COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
IndTribApp. No. 131 of 2021

B E T W E E N

WESTECH INTERNATIONAL SECURITY
Appellant

AND

JASON NOEL TYNES

Respondent

BEFORE: **The Honourable Madam Justice Crane-Scott, JA**
The Honourable Mr. Justice Jones, JA
The Honourable Sir Brian Moree, JA

APPEARANCES: **Mrs. Lisa Bostwick-Dean for the Appellant**
Mr. Charles McKay with Mr. Joseph Moxey for the Respondent

DATES: **3 October 2022; 21November 2022**

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Industrial Tribunal Appeal – Trade dispute – Employee's claim for overtime pay – Standard working hours – Overtime pay – Whether section 10 in breach of Article 6 of the United Nations Covenant on Economic, Social and Cultural Rights – Dualist legal system - Whether employer and employee could contract out of employer's statutory obligation to pay overtime – Whether parties can opt out of section 10 of the Employment Act – Estoppel – Whether employee waived right to complain about non-payment of overtime by employer – Sections 4, 8, 10, 75, 76 & 77 Employment Act – Section 72 of Industrial Relation Act

The respondent was employed at the appellant company as a security officer. After 4 years of working with his employer, the respondent was summarily dismissed. The respondent did not resist his dismissal, but instead lodged a "trade dispute" claiming unpaid overtime pay pursuant to the Employment Act.

The employer resisted the overtime claim on the basis that at the time of his engagement, the employee had signed the employer's Code of Conduct and Company Policies which expressly stipulated, inter alia, that *"the company DOES NOT pay overtime."*

Conciliation efforts at the Ministry of Labour failed to resolve the dispute, which was duly referred to the Industrial Tribunal for determination.

Following a contested trial, the Tribunal awarded the employee the sum of $10,903.21 plus interest being overtime pay due in accordance with section 10 of the Employment Act, Ch. 321A.

The employer appealed to the Court of Appeal raising several grounds of appeal.

Held: Appeal dismissed. The decision of the learned Vice-President is affirmed in its entirety. No order as to costs.

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. The Act commenced on 1 January 2002, well over 7 years *before* The Bahamas signed and ratified the United Nations Convention of Economic Social and Cultural Rights (CESCR), thereby assuming international obligations under international law.

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 vacation with pay for Bahamian employees. The relevant provisions (sections 8, 9 and 10) are located in Part II of the Act dealing with Standard Hours of Work, days off and overtime pay.

The provisions speak for themselves. It is no part of this Court's role to "strike down" as somehow inconsistent with the United Nations Convention of Economic Social and Cultural Rights, the minimum standard working hours and overtime provisions which the Parliament of this country has in its wisdom seen fit to enact. To do so would in effect be to assume law-making power which this Court, quite simply, does not possess. The appellant's submission is untenable and ground 2 is dismissed.

The appellant is not an "essential service" and therefore would be unable to lawfully cause or permit the respondent as its employee to "exceed the prescribed standard hours of work" as provided for in section 8(3).

The evidence is that the appellant was in the business of providing security guard services for the Airport Industrial Park and other clients. It was not engaged in the manufacturing or processing of goods and products; and by no stretch of the imagination could it be viewed as an "industrial enterprise." Neither, in our view, is the appellant a "law enforcement service" as in The Bahamas, that expression is reserved for police officers, reservists and police civilians attached to the Royal Bahamas Police Force.

Grounds 3 and 4 cannot succeed as the appellant has quite simply failed to demonstrate that the learned Vice-President failed to take account of amounts for which it had previously paid to the respondent. The pay slips speak for themselves and the amounts which the appellant paid to its

employee are clearly reflected in the fifth column of the Tribunal's calculations for each of the years 2015 through 2018, more particularly set out in the written Judgment.

Blackburn v. Attorney-General (1071) 2 All ER 1380 applied
Evangelistic Temple v. Lauriette Lightfoot IndTribApp. No. 47 of 2021 considered
Government of the United States of America v Assange (2021) All ER (D) 36 mentioned
Guardians of the Poor of Salford Union v. Dewhurst [1926] AC 619 mentioned
Guyana Electricity Corporation Inc v. Stoby and others [2002] 66 WIR 232 mentioned
Jack Warner v Attorney General of Trinidad and Tobago [2022] UKPC 43 mentioned
Johnson & another v. Moreton [1980] AC 37mentioned
Keen and anor v. Holland [1984] 1 WLR 251 mentioned
Kok Hoong v. Leong Cheong Kweng Mines Ltd [1964] AC 993 mentioned
*Melon and others v. Hector Powe Ltd (*1980) IRLR 477 mentioned
Oceania Heights Ltd v. Willard Clarke Enterprises Ltd et al. [2013] UKPC 3 mentioned
Regina (SC and others) v Secretary of State for Work and Pensions and others (Equality Human Rights Commission – intervening – (2021) 3 WLR 428 mentioned
Rustomjee v. The Queen (1876) 2 QBD 69 mentioned
Sampson v. Penn's Renovation and Construction Company Limited & another [1997] BHS J. No. 144 mentioned
Tycoon Management Limited v. Barrett [2016] 2 BHS J. No. 1107 mentioned
Vita Food Products Inc v. Unus Shipping Co Ltd [1939] 1 All ER 513 mentioned

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JUDGMENT

Delivered by The Hon. Madam Justice Crane-Scott, JA

Introduction

1. On 8 November 2021, the appellant ("Westech") filed an appeal against a written Judgment of Industrial Tribunal Vice-President, Her Honour, Miss. Simone Fitzcharles. In her Judgment (dated 1 October 2021 but handed down on 4 October 2021), the learned Vice-President held Westech liable to pay the Respondent ("Mr. Tynes") the sum of $10,903.21 plus interest being overtime pay due in accordance with section 10 of the Employment Act, Ch. 321A.

