

2017 CarswellNat 1428
Canada Adjudication (Canada Labour Code Part III)

Cicale and Swiss International Air Lines Ltd., Re

2017 CarswellNat 1428

Mina Cicale (Complainant) and Swiss International Air Lines Ltd. (Employer)

Mark Abramowitz Adjud.

Heard: June 28, 2016; June 29, 2016; June 30, 2016; September 15, 2016;
September 16, 2016; January 17, 2017; January 18, 2017; January 19, 2017
Judgment: April 9, 2017
Docket: YM2707-10183

Counsel: Me Raphael Levy, for Complainant
Me Natalie Bussière, for Employer

Subject: Employment; Public

Headnote

Labour and employment law

Mark Abramowitz Adjud.:

THE COMPLAINT AND ATTENDANT LEGAL ISSUES

1 The several issues raised by the complaint require a review of the circumstances under which Ms. Cicale was hired and dismissed.

2 On April 1, 2002, she began her career as an account manager of Crossair *Ltd.* for its operations in the U.S., a predecessor of Swiss International Air Lines Ltd. ("Swiss").¹ On December 24, 2003, following the takeover by Swiss of Crossair, she became an employee of Swiss and received an increase in salary in her position as account manager.² On December 13, 2006, she was promoted to "*Deputy Station Manager — JFK*" effective February 1, 2007.³ On March 6, 2009, she was named "*General Manager Sales and Service Center*" U.S.A.⁴, a level four "*Cadre*" status with various manager fringe benefits (e.g. Manager life insurance, flight privileges and participation in the "PBCA" incentive program and an additional week of vacation.⁵ On January 5, 2011, she received a cost of living and merit increase in salary "[...] in recognition of your special contributions to our organization, [...]".⁶

3 Swiss' offices for North America and gateway cities were in New York City, Montreal, was the location of Swiss' Canadian office. The Montreal office was involved with customer sales and services and approved flights. Technical services and cargo reported to cargo headquarters in New York. The Montreal office had 12 employees under supervision for sales and customer feed-back.

4 In 2011, the country manager for Canada left the employ of Swiss for medical reasons and Ms. Cicale was appointed to replace him as of 2012 at the Montreal office: At the time, Ms. Cicale lived in Bethpage, N.Y., with her husband and son. Her function and position in Montreal was that of "*Country Manager Canada*" but she was to remain under U.S. employment, and had a level 3B status. Her salary was stipulated as U.S.D. \$8,500 (per month) with a "*housing*

allowance" for a maximum 2 years at Can.D of \$2,500 (per month) and a onetime contribution of U.S.D \$1,500 for tax advice.⁷ Ms. Cicale was now reporting to Arved Von Zur Muehlen at Swiss's head office in Zurich. She was not considered an ex-pat(riote) but, rather, was considered a U.S. employee and retained certain of her U.S. job functions. Upon her appointment to Montreal she requested and it was agreed that she would retain her 401K pension and U.S. health insurance benefits for herself and her family. Effectively, she divided her work: part-time in Canada and part-time in the U.S.

5 A "Certificate of Coverage Service for Employers" prepared by Swiss in New York pursuant to a "U.S.-Canadian Social Security Agreement" relative to the assignment of Ms Cicale in Canada, beginning August 1st, 2012 and ending February 23, 2014, stipulated that "*We are a U.S. employer for whom the employee named above (Mina Cicale) will be working directly (for example, in a branch office) while in Canada.*"⁸ An Immigration certificate of Canada⁹ specified:

[...]

3. Interdiction de travailler pour un employeur autre que celui indiqué.

4. Interdiction de travailler a un endroit autre que celui indiqué.

5. Doit quitter le Canada au plus tard le 23 février 2014.

[...]

6 The letter of employment ("*at wilt*")¹⁰ set out the terms of her appointment to the Montreal office of Swiss as follows:

August 8, 2012

[...]

