Federal Court  Cour fédérale

Date: 20120917

Docket: T-494-11

Citation: 2012 FC 1085

Ottawa, Ontario, September 17, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

LAKE BABINE NATION

Applicant

and

NANCY WILLIAMS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under section 18.1 of the *Federal Courts Act* RSC 1985 c F-7 for judicial review of an award (Decision) by an Adjudicator (Adjudicator) appointed under section 242 of the *Canada Labour Code* RSC 1985 c L-2 (Code) which found the Respondent had been unjustly dismissed.

BACKGROUND AND DECISION

[2] The Applicant is an Indian Band within the meaning of the *Indian Act* RSC 1985 c I-2. The Respondent is a member of the Applicant band.

[3] The Applicant hired the Respondent on 3 October 2003 as the Social Development Director. Her duties included disbursing social assistance payments to band members according to set criteria. At one point during her tenure with the Applicant, the Respondent was also the Director of Justice and responsible for the Applicant's Justice and Child and Family Services Programs.

[4] The Applicant dismissed the Respondent from her employment on 24 November 2009. In the dismissal letter the Applicant wrote to her, it said she had harassed employees, bullied others, abused her position, and was unable or unwilling to follow instructions. The Respondent filed a wrongful dismissal complaint under section 240 of the Code. The Adjudicator heard her complaint over several days in November and December 2011. At the hearing, the Applicant relied on four grounds to support the Respondent's dismissal. The Applicant said she had exaggerated or falsified claims for overtime pay, failed to follow lawful orders, failed to repay a personal loan given to her, and improperly awarded a contract to her husband to build tables for a function.

[5] On 21 February 2011, the Adjudicator found the Respondent had been wrongfully dismissed. He ordered the Applicant to reinstate the Respondent to her previous position and pay her retroactively to the date of her dismissal. The Adjudicator found the loan was properly given and forgiven by the Applicant's Justice Committee. The Respondent had not done anything improper in this respect. The Adjudicator also found the Respondent's supervisor had approved her overtime claims and no one had ever questioned the process by which she claimed overtime. The

Applicant alleged the Respondent had disobeyed lawful orders by refusing to sign in to or out of her workplace. However, the Adjudicator found the Applicant had acquiesced to this behaviour. The Applicant knew the Respondent was not signing in or out, but had done nothing to change her behaviour. Finally, the Adjudicator found the Respondent's hiring of her husband to build tables was not improper. The decision to hire him was taken in a staff meeting, so senior management was aware of the decision. The Applicant had employed relatives of other senior employees and had not intervened on other occasions when the Respondent had hired other relatives to do work for the Applicant.

[6] The Applicant filed its Notice of Application on 23 March 2011. The Applicant did not challenge the Adjudicator's finding that the Respondent had been wrongfully dismissed. Rather, it challenged the Adjudicator's jurisdiction to hear the Respondent's complaint and the remedy he ordered. By letter, dated 7 June 2011, the Applicant abandoned two of the three grounds raised in the Notice of Application, leaving only its challenge to the Adjudicator's jurisdiction.

ISSUES

[7] The Applicant raises the following issue in this proceeding:

1. Does Part XIV of the Code apply to the Applicant because the Respondent was a manager within the meaning of subsection 167(3) of the Code?

STANDARD OF REVIEW

[8] The Supreme Court of Canada in *Dunsmuir v New Brunswick* 2008 SCC 9 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of

review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[9] The Applicant frames the issue before the Court in this proceeding as one of jurisdiction. However, I note Justice Dickson's statement in *Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corp*, [1979] 2 SCR 227 at page 233 that "courts […] should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so." The Supreme Court of Canada has since approved of Justice Dickson's caution. See *Dunsmuir*, above, at paragraph 35. In *Council of Canadians with Disabilities v VIA Rail Canada Inc* 2007 SCC 15, Justice Abella held at paragraph 89

> If every provision of a tribunal's enabling legislation were treated as if it had jurisdictional consequences that permitted a court to substitute its own view of the correct interpretation, a tribunal's role would be effectively reduced to fact-finding. Judicial or appellate review will "be better informed by an appreciation of the views of the tribunal operating daily in the relevant field": D. Mullan, "Tribunals and Courts -- The Contemporary Terrain: Lessons from Human Rights Regimes" (1999), 24 Queen's L.J. 643, at p. 660. Just as courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so", so should they also refrain from overlooking the expertise a tribunal may bring to the exercise of interpreting its enabling legislation and defining the scope of its statutory authority.

[10] The situation in the instant case is, I think, what Justice Abella had in mind in *VIA Rail*, above. The Adjudicator's jurisdiction depended on a finding that the Respondent was not a manager; this was clearly a finding of mixed fact and law within his specialized expertise. Justice André Scott in *6245820 Canada Inc. v Perrella* 2011 FC 728, found that the interpretation of the

term "manager" under subsection 167(3) of the Code ought to be reviewed on a standard of reasonableness. It would be inappropriate for the Court to substitute its own opinion for the Adjudicator's finding, simply because there are jurisdictional consequences attached to any finding the Respondent is not a manager within the meaning of subsection 167(3) of the Code. The sole issue in this case will be decided on the reasonableness standard.

