

T-1831-95

OTTAWA, ONTARIO, FRIDAY, THE 10TH DAY OF JANUARY 1997.

PRESENT: THE HONOURABLE MR. JUSTICE NOËL

BETWEEN:

PAT LEONTSINI,

Applicant,

and

BUSINESS EXPRESS INC.,

Respondent.

O R D E R

The application for judicial review is dismissed.

Marc Noël
Judge

Certified true translation

A. Poirier

BETWEEN:

PAT LEONTSINI,

Applicant,

and

BUSINESS EXPRESS INC.,

Respondent.

REASONS FOR ORDER

NOËL J. :

Pat Leontsini ("the applicant") is seeking judicial review of a decision by an adjudicator, Russel Steward, under section 242 of the *Canada Labour Code*.¹ In that decision, the adjudicator allowed the preliminary objection raised by Business Express Inc. ("the respondent") to his jurisdiction to adjudicate on the validity of the applicant's complaint. In her complaint, the applicant relied on the remedy set out in sections 240 *et seq.* of the *Code* since she felt that she had been unjustly dismissed by the respondent.

The adjudicator found that he had no jurisdiction to hear the applicant's complaint because she was a manager within the meaning of subsection 167(3) of the *Code* when she was dismissed. The applicant is challenging that decision on the ground that it is unfounded in law and based on an erroneous finding of fact.²

¹R.S.C. 1985, c. L-2, hereinafter "the *Code*".

²The applicant also made a third argument, namely that the adjudicator based his decision on a fact that was not in evidence before him. Since the burden of proof with respect to that argument

The respondent is a regional airline that operates mainly in the United States but also in eastern Canada. It employs some 1,400 employees throughout its network of operations. Of that number, 22 are "station managers"³ who work in the various airports served by the respondent. In those airports, they serve as senior representatives responsible for local operations and customer service. In hierarchical terms, the station managers report to one of five regional managers, who in turn report to a vice-president in Portsmouth, New Hampshire.

The applicant was the station manager at Dorval International Airport when she was dismissed by the respondent on March 14, 1994. She was in charge of seven employees. Under her supervision, they loaded and unloaded aircraft, received and dispatched baggage, checked in passengers, drove ground vehicles, handled ground equipment, etc. In short, they were responsible for the smooth functioning of the respondent's operations at Dorval.

As described by the adjudicator, the applicant's responsibilities included personnel management, work scheduling, preparation of budget forecasts for local operations, interaction with local airport authorities and the maintenance and proper functioning of ground equipment. She also had to prepare and submit a monthly report concerning employee hours, lost time, overtime authorized by her, irregular flight operations, redirected baggage and the rerouting of passengers to other airlines.

is on the applicant and since the evidence she adduced was countered by evidence of equal probative value, I feel no need to go beyond the foregoing to dispose of the argument.

³Term used in the documentary evidence.

In the course of a four-day hearing, the adjudicator heard four witnesses, namely the applicant and three of the respondent's employees. The witnesses called to testify by the respondent were a vice-president, the station manager at Toronto's Pearson Airport and the current station manager at Dorval Airport. After considering the testimony and reviewing the many exhibits filed during the hearing, the adjudicator reached the following conclusion: . . . I find that Mrs. Leontsini was accountable for her station and, in the discharge of her duties, she exercised the necessary autonomy and authority which brought her within the four corners of subsection 167(3) of the Code. She was a *Manager* and, consequently, I am without competence to hear the complaint. . . .⁴

The applicant has challenged this conclusion. Her first argument is that the adjudicator confused subsections (2) and (3) of section 167 of the *Code*.⁵ According to the applicant, it has been established that the word "managers" in subsection 167(3) has a narrow meaning and includes only those in senior management positions. In this regard, the applicant cited the following dictum by MacKay J. in *The Island Telephone Company Limited v. Minister of Labour*,⁶ at page 15: The word "managers" in subsection 167(3) has been determined to have a narrow meaning, to include only those in senior management positions, who are not included in a collective agreement as paragraph 240(1)(b) of the *Code*

⁴Reasons for decision, Applicant's Application Record, p. 93.

