COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
IndTribApp. No. 86 of 2021

B E T W E E N

COMMONWEALTH BREWERY LTD.
Appellant

AND

PATRICE FERGUSON
Respondent

BEFORE: **The Honourable Mr. Justice Isaacs, P (Actg.)**
The Honourable Madam Justice Crane-Scott, JA
The Honourable Mr. Justice Evans, JA

APPEARANCES: **Mr. Audley Hanna Jr. with Keith Major Jr., Counsel for the Appellant**

Mr. Obie Ferguson, Counsel for the Respondent

DATES: **26 October 2021; 12, 25 November 2021**

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Industrial Tribunal Appeal – Wrongful dismissal – Unfair dismissal – Managerial – Supervisory – Stare decisis – Statutory interpretation - Canons of construction - Section 29 of the Employment Act – Law Reform and Revision (Miscellaneous Amendments) Act – Section 33 of the Interpretation and General Clauses Act - Fair Labour Standards (Exceptions) Order

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

The appellant appeals on the basis that the Tribunal was bound by this Court's definition of "supervisory" and "managerial" as outlined in the case of Duran Cunningham v Baha Mar Development Company Limited and was not at liberty to depart therefrom. The appellant submits that had the Tribunal followed this decision, it would not have found that the respondent was in a supervisory position.

Held: appeal dismissed. No order as to costs.

The definitions of managerial and supervisory as laid down in Duran Cunningham were based on the Fair Labour Standards (Exceptions) Order which had been repealed in 2009, three years prior to the 2012 delivery date of the judgment in Duran Cunningham. In the circumstances the Tribunal resorted to the dictionary meaning of the words managerial and supervisory. However, given the hierarchical nature of the court system the Tribunal was bound to follow this Court's decision in Duran Cunningham.

The Fair Labour Standards (Exceptions) Order is no longer in effect and there has been no replacement to the definition of managerial and supervisory by the Employment Act. There is no statutory definition. Parliament is assumed to have left it to the courts to determine who falls within these categories on a case by case basis. Therefore the Court is entitled to place its own definition on the terms, managerial and supervisory having due regard to the facts disclosed in the circumstances of each case before it. Whether or not an employee will be found to fall within the category of a manager or a supervisor will depend on the actual duties and functions carried out by that individual in the organisation and not necessarily on the nomenclature used in his contract of employment.

In the circumstances of this case, the Tribunal did not err in concluding that for the purposes of the Employment Act the respondent held a supervisory position, having regard to her duties and responsibilities.

Anthony Rahming v Grand Bahama Power Company Ltd. SCCivApp. No. 177 of 2017 mentioned
Bethel v Southern Air Charter Co. Ltd. [2013] 3 BHS J. No. 70 mentioned
Duran Cunningham v Baha Mar Development Company Limited SCCivApp. No. 116 of 2010 considered
Gilbert v Commissionerr of Internal Revenue 248 F. 2d 399 (2d Cir. 1957) considered
Newbold and others v The Commissioner of Police and others (unreported) considered
Terry Delancey v The Attorney General SCCivApp. No. 43 of 2006 considered
Thompson v Private Investment Bank Limited [2014] 2 BHS J. No. 5 mentioned

J U D G M E N T

Judgment delivered by the Honourable Mr. Justice Isaacs, JA:

1. The appellant challenges the decision of Ms. Simone Fitzcharles, Vice President of the Industrial Tribunal ("the VP") made on 21 May 2020, whereby the VP found at paragraph 24 of her judgment:

> **"24. The provision which pertains to Ms. Ferguson's employment is 29(1)(c)(i) and (ii) for employees who hold a supervisory or managerial position, as the Tribunal has found that she held the same..."**

2. The appellant's complaint stems from the apparent failure of the VP to follow the decision of this Court, differently constituted, in **Duran Cunningham v Baha Mar Development Company Limited** SCCivApp. No. 116 of 2010.

3. They take issue also with the VP's finding that the respondent made out her claim of wrongful dismissal and was therefore, entitled to damages in the sum of twenty thousand, eight hundred and seven dollars and fifty cents ($20,807.50). Although the appellant asks for an order that the action be dismissed on the basis that the respondent was not wrongfully dismissed, the grounds outlined below, do not specifically raise this issue. The issue can be addressed if it is first determined that the VP erred in her finding that the respondent was a supervisor; and as such, was therefore entitled to be compensated pursuant to section 29(c) of the Employment Act.