Function:	Country Manager, Canada
New Title:	Senior Manager
Job Location:	Canada
Salary:	\$8,500 per month (paid semi-monthly) CAD 2500 per month housing allowance To be reviewed at the end of two year period One time maximum allowance of USD 1500 for tax advice All Subject to all applicable taxes
Employment Status:	Level 3B Manager
Report to:	Arved von Zur Muehlen, Managing Director
Effective Date:	August 1, 2012 ¹¹

7 In her position as Country Manager, Canada, Ms. Cicale was responsible for a team of 12 persons including account managers; management support sponsorships and interline personnel; direct and online sales personnel, customer service and support personnel.¹² According to Carol Sullivan, HR manager of North America service, Ms. Cicale was responsible for all employees' actions. She could recommend hiring and firing of personnel, although she needed to justify the need for additional employees with Swiss' head office. With regard to any discrepancies in personnel functions and sales, she had the power of final decision.

8 An advertisement of September 2014 for her position as "*Director, Head of Sales & Marketing Canada*" which became vacant upon her departure is significant with regard to the duties she fulfilled while in Montreal as the following excerpts attest:

Director, Head of Sales and Marketing Canada

The Director, Head of Sales and Marketing Canada, leads the Canada Core Team in Montreal consisting of 12 colleagues. In this position, you will represent SWISS in Canada in respect of all commercial aspects towards our customers, the Lufthansa GP organization and our local partners and suppliers. You report to the Head of Sales & Marketing the Americas in East Meadow, NY.

[...] You are responsible for tangible actions in the areas of marketing, customer servicing, direct sales [...] and revenue management [...], in close co-ordination with the SWISS area management in New York and the worldwide Central Competence Centers in Zurich.

Your Duties

- Responsible for fulfilling the revenue target, meeting the cost-of-sales budget and monitoring agreed service levels with local partners and suppliers
- Head and lead the SWISS Core Team based in Montreal
- Represent SWISS in the market place and manage the relationship to our customers, local authorities and partners, inclusive Switzerland Tourism
- Develop and implement a strategic and tactical market plan [...] cooperation with the local GP organization to exploit market and revenue opportunities with a maximum revenue impact for SWISS at an attractive and optimized cost ratio
- Ensure a regular and structured monitoring and review of sales activities against plan together with the local Lufthansa GP organization
- [...]
- Act as the first point-of-entry and provide a balanced flow of relevant information between SWISS functions in Zurich and New York, the local Lufthansa GP organization and our Joint Venture (A++) partners
- [...]
- Implement and communicate innovative sales initiatives in the market, including Added Value Offers¹³

9 To carry out her functions, Ms. Cicale was given the following power of attorney:¹⁴

POWER OF ATTORNEY

This is to certify that SWISS INTERNATIONAL AIR LINES LTD., [...] authorizes and grants full power to

Mina Cicale

25 September 1961

USA Citizen

to do all acts on behalf of SWISS INTERNATIONAL AIR LINES LTD. which may be involved with the normal exercise of business activity for the branch of SWISS INTERNATIONAL AIR LINES LTD. in the territory of Canada [...], namely this power of attorney includes but is not limited to the following:

- a) To make any legitimate payments, to collect accounts or income from other sources of whatever nature;
- b) To open and close bank accounts and to dispose of the funds in them;
- c) To conclude, alter and terminate any kind of contacts related to the performance of the activities of the branch;
- d) To acquire ownership of movable property and rights of any kind;
- d) To engage or dismiss personnel and sign the respective employment contracts and to deal with in business in connection with staff problems;
- f) To issue and sign documents and public and private instruments which may be necessary for the execution of any act mentioned herein;
- g) To represent the branch before tax authorities, social insurance authorities, other competent authorities as well as before any other state or municipal authorities or private persons in the territory of Canada;
- h) To intervene and represent SWISS INTERNATIONAL AIR LINES LTD. in any suit brought before any court in Canada to represent petitions of any kind, to institute or desist from legal proceedings, to submit any case to arbitration, to make legal statements, to perform any act which may be necessary in the course of legal proceedings;
- i) To accept service of process and any notices on behalf of the company;
- j) To transfer this power of attorney or any part of it to any third person. In the event of the holder's transfer to another country, this power of attorney shall automatically cease.

[...]

Zurich Airport, November 17, 2011

SWISS INTERNATIONAL AIR LINES LTD.

