 75(a) of the Employment Act…."**
>
> **25. Section 13 of the Employment Act makes it clear that vacation pay is earned, such that, as much of it as is permitted to accrue or accumulate, the same, logically, having already been earned, the employee, at the minimum, is entitled to receive the full benefit thereof, without fear of forfeiture…."** [Emphasis added]

29. In my opinion, the facts of **Westech** are wholly distinguishable from the facts of the present case. **Westech** concerns overtime pay and a policy not to pay overtime which was in breach of section 10 of the EA. This Court held that the provisions relating to overtime were clear and spoke for themselves.

30. Further, Mr. Smith submitted that although recognising that the employer has an unfettered right to determine and assign vacation time for its employees, the Vice President seemed to suggest, at paragraph 9, that such unfettered right is subject to a caveat that it makes '*good commercial and business sense for an employer to build consensus with its employees*' based on the needs of the operations. Mr. Smith submitted that it cannot follow that the employer has an unfettered right to determine vacation time but be considered in breach when it does since that would not make

good business sense and, by extension, it would leave management hostage to its employees.

31. To support his argument, Mr. Smith referred to the case of **Jacklyn Conyers v Central Bank of the Bahamas** 2018/CLE/gen/00923 which was upheld by this Court, differently constituted, on 4 May 2023. The brief facts of **Conyers** are that Ms. Conyers filed a claim alleging that she was wrongfully and/or unfairly dismissed by her employer, Central Bank. She also alleged that certain provisions of her contract of employment as contained in the industrial agreement were breached. Specifically, she pleaded that she was not allowed to schedule her leave in consultation with her immediate supervisor thereby rendering the termination of her employment unfair and wrongful.

32. Ms. Conyers was given many opportunities to submit her schedule setting out her proposed dates for taking her outstanding vacation. When she failed to do so, the Central Bank then prepared a schedule and sent it to her. At paragraph 49 of the Judgment, Moree CJ (as he then was) stated that he did not find evidence that Ms. Conyers had the right to ignore or disregard the provisions of Article 23 of the applicable industrial agreement. He found, on a balance of probabilities, that Ms. Conyers had many opportunities to schedule her accumulated vacation leave but declined to do so. In the circumstances, the learned Chief Justice did not regard the scheduling of vacation leave for Ms. Conyers by the bank in accordance with the [December] letter as a breach of Article 23.3 of the IA. He accordingly dismissed her claim for breach of contract.

33. Then at paragraph 60, Moree CJ stated:

> **"60. Under Article 23.4, an employee was required to take all annual vacation leave within each anniversary period subject to the right, with the approval of his Department Head, to carry forward up to 10 days which would have to be taken within the first quarter of the following anniversary period. That was clearly intended to limit the liability of the Bank for accrued vacation leave pay due to employees…. So looking at Articles 23.3 and 23.4 together, <u>what would the position be if an employee refused to consult his/her immediate Supervisor on vacation leave and/or refused to schedule the vacation leave? Would the Bank be impotent and be forced to allow the employee to breach Article 23.4 with impunity and accumulate as much vacation leave as he/she wanted for as long as he/she refused to consult her immediate supervisor and/or schedule the vacation leave? It was my view that the Bank would not be rendered powerless in that situation and on a proper construction of Articles 23.3 and 23.4 I</u>**

> **concluded that the Bank could schedule the vacation leave for an employee who was in breach of Article 23.4 and had been given a reasonable opportunity to comply with Article 23.3 but had refused or failed to do so. I did not accept that the provisions of Article 23.3 could be reasonably read and construed in a way which inexorably resulted in the accumulation of vacation leave in breach of Article 23.4 if the employee did not move to schedule his/her vacation leave.**" **An alternative view was that in such a situation the unused vacation leave taken forward into the next anniversary period in excess of the 10 days allowed under Article 23.4 would be forfeited on the basis that it was not permitted under Article 23.4. However, that position was not advanced by the Bank and I did not consider it."** [Emphasis added]

34. Mr. Smith contended that, similarly, as in this case, there was no evidence that Mr. Rolle had the right to ignore the instructions given by Mr. Deal, which were pursuant to Article 51.07 of the IA which provision is clearly intended to limit the liability of WSC for accrued vacation. He also submitted that it would be unjust or inequitable for WSC to be forced to allow an employee to breach Article 51.07 with impunity and accumulate as much vacation as he wanted. Mr. Rolle was mandated to take 17 days' vacation and he flatly refused.