4. They seek as their relief that the appeal be allowed and that the judgment be set aside in part and upheld in part, that is to say, the appellant asks that the Court find that the respondent was not wrongfully dismissed; and to accept the VP's finding that the claim of unfair dismissal had not been made out by the respondent. This relief may also be determined by the view the Court must take of the VP's finding that the respondent was a supervisor. There has been no appeal by the respondent against the VP's finding that she was not unfairly dismissed. Thus, we need not concern ourselves with this issue.

5. In the appellant's Notice of Appeal filed on 1 July 2021, the grounds of the appeal are set out and they are as follows:

> **"1. The learned Vice-President erred in law and misdirected herself in paragraphs 14-18 of the Judgement, in her assessment of what criteria should be determined when considering who is a Manager/Supervisor;**
>
> **2. The learned Vice-President erred in law and misdirected herself in failing to consider and/or apply in her Judgement the Court of Appeal Case of Duran Cunningham and BahaMar Development Company Limited SCCivApp No.116 of 2010 in which the Honourable Mrs. Justice Allen, President (as she then was) at paragraphs 13-16 provided clear guidance on the criteria that should be considered when determining who is a Manager/Supervisor;**
>
> **3. [T]hat, having not considered or distinguished the case of Duran Cunningham relied upon by the Appellant, the learned Vice-President erred in her findings as she was bound under the doctrine of stare decisis to apply this Court of Appeal authority in precedence over those which she cited in the Judgment upon which the learned Vice-President ultimately based her decision;**
>
> **4. [A]ny other ground that the Court may deem just and equitable."**

Brief Background

6. The respondent worked for the appellant for twenty-eight years and was given notice pay of two weeks totaling $1,600.88, and severance pay based on section 29(1)b(ii) as opposed to 29(1)(c)(i) and (ii) of the Employment Act.

7. At paragraphs three through six of her ruling, the VP set out the respondent's employment history with the appellant:

> **"3. Ms Ferguson was employed by Butler and Sands Company Limited on 11 April 1991 as a manager in the Computer Department. Her duties included the managing of all staff working in that department. She was qualified with a Bachelor of Science degree in Business Computer Information Systems, according to Butler & Sands' offer letter written by its Financial Controller, Chartered Accountant Michael W Neilson.**

4. In 2002 Burns House purchased the business from Butler and Sands Company Limited. In 2006, Ms Ferguson was placed in the Business Analysis Department. Her evidence was that in that department her managerial status was not disturbed. No evidence was produced to the contrary.

5. In 2007 Ms Ferguson was transferred to the Accounts Department. In 2012 the ownership of the Respondent became that of Commonwealth Brewery Limited. The Applicant testified that she had less power in that new position. Ms Ferguson's evidence was that after this change, she met with Mr Paul Frazier, Manager in the Accounts Department, who assured her that her status remained the same—that is, as a manager.

6. On 31 October 2016 Ms Ferguson was presented with a new contract. In this contract she was demoted from managerial status to line staff and was offered the position of a Warehouse Clerk. She met with the Human Resources Manager, Ms Nadia Stubbs and asked about the demotion and changes to her employment. Her evidence was that Ms Stubbs told her she would be compensated for the demotion at the end of her employment with the Company. Ms Ferguson said she asked for a meeting to discuss how she would be compensated. She said that she was "given the run around and the meeting never took place" and that despite many inquiries her questions were ignored. The Tribunal accepts this evidence; no evidence to the contrary was adduced by the Respondent. Ms Ferguson also said that despite the fact she was described as a Warehouse Clerk, her duties and responsibilities were that of a supervisor with responsibility for 5 employees. She would also attend managers' planning committee meetings, and when the warehouse manager was absent, she would step up and perform his duties.

7. Ms Tishana Saunders, Human Resources Business Partner of the Respondent confirmed that the Warehouse Clerk's position was non-managerial and non-supervisory. Based on the testimony at trial and the terms of the contract produced in evidence, the Tribunal accepts that in the Accounts Department Ms Ferguson's power was diffused and as at 31 October 2016 she was definitively demoted from a managerial post to that of a regular or line-staff worker, although from time to time she was given duties exceeding the rank of her lesser position.

