

NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE FULL COURT
SUIT NO. M 4/95

BEFORE: THE HONOURABLE MR. JUSTICE THEOBALDS
THE HONOURABLE MR. JUSTICE CLARKE
THE HONOURABLE MR. JUSTICE W. JAMES

**R. V. THE INDUSTRIAL DISPUTES TRIBUNAL EX PARTE
WORKERS SAVINGS AND LOAN BANK**

Dennis Goffe Q.C. and Lowell Smith
instructed by Gregory Reid of Ziadie,
Saunders & Reid for the Applicant

Neville Fraser, Ms. Llyle Armstrong
and Delroy Beckford instructed by
The Director of State Proceedings
for the Respondent

February 19, 20 and 28th November, 1997

THEOBALDS, J.

I have had the opportunity to read in draft the judgment of my brother Clarke. I agree with the reasoning and the conclusion arrived at. The motion is accordingly dismissed with costs to the respondent to be agreed or taxed.

CLARKE, J.

A collective labour agreement, made on 23rd August 1990 between Workers Savings and Loan Bank (the Bank) and the Bustamante Industrial Trade Union (the Union) representing certain categories of workers employed by the Bank, provided for a 40 hour week covering the period Monday to Friday. The Agreement designated that period as the "standard work week". It also provided that the "normal hours of work" were:

Monday to Thursday	-	8.00 a.m. - 4.30 p.m.
Fridays	-	8.00 a.m. - 5.00 p.m.

And under clause 11 of the Agreement, once the criteria therein set forth for overtime work were satisfied all work done on Saturdays, Sundays and Public Holidays would be payable at premium rates.

Whilst the Bank and the Union agree that the workers in question are entitled to a standard work week of 40 hours, they disagree about the particular course of days that the standard work week should embrace after 28th February 1992 when the wage agreement expired. The Bank says that the standard work week consisting of 40 hours (not exceeding 8 hours per day) was subsequently modified to cover the period Monday to Sunday and that for the period 1994 to 1995 the standard work week was again modified so as to be extendible from Monday to Saturday. The Union contends, on the other hand, that at all material times the standard work week of 40 hours consisted of five days covering the period Monday to Friday.

During negotiations for the period 1994-95 the Union complained that the "standard work week and normal work hours have been changed from Monday to Friday to include Saturday ... unilaterally". And although discussions were held at the local level and at the Ministry of Labour the dispute remained unresolved.

So, on 1st March 1994 the dispute was referred to the Industrial Disputes Tribunal under section 11(A)(1)(a) of the Labour Relations and Industrial Disputes Act. The terms of reference were expressed as follows:

"To determine and settle the dispute between Workers Savings and Loan Bank on the one hand and certain categories of workers employed by the Bank and represented by the Bustamante Industrial Trade Union on the other hand over the Union's claim for a 40 hour work week covering the period Monday to Friday".

After hearing evidence and submissions, the Tribunal on 16th December 1994 awarded as follows:

"The Tribunal awards that the Normal Work Week of the categories of workers represented by the Union shall remain Monday to Friday at a total of 40 hours per week and 8 hours per day.

The Tribunal further awards that any work done on Saturdays, Sundays and Public Holidays be paid for at premium rates".

In making the award the Tribunal arrived at the following findings:

- "(i) an original Collective Labour Agreement dated 23rd August, 1990 included provision for a 40-hour week (Monday through Friday) with work on Saturdays, Sundays and Public Holidays being paid for at premium rates.
- (ii) the proposed new Agreement for 1992-1993 signed by the Union delegates and providing for a 40-hour week (Monday to Saturday) at 8 hours per day expresses a wish of the Bank to amend clause 8 of the existing contract concerning Standard Work Week and Normal Work Hours to read -

"The Standard Work Week shall consist of 40 hours not exceeding 8 hours per day between Monday and Sunday".
- (iii) the proposal at (ii) above provides that the Bank will consult with the Union on proposed changes.
- (iv) the Tribunal interprets the Bank's letter of 17th August, 1992 as a proposal to the Union and that the Union is objecting to the extension of the Normal Work Week beyond the period Monday to Friday.