[11] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

Legislation

[12] The following provisions of the Code are applicable in this proceeding:

167. (3) Division XIV does not apply to or in respect of employees who are managers.	**167.** (3) La section XIV ne s'applique pas aux employés qui occupent le poste de directeur.
[…]	[…]
242. (1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an Adjudicator to hear and	**242.** (1) Sur réception du rapport visé au paragraphe 241(3), le ministre peut désigner en qualité d'arbitre la personne qu'il juge qualifiée pour entendre et trancher

adjudicate on the complaint in respect of which the report was made, and refer the complaint to the Adjudicator along with any statement provided pursuant to subsection 241(1).	l'affaire et lui transmettre la plainte ainsi que l'éventuelle déclaration de l'employeur sur les motifs du congédiement.
[…]	[…]
(3) Subject to subsection (3.1), an Adjudicator to whom a complaint has been referred under subsection (1) shall	(3) Sous réserve du paragraphe (3.1), l'arbitre:
(a) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon;	a) décide si le congédiement était injuste;
[…]	[…]

ARGUMENTS

The Applicant

Court can Review Jurisdictional Errors

[13] The Court can decide whether the Adjudicator had jurisdiction to hear the Respondent's complaint even though it was not raised at the hearing before him. As Justice Frank Gibson held at paragraph 13 of *Regional Cablesystems Inc. v Wygant*, 2003 FCT 236, a party can raise a tribunal's jurisdiction even if the issue was not raised at the original hearing.

Adjudicator Erred in Assuming Jurisdiction

[14] The Adjudicator did not have the jurisdiction to hear the Respondent's complaint because she was a manager. Subsection 167(3) of the Code excludes managers from protection against

wrongful dismissal. *Pepper v Fort McMurray # 468 First Nation Band*, [2004] CLAD No 205 establishes that a worker is a manager when two conditions are met:

1. The worker administers the employer's affairs; and
2. The worker has the power of independent action, autonomy, and discretion in a significant range of matters within her area of responsibility.

[15] The Respondent met both of these criteria, so she is a manager under subsection 167(3).

Administered Employer's Affairs

[16] When she worked for the Applicant, the Respondent was responsible for managing the Social Development Department. She also had the power to discipline other employees and to hire and direct employees in her department. The Respondent oversaw a department with a two million dollar budget and was a department manager. These factors are strong indicators that she was a manager. See *Donio v Matawa First Nations Management Inc*, [2007] CLAD No 33 (QL) at paragraph 40.

Independent Action, Autonomy, and Discretion

[17] The Respondent had significant autonomy in her duties in a way that made her a manager within the meaning of subsection 167(3). *Canadian Imperial Bank of Commerce v Bateman*, [1991] 3 FC 586 establishes that, while autonomy is necessary, it need not be absolute. In *Bateman*, an Adjudicator initially found a worker who was responsible for 200 employees, managed a ten million dollar budget, and set wages within guidelines was not a manager. Justice Bud Cullen overturned the arbitrator's decision, at paragraph 32, saying that

> In my opinion, the Adjudicator erred in his interpretation of subsection 167(3). He stated that in order to be considered a "manager" within the meaning of that subsection, "the degree of autonomy exercised by an employee must be, if not absolute, then very considerable". With respect to the Adjudicator, such an approach extends the law on this issue considerably farther than envisaged by the Federal Court of Appeal. While a manager must be "an administrator having power of independent action, autonomy and discretion", it is unrealistic to demand that such autonomy approach the absolute in order to be considered a "manager", even in the "narrow" sense of subsection 167(3). As counsel for the applicant argued, even the Chairman of the Board of a large corporation does not have absolute autonomy; he must answer to the Board of Directors. It is undisputed that Bateman did exercise significant autonomy and discretion in his position, with respect to salaries, discipline and the power to hire and transfer employees. Indeed, the Adjudicator concluded that "the complainant did in fact exercise a degree of autonomy and independence, which enabled him to decide certain issues within a fairly tight framework established by his superiors in Toronto." The evidence also shows that even on the occasions when Bateman was required to seek approval of his decisions, his recommendations were generally accepted. The Adjudicator seems to have focused instead on the occasional rejection of Bateman's recommendations by his superiors as more compelling.

[18] As in *Bateman*, above, the Respondent's recommendations were generally accepted by her superiors.

Principles Applicable to Subsection 167(3)

[19] The following principles should be applied when determining whether a worker is a manager within the meaning of subsection 167(3) of the Code:

1. Section 167(3) should not be read as departing too far from the classification used in normal labour relations;
2. A failure to exercise the full authority of a position does not alter the fact that the position was one of a manager;

3. A manager who is required to carry out her duties according to detailed policies is still a manager.

[20] All three of these principles are applicable to the Respondent. First, her position would have been excluded from a bargaining unit because of her supervisory role. Second, the fact she never actually hired or fired anyone does not mean she was not a manager. Third, although she was required to follow a detailed manual in determining eligibility for social assistance, this does not mean she was not a manager.

[21] Past Adjudicators have found people with similar responsibilities to the Respondent's were managers. See *Danes v Moricetown Band Council*, [2010] CLAD No 394, *Johnson-Macdonald v Six Nations of the Grand River*, [2003] CLAD No 350; *Brooks v St. Mary's First Nation*, [2010] CLAD No 132; *Lahache and Polson v The Long Point Band Council,* Unreported, 4 September 1992; *Fontaine v Sagkeeng First Nation*, [2005] CLAD No 406; *Pepper*, above; *Rollingson v Royal Bank of Canada*, [2003] CLAD No 223; *Skeete and National Bank of Canada*, [1996] CLAD No 410, *Normandeau and National Bank of Canada*, [1996] CLAD No 712.

[22] The Respondent's work situation was similar to the above cases. She had significant responsibility and authority and reported directly to the Applicant's Executive Director. She was responsible for the employees working in the Social Development Department and the Child and Family Services Department. The Respondent also had hiring and disciplinary authority and did not need approval from her superiors to hire seasonal or temporary employees. Further, she had created her own roles and responsibilities as Director of Justice. The Respondent's role as a manager was

not reduced simply because she needed the approval of the Executive Director in some matters and had to follow policies.