8. On 7 December 2017, Ms Ferguson received and accepted an appointment as a Raw Materials Warehouse Coordinator who reported directly to the Warehouse Manager. By the relevant contract she was "responsible for aiding in day-to-day order management, maintaining inventory records, managing the inflow and outflow of inventory & assets, analyzing inventory variances and periodic reporting. This role w[ould] aid in achieving departmental objectives and drive improvements as implemented by the organization." Her key responsibilities were to be:

- **Accurate invoicing and recording of Internal and External transactions**
- **Receiving and recording Raw Materials & Chemicals arriving to the warehouse**
- **Maintaining accurate Raw Material & Chemicals Inventory records**
- **Periodic analysis and reporting**
- **Coordination of cycle counts**
- **Responsibility for Inventory variances of the warehouse.**

9. Was this role managerial or supervisory in nature? The Tribunal accepts that Ms Ferguson, in performing this role, reported to managers in the organization, but that factor in itself does not negate the possibility that her role was managerial or supervisory, for managers and

supervisors may occupy different organizational tiers and nomenclature as regards the position is not in itself conclusive of its categorization. As with the 31 October 2016 contract, Ms Saunders of Human Resources also stated that this position of Raw Materials Warehouse Coordinator was non-managerial and non-supervisory. This seemed to be based on Ms Saunders' assessment of Ms Ferguson's contract of December 2017, but she made no specific references to parts of the contract which convinced her this was so. In cross-examination, Mr Everett Russell (Warehouse Manager of the Respondent) testified that Ms Ferguson did not manage the warehouse, but rather she managed her area of the warehouse. Mr Nolan Knowles (Customer Service and Logistics Manager) was asked whether Ms Ferguson's position of Raw Materials Warehouse Coordinator was managerial. He answered, "No, it was very low level, almost entry level. It's comparable to a warehouse clerk."

10. Ms Ferguson agreed that the position of Warehouse Clerk was not supervisory. However, she testified that she worked not quite a year as a Warehouse Clerk and was told that her performance surpassed that of a Clerk, so she was promoted to Raw Materials Warehouse Coordinator. The Tribunal noted that when Ms Ferguson took on the position of Raw Materials Warehouse Coordinator, she was given a salary increase of an extra $615.00 per annum. She stated she was responsible for raw materials and their distribution to other departments. She was responsible for container movement from one part of the Brewery to others. She also had to produce a month-end report. She was managed by the overall Warehouse Coordinator. She was responsible for a staff of 5 drivers and their duties and performance from day to day. She did not write their evaluations or discipline them, but she had the power to report their actions for reprimand by the overall Warehouse Manager.

> **11. The witnesses' testimony prompted the Tribunal to compare the agreed terms for the two positions (that is, for Warehouse Clerk and Raw Materials Warehouse Coordinator). These two contracts of employment between the parties set out in clear relief what Ms Ferguson's and the Brewery's rights and obligations were. Contrary to the testimony of Mr Knowles, it is clear the duties in the contracts are different and that the position of Raw Materials Warehouse Coordinator came with greater responsibilities in relation to the expected handling of the Respondent's human and material resources by the Applicant"**

8. I pause to note two matters that may prove to be of some moment to the appeal, they are, in 2012 the respondent was assured that she was still a manager; and that in 2016 she was told that she would be compensated for her demotion at the end of her employment with the appellant.

9. The VP went on to conduct a comparison between the agreed terms for the two positions, that is, for Warehouse Clerk and Raw Materials Warehouse Coordinator ("RMWC"); and to outline the respondent's duties at paragraph 12 of her decision, for example:

> **"12. …SHE [Safety, Health and Environmental] Management and Sustainability**
>
> - **Implements Heineken SHE standards and ensures these are embedded and applied in the warehousing operations, for both own and outsourced personnel. Monitors, controls and reports sustainability and SHE conditions and behaviours in the warehouse and takes appropriate actions/measures to prevent them happening.**
>
> **…**
>
> **Warehouse Service Provider Management**
>
> **…**

Holds regular meetings with the warehouse service providers to: 1) reinforce Heineken standards and local regulations awareness, 2) discuss gaps and possible solutions, 3) communicate new regulations applicable."