The Bank moves this Court for an order of certiorari to quash the Tribunal's award on grounds set forth in the amended statement filed pursuant to section 564 (B) of the Judicature (Civil Procedure Code) Act. The broad ground therein speaks of misinterpretation by the Tribunal of both the Collective Labour Agreement dated 23rd August 1990 between the parties, and the Bank's letter to the Union dated 17th August 1992 and signed on behalf of the Union. So far as concerns the Collective Labour agreement the Bank says the award was based on a misinterpretation of both clause 5 (1) and clause 8.

Clause 5(1) of the said Agreement provides:

"Subject to the provisions of this Agreement,
the Bank has the sole right and responsibility to conduct its business and manage its operations in such manner as it shall think fit. Accordingly the Bank has the right in its sole discretion:

- (i) to manage its business; plan, direct and control operations and the working force including the days, time, shifts, methods and manner of working, allocation of work and the number of employees required in any department or operation; to determine from time to time in which

rate or category any jobs or Employee falls;
to lay off Employees for lack of work or
other reasons".

(my emphasis)

It is as well to point out at this stage that the right conferred on the Bank by the sub clause to "control ... the days ... of working" is not absolute but is made "(s)ubject to the provisions of this Agreement".

Clause 8 of the said Agreement stipulates as follows:

"The standard work week shall be 40 hours per week presently consisting of five days - Monday to Friday. The normal hours of work are:

Mondays to Thursdays	8.00 a.m. - 4.30 p.m.
Fridays	8.00 a.m. - 5.00 p.m.

with one hour break for lunch. The Bank has the right to fix the times for commencement and cessation of work whether daily shifts or part time or partly one and partly another or in any other manner and to vary these from time to time. The Bank will inform the Union of proposed changes".

Observe, too, that both clauses 5 and 8 of the Agreement constitute part of the permanent terms and conditions of employment. Indeed, Part III thereof, which includes both clauses, and captioned "CONTINUING PROVISIONS", begins thus:

"The following clauses of this Agreement numbered 5 to 60 shall form part of the permanent terms and conditions of employment of the Employees and shall remain in force until varied by agreement between the Bank and the representative of the Employees for the time being ...".

In treating of "standard work week" and "normal hours of work" clause 8 makes an important distinction. The clause states what the normal hours of work are and then proceeds to invest the Bank with "the right" to fix or change the times for commencement and cessation of work. And in this regard a duty is imposed on the Bank to inform the Union of proposed changes. On the other hand, the clause confers no right on the Bank to fix, change or vary the standard work week. The clause, in my judgment, stipulates that "(t)he standard work week shall be 40 hours per week presently consisting of five days - Monday to Friday". So, the

Bank's right to control the days of working is subject to that stipulation. Same "shall remain in force until varied by agreement between the Bank and the representative of the Employees ...": see Part III - CONTINUING PROVISIONS at page 3 of the Agreement. And whilst I agree with Mr. Goffe that the use of the word, "presently" in clause 8 shows that both sides contemplate the possibility of future changes to the work week, it is plain that such changes can only be effectually made by agreement between the parties.

It follows, therefore, that Mr. Goffe's submission that on a proper interpretation of the relevant provisions of the agreement dated 23rd August 1990 the Bank had the right to change the standard work week without the agreement of the Union is, in the result untenable. There was, therefore, no error in law on the part of the Tribunal in interpreting the said Agreement.

Mr. Goffe submitted in the alternative that if the agreement of the Union was required as a matter of law to effect changes in the standard work week, such an agreement had been made. For this submission he relied heavily on the minutes of a meeting held at the local level on 5th June, 1992 and attended by officers of the Human Resource Development Department of the Bank on the one hand and two Union delegates (employees of the Bank) on the other hand. The minutes of the meeting were admitted in evidence before this Court and also earlier before the Tribunal. Captioned, "DISCUSSIONS ON UNION CLAIM", the minutes read as follows:

"Present were: Dianne Goban - HRD Manager
Marie Dann - Chief Union Delegate
Winston McKenzie - Union Delegate
Tenneth Fuller - Personnel Manager
Bevette Alvaranga - Personnel Assistant

Miss Goban opened the discussion by stating that it was agreed between herself and the Union that negotiations for 1993 salaries would be done now instead of December 1992.