(s) *Marcel Klaus*
Marcel Klaus
Chief Financial Officer

(s) Christoph Casparis
Christoph Casparis
Head of Legal Services and Deputy
General Counsel

10 Ms. Cicale was also responsible for a team of 6 employees in the U.S. as "*Head of Sales & Marketing*".¹⁵ She had, as per the testimony of Carol Sullivan, the final word in these matters for Canada, but the "*Country Manager*" of the U.S. had the final word on this subject for the U.S.

11 As of August 2012, it was understood that Ms. Cicale would carry out her duties part-time in Canada and part-time in the U.S. although she would be "*living*" in Canada. However, in order for her to be covered under the company U.S. health insurance plan, it was required that she spend at least 50% of her time during the year in the U.S.¹⁶ The split-time situation resulted in taxes being paid both in Canada and the U.S. The Canadian taxes were based on her worldwide income and the social security short term disability, group life insurance and medicare benefits taxes were paid in the U.S. Employment insurance and pension contributions were not deducted nor paid in Canada.¹⁷ This arrangement permitted Ms. Cicale to retain her 401K U.S. pension benefits to which she was contributing. Thus, at her request, her

U.S. bank account was credited with a sum of \$2,001.17 from her income earned in the U.S., rather than a 50-50 split, although her U.S. income was taxed in Canada.

12 The "*housing allowance*" of \$2,500 per month constituted the rental payable by Ms. Cicale for the apartment she occupied in Montreal. As per the letter of her appointment as country manager for Canada, E-10, it was subject to applicable taxes. The apartment itself had been occupied by Ms. Cicale's predecessor manager in Canada, and was initially in the name of Swiss as tenant at the time she took possession of same in August of 2012. The rent was apparently noted and expensed by Swiss on its ledger as a "*functional allowance*". On November 16th, 2012 the lease for the apartment was switched into the name of Ms. Cicale as the tenant.¹⁸ This resulted in duplicate charges for a period of time between the "*housing allowance*" and the "*functional allowance*" which is at the origin of the dispute giving rise to Ms. Cicale's departure from Swiss.

13 Initially, Ms. Cicale claimed to have received advice from a tax specialist in Montreal (an accounting firm) that the "*housing allowance*" was not taxable in Canada if her work in Montreal was for a maximum period of 23 months from August 2012. However, she did not provide a written opinion to this effect. Swiss maintained that this allowance was taxable as income, in accordance with the letter of her appointment as Country Manager, Canada, there being no mention of the length of time specified therein and it advised her to this effect.¹⁹ Ms. Cicale asked if the lease could be kept in the company name and thus have Swiss cover the taxes²⁰, but was told that it was taxable regardless. The position of Swiss was later reconfirmed by its Director of Taxation.²¹

14 While this discussion was ongoing, Ms. Cicale continued to receive her monthly "*housing allowance*" but also approved a "*functional allowance*" of a similar amount as an expense in her capacity as country manager. This expense was paid by Swiss via a circuitous process route in existence, to wit: expenses incurred in Montreal were forwarded by Ms. Cicale to be processed by "*Basware*" in Mexico, then returned to Montreal for review for by an underling and then approved and forwarded by Ms. Cicale to the finance department of Swiss in New York. The finance department was separate from its human resources department, the latter being that which was responsible for Ms. Cicale's appointment to Montreal. In the result, Swiss belatedly became aware of these double charges amounting over time to approximately \$50,000 and since the extra allowance was not redesignated as a "*functional allowance*" it was stopped and an investigation was initiated.