2. As appears from its Notice of Appeal, Westech seeks an order from this Court which would: (i) overrule the learned Vice-President's decision; and (ii) award them costs of the appeal.

3. Westech's Notice raised 5 grounds of appeal setting out why (in Westech's view) the appeal should be allowed and why the Tribunal's award of overtime pay to Mr. Tynes is erroneous and should be set aside.

4. As will shortly appear, ground 2 of the appeal raised a very unusual issue. Essentially, Westech contended that notwithstanding the clear intent of sections 4 and 10 of the Employment Act, the Tribunal's award of overtime pay to Mr. Tynes erroneously interfered with the parties' right to freedom of contract enshrined in the International Covenant on Economic, Social and Cultural Rights ("CESCR") to which The Bahamas is a party.

5. In this regard, Westech submitted that the Tribunal's award was wrong in law since it ignored the undisputed evidence that Mr. Tynes had, upon his engagement with Westech, signed Westech's Code of Conduct and Company Policies which contained an express stipulation that *"the company DOES NOT pay overtime."* Counsel for Westech further urged the Court to "strike down" section 10 of the Employment Act which, in her view, is in breach of The Bahamas international obligations under the CESCR.

6. After hearing the respective submissions for and against the appeal, we have dismissed Westech's appeal. Our reasons appear below.

7. Some background facts will give some context to the dispute.

Background Facts

8. Mr. Tynes was employed by Westech on or around 11 November 2013 as a full-time security officer. Both parties accept that at the time of his engagement, Mr. Tynes signed, and became subject to Westech's Code of Conduct and Company Policies clause 3 of which contained the following stipulation:

> **"3. Normal working hours for a full time Security Officer is 40 (forty) hrs. per week at a rate of $5 per hour. Officers requesting to work over 40 hrs. must apply to the Company. <u>Hours over the 40 hrs. mark will not be considered overtime</u>. Additional hours will be paid at the abovementioned rate. <u>*The company DOES NOT pay overtime*</u>…" [Emphasis added]**

9. Following his engagement, Mr. Tynes was deployed to work at the Airport Industrial Park ("AIP"), where he worked a standard 40-hour week <u>as well as</u> additional hours for which he was paid at a regular rate of pay rather than the statutorily prescribed overtime rates or the increased rates for work performed on his days off and public holidays. While making no

complaint about the non-payment of overtime, Mr. Tynes remained in Westech's employ for some 4 years or until 4 October 2018, when he was summarily dismissed.

10. Westech's termination letter cited as reasons for Mr. Tynes' termination, are his

> ***"repeated and escalating flaunting of company rules and regulations, gross insubordination, gross insolence, gross misconduct and failure to maintain the standards of service as outlined in the Company's Policies and Code of Conduct."***

11. Following his dismissal, Mr. Tynes completed a *'Report of A Trade Dispute Form',* by which he lodged a "trade dispute" with the Ministry of Labour claiming unpaid overtime pay from Westech over the 4-years of his employment between 2014 and his termination on 4 October 2018. He did not contest his dismissal.

12. The Ministry's efforts at settling the "trade dispute" failed and on 30 May 2019 it was duly referred to the Tribunal in accordance with the Industrial Relations Act, Ch. 321.

13. As appears from item 13 of his Originating Application before the Tribunal, Mr. Tynes claimed: **"A money award. Specifically, my overtime to which I am entitled …We do not get paid overtime…"**

14. Westech filed its Defence resisting the claim on the following grounds:

> **"1. Mr. Tynes was justifiably summarily dismissed.**
> **2. No overtime payments are owed to him.**
> **3. All NIB payments made on his behalf.**
> **4. All vacation pay made to him.**
> **5. All Colina Insurance payments made on his behalf."**

15. On or about 30 October 2019, the learned Vice-President gave directions for readying the dispute for a contested trial before her. Both parties filed their Witness Statements and supporting documents as directed. In due course, the trial took place before the Tribunal, with the witnesses for each party being cross-examined under oath. Following the trial, the Tribunal reserved its decision.

The Tribunal's written Judgment

16. The reasons for the learned Vice-President's overtime award to Mr. Tynes are contained in her 49-paragraph written Judgment (referenced earlier), which is the subject of this appeal.

There is no need to reproduce the entire Judgment here as the following summary highlighting its broad structure and identifying the Vice-President's core findings will suffice.

17. Between paragraphs [1] through [8] under the heading *"Preliminary",* the Vice-President rejected a preliminary objection by Westech that the claim be dismissed on the basis that there was "no dispute" before the Tribunal since Mr. Tynes had failed to complete item 11 of the Originating Application form.

18. In overruling the objection and assuming jurisdiction to hear Mr. Tynes' claim, the Vice-resident noted that the dispute about unpaid overtime had been specifically referred to the Tribunal by way of the Minister's Referral Certificate of 30 May 2019. She then set out the parties' respective *"Facts and Contentions"* between paragraphs [9] through [19] of her Judgment.