35. Turning to Article 51.07 of the IA, it provides as follows:

> **"Employees will be allowed to accumulate earned vacation to a maximum of three (3) years vacation entitlement. Vacation in excess will be forfeited unless the employee's application for vacation has been refused because of the demands of the service…."** [Emphasis added]

36. As Mr. Smith correctly alluded to, Article 51.07 of the IA creates a policy that employees would only be allowed to accumulate a maximum of three (3) years vacation. Despite the expiration of the IA, this policy was still in effect at the time when Mr. Rolle retired. Mr. Ferguson submitted that, given that the IA had expired, Article 51.07 was no longer in effect. I will come to this issue momentarily.

37. It is palpable from Article 51.07 that vacation in excess of three (3) years will be forfeited unless the employee's application for vacation leave has been refused because of the exigencies of the service.

38. In my opinion, the Vice President erred in law by finding that Mr. Rolle had earned the benefit of vacation which could not be forfeited. In this case, Mr. Rolle was

mandated to go on vacation but he refused to do so. At no time did WSC prevent him from doing so. In fact, he had done so on many previous occasions. There is no right to accumulate vacation and it is not the same thing as having worked overtime and the employer's policy not to pay for overtime which is clearly a breach of the EA.

39. At paragraph 31 of the Ruling, the Vice President acknowledged that WSC had the unfettered right to schedule vacation leave for its employees and WSC did schedule vacation leave for Mr. Rolle. She was also satisfied that WSC was not "*trying to be unfair or to take away his right to vacation.*" However, at various paragraphs of the Ruling (see for example, paras [15], [26], [27], [29], [30], [31], [32], [35] and [36]), she uncompromisingly repeated the 'recurring theme' (as she styled it) that "*Managers must manage*".

40. The simple facts of this case are, in December 2018, more than two years before Mr. Rolle's retirement date, WSC through its Acting General Manager, Mr. Deal placed Mr. Rolle on mandatory vacation since he had exceeded the three-year accumulation by 17 days. Mr. Rolle refused to proceed on vacation and those days were forfeited in accordance with Article 51.07 of the IA. This cannot be stated to constitute ineffective management.

41. At paragraph 32 of the Ruling, the Vice President stated that the onus is on management to exercise its vested right to effectively manage its operations and its employees. She continued:

> "**In my judgement, the Respondent exercised its right to set mandatory vacation, but it did not exercise its right to manage its own proposition. Based on the evidence led, the Respondent *permitted* the Applicant to work during the days earmarked as mandatory vacation. At all times, based on the evidence led, it was always open to the Respondent, to refuse the Applicant access to its premises, to his work space, to its employees that the Applicant managed and to its work. Whether the Respondent intended to or not, the Applicant was permitted to attend work and he did work and he was paid for the work he performed. To reprimand what you permit is not effective 'management'. By no means should any employee be penalized by reason of management's failure to effectively MANAGE its own operations."** [Emphasis added]

42. Mr. Rolle was a senior manager at WSC. He was told to proceed on mandatory vacation. He categorically refused to proceed on vacation and reported to work every day during the 17 days which were earmarked as mandatory vacation. In my opinion, Mr. Deal acted as any effective manager could to prevent Mr. Rolle from accumulating vacation leave. It would be unrealistic to expect him to police this mandatory

instruction or to take other highly controversial and/or antagonistic step, for example, physically removing Mr. Rolle from the premises and/or bolting all doors to prevent him from accessing his work station.

43. In my judgment, the Vice President erred in law. The finding that the Management of WSC did not effectively manage its operations and employees is misconceived and unsupported by the evidence.

44. The Vice President also criticized WSC for taking eight months to deal with the matter of gross insubordination and she questioned the motive behind it. She also considered that to be ineffective management but, since nothing of substance turns on it, there is no need to make any determination.

45. In the circumstances, Grounds 2, 7, 8 and 9 are accordingly allowed.

Grounds 3 and 6: Whether the expired IA is still binding and, if it is, whether Article 51.07 is inconsistent with Sections 12-15 of the EA and contravenes Section 4 of the said Act

46. Grounds 3 and 6 are interrelated and will be considered together. In Ground 3, WSC complained that the Vice President erred in law by finding that Article 51.07 of the IA attempts to limit the accumulation of vacation which is contrary to the saving provisions in the EA as it contravenes the provisions of section 4 of that Act which is silent on the issue.

47. The material parts of Article 51.07 of the IA provide as follows:

> **"Employees will be allowed to accumulate earned vacation to a maximum of three (3) years vacation entitlement. Vacation in excess will be forfeited unless the employee's application for vacation has been refused because of the demands of the service."**

48. WSC maintained that Article 51.07 of the IA is applicable to Mr. Rolle's vacation entitlement and as such, he was unable to accumulate earned vacation up to three (3) years.