10. At paragraph 13 she said:

> **"13. In contrast, the duties for Warehouse Clerk were obviously a lower position and featured:**
>
> **(1) No duties to train, monitor or control staff;**
>
> **(2) No duty to implement or monitor safety, health and environmental responsibilities;**
>
> **(3) None of the Warehouse Functional Competency requirements such as warehouse planning, SHE and Sustainable Warehousing duties, Stock Quality Assurance duties or Warehouse Service Provider management duties, amongst others."**

11. At paragraph 14 of the VP's decision she said:

> **"14. That is the evidence. So, where did Ms Ferguson stand in the organization? The Tribunal observes that no longer are courts strictly bound by the criteria that managers and supervisors (as they are referred to in the Employment Act) are confined to those persons who hire, lay off, promote, transfer or discipline workers. By the Law Reform and Revision (Miscellaneous Amendments) Act, No 9 of 2011, Parliament repealed in its entirety the Fair Labour Standards (Exceptions) Order which previously set out this criteria. By this repeal, the legislature demonstrated its intention not to so confine the definitions of those positions. It stands to reason that now, the natural or ordinary meaning of the words 'manager' and 'supervisor' as appear in the Employment Act are pertinent to this analysis."**

12. This view expressed by the VP in paragraph 14 that by the repeal of the Fair Labour Standards (Exceptions) Order ("the Order") pursuant to the Law Reform and Revision (Miscellaneous Amendments) Act, 2011 ("the 2011 Act"), Parliament signaled an intention by that body that the words 'manager' and 'supervisor' as they appear in the Employment Act would be given their natural and ordinary meanings. It also meant, to her way of thinking, that she was free to

consider cases/authorities beyond **Duran Cunningham** and those Supreme Court decisions following it; and to have recourse to dictionary definitions ascribed to those words.

13. The VP went on to state at paragraphs 18 and 19, the plinth of the appellant's complaint in this appeal:

> **"18. Having regard to the Raw Materials Warehouse Coordinator's duties contained in Ms Ferguson's contract, and weighing all of the witness' testimony on the issue of the level of Ms Ferguson's employment as a Raw Materials Warehouse Coordinator, the Tribunal is of the view Ms Ferguson was more than a regular line-staff worker. She was required to monitor systems, standards and persons. She was required to control behaviour of persons performing within those systems to ensure they performed to certain standards. She was required to recommend changes for improvement, not only of processes but also of performance, and to report to the Warehouse Manager**
>
> **19. Ms Ferguson was obviously supervising the flow of materials and orders for the same. She was required to train staff and discuss with them problems and solutions concerning their performance to meet given standards. She was also required to represent the business in meeting with, and conveying new regulations to, service providers of the warehouse. This was in her contract of employment —the bargain the Respondent made with her. At minimum, Ms Ferguson's duties and responsibilities as specified in her contract of employment put her in a supervisory role vis-a-vis both human and material resources of the Respondent. Her testimony as to what she did, and that of Mr Russell, her immediate manager, rang true. <u>The Tribunal is therefore of the view that, on a preponderance of the evidence, Ms Ferguson was in an entry-level supervisory position as a Raw Materials Warehouse Coordinator</u> who reported to a higher manager - Mr Russell." [Emphasis added]**

14. While Counsel were making their submissions to the Court it was brought to their attention what the VP had said about the Order, that is, it had been "repealed in its entirety" by the 2011 Act. This created a bit of consternation among the parties because it appears that neither side had accorded any real significance to this aspect of the VP's decision. But the Court's observation did precipitate a flurry of activity to ascertain if the Order had indeed been repealed

by the 2011 Act. This point is of vital importance to the appellant's appeal; and one would have thought Counsel for the parties would have placed this issue before us front and center.