⁵Subsections (2) and (3) of section 167 of the *Code* read as follows:

- (2) Division I does not apply to or in respect of employees who
 - (a) are managers or superintendents or exercise management functions; or
 - (b) are members of such professions as may be designated by regulation as professions to which Division I does not apply.
- (3) Division XIV does not apply to or in respect of employees who are managers.

⁶Unreported, T-1401-91, September 30, 1991.

stipulates, and who act as administrators, having power of independent action, autonomy and discretion. (Footnote omitted)

She also referred to the Court of Appeal's decision in *Avalon Aviation Ltd. v. Desgagne*,⁷ in which Heald J.A. stated the following on behalf of the Court: Section 27 [now section 167] of the Code is the application section insofar as Part III is concerned. Subsection 3 [now (2)] provides that Division I does not apply to or in respect of employees "(a) who are managers or superintendents or who exercise management functions". Subsection 4 [now (3)] stipulates that Division V.7 [now XIV] does not apply to or in respect of employees who are "managers". It is to be noted that in subsection (3) [now (2)] "managers" are distinguished from persons who "exercise management functions" and "superintendents". I am thus satisfied that when the word "manager" is used in section 27 [now 167] it is not intended to include all those persons, such as Mr. Desgagne in this case who do exercise some management functions. . . .

The applicant also cited the Court of Appeal's decision in *Lee-Shanok v. Banca Nazionale Del Lavoro*:⁸ In my view, care must be taken in determining whether a particular complainant is a "manager". Section 61.5 of the Code provides employees not covered by a collective agreement with a remedy against unjust dismissal and the exception found in subsection 27(4) subtracts employees who are "managers" from the body of persons enjoying that right. Consequently, the exception should not be wielded so as to strip the applicant of this protection simply because his job required him to exercise the power of independent decision-making.

According to the applicant, these decisions mean that the adjudicator could not find that the applicant was a manager under subsection 167(3) while in the same breath saying that she was "at

⁷(1981), 42 N.R. 337, at pages 340-41.

⁸[1987] 3. F.C. 578, at page 588, per Stone J.A.

the lower end of the management chain".⁹ The applicant argued that she cannot be both at the lower end of the management chain and a manager within the meaning of subsection 167(3) of the Code;¹⁰ for my part, I can perceive no inconsistency between the two. While as a general rule it is true that a senior manager is more likely to have the decision-making autonomy required to be a manager within the meaning of subsection 167(3), this does not mean that a lower-ranking manager cannot also have such autonomy.

As noted by Stone J.A. in *Lee-Shanok*:¹¹The adjudicator also found significant the fact that the parties, apparently, may have considered the applicant to be part of management. While he recognized that the job title itself cannot bestow the rank of manager, he nevertheless went on to pose the question of how the parties perceived the job. Their impressions, in my view, are not strictly relevant to the question he had to decide. Management was clearly at liberty to give its employees whatever titles, benefits and privileges it wished and employees could accept them, but such trappings are not necessarily indicative of the employee's function. The word "manager" is a statutory term relating to the nature of the work actually performed by the applicant and must be construed in that light.

(Emphasis added.)

Accordingly, it is the nature of the work actually performed, rather than the employee's title or place in the management chain, that must be used to determine whether he or she is a manager within the meaning of subsection 167(3). Someone who is part of management and whose primary responsibility is in fact to manage is a manager within the meaning of subsection 167(3), whether that person is at the upper or lower end of the management chain.

⁹Reasons for decision, Applicant's Application Record, page 96.

¹⁰This is the gist of the applicant's legal challenge to the adjudicator's decision, as paragraphs 3 to 10 of her memorandum make clear.

¹¹*Supra*, note 8, at page 589.

In the case at bar, it is agreed that the applicant was part of management, and despite the fact that her position was a low-ranking one, there is no doubt that the work she had to perform was managerial in nature. The adjudicator's decision is unequivocal in this regard. He concluded that the applicant had the power to hire, discipline and dismiss employees, prepare operating budgets, change staff assignments based on aircraft movements, etc.¹² In fact, according to the evidence accepted by the adjudicator, the applicant was the person responsible for the respondent's operations at Dorval and had all the managerial attributes required for that purpose.