[23] If the Respondent is not found to be a manager, the Applicant will be unable to run its organization effectively. Managers are excluded from the prohibition against unjust dismissal under the Code so that employers are not unduly limited in their common law right to terminate the senior management team. As the Adjudicator in *Johnson-Macdonald*, above, wrote at paragraphs 44 and 45:

> To return to an examination of the basis for and meaning of the exclusion of managers, one must also consider the effect of a person being designated as a "manager". Here I would note that if Ms. Johnson-Macdonald is considered to be a "manager" she is not stripped of relief for possible incorrect treatment by the Employer. The Complainant and others denied relief under the Code can still bring an action for damages at common law. Leaving aside the question of costs and the like, the major difference between these remedies is that under the Code an Adjudicator can order the complainant to be re-instated in employment; in the Courts relief would normally be limited to damages.
>
> The foregoing distinction is a useful consideration in applying subsection 167(3). In short, if re-instating a complainant would cause real problems to an employer in carrying out its work, it would perhaps be preferable to limit the claim to one of damages. It seems to me there exist situations where the continuation of an employment relationship would be unhelpful to the employer and, perhaps, the employee to such a degree as to not be permitted. In the end, an employer can terminate the relationship but may have to pay the cost of so doing.

[24] The Respondent has an adequate alternate remedy if she is excluded by subsection 167(3); she can seek damages in a civil proceeding for wrongful dismissal. To reinstate her will be to put her into a role where she has significant authority and responsibility but is unsuitable for the position. It is clear from the evidence that the Respondent is a manager, so the unjust dismissal

provisions in Division XIV of the Code do not apply to her. The Adjudicator did not have the jurisdiction to consider the Respondent's complaint.

The Respondent

[25] The Respondent points out that the Applicant consented to the Adjudicator's jurisdiction to hear her claim, so it cannot now challenge that jurisdiction on judicial review. The evidence also shows that the Respondent is not a manager, so the unjust dismissal provisions of the Code apply to her.

Jurisdiction

[26] It is inappropriate for the Applicant to seek to challenge the Adjudicator's jurisdiction. Judicial review is a process for reviewing a decision; it is not a *de novo* trial of issues not canvassed in the evidence before the tribunal. See *Regional Cablesystems*, above, at paragraph 29. The parties canvassed the issue of jurisdiction before the Adjudicator and the Applicant agreed that the Adjudicator was properly constituted to hear the full and integrated dispute. Essentially, the Applicant agreed the Respondent was not a manager.

[27] The Applicant had the opportunity to address the Respondent's status as a manager at the hearing but did not take it. The facts to establish the Respondent was a manager were in the parties' hands but were not placed before the Adjudicator. The Adjudicator cannot have made a jurisdictional error when the facts necessary to decide this issue were not before him when he canvassed the question of jurisdiction with the parties. The Court must not allow a *de novo* trial on an issue the Applicant agreed was resolved.

[28] The Applicant has pointed to numerous authorities showing similar cases where complainants were found to be managers. However, in all but one of theses cases the Adjudicators' jurisdiction to hear the claim was raised at the hearing. In *Regional Cablesystem*, above, the lone outlier, the Adjudicator had not properly considered the jurisdiction question. In the instant case, the Applicant did not lead any evidence before the Adjudicator to show the Respondent is a manager, so it must be held to have consented to the Adjudicator's jurisdiction. See *Msuya v Sundance Balloons International Ltd.*, [2006] FCJ No 398.

Respondent is not a Manager

[29] Even if the Court can properly consider whether the Adjudicator had jurisdiction to hear the Respondent's complaint, he had jurisdiction because she is not a manager. *Poirier v Lake Babine Nation*, [2005] CLAD No 237 establishes that "manager" should be given a narrow interpretation. There are several elements essential to finding that a worker is a manager:

1. Power to act and perform duties independently;
2. Membership in the management team;
3. A primary responsibility of management;
4. Power or authority to hire, supervise, and dismiss employees, including the power to discipline;
5. Firing and disciplinary actions must be proven;
6. Responsibility for the employer's operational and managerial functions required for that purpose;
7. Sufficient independent decision-making authority, which need not be absolute, including a measure of discretion;

8. Authority to make final decisions of significance.

[30] On the evidence before the Court, the Respondent was only a coordinator with little authority. She had to review all significant decisions with her supervisor and had no financial authority. The Respondent was not authorised to speak to government agencies which funded her departments. She did not have the power to act independently. Further, the Respondent could not hire or fire permanent employees; she could only assign short-term work to pre-approved clients. She did not have the authority to discipline other employees. Once, when she attempted to discipline another employee, her supervisor called her into his office and led her to believe she did not have the authority to discipline. The day-to-day running of her department was determined by the policies and manuals established by her superiors.

[31] The Respondent invites the Court to draw an adverse inference from the Applicant's failure to adduce evidence from any of her superiors. See subsection 81(2) of the *Federal Courts Rules* SOR/98-106. The Court should infer the evidence the Applicant has not adduced would be unfavourable to it. The Applicant had the opportunity to lead evidence from Frank Alec – the Respondent's direct supervisor – but has not done so. It is reasonable to infer from his failure to provide an affidavit that Mr. Alec's evidence would be unfavourable to the Applicant.