Unions Proposal

Non-clerical	1	111	25%
Clerical	1	1V	35%
Secretarial	1	1V	30%
Supervisory	1-	1V	40%
Administrative			40%
M1 - M4			40%

Bank's Proposal

Non-clerical	1-111	25%
Clerical	1-11	25%
Clerical	111-1V	30%
Secretarial	1-11	30%
Secretarial	111-1V	40%
Supervisory		40%
Administrative		
M1 - M4		40%

Miss Dann said that the union would be willing to accept the Bank's proposal if M3 and M4 were adjusted to 45%. Miss Goban said that she would make the change but would have to get back to them on the final decision after she had discussions with the Chairman.

Normal work hours

Miss Goban had concerns about the way in which the standard work week and normal work hours were worded in the contract. She felt that it was not in keeping with the Saturday opening of the Branches and that the work week should be 40 hours per week, which could fall on any day of the week.

Miss Dann did not agree as she felt that this would mean that staff members would be asked to work six days per week (although not necessarily 8 hours per day). She felt that if a worker was asked to work on Saturday that worker should be able to get another day off during the week.

Miss Dann further pointed out that Saturday work has been in for some time now and she felt that the Bank needed to make some firm decisions in regard to Saturday work and its effect on workers.

Miss Goban replied that this was what she was trying to address but Saturday would have to be brought into the regular working week.

Miss Dann agreed but said that she would want to see the Bank committing itself to a proper shift system which would not have people working six days per week. She would prefer the contract to be worded five days per week from Monday to Saturday.

Miss Goban pointed out that she was not against a five day work week as long as people know that Saturday was a normal work day. Under such a system not everybody would be required to work every Saturday. She went on to say that she would ask that a costing be done on the shift system.

Mr. McKenzie pointed out that part-time people could be employed to fill the slots for the shift system. He went on to say that these people would get only basic salary and no benefits and would be paid by the hour.

Miss Goban reminded them that this was all good but it would still mean that the wording of the contract would have to be changed to accommodate Saturday work. This was agreed on by all.

Pension Fund

Miss Goban said that this was not being worked on and that she had just received a draft of the Auditor's report. She said that the Bank would be unable to take any steps until certain things were finalized. She assured the Union that the Bank was committed to the restructuring of the Pension Fund and reminded them that this was an issue that affect staff members at all levels.

Staff Loans and Mortgages

These would remain as they now are and the only change would be the grade numbers.

Motor car loans would have a ceiling of \$100,000.00".

It is plain that whilst several matters affecting the Bank and the workers were looked at, no final decisions were taken. The matters looked at did not go beyond the tentativeness of discussion by executives of the Bank and Union delegates and so could not, without more, transform into decisions binding the Bank and the Union. Further, no agreement was reached between the Bank and the Union to change or vary the standard work week fixed by the Collective Labour Agreement of 23rd August, 1990.

So, on the question of the standard work week was the Tribunal in error in interpreting the Bank's letter of 17th August, 1992 as a proposal to the Union? In my judgment that interpretation was correct. The letter is captioned, "RE UNION NEGOTIATIONS 1992-1993" and essentially comprises two parts. The first part begins thus:

"We wish to refer to our previous letter to you of January 16, 1992 in which we outlined the items of claim which had been agreed to between the Workers Bank and the representatives of the employees, The Bustamante Industrial Trade Union. In our subsequent meetings we have reached agreement on those items of claim which remained outstanding".

The several items of claim presented in the letter are expressed to be the ones agreed upon in relation to specific categories of workers therein set forth. These items of claim have nothing to do with standard work week or normal hours of work. The second part of the letter reads as follows:

"The Bank wishes to amend clause 8 of the existing contract concerning Standard Work Week and Normal Work Hours to read as follows:

The Standard Work Week shall consist of 40 hours not exceeding 8 hours per day between Monday and Sunday.