19. At paragraph [17], she examined Mr. Tynes' responses to questions put to him during his cross-examination by Westech principal, Mr. Christopher Adderley regarding why he had not complained for 4 years about the non-payment of overtime and had only complained *after* he had been dismissed. She extracted the relevant portions of Mr. Tynes' testimony as follows:

> **"*Q.* My question to you is if you didn't complain, why after you were summarily dismissed you complain now?**
>
> ***Tynes:* Let's put it like this…The employer said either take it or leave it. I couldn't complain because I would have been removed.**
> **…**
>
> ***Q.* When you came to Westech did you not sign the Code of Conduct and Company Policies which stipulate how overtime is calculated and regular hours?**
>
> ***Tynes:* If there is no overtime pay, it can't be calculated. I did sign something (a bunch of papers) which was taken back. If Westech is not paying us overtime I don't see how you calculate it. It's something that does not exist.**
>
> ***Q.* Thank you, Mr. Tynes for verifying that point. In your contract I explained how it would be paid if there was a need for overtime. Why after 40 hours am I going to continue to give something unless you request it?**

> ***Tynes:*** **<u>According to the laws of working hours, after 40 hours one is paid time and a half</u>.**
>
> ***Q.*** **So <u>if you were not paid that for 4 years why continue to do it</u>?**
>
> ***Tynes:*** **You fill out an application. In that application you accept it or not. <u>If you want a job, you have to go along with it whether you like it or not. Security officers were expendable. A dime a dozen. We could easily be replaced</u>." [Emphasis added]**

20. At paragraph [20], the Vice-President then identified four (4) *"Issues"* that she found had arisen for her determination. Among the issues she identified were:-

> **"(1) …**
>
> **(2) Could the policy that the Respondent does not pay overtime, which the Respondent required the Applicant to agree, lawfully derogate from the effect of the Employment Act so as to enable the parties to opt out of the statutory overtime provision?**
>
> **(3) Did Mr. Tynes' failure to contest payment of his salary at a regular rate for time he worked over 40 hours each week throughout his employment, preclude him by way of waiver/estoppel from raising his claim for overtime?**
>
> **(4)….."**

21. Between paragraphs [21] through [23] under the heading *"Law and Discussion",* the learned Vice-President highlighted sections 8 and 10 of the Employment Act, together with the civil and criminal sanctions for breaches prescribed in sections 75, 76 and 77, respectively.

22. Addressing the right of parties to freedom of contract at paragraph [21], the Vice-President made the following astute observation:

> **"[21] <u>At the outset it should be stated that courts recognize the ordinary principle of freedom of contract</u>.**

> **But the principle does not operate in such a way as to be unfettered. Some well-established regulators of the principle may be found, for example, in certain pieces of legislation operating together with principles of public policy. This case is about whether that principle of freedom of contract is so restrained when it meets and competes with the protection afforded Bahamian employees in the right to overtime pay prescribed by the provisions of the Employment Act." [Emphasis added]**

23. Between paragraphs [24] and [25], under the heading: *"Issue 1: Overtime Pay- Would causing or permitting the work be different?"* the Vice-President addressed the first issue for her determination. She examined the wording of section 8 of the Employment Act to determine whether an employer's statutory obligation to pay overtime was affected if the employer does not *"request"* or *"cause"* the employee to work overtime, but merely accedes to the employee's request and *"permits"* the employee to work in excess of the standard 40 hours per week.

24. With the assistance of Black's Law Dictionary as to the respective meanings of *"cause"* and *"permit"*, the Vice-learned President reached the following conclusion of law:

> **"[25]…In both cases there has to be a meeting of the minds. If an employer requests of an employee that he work overtime hours and the employee so works, that employer must abide by Section 8. If an employer allows an employee, upon the employee's request, to work overtime hours, the employer would still be bound to comply with Section 8. So the Respondent's argument that he did not have to pay overtime because the Applicant requested to work overtime hours does not withstand the wording of Section 8… " [Emphasis added]**

25. Next, between paragraphs [26] through [40] under the heading: *"Issue 2: Contracting Out – Was it lawful or not?"*, the Vice-President considered the issue of the lawfulness of the Westech's stipulation set out in its Code of Conduct and Company Policies that *"the company DOES NOT pay overtime"* and the question whether the employee and his employer could contract out or opt-out of the statutory entitlement to overtime.

26. At paragraph [26], the Vice-President noted that, in general, Mr. Tynes as an employee, was entitled to overtime pay. She then began her inquiry into the question whether Mr. Tynes and his employer could nonetheless contract out of the statutory entitlement to overtime provided for in the Employment Act? She adverted to numerous authorities which, she said, supported the proposition that if the statutory provisions are mandatory and are further underpinned by public policy, they cannot be contracted out of. The learned Vice-President explained:

> **"…The clear purpose of section 3 of the Westech Code of Conduct and Company Policies was to deprive its employees of statutory overtime pay. Now, where a statute does not contain language which prohibits parties from agreeing to opt out, the authorities indicate that if the statutory provisions are mandatory and are underpinned by public policy, parties cannot contract out of the statute. The approach of courts has been to consider the scope and purpose of the legislation contrary to which parties have sought to contract." [Emphasis added]**

27. Between paragraphs [27] and [28], the Vice-President examined the Court of Appeal decision in **Tycoon Management Limited v. Barrett,** [2016] 2 BHS J. No. 107, where this Court (differently constituted) examined the Privy Council guidance in **Vita Food Products Inc v. Unus Shipping Co Ltd,** [1939] 1 All ER 513 and **Oceania Heights Ltd v. Willard Clarke Enterprises Ltd et al.,** [2013] UKPC 3 before construing the Immigration Act to determine whether its language, scope and purpose rendered an employment contract illegal and void as a matter of public policy.

28. While expressly recognizing that the facts in **Barrett**'s case were distinguishable, the learned Vice-President declared that she would employ a similar approach to construing the overtime pay provisions in the Employment Act. She then examined the House of Lords decision in **Guardians of the Poor of Salford Union v. Dewhurst,** [1926] AC 619 before making the following observation:

> **"[31] On this authority, not only did the purpose and policy of the statute count when parties sought to opt out of it, but also the imperative nature of the words in the statute weighed against such opting out. The policy in the statute to protect workers was conveyed by those words. The court did not doubt that an employer would be able to find workers who would be willing to contract out of**

> **their statutory rights to get the job. It requires no great imagination to appreciate how a person in need of a job would be willing to forego his minimal statutory rights in order to meet basic needs and obligations of life." [Emphasis added]**

29. At paragraph [32], relying on dicta from Lord Hailsham of Marylebone's speech in **Johnson & another v. Moreton,** [1980] AC 37 (another decision of the House of Lords), the Vice-President further observed that even where the statute does not expressly prohibit contracting out of a statutory provision, the contract may not be supported where the arrangement competes with public policy in the public interest.