ANALYSIS

Introduction

[32] The Applicant has chosen to challenge the Adjudicator's decision on the basis of jurisdiction. Having reviewed that decision, I can see why. The decision is cogent and thorough. It would be extremely difficult to find a ground for judicial review on the merits.

[33] What is revealing about the Applicant's approach is that jurisdiction was not raised as an issue before the Adjudicator and the Applicant is raising it for the first time on review. What this means is that I need to make an initial determination as to whether it is appropriate in the circumstances to review a decision on a single issue that was not raised with the Adjudicator.

Jurisdiction

[34] On the facts of this case, the Applicant, in effect, represented to the Adjudicator that jurisdiction was not an issue, and that he should decide the complaint on its merits. What the Applicant did not tell the Adjudicator was that, if he failed to decide matters in favour of the Applicant, the Applicant would then seek review on the basis of lack of jurisdiction. The Applicant was represented at all material times by experienced legal counsel, and would have known that jurisdiction is something that should be raised with the Adjudicator. I say this because the Applicant has been through this process before in recent years. In *Poirier*, above, the Adjudicator indicates at paragraph 3, as follows:

> At the outset of the hearing William Ferguson, acting for the Lake Babine Nation, raised the objection to the adjudicator's status to rule on this matter due to the position of the Lake Babine Nation that Mary-Ann Poirier was a manager. Section 167 (3) of the Canada Labour Code states "Division XIV does not apply to or in respect of employees who are managers". It was agreed that a true assessment of whether Mary-Ann Poirier was a manager could not be made without hearing evidence of her duties and counsel agreed that all evidence would be called. Judgment as to whether she was a manager would be made at the conclusion of hearing all the evidence.

[35] The General Manager in the *Poirier* case was the same Frank Alec who is the General Manager in the present case and to whom the Respondent had to report.

[36] The conclusion on jurisdiction in *Poirier* goes some way to explaining why the Applicant chose not to raise jurisdiction with the Adjudicator in the present case, and why the Applicant has not provided an explanation to the Court as to why it agreed the Adjudicator had jurisdiction to hear the complaint, but has now reneged on that position to come before the Court to debate the issue on what is really a *de novo* basis. In *Poirier*, at paragraph 16, the adjudicator made some significant points about the Applicant's hierarchical system and its effect upon the key issue that arises in the present case:

> WHEN IS A MANAGER NOT A MANAGER?
>
> **16** My answer is - when the system doesn't allow them to manage. The hierarchical structure of the Chief and Council is designed, and operates, in a strict top down manner. They don't abide any bottom up approach concerning advice or suggestions. They report to their members when they want to and what they want to and if something is held back only the Council knows. Under cross examination, Frank Alec, in one of his most candid statements, said he would never correct or question a Councilor's decision. Furthermore if a Councilor asked a staff member to do something, they should take it up with him rather than just do it. But he wasn't about to correct a Councilor himself, ever, anytime. In light of that kind of organizational intimidation, it isn't surprising that MAP could run into difficulty as she attempted to argue and promote her project of re-establishing Old Fort. But I cannot find her to be a manager, because the system didn't allow her to manage.

[37] As the Adjudicator noted in the present case, no one from the Applicant's management or leadership gave evidence, and that is the same before me on this application. Hence, there is no direct evidence (Mr. Alec excepted) from those who can speak to the way the system operates, nor has there been any cross-examination of those parties. The Applicant's witnesses had no direct knowledge on the merits of the claim or the Applicant's role, and they were, in any event, discredited during the course of cross-examination. As Applicant's counsel concedes, the

evidentiary basis upon which he relies in this application is basically the Adjudicator's decision, the Respondent's affidavit, and the cross-examination of the Respondent on her affidavit.

[38] As the Adjudicator's decision makes clear, the issue of jurisdiction was brought up and both parties agreed that the Adjudicator was "properly constituted to hear the full and integrated dispute, and to determine a complete remedy." The Applicant now wishes to renege on that agreement before this Court on the basis of evidence that was not before the Adjudicator. This is not a judicial review in my opinion. I am being asked to determine an issue *de novo* that the Adjudicator was told was not an issue and on the basis of new evidence that was not before the Adjudicator.

[39] The Applicant says I have no choice and must proceed to review jurisdiction. Before I decide whether the Applicant is right on this point, I think I do have to say that I find the Applicant's conduct in this matter somewhat unconscionable. I do not think it is appropriate to agree that the Adjudicator is "properly constituted to hear the full and integrated dispute, and to determine a complete remedy" and then, after a decision is rendered that goes against the Applicant, to come before the Court — without explanation or excuse — and ask for the decision to be set aside on the basis that the Adjudicator was not "properly constituted" on the basis of evidence that was not placed before the Adjudicator.

[40] The Applicant points to the discussion in *Gleason v Daylu Dena Council*, [2006] CLAD No. 298, at paragraphs 3 and 4, where the Adjudicator provided the following summary of the jurisprudence on point:

> The issues of whether there was a discontinuance of function, or whether Ms. Gleason is a manager are pure jurisdictional issues. The employee's counsel submits that the employer should be estopped from raising the "manager issue" as this was not a live issue at the hearing, and it would be unfair to decide this issue at

this point in time, without having a chance to structure the evidence.