Work day shall include a one hour break for lunch. The Bank has the right to fix the days on which an employee is required and the time for the commencement and cessation of work, whether daily shifts or part-time, partly one and partly another or in any other manner and to vary these from time to time. The Bank will consult with the Union on proposed changes".

Here the proposed amendment, for that is what it was, would confer on the Bank the right, which it would not have under the said Collective Labour Agreement, to fix the days on which an employee would be required to work within a work week covering the period Monday to Sunday. The Bank had, as I have found, no authority to change the standard work week, or introduce a new one, without the agreement of the Union.

The second part of the letter beginning "The Bank wishes to amend clause 8 of the existing contract" was no more than a proposal which starkly contrasted with the first part. The first part addressed the items of claim, and only the items of claim, which had been agreed upon between the parties. For the second part of the letter to have been effectual the consent or agreement of the Union would have had to be given expressly and unambiguously. This clearly was not the case. It is plain that the Bank's letter was signed by the Union in the context of what the second paragraph of the letter encapsulated as having been agreed by the parties. That paragraph reads:

"We now wish to present for your final agreement, all the items of claim discussed and agreed on so that we may enter into a Collective Labour Agreement for the period 01/01/92 to 31/12/93".

The second part of the letter constituted, therefore, no more than an addendum which expressed the Bank's wish to amend, in the manner therein stated, clause 8 of the Agreement of 23rd August, 1990. So, for the reasons given, I find no merit in the Bank's contention that:

- (a) "[t]he signing by the Union of the said letter had in law the effect that the Union agreed clause 8 should be amended as shown to accord with the new standard work week which the Bank had already decided to introduce; and
- (b) [a]lternatively the signing had the effect in law that the Union agreed that the standard work week should be changed in the manner set out."

The Bank impugns not only the first part of the award but also the second part. As for the second part the Bank says that the Tribunal erred in making the following award:

"The Tribunal further awards that any work done on Saturdays, Sundays and Public Holidays be paid for at premium rates"

in that the jurisdiction to make the same was not conferred upon the Tribunal by its terms of reference. Mr. Goffe submitted that by the first part of the award the Tribunal pronounced on the dispute referred to it and that when it did that it exhausted its jurisdiction in relation to that dispute. Mr. Fraser submitted, on the other hand, that the second as well as the first segment of the award was consistent with the reference to settle and determine the dispute over the claim by the Union for a 40-hour week covering the period Monday to Friday.

The resolution of the dispute in terms of the reference, called for ineluctably, in my judgment, a determination as to the course of days that the standard work week constitutes as well as a pronouncement as to the rate of remuneration to be paid for work done on days ~~dehors~~ the standard 40-hour work week. The Tribunal having awarded that the standard work week consists of 40 hours covering the period Monday to Friday, I hold that it was within its jurisdictional competence to pronounce as it did that any work done on Saturdays, Sundays and Public Holidays be paid for at premium rates. That is a concise way of saying that any work done on Saturdays, Sundays and Public Holidays by the relevant categories of workers beyond the normal work week Monday to Friday at a total of 40 hours per week and 8 hours per day shall be paid for at premium rates. The pronouncement is

merely a reiteration of the provisions of clause 11 of the subsisting Collective Labour Agreement of 23rd August, 1990. So at worst the second part of the award is mere surplusage.

For the foregoing reasons I agree with Mr. Fraser that the Tribunal did not err in point of law in its findings or award. The clauses of the said Agreement providing for a 40 hour week 8 hours per day, Monday to Friday, with Saturdays, Sundays and Public Holidays to be paid for at premium rates, could not have been unilaterally amended by the Bank. Nor was there any agreement to amend those provisions. So far as the question of any amendment was concerned, the Bank's letter of 17th August, 1992 was correctly interpreted by the Tribunal as a mere proposal. And that proposal was never approved by the Union.

All that remains for me to say, therefore, is that I would dismiss the motion.

JAMES, WESLEY, J

I agree.