Federal Court Cour fédérale

Date: 20100129

Docket: T-622-09

Citation: 2010 FC 105

Ottawa, Ontario, January 29, 2010

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

and

NELLIE TORRE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review of an interlocutory decision dated March 18, 2009, by Gilles Brunet, adjudicator (the tribunal), to the effect that he had jurisdiction to hear a complaint for unjust dismissal filed by the respondent under section 240 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code).

[2] The applicant, the Canadian Imperial Bank of Commerce (the Bank) is a federal enterprise. On April 30, 2007, the respondent's immediate supervisor, Daniel Poudrier, Associate Vice-resident, dismissed the respondent, Nellie Torre, for having breached the Bank's confidentiality rules.

[3] Under Part III, Division XIV of the Code (sections 240 to 246), an employee who is not a member of a group of employees subject to a collective agreement, who works in a federal work, undertaking or business and who considers herself to have been subject to an unjust dismissal may file a complaint against the employer if that employee has twelve consecutive months of service (section 240). However, under subsection 167(3) an employee who is a “manager” is excluded from this recourse.

[4] Submitting that the respondent was a “manager”, the applicant requested that the adjudicator dismiss the complaint for lack of jurisdiction. For now it is sufficient to recall that when she was dismissed the respondent held a position as manager of the Langelier Banking Centre (province of Quebec). In fact, five employees, including three customer service representatives and two sales representatives were supervised by the respondent.

[5] For the following reasons, the applicant did not satisfy this Court that the adjudicator had committed a reviewable error.

I – STANDARD OF REVIEW

[6] In practice, the judgment of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 49 (*Dunsmuir*) did not substantially change the applicable standard of review for decisions made by an adjudicator appointed under the Code (*Deschênes v. Canadian Imperial Bank of Commerce,* 2009 FC 799 at paragraphs 12 and 13).

[7] In fact, the privative clauses at sections 243(2) and 251.12(7) of the Code for unjust dismissals and monetary claims, and the purpose and expertise of the adjudicator or referee continue to command a very high degree of deference (*Alberta Union of Provincial Employees v. Lethbridge Community College,* 2004 SCC 28 at paragraph 48; *Bitton v. HSBC Bank of Canada*, 2006 FC 1347 at paragraph 29).

[8] Overall, for questions of fact, this Court will intervene only if the tribunal based its decision on an erroneous finding of fact that was made in a perverse or capricious manner, or if the decision was made without regard for the material before it: paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paragraph 46.

[9] When considered separately, an adjudicator's legal interpretation of the term "manager" used in subsection 167(3) of the Code, may give rise to a question of law reviewable according to the standard of correctness. However, in practice, the determination made by the same adjudicator following an exhaustive analysis of the evidence in the record that a person does or does not hold a position of manager must be dealt with as a question of mixed law and fact.

[10] In general, an issue of mixed law and fact is reviewed according to the same standard that applies to questions of fact, which are usually reviewed on the basis of reasonableness (*Democracy Watch v. Campbell*, 2009 FCA 79 at paragraphs 21 and 22).

[11] In *Dunsmuir*, above, at paragraph 49, Justices Bastarache and LeBel emphasize the need to review the impugned decision on the basis of the conclusions of fact and the overall reasoning of the tribunal:

> …
>
> Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.
> …

[12] A review by the tribunal of the tasks performed by an employee is strictly an exercise of fact. Every case in which the issue of an employee's management responsibilities is raised is a particular case. In the case of a dispute, particularly when issues of credibility are raised by the parties, the tribunal's findings are entitled to considerable deference. In the present case, despite the attempt by counsel for the applicant to recast this as a "jurisdictional" issue, considering the specialized expertise of the adjudicator's functions, there is no particular reason to undertake a *de novo* examination of the evidence and to review the reasoning and general conclusions of the tribunal according to the standard of correctness rather than the standard of reasonableness.

II – LEGAL CONCEPT OF MANAGER

[13] Considering that the word “manager” used in subsection 167(3) of the Code is not defined by Parliament, case law has remedied this shortcoming by enumerating a certain number of relevant criteria or factors to be considered to determine in which cases an employee holds or does not hold a position of manager.

[14] In the impugned decision, the adjudicator stated that there were two [TRANSLATION] “lines of thought” in case law, one to the effect that the word “manager” must be broadly interpreted and the other narrowly interpreted. This finding is not determinative, however, and entails no consequences because the adjudicator ruled that [TRANSLATION] “the second school of thought must be followed, that is to say a narrow interpretation of the concept of manager . . .”