30. Between paragraphs [33] through [36], the Vice-President found the Employment Act was intended to provide minimum standards applicable to employers and employees and that in relation to overtime pay, no employer can contract to pay an employee less than the prescribed amount for the overtime worked.

31. Drawing assistance from the historical account of the development of employment legislation taken from the text, *"Labour Law in The Bahamas, 2005"* authored by the late Justice Emmanuel Osadebay, the learned Vice-President found:

> **"[33] For decades, successive Bahamian legislators have sought to protect and balance the rights and obligations between workers and employers. The Truck Act 1907 which stopped employers from paying workers, not in the 'coin of the colony', but rather with a credit which was only redeemable in shops owned by the employers; and the Minimum Wages Act 2006 which evolved into its current form, prescribing a mandatory minimum wage for workers to be paid, are good examples of this approach. Workers and employers have made up the majority of the Bahamian public, so the statutes which govern employment relations directly impact that vast section of the populace and are meant to provide them with protections and certainty as *(sic)* the expectations of the law. Public policy and the public interest are interwoven in the fabric of these pieces of legislation, which include the Employment Act. Therefore, although their situation is presented today for this Tribunal to consider, Mr. Tynes and Westech are a meaningful subset in a much bigger picture.**

[34] May their bargain be allowed to make… "a dead letter" of sections 8, 10, 75 and 77? In the Tribunal's view the answer is no. The mandatory wording of sections 8 and 10 is clear. The public policy implications are also clear. The Statute is meant to provide minimum standards which are applicable to employers and employees. In relation to overtime pay provisions this means that no employer can contract to pay an employee less than the prescribed amount for overtime hours worked….the basic principle is that compensation equal or better than (if the parties so choose in accordance with Section 4) the levels set by the Act for overtime hours worked is what is due.

[35] As in any other jurisdiction, in The Bahamas, not all employees would be bargaining with potential employers from a position of weakness, particularly those who are highly skilled and educated. However, workers with minimal education and skills, or persons who may be desperate for work whether caused by general economic hard times or the immediacy of their need to earn, because of familial or other obligations, to name a few, would be particularly susceptible to falling into a situation where they may accept any work on any terms. Parliament must have foreseen the budding mischief in such a situation as well. So mandatory rest periods for employees in Section 9 and mandatory overtime hours in Sections 8 and 10 appear to work hand-in-hand to protect and preserve the physical, mental, economic and social well-being of employees in The Bahamas.

[36] The approach is bolstered by Section 4 of the Employment Act, which stipulates that the provisions of that Act (inclusive of those governing overtime) shall apply irrespective of *"any contract of employment, arrangement or custom"* and *"notwithstanding any other law."* Section 4, however, does not limit an employee from contracting for better benefits than the minimum set out by the Act. So save in a situation where the Applicant was given better compensation for overtime than is afforded by Sections 8 and 10, by the Section 4 mechanism, the parties could not lawfully enter into a contract of employment which contracdicted those provisions." [Emphasis added]

32. Between paragraphs [37] through [39], the learned Vice-President examined Westech's contention. She noted, *inter alia*, that the employer's business had **"dictated the employment terms to Mr. Tynes on a take-it-or-leave it basis";** had **"received the benefit of multiple hours of work from Mr. Tynes beyond a standard 40-hour work week, having placed him in a 12-hour shift location;** and further had **"by its contract, saved itself from having to employ and pay another security guard to work the extra hours Mr. Tynes put in at the AIP post."**

33. At paragraph [38], the Vice-President examined the penal provisions of the Employment Act. She observed that the mandatory or obligatory nature of the overtime provisions had been reinforced by the creation of criminal offences for contraventions of the Act. She further noted that in addition to the prescribed penalties, Parliament had given the court the power to order the employer to pay to the employee, *inter alia*, any overtime pay to which the employee is entitled under the Act. Finally, she noted that the Act had expressly preserved or 'saved' the right of an employee to pursue civil proceedings for the recovery of unpaid wages, overtime pay or for other breaches of the Act.

34. She buttressed her conclusions by reference to the decision of the Guyana Court of Appeal in **Guyana Electricity Corporation Inc v. Stoby and others,** [2002] 66 WIR 232; and the decision of the Bahamas Industrial Tribunal in **Sampson v. Penn's Renovation and Construction Company Limited & another,** [1997] BHS J. No. 144.

35. Finally, at paragraph [40], the learned Vice-President concluded as follows:

> **"[40] In the light of the above, the Tribunal finds that the parties could not lawfully contract out of paying correct rates of overtime pay to Mr. Tynes for the overtime hours he worked as shown by the Westech-generated pay slips he adduced in evidence. The policy in the Respondent's Code that it does not pay overtime to employees is therefore not enforceable against the Applicant." [Emphasis added]**

36. Between paragraphs [41] through [43] of her Judgment under the heading: *"Issue 3: Waiver/Estoppel – Do these operate in relation to statutory overtime?",* the Vice-President turned to consider Westech's contention that it could, rely on the doctrines of estoppel and waiver, to avoid the statutory obligation to pay overtime due to Mr. Tynes' failure to complain.