49. However, Mr. Rolle argued that his contract of employment is governed by the EA because under Article 72.02, once the IA expired, the better conditions under the EA came into effect immediately and he was statutorily entitled to vacation. Assuming that he was correct, then Sections 12 to 15 of the EA come into play.

50. Section 12 of the EA provides as follows:

> **"<u>Annual vacation</u>.**
> **12.(1) Every employer shall give a vacation of at least two weeks to each employee upon the completion of each twelve months of employment."** [Emphasis added]

51. Section 13 addresses vacation pay and provides at Section 13(1) that "*[a]n employer shall pay vacation leave to an employee entitled to vacation under section 12."* Section 14 deals with commencement of vacation with pay and provides that:

> **"The employer shall at least one day before the beginning of the vacation, or such earlier time as may be prescribed, pay to the employee the vacation pay to which he is entitled in respect of that vacation."**

52. Section 15 addresses termination of employment prior to one full year of employment and is not relevant to the present case.

53. The first issue which arises here is whether there is a statutory entitlement or provision in Sections 12-15 of the EA for an employee to accumulate vacation. The EA is silent with respect to the "roll-over" of vacation leave from one year to the next. In fact, Section 12 expressly states "*<u>annual</u> vacation*" which portends that vacation leave must be taken annually. Mr. Ferguson was unable to proffer any authority to demonstrate that Section 12 does not relate to "annual" vacation. In addition, the wording in section 12(1) "*upon the completion of each twelve months*" suggests that the employee is entitled to one vacation a year. The other consideration as alluded to by WSC, is that there is no statutory authority or provision requiring an employer to pay the employee in lieu of taking vacation.

54. At paragraph 13 of her Ruling, the Vice President agreed with WSC's assertion that "*there is no statutory entitlement that permits any employee to 'roll over' his vacation days from one year to the next*." She proceeded to consider the cases of **Claude Leach v The Development Corporation of Saint Vincent and the Grenadines and The Attorney General** High Court Civil Claim No. 46 of 2002; **Morley v Heritage Plc** [1993] IRLR 400 and **Witty v Stamps Solicitors Employment Appeal Tribunal** Appeal No. EAT/35/97 21st March 1997, which underscored the principle that, in the absence of specific provisions in an employee's contract of employment, vacation leave not taken cannot be rolled over from one year to the next.

55. Another consideration which is intrinsically redundant since Mr. Rolle argued that his contract of employment is governed by the EA, and not the IA, is whether the policy in Article 51.07 is inconsistent or in breach of Section 4 and Sections 12 to 15.

56. In its simplest terms, Section 4 means that if an employee has a contract that provides for better terms and conditions of employment than what is required by the EA, those more favourable terms will continue to apply and cannot be diminished or reduced by the EA. In other words, the EA provides a saving of more favourable terms of employment. For a comprehensive analysis of Section 4: see Sir Hartman Longley P in **Leon Cooper v Grand Bahama Power Company Ltd.** SCCivApp. No. 178 of 2017 at paragraphs [20] to [24] and paragraphs [28] to [29].

57. The fact that the IA provides for accumulation of vacation up to three (3) years is a greater benefit than is provided for in the EA, which does not permit the accumulation of vacation and payment in lieu of taking the same.

58. In my judgment, the Vice President, having found that the EA is silent on the issue of accumulation of vacation, erred when she found that Article 51.07 of the IA attempts to limit the accumulation of vacation which is contrary to the provisions in the EA as it contravenes the provisions of section 4 of the EA. As WSC correctly pointed out, this finding is an error as it is the EA which must not be construed as limiting or restricting any greater benefit. Accordingly, Ground 3 is allowed.

59. In Ground 6, WSC alleged that the Vice President erred in law by finding that Article 1.02 (b) of the IA has no binding impact and that the life of the IA is to be construed more that "*in honour only but binding only during the currency of the IA*."

60. Mr. Rolle asserted that the IA, having expired, is not binding and Sections 12-15 of the EA governed his benefits.

61. On the other hand, WSC asserted that pursuant to Article 1.02(b) of the IA, the terms and conditions of the IA (although expired) still remained in force until a new agreement is negotiated.