[15] The applicant conceded that the exclusion in subsection 167(3) of the Code must be [TRANSLATION] “restrictively interpreted.” The Federal Court of Appeal has noted on several occasions that the word “manager” in subsection 167(3) had to have a narrow meaning because this provision “subtracts employees who are ‘managers’ from the body of persons enjoying that right” (*Lee-Shanok v. Banque Nazionale del Lavoro of Canada,* [1987] 3 F.C. 578 at paragraph 11 (F.C.A.); *Attorney General of Canada v. Gauthier*, [1980] 2 F.C. 393 (F.C.A.) and *Avalon Aviation Ltd. v. Canada (Canada Labour Code)*, [1981] F.C.J. No. 111 (QL)).

[16] As for the relevant criteria to determine if a person is or is not a “manager”, in *Msuya v. Sundance Balloons International Ltd.*, 2006 FC 321 at paragraph 23 (*Msuya*), the Federal Court

ruled that the approach used by adjudicator Bertrand in *Isaac v. Listuguj Mi'gmaq First Nation*, [2004] C.L.A.D. No. 287 (*Isaac*), was the “correct approach.” On this point, my colleague Justice Barnes stated that: “The fundamental test is whether that person had significant autonomy, discretion, and authority in the conduct of the business of the employer” (*Msuya*, paragraph 23). I agree with him.

[17] In *Isaac*, as well as in arbitration case law referred to by the adjudicator in the impugned decision, there are a number of criteria, the usefulness of which the applicant has not seriously challenged:

- the nature of the work performed by the said “manager” is more important than the title of the position;
- the “manager” must perform administrative rather than operational duties;
- a “manager” within the meaning of subsection 167(3) of the Act can include persons at the upper or lower end of the management chain, depending on the degree of independence the manager may have and the importance of the management functions in question;
- the manager must be in a position of control. A clear distinction is to be made between a “supervisor” and a “manager”;
- a person is not a “manager” if he is merely a conduit between the employees and a higher body who is the actual decision-maker or makes recommendations to a higher body that approves or disapproves his recommendations.

[18] In this case, the adjudicator was warranted in examining the tasks performed by the respondent to determine whether

- she had the authority to work and make administrative decisions affecting the company independently from her superiors;
- the respondent's main responsibility was to direct others, which included the power to hire and supervise employees;
- the respondent had the power to discipline and dismiss employees (in practice, whether the respondent had or had not exercised such powers of discipline and dismissal was also a relevant factor);
- the decisions made by the respondent concerning significant issues in staffing and general company policies had to be approved before being enforceable.

[19] Of course, the special nature of the employer's banking activities, the size of the organization and the scope of the respondent's authority where she performed her duties (in this case a banking centre), are also important contextual factors. In fact, as has been underlined in abundant case law of this Court or adjudicators, namely *Canadian Imperial Bank of Commerce v. Bateman*, [1991] 3 F.C. 586 at paragraph 32 (Trial Division) (*Bateman*), which is cited in support by the applicant, it is not necessary that the independence of the person filing a complaint for dismissal be ". . . absolute in order to be considered a 'manager', even in the 'narrow' sense of subsection 167(3)."

III – REASONABLENESS OF THE IMPUGNED DECISION

[20] According to *Dunsmuir,* above, the reasonableness of the adjudicator's decision to the effect that the respondent is not a "manager" within the meaning of subsection 167(3) of the Code basically concerns the existence of justification, transparency and intelligibility within the decision-making process, as well as whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above at paragraph 47; *Khosa*, above at paragraph 59).

[21] The evidence submitted by the parties was explained in detail by the adjudicator in the impugned decision. The applicant did not challenge the first part of the impugned decision in any material way. In fact, the adjudicator is in a better position than this Court is to assess the credibility of the witnesses and to weigh the evidence submitted by the parties. In this case, the conclusions reached by the adjudicator appear to me to be reasonable and are defensible in the circumstances according to the evidence in the record.