The adjudicator also noted that the applicant's decision-making authority was not absolute and that she had to observe guidelines and was accountable for her management. In reliance on this Court's decision in *Canadian Imperial Bank of Commerce v. Bateman*,¹³ the adjudicator nevertheless found that the applicant had sufficient decision-making autonomy and discretion for her to be a manager within the meaning of subsection 167(3) of the *Code*.

In light of the findings of fact upon which the adjudicator's decision was based, it is entirely consistent with the law as it stands.

As noted by Cullen J. in *Bateman*, the term "manager" is administrative rather than operational in nature.¹⁴ In *Lee-Shanok*, it was the absence of that administrative element that prompted Stone J.A. to find that the mere exercise of independent

¹²Reasons for decision, Applicant's Application Record, pages 87-92, paragraphs c), d), e), g), h), i), j), k), l), m) and n).

¹³[1991] 3 F.C. 586; affirmed by the Court of Appeal (1992), 140 N.R. 399.

¹⁴*Idem*, at pages 603-04.

decision-making authority by the person occupying the position in issue in that case¹⁵ was not enough to exclude that person from the Code's protection.¹⁶ In the case at bar, however, as in *Bateman*, the applicant supervised and exercised substantial discretion over a number of employees. Not only did she perform the duties of her position independently, but she was in charge of and managed the respondent's employees at Dorval. In my view, the adjudicator was correct to conclude that this made her a manager for the purposes of subsection 167(3). The applicant's first argument must therefore be dismissed.

The applicant's second argument is that the adjudicator based his decision on an erroneous finding of fact that he made without regard for the material before him. More specifically, the applicant argued that the adjudicator's decision ignored the documentary evidence. She also restated, by way of affidavit, what she considered to be her testimony before the adjudicator, thus seeking to call into question the accuracy of his findings of fact.

¹⁵A foreign exchange dealer working alone and not supervising other employees.

¹⁶*Supra*, note 8. Stone J.A. described this distinction as follows at pages 589-90:

In the *Gauthier* case, at page 4 of his decision the adjudicator defined "manager" for the purpose of subsection 27(4) as "an administrator having power of independent action, autonomy, and discretion" and on review, Mr. Justice Pratte found no error of law in his treatment of the term. The adjudicator in the *Desgagné* case adopted this definition, and his interpretation of the subsection was, in turn, approved by Mr. Justice Heald at page 341 of his judgment. With respect, it seems that the adjudicator in the present case neglects the "administrator" component of this judicially approved definition, an element reflected in the term "directeur" which appears in the French text of the subsection and which is defined by *Le Petit Robert* as "personne qui dirige, est à la tête". It is clear that the applicant did not, in the sense of these definitions, direct or administer anything. . . .

I fail to see how his job as such contained the administrative element which I consider the term "manager" requires. (Emphasis added.)

As far as the documentary evidence is concerned, the reasons for the decision show that the adjudicator analysed it very carefully. He considered that evidence together with the testimonial evidence and, when faced with contradictions, explained why he preferred one piece of evidence over another. I cannot find that the adjudicator ignored the documentary evidence in finding as he did.

As for the rest, the adjudicator had to decide between the applicant's testimony and that of the respondent's managers. The applicant portrayed herself to the adjudicator as a mere underling without any decision-making autonomy. The adjudicator did not find her credible and therefore rejected the main part of her testimony. In doing so, he took care in each instance to indicate why the applicant's testimony could not be accepted.

Assessing the credibility of interested witnesses who present conflicting versions of the facts is the role of the person who hears and can observe them. The applicant presented a version of the facts that supported her position but that the adjudicator felt was inconsistent with the evidence. He preferred the version presented by the respondent's managers, finding it more coherent and thus trustworthy. There is nothing to suggest that in this decision-making process the adjudicator acted unreasonably or did not have regard to the material before him.

For these reasons, the application for judicial review is dismissed.

Marc Noël
Judge

Ottawa, Ontario
January 10, 1997

Certified true translation

A. Poirier

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT NO.: T-1831-95

STYLE OF CAUSE: PAT LEONTSINI v. BUSINESS EXPRESS INC.

PLACE OF HEARING:Montréal, Quebec

DATE OF HEARING:December 3, 1996

REASONS FOR JUDGMENT BY:The Honourable Mr. Justice Noël

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