62. After considering some authorities, the Vice President resolved the issue at paragraph 22 of the Ruling. She stated:

> **"In this regard, and based on the strength of the Court of Appeal rulings whereunto this Tribunal is bound, it would appear that the life of the Industrial Agreement is to be construed more that "in honour" only, but binding only during the currency of the particular Industrial Agreement. As such, the provision set out**

> **at 1.02(b) of the Industrial Agreement has no binding effect, save but in honour only. Other than that, the terms of the Employment Act must apply, except for where, however, the employee has become accustomed to better and greater conditions.”** [Emphasis added]

63. Article 1.02(b) of the IA provides as follows:

> **“If at the expiration date of this contract a new contract is not consummated the terms and conditions of this contract shall remain in effect until the new contract is negotiated up to the maximum period of time provided by law.”**

64. Mr. Smith submitted that the Vice President in her Ruling referred to the case of **Alexander Brown and Grand Bahama Power Company Ltd** SCCivApp & CAIS No. 175 of 2017, where this Court affirmed the principle that an industrial agreement purporting to include terms which permitted its existence/continuation, once it expired, was of no effect pursuant to Section 46(2) of the Industrial Relations Act (“the IRA”). However, according to Mr. Smith, the Vice President did not consider the employment relationship with Mr. Rolle after the purported expiration date of the IA. Mr. Smith argued that it was Mr. Rolle who knowingly jump-started the Grievance Procedure under Article 10 of the IA on 8 August 2019. In other words, he set the train in motion about six years *after* the date of the purported expiration and therefore, he believed at the time that the terms and conditions of the IA were still binding.

65. Mr. Smith also criticized the Vice President for referencing paragraphs 92 and 93 of the case of **Bahamas Industrial Engineers Managerial and Supervisory Union (“BIEMSU”) v Grand Bahama Power Company Limited and anor. (“GBPC”)** 2010/CLE/gen/FP00162 but failing to consider Article 72.03 of the IA. The gist of paragraphs 92 and 93 is that the terms of an industrial agreement may be incorporated into an employee’s individual contract of employment, either expressly or impliedly once it is done during the currency of the industrial agreement.

66. Article 72 of the IA is the Saving Clause provision and Article 72.03 provides that:

> **“If at the expiration of this Agreement a new agreement is not consummated, any benefits conferred upon employees by this Agreement shall mutatis mutandis be deemed incorporated into their individual signed contracts.”**

67. Mr. Smith submitted that the failure of the Vice President to examine and analyse Article 72.03 (which was argued both orally and in writing before her), in conjunction

with Article 1.02 (b) of the IA, resulted in an error in law in her conclusion that the expired IA was bound in honour only.

68. On the other hand, Mr. Ferguson argued forcibly that all of the grounds of appeal relied upon by WSC are premised on an industrial agreement which had expired and therefore was of no relevance. He relied on the Supreme Court case of **Leon Cooper v Grand Bahama Power Company Limited** 2011/COM/lab/FP0011 which, according to him, established the principles that there is no provision in any industrial agreement that could extend the life of that industrial agreement for more than five years since it would be contrary to Section 46(2) of the Industrial Relations Act ("the IRA"). Mr. Ferguson further submitted that this Court's Judgment in **Leon Cooper v Grand Bahama Power Company Ltd** SCCivApp. No. 178 of 2017, affirmed the principles and determined the effect of an expired industrial agreement.

69. In **Leon Cooper**, at paragraphs 35 to 36, Sir Hartman Longley, P had this to say about industrial agreements which have expired due to effluxion of time and no new agreement has been consummated:

> **"35. I find it unnecessary to decide the point to dispose of this appeal. However, since there has been much argument on the point I would hold that the agreement expired on the 1st January, 2005 and did not continue in force. I do so for the reason that to hold otherwise would violate the express terms of the Industrial Relations Act which intended that such an agreement should have a life span of five years and no more.**
>
> **36. In any event, it seems to me, as a matter of interpretation, what the draftsman had in mind when section 77(2) was drawn is that section 46(2) of the Industrial Act, so that the expiration of the five year limitation imposed by the legislation would trigger the application of the Employment Act to the industrial agreement in force at the date of the commencement of the Employment Act. Therefore, when the five-year term of the industrial agreement was attained on the 1st January, 2005, *regardless of any provision of the agreement itself for an alleged continuance*, the Employment Act kicked in to govern the contract of employment in accordance with section 77(2)."**

70. The case of **BIEMSU** (supra) emphasizes the principle that the terms of an industrial agreement may be incorporated into an employee's contract of employment either expressly or impliedly provided that it is done during the currency of the industrial agreement.

71. In the present case, the IA having expired and a new agreement not having been consummated, by Article 72.03, those benefits (the three-year or 81 days' leave accumulation) have either expressly or impliedly been incorporated into Mr. Rolle's contract of employment.