[22] More specifically, according to the evidence in the record, the respondent's main tasks were the following:

- consistently offering a superior quality of service within the Banking Centre to meet or exceed customers' expectations;
- attaining the Banking Centre's corporate objectives;

- directing, supervising and ensuring the professional development of the Banking Centre’s employees to create a positive experience for customers and develop the team’s capacities;
- maximizing the Banking Centre’s operational capacity;
- managing risks and ensuring that policies, procedures and controls are established to reduce the risk of fraud, counterfeiting and unrecoverable losses;
- ensuring compliance with training on regulations and if necessary, ensuring that programs and policies are uniformly applied throughout the company.

[23] In addition, the respondent’s tasks included

- conducting a semi-annual assessment of the employees under her supervision;
- interviewing and hiring candidates following a first interview completed by the Bank’s human resources department;
- training customer service representatives;
- disciplining employees pursuant to the Bank’s directives and procedures;
- establishing shifts for employees in compliance with the ratio of the number of hours of work per employee for the branch, which is already determined by the Bank;
- managing employees’ holidays.

[24] According to the evidence in the record, it is also clear that the respondent had to meet the goals determined by the Bank for the Langelier Banking Centre. She had to ensure that the employees under her supervision met their personal targets. As far as the assessment of her

performance and the accomplishment of the Banking Centre's objectives are concerned, including financial objectives, the respondent was assessed by her immediate superior, Mr. Poudrier. In addition to her salary, the respondent received a bonus in connection with her position as branch manager.

[25] On the other hand, two decisions made by the respondent, respectively concerning a promotion and a dismissal, were cancelled by her superiors. The first example concerned an employee who had been promoted from a position of customer service representative to that of sales representative. Mr. Poudrier considered that this employee's performance was inadequate. Therefore, in spite of the respondent's opposition, Mr. Poudrier asked that the employee in question be returned to his former position. The respondent subsequently wanted to hire a person she knew but the human resources division refused.

[26] The adjudicator's core reasoning for dismissing the Bank's preliminary objection and concluding that the respondent did not hold a position of "manager" is found in paragraphs 241 to 256 of the impugned decision:

> [TRANSLATION]
>
> …
>
> [241] I consider that an interpretation which allows the recourse under sections 240 *et seq*. of the *Canada Labour Code* for employees holding a supervisory position rather than those holding a management position must be made.
>
> [242] In this case, Ms. Torre certainly has administrative responsibilities, but these do not exceed supervisory tasks, as explained in several decisions previously cited: *Gil v. National Bank*

of Canada, Ciminelli v. Bell Canada, Monsieur T.L. v. The Bank, Clarke v. Royal Bank of Canada and *Shek v. Bank of Nova Scotia*.

[243] Her work as manager of the Banking Centre is also structured and restricted by the policies and directives issued by the Bank's higher authorities.

[244] For example, as far as hiring is concerned, Ms. Torre hires persons who are referred to her by the Bank's personnel department. A first selection has already been made. She does not decide on the number of employees she needs for her Banking Centre. This decision is made at a higher level.

[245] As far as training is concerned, she supervises the tellers' training (customer service), while sales representatives are trained outside the branch. Ms. Torre conducts assessments of her employees, as any manager in a company would do, but it is impossible to conclude from this sole fact that she holds a managerial position within the meaning of subsection 167(3) of the *Canada Labour Code*.

[246] An employee's assessment determines the salary increase to which she is entitled, but Ms. Torre does not determine the salary scale. This is done at a level higher than hers.

[247] The evidence as to whether Ms. Torre has the authority to discipline and dismiss employees is not conclusive. She never had to do so during her four (4) years as a manager.

[248] She underlined the fact, however, that she had to comply with the policies and directives in the Bank's Guidelines in such cases.

[249] Mr. Poudrier affirmed that Ms. Torre had the power to dismiss, but I am convinced that in an organization such as the CIBC, a manager cannot dismiss without previously consulting the Bank's labour relations and human resources department.

[250] In fact, it must be noted that all of the letters signed by Ms. Torre were written by other persons at the Bank, even the least significant letters such as to notify employees under her supervision of their work schedule.