37. Relying on dicta of Viscount Radcliffe which she extracted from the Privy Council authority of **Kok Hoong v. Leong Cheong Kweng Mines Ltd,** [1964] AC 993 at p. 1016; and the

dictum of Oliver LJ in the English Court of Appeal decision in **Keen and anor v. Holland,** [1984] 1 WLR 251 at p. 261, the learned Vice-President rejected Westech's contention, concluding as follows:

> **"[43] The Tribunal believes that this dicta applies as that section of the public comprised of employees (not falling within exempted categories) in The Bahamas is protected by, inter alia, sections 8 and 10 of the Employment Act in accordance with public policy and the public interest. The Tribunal is therefore of the view that the Respondent cannot set up an estoppel in the face of those provisions concerning the mandatory compensation for overtime at the rate prescribed by the Act." [Emphasis added]**

38. Finally, at paragraph [44] of the Judgment under the heading: *"Issue 4: Bonus – Did it expunge overtime pay obligations?",* the Vice-President considered Westech's further contention that its obligation to pay Mr. Tynes overtime pay had been expunged by the fact that Mr. Tynes had been paid a bonus by AIP equivalent to the overtime pay he should have received under the Employment Act.

39. In rejecting Westech's submission, the learned Vice-President held, *inter alia*, that Westech had adduced no evidence that the bonus, if paid to Mr. Tynes at some time during the course of 2014 through 2018, was of equal value to one and a half (11/2) times his salary for all hours he worked in excess of the standard 40-hour week.

40. Having determined the 4 issues in Mr. Tynes' favour, the learned Vice-President then found Westech liable to pay Mr. Tynes overtime pay of $10,903.21 in accordance with the Employment Act. At paragraph [45] she supported the award by set out her detailed calculations for overtime based on the pay slips for each of the years 2014, 2015, 2016 and 2017, respectively.

41. At paragraph [46], she concluded with her final Order as follows:

> **"The Tribunal therefore orders that the sum of Ten Thousand Nine Hundred and Three dollars and Twenty-one cents in the currency of the Commonwealth of The Bahamas (B$10,903.21) be paid by the Respondent to the Applicant together with interest at the rate of 10% per**

annum from the date of this judgment until payment is made in full."

42. We turn now to Westech's grounds of appeal.

The Grounds of Appeal

43. As originally filed, Westech's Notice of Appeal of 8 November 2021 raised 5 grounds of appeal. However, at the start of the hearing, Westech applied by way of its Summons filed on 4 July 2022 to amend its grounds by adding sub-ground (b) to ground 1. After hearing arguments for and against the amendment, the Court acceded to the application.

44. As appears from paragraph 49 of Westech's Skeleton Arguments filed on 5 July 2022, ground 5 was withdrawn. Accordingly, the appeal proceeded on the basis of the following grounds:

> **"(1)(a) The Judge was wrong in law as a security officer is deemed to be an essential service and therefore the standard hours of work are twelve (12) hours per day and not eight (8) hours per day.**
>
> **1(b) Further or in the alternative, the learned Judge misdirected herself in law when she failed to consider whether the Appellant's business conducted at Airport Industrial Park, fell into one of the exempted categories of work as set out in section 8(3) of the Employment Act. Had she done so, the learned Vice-President would have determined that the Respondent's business fell into either the exemption of "any industrial enterprise" or alternatively, "law enforcement service" or both, whereby the standard hours of work may be exceeded up to a maximum of 12 hours per day before overtime is payable.**
>
> **2.The Respondent requested and often insisted upon working extra hours so that he could earn extra money knowing and accepting that the Appellant does not pay overtime. The Respondent was free to decide how many hours he wanted to work. At no time did the Appellant make a request of the Respondent to work extra hours.**

3. Further or in any event, the Judge's overtime calculation is wrong in that she failed to take into account the amount which the Appellant already paid to the Respondent when calculating the total sum which she found to be due and owing to the Respondent.

4. Further and in any event, the Judge's calculation of overtime fails to take into account that the Respondent was paid double-time on all public holidays.

~~**5. Further or in any event, the Judge's calculations included cheques in the name of Antonio Campbell and not in the name of the Appellant. The Judge included those sums and failed to make any mention of the irregularity of the Respondent presenting cheques in someone else's name as a part of his evidence in the matter.**~~ *(Withdrawn)"*

45. Counsel for Westech, Mrs. Bostwick-Dean, advised that it was her intention to move ground 2 ahead of ground 1 since, in her view, if successful, it would completely dispose of the appeal. We turn therefore to ground 2.

Ground 2 – Are sections 4 and 10 of the Employment Act in breach of The Bahamas' obligations under the International Covenant on Economic, Social and Cultural Rights ("CESCR")?

46. Mrs. Bostwick-Dean submitted that ground 2 concerns the liberty of persons to freely contract, that is, to enter into an agreement on terms which are best for them.

47. Mrs. Bostwick-Dean's core contention was that sections 4 and 10 of the Employment Act are void and unenforceable by reason of the CESCR, which came into force *vis-à-vis* The Bahamas on 23 March 2009 following the deposit of its instruments of ratification on 23 December 2008.

48. While conceding that ground 2 is not crafted as a direct attack on sections 4 and 10 of the Employment Act, Mrs. Bostwick-Dean submitted that the ground directly attacked the Vice-President's finding at paragraph [36] of her Judgment *(extracted earlier)* that save in a situation where Mr. Tynes was given better compensation for overtime than is afforded by section 8 and 10, the parties could not lawfully enter into a contract of employment which contradicted the statutory overtime pay entitlements.

49. By this route Mrs. Bostwick-Dean submitted, the door was open for her to raise on appeal (albeit indirectly) the lawfulness of section 10 of the Act *vis-a-vis* this country's international obligations under the CESCR.

50. In her oral arguments, Mrs. Bostwick-Dean submitted that while the Employment Act was admittedly passed before The Bahamas ratified the CESCR, its provisions are already consistent with the CESCR rights. She suggested that an examination of the CESCR and the Employment Act, would confirm that the economic rights in the CESCR already exist in the Act. The Act, she said, is a codification of the CESCR rights save for the overtime pay requirements in section 10 which, she claimed, are contrary to the freedom of contract provisions of the CESCR.