It is unfortunate that the manager issue was not raised during the hearing, as both parties could have addressed this as a matter of evidence. The employer is not precluded from raising the issue after the close of evidence, as I accept the submission that the issue of jurisdiction is one that could be raised on a judicial review of my decision, without the issue being dealt with at the hearing: *Regional Cable Systems v. Wygant*, [2003] F.C.J. 321 (T.D.). In that decision the court referred to *Shubenacadie Indian Band v. Canada (Human Rights Commission)*, [1998] 2 F.C. 198 (T.D.), affirmed, (2000), 256 N.R. 109 (F.C.A.):

> [39] My concern is with the argument that the Court cannot review a tribunal decision, even where that decision is either in excess of that tribunal's statutory jurisdiction, or is made pursuant to a statutory jurisdiction that is unconstitutional.
>
> In *Crevier v. Attorney General of Quebec et al.*, [1981] 2 S.C.R. 220, ..., the Supreme Court of Canada held that a statutory tribunal cannot be immunized from review for errors of jurisdiction. Laskin C.J. states, ...:
>
> ... if such a tribunal has acted beyond its jurisdiction in making a decision, it is not a decision at all within the meaning of the statute which defines its powers because Parliament could not have intended to clothe such tribunal with the power to expand its statutory jurisdiction by an erroneous decision as to the scope of its own powers. [Emphasis added]
>
> Given that a decision of an administrative tribunal in excess of its jurisdiction "is not a decision at all", it seems paradoxical that the same "decision" would be immunized from review where jurisdiction is never raised and the tribunal's jurisdiction and/or the constitutionality of its enabling legislation is assumed. This is tantamount to saying that parties to an administrative proceeding may, by waiver or acquiesence [acquiescence], confer jurisdiction on a tribunal that was not, or could not be, conferred by Parliament, and that this conferral of authority by the parties is unreviewable once the decision is

> made. Indeed, it is not difficult to imagine a tribunal falling into jurisdictional error simply because it did not hear arguments on that issue.
>
> Viewed in this light, the decisions of the Federal Court of Appeal in *Toussaint, Poirier*, [1989] F.C.J. No. 240, and *Sirois*, [1988] F.C.J. No. 577, are distinguishable from the case at bar because of the jurisdictional nature of the new arguments being raised here. The Alberta Court of Appeal and Ontario High Court have considered this issue and held that a reviewing court may consider a challenge to a tribunal's jurisdiction that was never raised before the tribunal itself... . I find this approach to jurisdictional questions more consistent with the reasoning in *Crevier* and conclude that it is appropriate to consider the new jurisdictional arguments raised by the applicant in this proceeding.

[41] The Federal Court of Appeal has also provided guidance on point. The Applicant refers me to the decision in *Payiappily v Rogers Cantel Inc.*, [2000] FCJ No 630 at paragraph 9:

> The Motions Judge decided the adjudicator was correct in holding that he lacked jurisdiction because of this section. If the adjudicator lacked jurisdiction, then it was immaterial whether either of the parties raised the issue. Consent cannot confer jurisdiction. [Emphasis added]

[42] As the facts of the present case show, if consent cannot confer jurisdiction and if the tribunal cannot be immunized on review, then it means that a tribunal cannot rely upon agreement between the parties and must proceed to hear evidence and argument on point. It also means that a party to a dispute can reserve to itself the right to agree that jurisdiction is not an issue and then have a reviewing court decide the issue *de novo* if that party does not get the result it wants from the tribunal.

[43] The Supreme Court of Canada has more recently addressed the whole issue of what should happen when a court is asked to review an issue that was not raised before the tribunal. In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654, the Supreme Court of Canada provided the following guidance at paragraphs 22-26:

> The ATA sought judicial review of the adjudicator's decision. Without raising the point before the Commissioner or the adjudicator or even in the originating notice for judicial review, the ATA raised the timelines issue for the first time in argument. The ATA was indeed entitled to seek judicial review. However, it did not have a right to require the court to consider this issue. Just as a court has discretion to refuse to undertake judicial review where, for example, there is an adequate alternative remedy, it also has a discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so: see, e.g., *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, *per* Lamer C.J., at para. 30: "[T]he relief which a court may grant by way of judicial review is, in essence, discretionary. This [long-standing general] principle flows from the fact that the prerogative writs are extraordinary [and discretionary] remedies." [Emphasis added]
>
> Generally, this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised before the tribunal (*Toussaint v. Canada Labour Relations Board* (1993), 160 N.R. 396 (F.C.A.), at para. 5, citing *Poirier v. Canada (Minister of [page671] Veterans Affairs)*, [1989] 3 F.C. 233 (C.A.), at p. 247; *Shubenacadie Indian Band v. Canada (Human Rights Commission)*, [1998] 2 F.C. 198 (T.D.), at paras. 40-43; *Legal Oil & Gas Ltd. v. Surface Rights Board*, 2001 ABCA 160, 303 A.R. 8, at para. 12; *United Nurses of Alberta, Local 160 v. Chinook Regional Health Authority*, 2002 ABCA 246, 317 A.R. 385, at para. 4). [Emphasis added]
>
> There are a number of rationales justifying the general rule. One fundamental concern is that the legislature has entrusted the determination of the issue to the administrative tribunal (*Legal Oil & Gas Ltd.*, at paras. 12-13). As this Court explained in *Dunsmuir*, "[c]ourts ... must be sensitive ... to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures" (para. 27). Accordingly, courts should respect the legislative choice of the tribunal as the first instance

> decision maker by giving the tribunal the opportunity to deal with the issue first and to make its views known.
>
> This is particularly true where the issue raised for the first time on judicial review relates to the tribunal's specialized functions or expertise. When it does, the Court should be especially careful not to overlook the loss of the benefit of the tribunal's views inherent in allowing the issue to be raised. (See *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 89, *per* Abella J.)
>
> Moreover, raising an issue for the first time on judicial review may unfairly prejudice the opposing party and may deny the court the adequate evidentiary record required to consider the issue (*Waters v. British Columbia (Director of Employment Standards)*, 2004 BCSC 1570, 40 C.L.R. (3d) 84, at paras. 31 and 37, citing *Alberta v. Nilsson*, 2002 ABCA 283, 320 A.R. 88, at para. 172, and J. Sopinka and M. A. Gelowitz, *The Conduct of an Appeal* (2nd ed. 2000), at pp. 63-68; *[page672] A.C. Concrete Forming Ltd. v. Residential Low Rise Forming Contractors Assn. of Metropolitan Toronto and Vicinity*, 2009 ONCA 292, 306 D.L.R. (4th) 251, at para. 10 (*per* Gillese J.A.)).