[251] As far as holidays are concerned, she is just a go-between forwarding to her superior the choices of holidays established by the

> employees among themselves. She never had to intervene on this point.
>
> [252] Concerning the unjustified absences of an employee, Ms. Torre affirmed that she never had to intervene in the past but according to her, the directives specify that she has to fill out a register of absence and advise her Associate Vice-President. Mr. Poudrier affirmed the contrary.
>
> [253] As the Bank's Handbook on Policy and Directives has not been filed, the evidence is not conclusive on this point.
>
> [254] The complainant did not establish the branch's budget, as this was also done at a higher level.
>
> [255] She has no decision-making power regarding the budget of her Banking Centre. The budget is given to her and her objective is obviously to exceed expectations and make the maximum profit at her Banking Centre.
>
> [256] Finally, she does not have the powers of action, independence and discretion that distinguish an employee governed under the *Canada Labour Code* (Part III, Division XIV) from a manager not covered by the application of the *Canada Labour Code*.

[27] The reasoning and the conclusions of fact reached by the adjudicator were based on his assessment of all the evidence, which led him to conclude that the respondent was not a "manager". In my opinion, the adjudicator's conclusion is based on the evidence in the record and is reasonable in the circumstances. The adjudicator initially took pains to cite various excerpts from adjudication decisions containing many principles previously enumerated by the Court. In this case, nothing shows that the adjudicator's general approach is inconsistent with these principles.

[28] Finally, in this case, after reviewing the evidence, the adjudicator could reasonably conclude that the respondent held a "supervisory" position rather than a "managerial" position at the Bank so

that the criticisms made today by the applicant seem to me to be unwarranted. The adjudicator's decision must be read as a whole. Considering the applicable standard of review in this case, it is not appropriate to conduct a micro-analysis of each of the adjudicator's conclusions.

[29] In this case, it is obvious that under the pretence of invoking alleged errors of law or the infringement of principles of procedural fairness, the applicant is in reality challenging the overall finding of fact reached by the adjudicator. For example, the applicant criticizes the adjudicator for having given too much importance to the fact that in one case the respondent's recommendation for hiring had not been followed. As far as the respondent's disciplinary power was concerned, the applicant submitted that it existed even if the respondent did not have to exercise it in practice. On the other hand, the fact that the respondent was required to respect the Bank's directives and procedures or that she was obliged to consult the labour relations and human resources department beforehand is understandable in a large organization like a bank. In addition, according to the applicant, the fact that the respondent did not establish the salary scales of the branch employees under her supervision was not material. According to the applicant, the adjudicator should have given more importance to the fact that the performance assessment of the employees of the Banking Centre by the respondent could affect the bonuses paid by the employer. As may be seen, the applicant simply disagrees with the adjudicator's assessment of the evidence in the record.

[30] On the other hand, an analysis of the impugned decision clearly shows that the adjudicator considered the arguments submitted by the applicant. He merely did not accept them. Contrary to the applicant's allegation to the effect that the adjudicator's reasons are questionable, they are not

perverse or made in a capricious manner. The applicant submitted that there are many resemblances between this case and this Court's decision in *Bateman*, above. On the other hand, even if that is the case, I do not consider that the adjudicator required, like in *Bateman*, above, the existence of "quasi-absolute" independence.

[31] Without expressing any opinion on this point, the conclusion to the effect that the respondent was a "manager" was undoubtedly a possible outcome (*Fox v. Bank of Nova* Scotia, [2002] C.L.A.D. No. 552; *Normandeau and National Bank of Canada*, [1996] C.L.A.D. No. 712; *Rollingson v. Royal Bank of Canada*, [2003] C.L.A.D. No. 223). However, this conclusion was certainly not the only one within the "range of possible acceptable outcomes which are defensible in respect of the facts and law", as other adjudicators in the past may have dismissed objections similar to the ones made by the applicant (*Shek and Bank of Nova Scotia*, [1996] C.L.A.D. No. 126).

[32] In any event, the issue is not to determine whether there are more adjudicators who consider that a manager of a Banking Centre is a "manager" within the meaning of subsection 167(3) of the Code. At the risk of repeating myself, each case must be decided on its own facts. Even if I must repeat myself, in fact, each case is particular. In this case, the adjudicator could reasonably conclude on the basis of the evidence in the record that the respondent had little independence in practice; she would comply with the Bank's directives concerning discipline, hiring, dismissal, preparing schedules and establishing salaries so that the branch's objectives were met by the staff in office. Accordingly, the respondent's role was much more similar to that of a supervisor than that of a "manager." The adjudicator therefore has jurisdiction to hear the respondent's complaint.

IV – CONCLUSION

[33] For the above reasons, the application for judicial review must be dismissed, with costs, considering the result.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed with costs.

"Luc Martineau"
Judge

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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