15 On June 5, 2014 a meeting with Ms. Cicale was held in the New York office of Swiss in the presence of its director, Patrick Heymann, senior manager, Annette Reantragoon, and manager of human resources, Carol Sullivan, with regard to this double payment. Ms. Cicale (according to minutes of the meeting)²² admitted that she knew something was wrong with these payments and that the second amount should have been designated as a "*functional allowance*". She herself stated that, at her initiative, she had verbally suggested this to managing director Arved Von Zur Muehlen. When pressed as to why she was "[...] *Issuing and approving (the rental as) [...] expenses [...] she stated that she had always done this from day one of her position in Canada and was told to do so, but not in writing. [...]*". Furthermore, she did not know why she had charged the lease from Swiss to her own name. She also maintained that she was not being properly compensated and was losing out on the differential in her after tax salary as between her U.S. and Canada. Her pretension was that the additional CAD \$2,500 was to compensate this difference in net pay, although admittedly she did not have any written approval to this effect. Accordingly, she was told to "[...] *discontinue making these monthly expense requests effective immediately. To this, Mina (Cicale) replied. "if that is the case, then I am not doing it and you should find someone else for Canada" as she believed the financial constraint would not allow her to continue in her current position.*"

16 The investigation continued and on June 12, 2014, the following disciplinary letter was issued to her:²³

June 12, 2014

Mina Cicale

[...]

Dear Ms. Cicale,

As you are aware the Company has been conducting a fair and thorough review of the circumstances related to the housing allowance provided to you in your position as Country Manager Canada. Your letter of assignment dated August 8, 2012 states that you were to receive the sum of **CAD 2,500** per month as a housing allowance. The Company has consistently paid you that sum in conjunction with your salary payments. There is no document, email or record of any kind that suggests that you would be entitled to anything above that sum. Nevertheless, it is clear that since you assumed that position, you have been self-approving an additional amount of **CAD 2,500** via our internal IPI procedure. In such process, you categorize that additional **CAD 2,500** as being for payment of your rent. Accordingly, you have self-approved a total sum of **CAD 55,000**.

We have discussed this matter with you at the meeting of June 5th, 2014 with Patrick Heymann, Annette Reantragoon and myself.

After careful consideration, we want to express our disappointment in the manner that you have conducted yourself and the circumstances related to this matter caused by your lack of diligence and transparency. The Company expects its managers to abide by all rules and policies, to execute all duties and responsibilities in a professional manner and abide by the highest standards of professional judgment. It is imperative that all managers and employees avoid even the appearance of impropriety.

You have placed yourself in a rather precarious situation which requires us to take the disciplinary measures outlined below. Bear in mind that the consequences of your actions could have led to even more severe disciplinary sanctions. The Company does reserve any rights with respect to further disciplinary measures in the event of any new information related to this matter or your employment with the Company.

Accordingly, the following steps are to be implemented:

Your assignment in Canada will terminate effective July 31, 2014. Until the date of termination, you are expected to continue with your responsibilities in Canada, carrying out your duties in a diligent manner in the best interest of the Company.

You will be offered a local position in the US to be determined by the Company. You will be apprised of the position and its salary and benefits as soon as possible.

You are to terminate your current lease agreement for housing in Canada which indicates a three (3) month written notice by registered mail, and provide SWISS with a copy of this termination notice. Assuming that you remain in good standing with the Company going forward, SWISS will pay the remainder of the lease term directly to your landlord effective with the July, 2014 payment. You are not entitled to any additional housing allowance or additional payment of any kind related to your position in Canada.

It is imperative and expected that any member of the SWISS Management Team remain free from any appearance of impropriety, and as such, SWISS feels that your actions have indicated a lack of transparency in your business dealings. We believe that going forward, in the capacity of local employment, that this will be rectified.

Sincerely,
(s) *Patrick Heymann*
Patrick Heymann
Senior Director

(s) *Carol A. Sullivan*
Carol A. Sullivan
Manager, Human Resources USA

Head of Sales and Marketing, Americas

17 On the same day of June 12, 2014, Swiss forwarded the following letter to Ms. Cicale (E-19):

June 12, 2014

Mina Cicale

Dear Mina:

[...]

Please be advised that with the recent discovery indicating an error in the calculation of your pay from CAD to USD, that you will receive an adjustment of \$9,190.16 (subject to all applicable taxes) in the July 2014 pay period.

Your monthly salary effective July 1, 2014 will be correctly amended to UST \$8,630.90 per month, paid semi-monthly (subject to all applicable taxes).