51. Referring to Articles 1, 6 and 7 of the CESCR and drawing heavily on guidance published by the United Nations Committee on Economic, Social and Cultural Rights, Mrs. Bostwick-Dean urged us to **"do what is necessary"** to avoid placing The Bahamas in violation of the terms of an international treaty which it had ratified.

52. At paragraph 38 of Westech's Skeleton Arguments, Mrs. Bostwick-Dean concluded with the following bold submission:

> **"38. Sections 4 and 10 together are a *(sic)* clear violations of the parties' human right, pursuant to CESCR, to freely choose the work that they will do and their terms of employment. The Court has a duty to adjudicate on this breach of CESCR so as to bring about "systematic institutional change to prevent violations of rights in the future". In the premises, it should be held that section 10 of the Employment Act is excluded from section 4 thereof by reason of the fact that its inclusion, thereby denying employers and employees to negotiate their own terms with respect to overtime, violates the terms of CESCR."**

53. In his response, Counsel for Mr. Tynes, Mr. MacKay, submitted that the ground had no merit since it is trite that unless and until Parliament gave a stamp of approval to a treaty, it does not become enforceable in municipal law. He relied on the authorities of **Rustomjee v. The Queen**, (1876) 2 QBD 69 and **Blackburn v. Attorney-General,** (1971) 2 All ER 1380.

54. We considered the contending submissions. With the greatest respect to Mrs. Bostwick-Dean, her submission that section 10 of the Employment Act was *ultra vires* the CESCR appears to have been based on her clearly erroneous assumption that the mere fact of Bahamas ratification

of the CESCR in 2008 had somehow resulted in its various provisions having the force of law in The Bahamas and superseding the express provisions of the Employment Act.

55. As we see it, that submission cannot withstand serious legal scrutiny for many reasons. We start with Lord Denning MR's off-cited observation in **Blackburn** *(above)* regarding the approach of courts of law to international treaties. At page- 1382 Lord Denning MR famously stated:

> **"Even if a treaty is signed, it is elementary that these courts of law take no notice of treaties as such. <u>We take no notice of treaties until they are embodied in laws enacted by Parliament, and then only to the extent that Parliament tells us</u>." [Emphasis added]**

56. Quite simply, this means that as a court of law operating in a dualist legal system, this Court can take no notice of the CESCR or any obligations which The Bahamas may have assumed under international law unless the CESCR has been given the direct force of law in The Bahamas and its provisions have been expressly recognised and embodied in legislation passed by the Parliament of The Bahamas. See Jack Warner v Attorney General of Trinidad and Tobago [2022] UKPC 43 at paragraph 35; Regina (SC and others) v Secretary of State for Work and Pensions and others (Equality and Human Rights Commission intervening [2021] 3 WLR 428 at paragraphs 76 -78 and Government of the United States of America v Assange (2021) All ER (D) 36 at paragraph 60.

57. It is obvious that to succeed on this ground, Mrs. Bostwick-Dean had to convince us that the CESCR had the direct force of law in The Bahamas or alternatively, that the international obligations that this country assumed under the CESCR had been embodied in the substantive provisions of our domestic legislation and given pre-eminence over ordinary law. This she was unable to do.

58. It need hardly be said that under this country's constitutional arrangements, the Parliament of The Bahamas has the <u>exclusive power</u>, subject only to the provisions of the Constitution itself, to make laws for the peace, order and good government of The Bahamas. See Article 52(1) The Constitution.

59. 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. The Act commenced on 1 January 2002, well over 7 years <u>*before*</u> The Bahamas signed and ratified the CESCR thereby assuming international obligations under international law. Although some of its precepts may well have been indirectly recognized and

given effect to in substantive provisions of our domestic law, nothing in the Employment Act gives the CESCR the direct force of law in The Bahamas. What is more, even after this country ratified the CESCR in 2009, Parliament passed no amendments to the Employment Act to acknowledge the existence of the CESCR; or to give its international obligations the force of domestic law.

60. As its long title clearly states, the Employment Act was enacted, to provide, *inter alia*, minimum standard hours of working and vacation with pay for Bahamian employees. The relevant provisions (sections 8, 9 and 10) are located in Part II of the Act dealing with Standard Hours of Work, days off and overtime pay.

61. The relevant provisions of sections 8 and 10 of the Employment Act provide:

> **"8. (1) Except as otherwise provided by or under this Act, no employer shall cause or permit any employee to work in excess of eight hours in any day or forty hours in any week (in this Part referred to as the "standard hours of work") without the payment of overtime pay in respect of such excess in accordance with section 10:**
>
> **Provided that the standard hours of work shall be –**
>
> **(a) Forty-four hours in any week for the period February 1, 2002 to February 1, 2003;**
> **(b) Forty hours in any week after February 1, 2003.**
>
> **…**
>
> **10. Where an employee is required or permitted to work in excess of the standard hours of work, he shall be paid in respect of such work at a rate of wages not less than-**
>
> **(a) in the case of overtime work performed on any public holiday or day off, twice his regular rate of wages;**
> **(b) in any other case, one and one-half times his regular rate of wages:**
>
> **Provided that an employee in a tipped category in the tourism and hospitality industry shall be paid at his regular rate of pay other than in respect of his second day off in any week,**

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

62. The above provisions speak for themselves. Notwithstanding Mrs. Bostwick-Dean's submissions to the contrary, it is no part of this Court's role to "strike down" as somehow inconsistent with the CESCR, the minimum standard working hours and overtime pay provisions which the Parliament of this country has in its wisdom seen fit to enact into law. To do as Mrs. Bostwick-Dean suggests would in effect be for this Court to assume law-making power which we, quite simply, do not possess. The submission is untenable and ground 2 is dismissed.