[44] In *Alberta Teachers' Association*, the issue that was not raised before the tribunal was a "timeliness issue." It was not jurisdiction. However, the Supreme Court of Canada speaks in general terms that are obviously meant to have an application beyond the specific facts of the case. "Generally, this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised before the tribunal" and the "court has a discretion… not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so…."

[45] The first issue before me, therefore, is whether it is inappropriate to do so where the issue that was not raised is "jurisdiction," or, to be more precise, where jurisdiction was raised but both parties agreed that the Adjudicator had jurisdiction. If I examine the case law referred to by the Supreme Court of Canada it does not make clear whether the Supreme Court of Canada had

"jurisdiction" in mind when it made the statements referred to above and whether I have a discretion not to hear the Applicant's case based upon the issue of jurisdiction.

[46] The cold logic of prior case law is that consent cannot confer jurisdiction and a tribunal cannot be immunized from review for errors of jurisdiction. It is not clear to me whether the Supreme Court of Canada in *Alberta Teachers' Association* is saying that I have the discretion not to consider the jurisdictional issues raised in this case if I think it is inappropriate to do so. Fortunately, I do not need to decide this issue on the facts before me because it appears to me to be clear from the evidence that the Respondent was not a manager so that the Adjudicator did have jurisdiction and the decision must stand. In assessing that evidence, however, I think I have to be cognizant of the fact that the Applicant, by agreeing that the Adjudicator could hear this matter, has made a prior indication that it does not consider the Respondent to be a manager and did not feel it was necessary to call any evidence on point before the Adjudicator. Also, I have been given no explanation as to why the Applicant has now changed its position on this issue, other than that it is displeased with the decision on the merits. Further, I think I also have to keep in mind that the Applicant has not produced evidence from prominent persons in the Applicant's hierarchy who could speak to this issue and be cross-examined. Besides the Adjudicator's award, the Applicant is arguing on the basis of what the Respondent has said in her affidavit and in cross-examination.

[47] Having concluded that I should exercise my discretion to hear this matter, I now have to decide whether, given the evidence before me, the Respondent was a manager so that her complaint fell outside the jurisdiction of the Adjudicator.

[48] This is a fact-driven exercise and, as already pointed out, the only compelling evidence before me on this issue comes from the Adjudicator's award and the Respondent herself. The

approach which the Court must take to this issue was summarized by Justice Barnes in *Msuya*, above, at paragraph 23:

> There are many authorities dealing with the determination of whether a person is a manager pursuant to subsection 167(3) of the Code. The fundamental test is whether that person had significant autonomy, discretion, and authority in the conduct of the business of the employer. A very thorough review of the relevant caselaw can be found in the decision of Adjudicator A.E. Bertrand in *Isaac v. Listuguj Mi'gmaq First Nation* [2004] C.L.A.D. No. 287. That decision also provides a useful list of factors and principles which should typically be considered in determining whether a person is a section 167(3) manager (see paragraph 164). The approach taken by Adjudicator Bertrand in the *Isaac* case, above, is the correct one.

[49] In *Msuya*, Justice Barnes also stated at paragraph 25 that

> It is clear that the onus of proving that an employee is a manager under section 167(3) of the Code rests upon the party making that assertion (in this case, Sundance). That principle was recognized in the decision of Justice MacKay in *Waldman*, above, where he held at paragraphs 15 and 16 as follows:
>
> > 15 In the final analysis the adjudicator held that the burden of establishing that Mr. Waldman was exempt from consideration under the Code as a "manager" lay with the applicant Band Council. He found that there was not sufficient evidence to support a conclusion that the duties of Mr. Waldman, excluded him from consideration under the Code as a "manager". Thus the adjudicator maintained jurisdiction to deal with the complaint.
> >
> > 16 In so doing, in my opinion, the adjudicator was correct.

[50] The parties in the present dispute have provided me with their respective reviews of the evidence and their conclusions. The Applicant's summary is as follows:

> The facts in the present case parallel those in the cases discussed above. The Respondent's position, duties and responsibilities are very similar to the positions, duties and responsibilities of the

complainants who are found to be managers excluded from the provisions of Division XIV of the *Code*. In particular, as the director of Social Development and Director of Justice with responsibility for Child and Family Services, the Respondent had significant responsibility and authority. The evidence indicates that:

The Respondent reported directly to the Executive Director;

The only higher ranking employee of the Respondent was the Executive Director;

As Director of Social Development, the Respondent had responsibility for all of the employees working in the Social Development Department, plus the employee working in the Child and Family Services Department;

The Respondent had significant administrative authority and was responsible for making and implementing important decisions. The Respondent was put in the position of Director of Social Development to bring the program back up to standards. The Respondent was successful at getting the Social Development Department back on budget;

The Respondent had sole responsibility for the day to day administrative functioning of the Social Development Department, the Justice Department and the Child and Family Services Department; and

As the Director of Justice, the Respondent created her own role and responsibilities, and was ultimately responsible for what happened in the Applicant's Justice Department.

