**IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE**

**APPELLATE JURISDICTION**

**CIVIL APPEAL NO. 76 OF 1999**

BETWEEN:

**GUYANA ELECTRICITY CORPORATION**

Appellants/Defendants

- and –

1. **FRANK STOBY**
2. **LEON DUNCAN**
3. **RONALD GRANVELLE**
4. **FELIX CONWAY**
5. **INEZ ULLAH**
6. **WINSLOW GRANT**
7. **EMIL MOORE**
8. **ADIL ULLAH**
9. **RONALD BAIRD**
10. **CLYDE PERSAUD**
11. **GEORGE MORRISON**

Respondents/Plaintiffs

BEFORE:

| | | |
|---|---|---|
| **Hon. Madam Justice Desiree Bernard** | - | **Chancellor** |
| **Hon. Mr. Justice Nandram Kissoon** | - | **Justice of Appeal** |
| **Hon. Mr. Justice Ian Chang** | - | **Justice of Appeal** |

Mr. F. Holder and Ms. N. Pierre for Appellants

Mr. A. Chase, SC and Ms. P. Chase for Respondents

**2002**: July, 17 & 18
October, 11

**JUDGMENT**

**BERNARD, C.**: delivered the judgment of the Court

The Respondents from around June 1990 were all employed with the Appellants at their premises at Anna Regina, Essequibo, in the generating and regulating of electricity. During this period the Respondents were required to work and did in fact work overtime, but allegedly were not paid

for such overtime in accordance with the Factories Act, Chapter 95:02, the said premises of the Appellants falling within the definition of a factory. The Respondents commenced proceedings in the High Court claiming payment for overtime work from 1990 to 1996, and on 29th September, 1999 Moore J ruled that they were entitled to payment for the said overtime work. The Appellants being dissatisfied with the decision have appealed to this Court.

Counsel for the Appellants contended that the Respondents had been paid an overtime allowance in keeping with a decision which had been taken by the Appellants, but could not say when such a decision had been taken. He drew the Court's attention to a letter dated 26th November, 1984 sent to the Personnel Manager of the Appellant company by the Personnel & Industrial Relations Manager of the Guyana State Corporation which indicated that an increase of 5.4% of the basic salary of employees listed in the letter should be added to the current commuted overtime and constitute the new salary. It seems from this that no overtime was to be paid any longer and this was absorbed into the salary.

Counsel made reference to the cases of **Enmore Estates Ltd. v. D.R. Singh (1976) 22 WIR, 206** and **Sheik Mahazudin v. Guyana Sugar Corporation Ltd. (C.A. No. 23/1982)** which he contended are distinguishable from the present case; instead he relied on two Canadian cases of **Still v. M.N.R. (C.A.) 1 F.C., 549** and **Nova Scotia Union of Public Employees v. Halifax Regional School Board (2000) NSSC, 14**. He contended that there should be a set-off against what was already paid. He also submitted that the learned trial judge did not make a finding that all of the Respondents were entitled to overtime, but the order of court granted all of them the reliefs sought. He stressed that it was incumbent on the

learned trial judge to find as a fact that overtime was either paid or not paid, and this he did not do.

In reply Counsel for the Respondents relied on the decisions in **Mahazudin v. Guyana Sugar Corporation Ltd**. (supra) and **Enmore Estates Ltd. v. Singh** (supra) as well as **The Shipping Association of Georgetown v. Hayden (1975) 22 WIR, 135**. He contended that any agreement for payment of a percentage of wages in lieu of overtime is illegal, and one cannot claim restitution arising out of an illegal act. Legislation was passed for the benefit of workers, and they cannot contract out of it.

The issue to be determined in this appeal concerns the rectitude of the decision of the Appellants to cease payment to the Respondents for working overtime and instead to incorporate this into their basic salary. A perusal of the employee register report of two of the Respondents for April 1992, and which was tendered as an exhibit, indicates the basic salary but no overtime pay. According to the evidence of Mr. Dale De Roy, Personnel Manager of the Appellants, the merger of basic salary and an overtime allowance arose out of an agreement signed between the Appellants and NAACIE, the trade union representing employees of the Appellants. This seems to have become operative from 1992 and continued until 1996. Mr. De Roy testified that when he began working with the Appellants as Senior Staff Grade 6 he received prior to 1990 a basic salary and an overtime allowance of one-third of his salary. He also said that he did not think that the Appellants kept records of the amount of hours worked overtime by individual employees prior to 1992.

The agreement between the Appellants and the union to absorb the overtime allowance into the basic salary of employees was recognised in the

arbitration award of former Justice Prem Persaud in 1994 which was tendered in evidence even though the actual agreement was not produced. The question arises immediately as to the validity of the agreement entered into between the union representing employees of the Appellants and the Appellants on this issue.

In deciding this point I start by reference to dicta in the judgment of **Crane, JA** in **Enmore Estates Ltd. v. Singh** (supra) which was decided mainly on an interpretation of **Section 24 (1) of the Factories Act, Cap. 95:02**. However, **Crane, JA** expressed views on the validity of a collective labour agreement between the employers and the employee contracting out of the Factories Act by providing for "time off" in lieu of overtime pay. He made this comment in relation to collective labour agreements at page 237:

> "Parties are generally left free by law to conclude by collective negotiation and to include in their agreements whatever terms they think fit, only so long as those terms are not contrary to law. If negotiated terms are unlawful, it is immaterial that they have agreed to them, because it is one of the canons of the law of contract that "no one shall stipulate for illegality."

The learned Chancellor, then Justice of Appeal, concluded that an agreement entered into for the purpose of evading the terms of a public statute such as the Factories Act, is against public policy, and in so far as it purports to do so is initially void. He went on to say that there can be no waiver or contracting out of the Factories Act by an agreement to give time-off (in relation to the facts of that case) in lieu so as to avoid paying overtime rates.

In like manner there can be no agreement to incorporate overtime pay into the basic salary of an employee. **Section 24(1)** of the **Factories Act** (supra) empowers the relevant Minister to make regulations prescribing the