Ground 1(a) – Are security guard services an "essential service" falling within the statutory exception in section 8 (3) of the Employment Act?

63. Next, Mrs. Bostwick-Dean sought to convince us that the learned Vice-President erred in law when she failed to find that the security guard services which Westech provided at the AIP was an "essential service" within the meaning of section 8(3) and therefore exempt from the overtime pay stipulation in section 10.

64. Referring to section 8(3) of the Employment Act, Mrs. Bostwick-Dean submitted that by virtue of section 72(2)(d) of the Industrial Relations Act, Ch. 321, the services which Westech provided at the AIP are *"essential to the safety of aircraft"* and therefore Westech is an "essential service" which is exempt from the standard hours of work in section 8 and the payment of overtime under section 10.

65. Mrs. Bostwick-Dean sought to buttress her submission by reference to the several Emergency Powers (Covid 19) Orders, 2020 under which "a business licensed to provide security guard services" was deemed to be an "essential service" and consequently exempt from the curfew provisions. She submitted that the Emergency Orders did not create a new category of "essential worker" but rather formally recognized security services as an "essential service" thereby permitting the movement of such employees during the lockdown.

66. On this basis, Mrs. Bostwick-Dean submitted that section 8(3) of the Act applies and in consequence, the standard hours of work in section 8(1) should be expanded to no more than 12 hours per day. This finding, she claimed, would have implications for the Vice-President's overtime pay calculations and Westech's complaints on grounds 3 and 4.

67. In response, Mr. MacKay submitted that the ground had no merit and should be dismissed. He said that security guards are governed under the Inquiry Agents and Security Guards Act, Ch. 210 and its associated Regulations. He disagreed with Mrs. Bostwick-Dean's suggestion that

Westech's business was an "essential service" within the meaning of section 72(2) of the Industrial Relations Act or that it included the industry in which Mr. Tynes was employed.

68. With reference to the Covid Emergency Orders cited by Mrs. Bostwick-Dean, Mr. MacKay submitted that they were not relevant to the matter before the court and further, could not be read retrospectively to recognize security guards as "essential" workers or as rendering "essential service."

69. We have considered the respective contentions together with sections 8 and 10 of the Employment Act and section 72(2) of the Industrial Relations Act. We agree with Mr. Mackay that ground 1(a) must fail for the simple reason that Westech is not an "essential service" within the meaning of section 72(2) of the Industrial Relations Act so as to be in a position to lawfully cause or permit its employees to *"exceed the prescribed standard hours of work in a day up to a maximum of 12 hours"* as provided for in subsection 8(3).

70. Subsection 8(3) of the Employment Act provides:

> **"(3) Notwithstanding subsection (1), in any industrial, construction, manufacturing or transshipment enterprise *or* in any *essential service* within the meaning of section 72(2) of the Industrial Relations Act or law enforcement service the hours of employment of an employee for the purposes of such employment may exceed the standard hours of work in a day up to a maximum of twelve hours and the Minister may by Order include other enterprises or services within this subsection as he deems fit." [Emphasis added]**

71. As is evident from subsection 8(3) itself, there is a cross-reference to section 72(2) of the Industrial Relations Act. Accordingly, it is to that Act alone that one must look to discover what Parliament means by the term "essential service". Subsections 72(2), (3) and (4) state:

> **"in this section and section 74 "essential service" means any service declared by the Governor-General by order to be an essential service, so, however, that the services hereafter mentioned in this subsection, that is to say –**
> **(a) …**
> **(b) …**
> **(c) …**
> **(d) any service essential to the safety of aircraft;**

> **(e) …**
>
> **<u>shall be deemed to have been so declared</u> by an order satisfying the requirements of subsections (3) and (4).**
>
> **(3) ….every such order shall be subject to affirmative resolution of both Houses of Parliament.**
>
> **(4) In subsection (3) the expression "subject to affirmative resolution of both Houses of Parliament", in relation to an order, means that the order is not to come into operation unless and until approved by a resolution of each of those chambers." [Emphasis added]**

72. It is obvious from the foregoing that whether a service is an "essential service" or not will depend upon either of two things. The first is whether the service in question has specifically been declared by an order of the Governor-General to be an "essential service" for purposes of the Industrial Relations Act. The second relates to whether the service in question falls into the list of services identified in subparagraphs (a) through (e) of section 72(2) such that it is *<u>deemed</u>* an "essential service" by an order approved by an affirmative resolution of both Houses of Parliament as mandated by subsections (3) and (4) of the Employment Act. In either scenario, it appears that there must be an order.

73. Having considered subsection 8(3) of the Employment Act and section 72(2) of the Industrial Relations Act, we are satisfied firstly that the provision of security guard services is not a service which has been declared by order of the Governor-General to be an "essential service" within the meaning of section 72(2) of the Industrial Relations Act. Mrs. Bostwick-Dean referred us to no such order and we are satisfied that no such order exists. Accordingly, Westech is not an "essential service" and therefore would be unable to lawfully cause or permit Mr. Tynes as its employee to "exceed the prescribed standard hours of work" as provided for in section 8(3).

74. Next, even assuming that Westech is correct that by virtue of its contract with the AIP it in fact provides a "service essential to the safety of aircraft" within the meaning of section 72(2)(d), we are satisfied that the deeming provisions of section 72(2) will not be triggered in the absence of an order satisfying the requirements of subsections (3) and (4). Here again, we have been referred to no such order approved by an affirmative resolution of both Houses of Parliament and are satisfied that there is no such order. Consequently, Westech cannot claim to be an "essential service" so as to bring itself within subsection 8(3) of the Employment Act.

75. Finally, we agree with Mr. Mackay that Westech's submissions with respect to the Covid 19 Emergency Orders are irrelevant in construing subsection 8(3) of the Employment Act.