72. In addition, despite its expiry, both parties utilized the IA. Hence, while Mr. Rolle had no entitlement to accumulate vacation leave under the EA, he could have done so under the IA but only to a maximum of three (3) years vacation leave. Therefore, his attempt to accrue a further 17 days' vacation leave ran afoul of any entitlement under both the EA and the IA.

73. By not considering Article 72.03 of the IA in conjunction with Article 1.02(b) of the IA the Vice President erred, because had she done so, she would have concluded that Mr. Rolle's greater benefit resides in the IA and not in the EA.

74. For all of the foregoing reasons, both Grounds 3 and 6 are allowed.

Ground 4: Whether there was an established custom or practice of WSC with regard to the accumulation of vacation.

75. In Ground 4, WSC complained that the Vice President erred in law by finding that there was an established custom or practice at WSC relative to the accumulation of vacation which practice existed up to the time of the Board's directive of 2018. This is reflected at paragraphs 11 and 12 of her Ruling. The Vice President addressed the issue in this manner:

> **"11. … Moreover, the Applicant asserts that during the life of the same Industrial Agreement and beyond its point of expiry, the Respondent allowed for and paid for the accrual of vacation days in excess of the three-year limitation.**
>
> **12. This all apparently changed in 2018 when a Board directive of the Respondent Corporation purported to vary what had become, by then, as asserted by the Applicant, a custom and practice, as demonstrated by the exhibiting of documents pertaining to several employees who had, during the currency of, and since the expiry of the Industrial Agreement in 2013, accumulated and had been paid for the excess vacation days which exceeded the three-year allotment set out in the Industrial Agreement. The Respondent raised no opposition or contradiction to the Applicant's exhibits in this regard. <u>In fact, in one instance, excess vacation days was paid to the spouse of the deceased employee.</u> The Applicant submits that this is in keeping with what was intended by the provision –i.e. that the**

> **Respondent would allow for excess vacation to be used in tandem with retirement leave or would otherwise effect payment out upon the retirement of the employee, as had been the custom and practice of the Corporation.** [Emphasis added]

76. Then at paragraph 15, she stated:

> **"On the evidence led, throughout the currency of the Industrial Agreement, the employer did not limit the accrual of vacation time to three years. It waited five years after the expiration of the Agreement to seek to implement and enforce the provision. In this regard, one may well suggest, that for the specific employee who may claim the benefit of custom and practice, in his individual contract of employment, Section 51.07 does in fact contravene for him, the provision of Section 4 of the Employment Act. This will not apply in every instance, for once again, upon the evidence led, there were not many employees who fell within this category."** [Emphasis added]

77. In oral submissions before us and if I understood Mr. Ferguson well, he argued that WSC had a policy in place where employees were able to accumulate leave without limitation as is shown at Tab 8, tab 1 at page 4 of 27.

78. Page 4 of 27 is titled "*Excess vacation leave in accordance with our policy for the following persons*":

Employee	Annual Entitlement Amount	Maximum Entitlement Allowed	Leave accrued as at November 2018	
Names of 23 other employees	Their respective annual entitlements	Their respective maximum entitlements	Their respective leave accruals as at Nov 2018	
24. Rolle Ednel	27	81	97.5	16.5

79. At the bottom of the Table, the following words are inscribed "*Please submit approved leave form for vacation to our Employee Services Department no later than 12:00 noon on Friday, 14th December, 2018. We anticipate your full cooperation."*

80. So, while the Table does demonstrate that some employees, for example, Jeremiah Storr, had accumulated 211.7 days, WSC is saying to these employees who have exceeded the maximum entitlement of three years to submit their vacation leave form no later than 12:00 noon on Friday, 14 December 2018 so they can proceed on leave which exceeded the maximum entitlement allowed (i.e. three years). In the case of Mr. Rolle, the Table shows that he exceeded his maximum entitlement allowed by 16.5 days.

81. Mr. Smith asserted that there was no substantive evidence from Mr. Rolle to support the finding that there was an established custom or practice at WSC (presumably different from the Board's directive in 2018). According to him, the custom and practice was always to enforce all policies in the IA and provisions of the EA. Mr. Smith argued that the Vice President committed a serious error when she found that WSC had a custom or practice of not enforcing the policy with all employees based on the limited evidence about one employee, namely Mr. Keith Thompson.

82. Mr. Smith further contended that Mr. Rolle provided no witness statement. He did not testify under oath and the exhibits attached to skeleton arguments (Tab. 8), tab 1 at Page 4 of 27 demonstrated WSC advising its employees about their excess leave and the necessity to apply and proceed on leave which exceeded the maximum entitlement allowed.