15. In **Duran Cunningham**, Allen, P had relied on the Order to ground her exposition on the meaning of the words "managerial" and "supervisory" when she said:

> **"13. Admittedly, the Fair Labour Standards Act (Ch. 295), under which the order was made was repealed in its totality by the Fair Labour Standards Act 2001 (Ch. 321 A). However, by virtue of section 33 of the Interpretation and General Clauses Act, such an order is deemed to continue after the repeal of the Act under which it is made, so far as it is not inconsistent with the provisions of the repealing Act.**
>
> **14. In my view, the Vice President erred when he determined that pursuant to section 33 (above), the definition in paragraph 3 of the first schedule to the above order, is itself repealed because it is inconsistent with the Act.**
>
> **15. To the contrary, the order excepted supervisory and managerial positions from the entitlement, inter alia, to overtime payable under the Fair Labour Standards Act (Ch. 295) as does section 8(4) of the Act. Moreover, the Act does not define 'supervisory or managerial' employment and the old definition fills that gap. In my view, the definition survives the repeal of Chapter 295.**
>
> **16. Under the definition, there are three essential elements of <u>supervisory or managerial status</u>: (i) authority to exercise one or more of the functions stated in the definition; (ii) the exercise of such authority in the employer's interest, and (iii) the exercise of independent judgment in performing one or more of the functions stated." [Emphasis added]**

16. **Duran Cunningham** has been followed by a number of cases, including **Bethel v Southern Air Charter Co. Ltd.** [2013] 3 BHS J. No. 70 and **Thompson v Private Investment Bank Limited** [2014] 2 BHS J. No. 5; and tangentially referred to in **Anthony Rahming v Grand Bahama Power Company Ltd.** SCCivApp. No. 177 of 2017.

17. Furthermore, articles written on the subject of "manager" and "supervisor" have referred to **Duran Cunningham**, for example, in an 11 January 2017 article on Latest Legal Developments issued by the firm of Graham Thompson and Co. entitled, "The Financial Pitfalls of Inaccurate Staff Designations" the writer stated:

> **"The recent Court of Appeal decision of Duran Cunningham v Baha Mar Development Company Limited SCCiv App No. 116 of 2010, has further clarified the law in The Bahamas pertaining to an employee's designation as either a supervisor or manager, particularly for the purpose of ascertaining that employee's rights in the event of separation."**

18. It is clear, therefore, that if the VP's view is found by the Court to be correct, that is, the Order had been repealed, and has been so repealed since 2009, then **Duran Cunningham** and all those cases that purported to follow that decision would have been decided per incurium. Additionally, the legal advice offered by law firms on the subject would have to be re-assessed.

Ground 2 - The learned Vice-President erred in law and misdirected herself in failing to consider and/or apply in her Judgement the Court of Appeal Case of Duran Cunningham and BahaMar Development Company Limited SCCivApp No.116 of 2010 in which the Honourable Mrs. Justice Allen, President (as she then was) at paragraphs 13-16 provided clear guidance on the criteria that should be considered when determining who is a Manager/Supervisor;

Ground 3 - That, having not considered or distinguished the case of Duran Cunningham relied upon by the Appellant, the learned Vice-President erred in her findings as she was bound under the doctrine of stare decisis to apply this Court of Appeal authority in precedence over those which she cited in the Judgment upon which the learned Vice-President ultimately based her decision

19. These grounds are wide ranging in scope as they seek to impugn "findings" of the VP; and she has made a number of them. However, I focus on her finding that the respondent occupied a supervisory position in the appellant's organization. I begin with the recognition that as an appellate court we would be slow to interfere with a finding of fact by the VP.

20. In **Bahamas Princess Resort & Casino v Richard John Wilson et. al.** Civil Appeal No. 2 of 2001, Osadebay, JA said at page 4 of an oral judgment, with which Sawyer, P and Ganpatsingh, JA agreed, that:

> **"…This Court has stated in a number of decisions that appeals from the decisions of the Industrial Tribunal to this Court are confined by the Industrial Relations Act, Chapter 296, to questions of Law only. We must loyally accept the findings of fact as presented and resist the strong temptation to treat what are, in truth, findings of fact as holdings of law or mixed findings of fact and law. We recognise that Parliament has constituted the Industrial Tribunal the only tribunal of fact and its conclusions of fact must be accepted unless it is apparent that on the evidence, no reasonable tribunal could have reached them…"**

21. The VP "found" that the Order had been repealed by the 2011 Act. Is there an error in that "finding"? I hold the view that there is no error. Section 2 of the 2011 Act states:

> **"Amendments to miscellaneous written laws.**
>
> **The written laws described in the first column of the Schedule are amended in the manner and to the extent set out in the second column of that Schedule."**