Based on the case law discussed above:

a. Workers in positions such as the Respondent's with similar responsibilities and authority are to be considered "managers" under Section 167(3) of the *Code*;

b. The Respondent's status as a manager was not demeaned by the fact that she was required to seek the Executive Director's approval on certain matters; and

c. The Respondent's status as a manager was not demeaned by the fact that she conducted her duties in accordance with detailed policies.

[51] The Respondent's summary is as follows:

> The Respondent was responsible for the day-to-day coordination of department activities, but did not have the authority or discretion to:
>
> a. Make any Social Development decision that varied from the criteria in the Manual, or the advice of the Society;
>
> b. Set or vary the budget set for the department;
>
> c. Sign or authorize any cheque in any amount;
>
> d. Negotiate or sign any contract with a funder, or to even speak directly to any funder agency;
>
> e. Negotiate or authorize any projects;
>
> f. Hire full-time employees;
>
> g. Discipline employees;
>
> h. Dismiss employees;
>
> i. Promote employees;
>
> j. Give raises to employees;
>
> k. Set work schedules for employees;
>
> l. Approve vacation schedules for employees.
>
> In summary, the evidence is clear that during her employment the Respondent had no power or authority for independent action, autonomy, or discretion.

[52] The case law relating to section 167(3) of the Code has established that the following two elements must be present in order for a worker to be deemed a manager under that section:

a. The worker must be engaged in administering the employer's affairs; and

b. The worker must have the power of independent action, autonomy and discretion in a significant range of matters within his/her area of responsibility.

[53] Based on the evidence proffered in this application, the first prong of this test has been met. A review of the Respondent's position, duties, and responsibilities at the time of her dismissal makes it clear that the Respondent was engaged in administering the affairs of the Applicant.

[54] The real issue arises under the second prong of the test, which requires the worker to have the power of independent action, autonomy and discretion in a significant range of matters within her area of responsibility.

[55] The Applicant has provided a lengthy list of cases and invites me to draw parallels with the present situation. In particular, the Applicant directs me to *Danes*, above, as being especially close to the Respondent's position. In reviewing that decision, however, I find a marked difference between the role of Ms. Danes and that of the Respondent. For example, in paragraph 11 of *Danes*, the following findings are made:

> I accept the evidence of the Band Manager that the Complainant had full signing authority within her budget, and had full spending authority for all matters dealing with social development. Within the Band there were only four people that signed their own purchase orders, one of whom was Bonita Danes. Danes testified that if she needed to buy items she filled in a purchase order for larger items, but first sought the okay from Gagnon. Danes also testified that in regards to the food bank she was given a credit card with her name and she could use it for large amounts to purchase groceries. The Band had not placed any spending limitations on Bonita Danes within her budget. The Band Manager had a $5,000 limit per transaction, whereas Danes was authorized to spend an unlimited amount up to the line authorization provided by the funding source. For example if the funding source authorized $100,000 to be spent on a program, the Complainant could write one cheque for $99,000.

[56] In the present case, the evidence before me is that the Respondent:

a. Did not have full signing authority with her budget and she did not have full spending authority for all matters dealing with social development;

b. Did not sign her own purchase orders;

c. Had no credit card to purchase groceries;

d. Was not free of spending limits.

[57] Also, in comparison with the *Danes* decision, the Respondent:

a. Did have to consult before exercising any authority over other staff;

b. Was not the staffing decision-maker and could only hire part-time staff from an approved pool in a very short-term basis;

c. Could not discipline staff and was reprimanded for her single attempt to do so;

d. Could not deal with or put proposals to INAC;

e. Did not exercise complete independence in exercising her responsibilities;

f. Was not free to make decisions independent of the General Manager or the Band Council.

[58] The present case is strange in that, because the Applicant agreed that the Adjudicator had jurisdiction, it was not established at the adjudication that the Respondent was an excluded manager. Because the Applicant has reneged on its agreement before the Adjudicator and has, in effect, placed the issue of jurisdiction before the Court on a *de novo* basis, it does not change the fact that "the onus of proving that an employee is a manager under section 167(3) of the Code rests upon the party making that assertion…." In the present case, that is the Applicant. Having failed to produce any reliable evidence from its own management, leadership or employees, the Applicant has attempted to discharge this onus by relying upon the evidence of the Respondent in her affidavit, the Applicant's cross-examination of the Respondent, and the Adjudicator's award. Not

surprisingly, in my view, the Applicant has not discharged the evidentiary burden of showing that the Respondent is a manager. The preponderance of the evidence before me suggests otherwise.

[59] In other words, my review of the evidence leads me to conclude that the Applicant's assessment of the Respondent's powers of independent action, autonomy and discretion do not reflect the reality of the Respondent's role or the system within which she functioned. I accept the Respondent's characterization as being closer to the reality. In particular, I accept the following:

> **The Social Development Department**
>
> When the Respondent was given the position of Social Development Director, she was given a five inch thick policy binder called the "First Nations Social Development Program Policy and Procedures Manual (the "Manual").
>
> The Manual was a comprehensive document that essentially covered off almost every possible scenario the department would encounter when dealing with the eligibility for funding requirements.
>
> The Respondent was instructed by the General Manager that the Manual was to be strictly followed.
>
> The Respondent was further instructed by the General Manager that if she encountered a situation not covered by the Manual, she was to contact the First Nations Social Development Society for guidance on eligibility.
>
> The Respondent had no authority to make any eligibility decisions on her own; all decisions were either covered by the criteria in the Manual, or were made on instructions and guidance from the Society.
>
> The Respondent was directly instructed by the General Manager that she was not authorized to speak to the major Social Development funder, specifically, the Department of Indian Affairs and Northern Development (DIA).
>
> The Respondent was directly instructed by the General Manager to run all decisions past him before taking action.