83. In addition, exhibited by Mr. Rolle at Tab 9A, is a private and confidential letter addressed to Mr. Keith Thompson dated 21 August 2017. He exceeded his three-year entitlement by 40.75 vacation days and he was advised that he MUST take these days before his pre-retirement leave begins. Also exhibited is another private and confidential letter written to Mrs. Rayane Thompson, the spouse of the late Mr. Thompson. The letter indicated that she, as the beneficiary of her husband's estate, would be paid the sum of $4,886.58 for the 18 days' vacation leave Mr. Thompson had remaining.

84. Looking at these exhibits in the round, there was no evidence before the Tribunal to explain why Mr. Thompson was paid (18.20) days over the three years. The Vice President never solicited from Mr. Rolle any explanation as to the reason for WSC doing so; for example, whether Mr. Thompson's 18.20 days' vacation leave was refused because of the demands of the service or whether, as is more likely the case, having died before his pre-retirement period had ended, he could not take his full vacation leave and the only recourse available was to pay him for those 18.20 days. The Vice President's statement that "…*in one instance, excess vacation days was (sic) paid to the spouse of the deceased employee*", without more, could not be regarded as

an established custom or practice at WSC relative to accumulation of vacation that existed up to the time of the Board directive in 2018.

85. In my judgment, the finding of the Vice President that there was an established custom or practice at WSC with respect to the accumulation/accrual of vacation leave was an error in law and unsupported by evidence to the requisite standard of on a balance of probabilities. Accordingly, this ground of appeal is allowed.

Ground 5: Whether WSC did not limit the accrual of vacation to three years for other employees

86. WSC complained that the Vice President erred in law by finding, on the evidence led, that throughout the currency of the Industrial Agreement, it did not limit the accrual of vacation to three years.

87. The Vice President addressed the issue of whether or not Article 51:07 of the IA, which specifically limits an accumulation/accrual of vacation leave up to three years, contravenes Section 4 of the EA which is silent on the issue. At paragraph 16, she summarized it in this manner:

> **"On the evidence led, throughout the currency of the Industrial Agreement, the employer did not limit the accrual of vacation time to three years. It waited five years after the expiration of the Agreement to seek to implement and enforce the provision. In this regard, one may well suggest, that for the specific employee who may claim the benefit of custom and practice, in his individual contract of employment, Section 51:07 does in fact contravene, for him, the provision of Section 4 of the Employment Act. This will not apply in every instance, for once again, upon the evidence led, there were not many employees who fell within the category…."**

88. WSC correctly submitted that there was no evidence for the Vice President to come to this finding. The principal document that Mr. Rolle relied on is the letter dated 16 August 2018 at Tab 9A which referenced a letter of 31 October 2017, which the Tribunal did not have the benefit of seeing. It is significant to note that the letter pertained to Mr. Thompson who passed away and was unable to take the vacation before he retired. As WSC correctly submitted, the Table at Tab 8, tab 1 - page 4 of 27 (above) clearly shows WSC advising 26 employees, including Mr. Rolle, about their excess vacation and to submit approved leave forms for vacation which exceeded the maximum entitlement allowed.

89. In addition, the letter addressed to Mr. Thompson dated 21 August 2017 made it abundantly clear that he had exceeded his three-year vacation entitlement by 40 days and he was required to take those days before retirement. I agree with WSC that the letter to Mrs. Thompson is no indication that WSC was not following its policy relative to vacation in excess of the three-year entitlement. As already mentioned, there was no evidence before the Vice President to explain why Mr. Thompson was paid (18) days in excess of the maximum entitlement allowed.

90. This ground of appeal is also allowed.

Ground 10: Whether the Vice President erred when she found that the EA is silent but it does not prohibit accrual of vacation

91. On this ground, WSC argued that the Vice President erred in law by finding that, as the EA is silent, it does not prevent nor prohibit accrual of vacation and that Mr. Rolle should receive the sum of $5,590.38 as claimed.

92. At paragraph 10, the Vice President addressed the question of whether an employee is entitled to 'roll over' vacation days into the following year. After hearing submissions from both parties, she agreed with WSC that there is no statutory entitlement that permits any employee to 'roll over' his vacation days from one year to the next: paragraph 13. She then referred to the case of **Leach** (supra), where Thom J noted at page 7 that:

> **"20. Learned Counsel for the Second Defendant submitted that in the absence of specific provisions in the Claimant's terms of employment for the roll-over vacation leave not taken such leave cannot be rolled over from one year to the next. Learned Counsel referred the court to the cases of Morley v Heritage Plc [1933] IRLR p. 400, Rowley v Stagecoach South Ltd, where the United Kingdom Appeal Tribunal stated at paragraph 5:**
>
> > **"…under the general law, in the absence of agreement, the Appellant would not be entitled to carry forward holiday pay from one year to the next. We think that principle is to be found in the Court of Appeal decision in Morley v Heritage Plc."**
>
> **21. Learned Counsel also relied on Witty v Stamps Solicitors Employment Appeal Tribunal Appeal No. EAT/35/97 21st March 1997 where the Appeal Tribunal stated:**

> **"….<u>as a matter of law in the absence of an express term, the court will not imply a term that unused holiday can be carried forward to the next holiday year</u>." [Emphasis added]**

93. Besides there being no statutory entitlement that permits an employee to 'roll over' vacation leave from one year to the next, case law (supra) also supports that unless there is an express provision in the employment contract, unused vacation cannot be rolled over.

94. Mr. Rolle contended that the EA which governed his contract of employment provides no specific limitation to the right of the employee to accrue vacation leave and this is a superior condition to that set out in the IA, which seeks to limit such accrual to three years' entitlement. Mr. Rolle did not provide any authority to support his contention. On the other hand, WSC submitted that the express provision is found in Article 51.07 of the expired IA and it provides that vacation can only be accrued up to three years.

95. At paragraphs 26 and 36, the Vice President dealt with the accrual of vacation. At paragraph 36, she stated:

> **"In general, the Tribunal accepts the preference of many employees to accumulate as much vacation time as possible in order to achieve ultimate benefit and pay out at presumably higher wages when such accrued vacation time is assessed for payment at the point of retirement or termination as the case may be. <u>But, then again, the Act being silent on the matter does not prevent or prohibit an inevitable accrual which would naturally arise if employees do not take vacation as and when the same falls due.</u> In such instances, and as stated above, Management must simply and effectively manage their operations to avoid administrative and financial nightmares which would naturally be occasioned."**

96. After finding that the EA is silent, the Vice President proceeded to find that the EA does not prevent nor prohibit accrual of vacation and that Mr. Rolle should receive the sum of $5,590.38 as claimed. This is wholly inconsistent with her own finding that there is no statutory entitlement that permits any employee to 'roll over' his vacation days from one year to the next and the authorities of which she referred to in paragraph 13 of the Ruling.

97. This ground of appeal is also allowed.

Conclusion

98. In my judgment, there is no legal basis upon which Mr. Rolle could assert that WSC ought to pay him vacation pay for the 17 vacation days which he worked when he deliberately refused to proceed on vacation upon being mandated to do so.

99. Additionally, Mr. Rolle commenced the Grievance Procedure under the IA but then did a *volte face* and argued that the IA, having expired, or was of no relevance and the EA kicked in to govern his contract of employment in accordance with section 77(2) of the EA. There is no statutory provision that permits an employee to "roll over" his vacation leave from one year to the next. As I see it, Mr. Rolle's better benefits were found in the expired IA, which he chose to distance himself from. On his own arguments, he was stuck between a rock and a hard place.

100. Consequently, I will allow the appeal and set aside the award made by the Vice President. As this matter emanated from the Industrial Tribunal, I make no order as to costs.

_____

The Honourable Madame Justice Charles, JA

101. I agree with the reasons for judgment as set out by my learned sister Charles JA. There is nothing I wish to add.

_____

The Honourable Mr. Justice Smith, JA

Judgment delivered by the Honourable Sir Michael Barnett, P:

102. I have read in draft the judgment of Charles JA, with which Smith, JA agrees.

103. Although I had reservations in this matter, I agree that the appeal must be allowed and the judgment of the Tribunal set aside.

104. This appeal raises a simple but important question: can an employer who directs an employee to take vacation and scheduled the employee's vacation refuse to pay an employee vacation pay upon termination because the employee refused to take the vacation which the employer scheduled the employee to take?

105. The employee was a manager at WSC. With the consent of WSC, he had accumulated vacation over a period of time. He was entitled to 17 days' vacation. He was directed

by the General Manager to take the accumulated vacation commencing on 17 December 2018; the employee refused to do so. He reported to work and was paid his usual salary for work done.

106. The employee retired on 21 January 2021. At the time of his retirement, he was not paid for the 17 days' vacation which he was directed, but refused to take. As a result, he filed a trade dispute which was referred to the Industrial Tribunal. The Tribunal ruled that WSC was obliged to pay him the 17 days of vacation pay.