22. The Schedule provides, inter alia, as follows:

> **"SCHEDULE**
>
> | **WRITTEN LAW** | **RECTIFICATION** |
> |---|---|
> | **...** | |
> | **Fair Labour Standards (Exceptions) Order** | **Repeal the whole Order** |
> | **(S.I. No. 33 of 1971)"** | |

23. Sub-section (2) of section 1 of the 2011 Act states:

> **"(2) This Act shall be deemed to have come into force on the 31st day of December, 2009."**

24. It is evident, therefore, that at the time the Court rendered its decision in **Duran Cunningham**, the Order was no longer a viable piece of legislation and could not be used to fill in the lacuna found in the Act by the omission of a definition for the terms "supervisory", "supervisor", "managerial" and "manager".

25. Section 33 of the Interpretation and General Clauses Act ("the IGCA") which was relied upon by Allen, P in **Duran Cunningham** to provide a definition for the terms mentioned in the paragraph above, can only be called on for assistance if the Order was still subsisting in 2010. Section 33 of the Interpretation and General Clauses Act provides as follows:

> **"33. (1) Where any Act —**
>
> **(a) repeals any former Act and substitutes other provisions therefor; or**
>
> **(b) repeals any former Act and re-enacts such former Act with or without modification,**
>
> **any subsidiary legislation made under the former Act and in force at the commencement of the repealing Act shall, so far as it is not inconsistent with the repealing Act, continue in force and have the like effect for all purposes as if made under the repealing Act.**
>
> **(2) Where any subsidiary legislation is continued in force by virtue of subsection (1), such subsidiary legislation may be from time to time amended as if it had been made under the repealing Act."**

26. The 1989 Interpretation and General Provisions Act of Grenada is couched in similar terms to section 33 of the IGCA but is fuller in its terms since it speaks to the eventuality of the subsidiary legislation itself being revoked. Section 20 of the Grenada Act states:

> **"20. Where any Act or part of an Act is repealed, subsidiary legislation issued under or made by virtue thereof shall, unless a contrary intention appears, remain in force so far as it is not inconsistent with the repealing Act until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of such repealing Act, and shall be deemed for all purposes to have been made thereunder."**

27. In my view, although not expressly stated as to what is to happen if the Order itself is repealed, the effect of such repeal would be to terminate the Order as an aspect of the written law of The Bahamas.

28. How then is the Court to dispose of this appeal? The appellant asks that we follow the definition of managerial and supervisory as stated in **Duran Cunningham**; and that the scope of the definition ought to be dictated by Parliament's definition in the Order to the Fair Labour Standards Act ("the FLS Act"). Section 3 of the now repealed FLS Act stated:

> **"3 .— (1) Subject to subsection (2), the provisions of this Act shall apply in relation to any employee employed in any form of employment in The Bahamas including any such employment by or under the Crown in right of the Government of The Bahamas or by any body corporate established by law for public purposes.**
>
> **(2) The Minister may by order provide that the provisions of this Act or such of the said provisions as are mentioned in the, order shall or shall not apply in relation to persons or employments of such classes as may be specified in the order subject to such exceptions or modifications as may be so specified."**

29. The Order made under the FLS Act ("the Order") provided the following in its First Schedule:

> **"(i) Any employee disentitled under his contract of employment to the payment of overtime pay and <u>performing managerial or supervisory functions, that is to say, having authority on behalf of, and independently of, his employer to hire or lay off or promote or transfer or exercise disciplinary power over persons employed by his employer or to adjust the grievances of such persons</u>."**
> **[Emphasis added]**

30. Thus, the Order provided a definition for who was performing managerial and supervisory functions and who were therefore not entitled to overtime pay. However, such persons received better severance packages when terminated with notice.

31. The Employment Act replaced the FLS Act and enacted section 29 which relates to termination of an employee with notice. It states, inter alia:

> **"29. (1) For the purposes of this Act, the minimum period of notice required to be given by an employer to terminate the contract of employment of an employee shall be —**
>
> **...**
>
> **(c) where the employee holds a <u>supervisory or managerial position</u> —**

> **(i) one month's notice or one month's basic pay in lieu of notice; and (ii) one month's basic pay (or a part thereof on a pro rata basis) for each year up to forty-eight weeks." [Emphasis added]**

32. Section 3(2) of the Employment Act authorises the Minister responsible for Labour to except certain classes of workers from the general terms of the Act along the lines, no doubt, as was done in the Order. Section 3(2) of the Employment Act states:

> **"3. (2) The Minister may by Order after consultation with a confederation, being, in the opinion of the Minister, a confederation representative of a majority of employers and associations of employers generally and after consultation with an association of registered trade unions being an association in the opinion of the Minister representative of employees provide that any provision of this Act as are mentioned in the Order shall or shall not apply in relation to persons or employments of such classes as may be specified in the Order subject to such exceptions or modifications as may be so specified."**

33. As presently advised no Order has been made by the Minister. Thus, there is no definition of managerial and supervisory as provided in the Order to be found in the Employment Act.

34. The VP resorted to the dictionary meanings of the words "managerial" and "supervisory" in concluding that the respondent fell within the category of a supervisor. The appellant submits that she was wrong to have done so and ought to have followed the definition provided by this Court, differently constituted, in **Duran Cunningham**. They rely on the doctrine of stare decisis; simply put, an inferior court is obliged to follow a decision made by a court of superior jurisdiction. Although this may seem incongruous in the present circumstances, I agree with the submission of the appellant that the VP ought to have had regard to the decision of this Court in **Duran Cunningham**; and to have applied the definition of "managerial" and "supervisory" supplied in that case.

35. The system of courts in The Bahamas is hierarchical; as was recognised in **Terry Delancey v The Attorney General** SCCivApp. No. 43 of 2006 and in **Newbold and others v The Commissioner of Police and others** (unreported). In **Delancey** the appellant had applied for constitutional relief before me because he alleged that the Court, differently constituted, did not accord him a fair hearing. At paragraph 85 of her judgment Sawyer, P said:

> **"85. Under the Constitution of The Bahamas, the court system is an hierarchical one with the Privy Council at the apex, this court next, the Supreme (High) Court next, magisterial courts and other tribunals next, and so on. Decisions of higher courts are normally binding on all lower courts. It therefore follows that a decision of a lower court, while it will be accorded every respect by a higher court if it is not overruled, cannot bind a higher court or even a judicial officer of the same rank. To apply to the Supreme Court for redress against this court's decision, therefore, was seeking to bind this court by a lower court's judgment or to indirectly appeal to a lower court from this court's decision. It certainly amounts to an abuse of the process of the court."**

36. I do not suggest that the VP's departure from the definition arrived at in **Duran Cunningham** rises to the level of an abuse of the process of the court, but it certainly deviates from the doctrine of stare decisis.

37. The path the VP ought to have followed, perhaps, is the route I followed in **Newbold** when, as a Justice of the Supreme Court, I indicated my disagreement with the decisions of this Court in **Butterfield v Commissioner of Police** CrimApp. No. 55 of 2001 and **Major v Superintendent of HM Prison** Const/CivApp. Nos. 14 and 15 of 2005, yet followed them. It was open to the VP to articulate her view on the repeal of the Order and to suggest that the Court may have arrived at a different conclusion had that been known; but ultimately, the VP would have had to follow this Court's lead and accept the definition of managerial and supervisory fixed in **Duran Cunningham**.

38. In this context, the complaint of the appellant is well grounded.

Ground 1 - The learned Vice-President erred in law and misdirected herself in paragraphs 14-18 of the Judgement, in her assessment of what criteria should be determined when considering who is a Manager/Supervisor

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

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

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

42. Now that the true position is known, the issue of who is a supervisor or manager, in my view, is at large.

43. The VP resorted to the dictionary meanings of the two words to arrive at her conclusion that the respondent occupied a supervisory position albeit an entry level position. Can it be said that her analysis of the functions performed by the respondent when viewed through the prism of the dictionary definitions was wrong?

Canons of Construction

44. Under the canons of statutory interpretation, where the wording of a statute is plain and unambiguous, it must be interpreted and applied in accordance with the words used.