Furthermore, without sight of an order satisfying the requirements of subsections (3) and (4) of the Industrial Relations Act, Westech is not and cannot claim to be an "essential service" within the meaning of subsection 8(3). Ground 1(a) is dismissed.

Ground 1(b) – Are security guard services performed at the Airport Industrial Park (AIP) an "industrial enterprise"? or alternatively, a "law enforcement service" falling within the statutory exception from the standard hours of work under section 8 (3) of the Employment Act?

76. On ground 1(b), Westech sought to challenge what Mrs. Bostwick-Dean claims is the Vice-President's failure to consider whether the employment contract between Westech and Mr. Tynes was covered by the exemption from the standard hours of work in subsection 8(3). The specific focus of the ground was on paragraph [43] of the Judgment *(extracted earlier)* where the learned Vice-President made a passing reference to employees "not falling within the exempted categories" without, it seems, considering whether subsection 8(3) applied to the business of Westech.

77. While conceding that Westech led no evidence before the Tribunal as to what operations at the AIP required longer shift hours than the standard hours of work, Mrs. Bostwick-Dean said that there had been some indication that Westech's contractual arrangement with the AIP required it to provide security detail at the airport on 12-hour shifts.

78. Mrs. Bostwick-Dean referred once again to subsection 8(3) of the Employment Act and submitted that by providing security guard services at the AIP, Westech either qualified as an "industrial enterprise" or alternatively, as a "law enforcement service". She submitted that as an "industrial enterprise" or a "law enforcement service", the standard hours of work in a day could lawfully be exceeded up to a maximum of 12 hours before the employee was entitled to overtime pay.

79. According to Mrs. Bostwick-Dean, even if Westech could not be regarded as an "industrial enterprise", it certainly qualified as a "law enforcement service" because, as a private security service, it was responsible for enforcing AIP's rules for access to its property and for maintaining public order and public safety on the property.

80. In response, Mr. Mackay simply said that the ground had no merit as Westech was neither an "industrial enterprise" nor a "law enforcement service". We agree.

81. The evidence is that Westech was in the business of providing security guard services for AIP and other clients. It was not engaged in the manufacturing or processing of goods and products; and by no stretch of the imagination could it be viewed as an "industrial enterprise." Neither, in our view, is Westech a "law enforcement service" as in The Bahamas, that expression is

reserved for police officers, reservists and police civilians attached to the Royal Bahamas Police Force.

82. As we see it, Westech is neither an "industrial enterprise" nor a "law enforcement service" and accordingly, could not lawfully cause or permit Mr. Tynes as its employee to "exceed the prescribed standard hours of work" as provided for in section 8(3). Ground 1(b) is dismissed.

Grounds 3 & 4 – Erroneous calculations of overtime

83. On both these grounds, Westech complains that the Tribunal erred when calculating the amount due in respect of overtime pay. On ground 3 Mrs. Bostwick-Dean complains that the judge's calculation is wrong because she failed to credit Westech with amounts which Westech had already paid Mr. Tynes. On ground 4, the contention is that the judge's calculations are wrong because Westech paid Mr. Tynes double time on all public holidays and accordingly, no further sum is due in respect of the holidays. She urged that the amounts already paid to Mr. Tynes be deducted from the award to avoid double recovery.

84. With the aid of Excel spreadsheets attached to her written submissions, Mrs. Bostwick-Dean provided the Court with re-calculations of the amounts which, in her view, would be due for overtime based on 8-hour and 12-hour workday respectively in the event that Westech is found liable to pay overtime.

85. In his reply, Mr. Mackay invoked section 64 of the Industrial Relations Act and submitted that the matters complained of in grounds 3 and 4 raised issues of fact and did not involve a point of law on which Westech could appeal as of right. He submitted that at paragraph 45 of her Judgment, the Vice-President clearly examined Mr. Tyne's pay slips for the years 2014 through 2018. Based on the tables she produced, she ostensibly worked out the amounts due for standard hours and overtime, respectively and took into account the amounts he had been paid. He submitted that both grounds should be dismissed since they challenge the Tribunal's finding of fact and disclose no obvious errors of law.

86. Section 64 of the Industrial Relations Act sets out the statutory grounds on which an appeal from the Tribunal can be launched. All of these matters involve points of law and not fact. Mrs. Bostwick-Dean suggested that grounds 3 and 4 fall within the statutory grounds, namely, that the Vice-President's overtime calculations are erroneous in point of law (section 64(1)(d)) and further that the order or award is inordinately high (section 64(1)(e)).

87. As this Court (differently constituted) has previously had occasion to point out, appeals from the Industrial Tribunal are open only on a question of law. Accordingly, we can only interfere if the appellant can succeed in showing that the Tribunal has either misdirected itself in law or reached a decision which no reasonable Tribunal directing itself properly on the law, could

have reached, or that its decision is plainly wrong. See **Evangelistic Temple v. Lauriette Lightfoot,** IndTribApp. No. 47 of 2021. Also see the House of Lords decision in **Melon and others v. Hector Powe Ltd,** (1980) IRLR 477.

88. As we see it, grounds 3 and 4 cannot succeed as Westech has quite simply failed to demonstrate that the learned Vice-President failed to take account of amounts for which it had previously paid to Mr. Tynes. The Westech-generated pay slips speak for themselves and the amounts which Westech paid to Mr. Tynes are clearly reflected in the fifth column of the Tribunal's calculations for each of the years 2015 through 2018, as detailed at paragraph 45 of the written Judgment.

89. Grounds 3 and 4 are dismissed.

Disposition and Order

90. For all the foregoing reasons, Westech's appeal is dismissed. The decision of the learned Vice-President is affirmed in its entirety. No order as to costs.

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The Honourable Madam Justice Crane-Scott, JA

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The Honourable Mr. Justice Jones, JA

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The Honourable Sir Brian Moree, JA