Budgets/Cheques

The Respondent did not have authority to set any budget.

The budgets for all departments were set by the LBN Finance Department.

Once a budget was set by the Finance Department, it was given to the department to ensure every prescribed program was covered in the budget.

The Respondent did not have any authority to alter or change the budget; and had her budget unilaterally altered by LBN Chief and Council on more than one occasion without her input or approval.

The Respondent did not have the authority to issue or sign any cheques. If the cheque was required, the Respondent was required to fill out a cheque requisition form, and send the form to the General Manager for approval. If the General Manager approved the requisition, a senior member of LBN would sign the cheque.

During her entire employment in the Social Development Department, the Respondent never signed or issued a single cheque for LBN.

Project/Contract Approval & Reports

The Respondent did not have the authority to talk to or negotiate contracts with any government agencies, nor to sign any reports to government agencies.

The Respondent did have the authority to propose projects, but no authority to approve a project.

All approvals for Social Development contracts were done at the level of the General Manager or above.

During her entire employment in the Social Development Department, the Respondent never approved a single project, and never signed a single contract with a funding authority.

Hiring – Full-time & Regular Employees

The Respondent did not have the authority to hire full-time and regular employees.

During the course of her employment, the Respondent did not hire a single full-time or regular employee.

During the course of her employment, the Respondent did not sign a single employment contract for any full-time or regular employee, other than her own employment contract.

Hiring – Short-term Employees

The Social Development Department did have the authority to fill short-term work positions.

It was an LBN requirement that persons on social assistance had to be available for employment. The Social Development Department had developed a list of persons on social assistance that were available for work prior to the Respondent coming to the department. The Respondent maintained that list during her tenure in the department.

On occasion, short-term work arose involving a duration of a few hours to a few days. When short-term work did arise, the employees in the department, including the Respondent, would offer the work to an LBN member on the list of persons receiving social assistance.

Project Work — The Traditional Food Project

On one occasion, a short-term project work arose relating to a project affecting the department: the Traditional Food Project. This project was funded by DIA.

This project was proposed by two employees in the Social Development Department, the Respondent, and Mary West. The proposal was submitted to the General Manager and the Finance Department for approval. It was then submitted to DIA, and was eventually funded by DIA.

When this project work arose, the employees in the department, including the Respondent, coordinated the project, and offered the short-term work to qualified LBN members.

Discipline/Dismissal Authority

The Respondent did not have the authority to dismiss regular employees under her supervision.

During the course of her employment, the Respondent never dismissed a single employee.

The Respondent did not have the authority to discipline employees under her supervision.

On one occasion, the Respondent sent an employee home for being intoxicated on the worksite. The Respondent was later called into a meeting with the General Manager, where she was questioned and asked to explain her actions. She left this meeting with the firm belief the General Manager was making it clear she did not have the authority to discipline employees.

The Applicant alleges a second occasion where the Respondent is alleged to have disciplined an employee with an oral warning. The Respondent has no recollection of such an incident, and the Applicant provided no paperwork or specifics as to circumstances, time, or place of such an incident.

Promotions

The Respondent did have the authority to coordinate department work or move employees to different job assignments at the same job level within the Social Development Department.

The Respondent did not have the authority to promote employees.

During the course of her employment, the Respondent did not promote a single employee.

Salaries/Raises

The Respondent did not have the authority to determine either salaries or raises for employees.

The salaries for all full-time employees were set out in the budget, and were set prior to the appointment of the Respondent as Social Development Director.

The Respondent never set a salary for a full-time employee.

> The wages for all short-term workers were contained in the budget and the project description.
>
> The Respondent never set a wage rate for a short-term worker.
>
> All raises required the approval of the General Manager. On one occasion during her employment, the Respondent issued a raise to each of the three full-time Social Development employees after the raises were approved by the General Manager.
>
> **Work Schedules**
>
> The Respondent did not have the authority to set work schedules. During her employment in the Social Development Department, the Respondent never set a work schedule for employees.
>
> The Respondent did not have the authority to authorize overtime. During her employment, all overtime for herself and employees in her department was authorized by the General Manager.
>
> **Vacation Schedules**
>
> The Respondent did not have the authority to approve vacation schedules. During her employment in the Social Development Department, all vacation requests in the department were forwarded to the General Manager for approval.

[60] My conclusions are that the Applicant has not shown that the Respondent had sufficient, independent decision-making authority, sufficient power to hire and fire employees, or sufficient power to make decisions of significance to make her a manager. Consequently, I conclude that the Adjudicator had jurisdiction to hear the Respondent's complaint and to award the remedies he did.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The decision of the Adjudicator Coleman is upheld.

2. The Applicant's appeal is dismissed with costs to the Respondent.

"James Russell"

Judge

FEDERAL COURT
NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-494-11
STYLE OF CAUSE:	**LAKE BABINE NATION**
	- and -
	NANCY WILLIAMS
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	July 17, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	September 17, 2012

APPEARANCES:

Scott A. McCann	**APPLICANT**
Michael Schuster	**RESPONDENT**

SOLICITORS OF RECORD:

Harris & Company LLP Vancouver, BC	**APPLICANT**
Giddings & Company Barristers, Solicitors, Notaries Public Smithers, BC	**RESPONDENT**