45. Judge Learned Hand in **Gilbert v Commissioner of Internal Revenue** 248 F. 2d 399 (2d Cir. 1957) expressed the purposive approach to statutory construction when he said, inter alia:

> **"…It is a corollary of the universally accepted cannon of interpretation that the literal meaning of the words of a statute is seldom, if ever, the conclusive measure of its scope. Except in rare instances statutes are written in general terms and do not undertake to specify all the occasions that they are meant to cover; and their "interpretation" demands the projection of their expressed purpose, upon occasions, not present in the minds of those who enacted them…"**

46. Inasmuch as statutes enacted by various legislative bodies do not always state in clear and unambiguous language all of the matters touched upon by such statutes, over the centuries, courts have developed cannons of construction in the interpretation of statutes to provide clarity

to the language Parliament has chosen to employ. I have already mentioned the plain meaning and purposive approaches; but there are many others. I will mention a few.

47. There are: the ejusdem generis rule; expressio unius est exclusio alterius; noscitur a sociis; and generalia specialibus non derogant. Additionally there are approaches adopted by the courts such as giving an interpretation to an ambiguous criminal statute that would favour a defendant; and reading down legislation to avoid declaring it invalid.

48. Regardless of the approach taken by a court when interpreting a particular enactment, the undergirding principle in my view is that Parliament does not act in vain. In this regard, I do not think that when Parliament repealed the Order and did not replace it under the Employment Act, Parliament intended the restrictive interpretation it had previously given to the words "managerial" and "supervisory" to continue in existence.

Discussion

49. The long title of the Employment Act states that it is:

> **"An Act to establish minimum standard hours of working and vacation with pay for employees; to provide for the grant of maternity and family leave; to provide for redundancy payments to employees; to make provisions relating to notices to terminate contracts of employment; to make provisions relating to summary dismissal and unfair dismissal; to make provisions in respect of the employment of children and young persons; to make provisions in respect of the wages of employees; to make provisions relating to fingerprinting and lie detector tests; and for connected purposes."**

50. The Act does not appear to be overly concerned in making provision for who is a manager or who is a supervisor. There is no statutory definition. Parliament is assumed to have left it to the courts to determine who falls within these categories on a case by case basis. The VP seems to have adopted the plain and unambiguous approach in defining the two terms.

51. In my view, the definition of "managerial" and "supervisory" found in the Order obviously referred to persons occupying positions high on the corporate ladder, to wit, they could "... on behalf of, and independently of, his employer to hire or lay off or promote or transfer or exercise disciplinary power over persons employed by his employer or to adjust the grievances of such persons". An employee supervising others as understood in the dictionary definition of

"supervisory" would not fall within the definition found in the Order. This may explain why there is now no definition contained in the Employment Act thereby introducing a level of flexibility. Under the Employment Act the courts are no longer hamstrung by the rigidity of the Order.

52. However, for the purposes of the notice to be given for persons considered to be managerial or supervisory under the Employment Act there does not appear to be any incongruity or violence done to the intention of Parliament by placing a broader interpretation on those two words so as to include those who perform duties over and above those performed by the line staff in an organisation.

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

54. In the present case, although the respondent had been said to have been demoted from a managerial position, she, as found by the VP, was responsible for supervising other employees. Hence, on a plain reading of the Employment Act, and using the dictionary meaning of the word "supervisor", it was open to the VP to arrive at the determination that she did.

Conclusion

55. Notwithstanding that I have found favour with grounds 2 and 3 of the appellant's appeal and partially with ground 3, this appeal has taken an unexpected turn, that is, a question arose as to the applicability of **Duran Cunningham** to the decision the VP had to make. The answer to the question was not the VP's to make if it differed with that answer made by the Court. She was obliged to move in lockstep with the decision in **Duran Cunningham**.

56. Nevertheless, as I am satisfied that the Order is no longer in effect, and no replacement to the definition provided in the Order has been enacted by Parliament the Court is entitled to place its own interpretation on the terms "managerial" and "supervisory" with due regard to the facts disclosed in the circumstances of each case before it.

57. I am satisfied that the VP did not err in the circumstances of this case when she concluded that for the purposes of the Employment Act, the respondent was a supervisor. In the circumstances, the respondent was entitled to the period of notice stipulated in section 29(1)(c) of the Employment Act and compensated accordingly, to wit, as calculated by the VP in paragraph 30 of her decision.

58. For these reasons I would dismiss the appeal. As this is an appeal from the Industrial Tribunal the Court makes no order as to costs.

The Honourable Mr. Justice Isaacs, P (Actg.)

59. I agree.

The Honourable Madam Justice Crane-Scott, JA

60. I also agree.

The Honourable Mr. Justice Evans, JA