107. WSC has appealed.

108. It is settled law that an employer has the right to determine when an employee shall take vacation. An employee does not have the right to take vacation at his convenience or refuse to take vacation when directed by his employer to do so. In good employer/employee relations, these issues are usually resolved amicably to the benefit of both employer and employee. Unfortunately, in this case it has become a matter of principle, perhaps affected by the fact that the employee is a union leader at the WSC. The amount of money involved is $5,590.00.

109. This issue in this case arises where the employer permits the employee to continue to work and pays him notwithstanding that it has directed the employee to take vacation.

110. The statutory framework is found in the EA. It provides:

> **"12. (1) Every employer shall give a vacation of at least two weeks to each employee upon the completion of each twelve months of employment.**
> **(2) The vacation given under subsection (1) shall be extended by one day for every public holiday that occurs during the vacation.**
> **13. (1) An employer shall pay vacation pay to an employee entitled to a vacation under section 12.**
> **(2) The vacation pay —**
> **(a) in respect of an employee who has been employed for six months or more but under one year, shall be one week basic pay earned by the employee during the year of employment in respect of which he is entitled to the vacation;**
> **(b) in respect of an employee who has been employed for one year or more but under seven years, shall be two weeks basic pay earned by the employee during the year of employment in respect of which he is entitled to the vacation;**
> **(c) in respect of an employee who has been employed for seven years or more shall be three weeks basic pay earned by the**

employee during the year of employment in respect of which he is entitled to the vacation.

14. The employer shall at least one day before the beginning of the vacation, or such earlier time as may be prescribed, pay to the employee the vacation pay to which he is entitled in respect of that vacation.

15. (1) Where the employment of any employee ends before the completion of a year of employment, the employer shall forthwith pay to the employee —

(a) vacation pay then owing to such employee under this Part in respect of any completed year of such employment; and

(b) subject to subsection (2), on a pro rata basis of the basic pay earned by the employee during the incompleted year.

(2) Notwithstanding paragraph (b) of subsection (1), an employer is not required to pay to an employee any amount under that paragraph unless the employee has been continuously employed by him for a period of ninety days or more."

111. The right to vacation and vacation pay is a statutory right.

112. The EA requires the employer to give the employee a vacation (see section 12). The employer must give to the employee vacation pay for the period of his vacation (see section 13) and that pay must be made by the employer at least one day prior to the date the vacation begins (see section 14). Upon termination of employment, the employer must give the employee any vacation pay then owing for any completed year and prorated for any incomplete year (section 15)

113. An employee cannot refuse to take vacation. When an employer has directed an employee to take vacation, the employee must do so. If he refuses to do so, that in my judgment is an act of gross misconduct. The taking of vacation is not simply a benefit to the employee, it is also in the interest of the employer that an employee takes vacation. Vacation gives an employee rest and thus improves his productivity. It also gives an employer an opportunity to audit an employee's work while the employee is on vacation.

114. If the employee, contrary to the instructions of his employer, reports to work although he is on vacation and has received his vacation pay, the employer is not obliged to pay him anything.

115. The issue in this case is the circumstances where the employer does not pay the vacation pay prior to the date of the scheduled vacation as required by section 14 and allows the employee to remain at work and pay him his salary in the usual manner. Is

the employee still entitled to receive the vacation pay which section 13 obliges the employer to pay?

116. As previously indicated, section 15 of the EA requires an employer on termination to pay to the employee all earned vacation pay up to the end of the employment. But this applies to only earned vacation pay.

117. The EA does not itself give an employee a right to accumulate vacation from year to year. The ability to accumulate vacation pay over the years is not given by statute but by agreement between employer and employee. What the EA does do is give the employee the right to receive all contractually earned vacation pay upon the termination of his employment.

118. In my judgment, Article 51.07 is immaterial. It provides:

> **"Employees will be allowed to accumulate earned vacation to a maximum of three (3) years vacation entitlement. Vacation in excess will be forfeited unless the employee's application for vacation has been refused because of the demands of the service."**

119. In my judgment, the Article permits WSC to allow an employee to accumulate vacation in circumstances where there is no statutory right to do so. The Article does not prevent WSC from requiring an employee to take vacation when directed by WSC to do so.

120. However, if as the respondent contends, the industrial agreement has expired and the clause is inapplicable, then there is in fact no legal basis for the claim for accumulated vacation pay.

121. I am satisfied that an employee cannot claim a right to vacation pay under section 13 for a vacation which he has simply refused to take notwithstanding that he has been directed by the employer to take vacation. To hold otherwise would severely undermine an employer's right to determine when an employee would take his vacation. As I said earlier, it is settled law, that an employer has the right to determine when an employee shall take vacation.

122. For these reasons I would also allow the appeal.

The Honourable Sir Michael Barnett, P