Sincerely,

(s) Patrick Heymann

Patrick Heymann

Senior Director

Head of Sales and Marketing, Americas

(s) Carol A. Sullivan

Carol A. Sullivan, PHR

Manager, Human Resources USA

18 In her response, Ms. Cicale to the disciplinary letter, Ms. Cicale expressed her shock and disbelief of the accusations and the termination of her position in Canada as of July 31, 2014 claiming that she was transparent and did not violate any applicable rules or policies nor do anything illegal. She invoked her 15 years of dedication to the company and asked that the company reconsider its decision and the content of its letter which she requested be removed for her file.²⁴

19 Following up on its disciplinary letter and the termination of her position in Canada, on July 16, 2014, Swiss offered Ms. Cicale a position in the U.S. effective September 1st, 2014 subject to her acceptance of same by July 23, 2014, failing which her "*separation from Swiss*" would be effective as of July 31st, 2014. The position offered was set out in a letter of the same date reproduced hereinafter (E-22):

16 July 2014

Dear Mina,

Based upon the recommendation of your SWISS management, we wish to inform you of your transfer back to the SWISS US organization in accordance with the following description:

Function:	Project Management, Direct Sales and Customer Service Excellence USA and Canada. This project's expected timeline will commence September 1, 2014 and continue to approximately June 30, 2015. Upon completion of the project you may apply for any available positions in the SWISS US organization.
Job Location:	East Meadow, New York
Salary:	\$8,000.00 per month
Employment:	Manager, Cadre
Reports to:	Head of the Americas

Effective Date: September 1, 2014

Please note that nothing herein changes your employment-at-will status.

Please find attached a copy of the current Job Description for the Project Management position.

Please acknowledge your acceptance of this position as stipulated no later than July 23rd, 2014 in order so that we can move forward with organization decisions.

Thank you.

Kind regards

Swiss international Air Lines Ltd.

(s) *Patrick Heymann*
Patrick Heymann
Senior Director
Head of Sales and Marketing

(s) *Carol A. Sullivan*
Carol A. Sullivan, PHR
Manager, Human Resources USA

20 As noted in the above letter, a description of the job proposed was attached:

PROJECT BRIEF

Function:	Project Manager Direct Sales and Customer Service Excellence USA & CA		
Name:	Ms Mina Cicale		
Business Unit:	Sales America	Division:	KIK
Superior:	Head of Marketing & Sales, The Americas		

Goal of the Project

- Achieve a visible and measurable improvement in respect of service quality and customer proximity (along KPIs to be defined) and a constant and sustainable improvement efficiency and costs of the USA & CA servicing organization.
- Establish an effective & lean local servicing organization with a high focus on external provider management, consistency and customer centricity.

Scope of the Project

- Map servicing organization and processes in the USA and CA in respect of B2B and B2C servicing, direct sales, premium customer servicing, group sales & fulfillment and feedback management. Propose measurable KPIs.
- Review the current organizational set-up and propose structural changes to adapt to market and new organizational requirements, and evaluate improvement in efficiency and synergy through internal and external providers.
- Execute and supervise transition and restructuring of the current servicing organization as required.

- Identify and apply competitive servicing innovations which meet current market trends, including added value offers and premium customer appreciation.

Responsibilities & Tasks

Call Centre

- Monitor service level quality of internal and external providers regarding fulfillment, servicing, reservation, sales policies and procedures, and identity fields for quality improvement.

Customer Feedback Management

[...]

Premium Customers

[...]

- Initiate and conduct special premium customer CRM actions and ensure updated premium customer data (e.g. SWISS Customer Portal).

[...]

Training

- Ensure a comprehensive and continuous training regarding servicing, reservation, sales policies and procedures within SWISS and the NYC EA organization, travel agents and service providers as required.

[...]

- Act as an administrative training coordinator for the SWISS Core Team.

Group Fulfillment

Co-ordinate and monitor the group fulfillment for market USA and CA along feedback from the market.

[...]

- Supervise and manage changes/ transitions in the future regarding Group Fulfillment.

Interfaces Management

Establish and maintain smooth and beneficial interfaces to all servicing- and sales relevant SWISS- and Lufthansa Group counter-parts at head-office and in the markets and service providers, including

[...]

- Establish and maintain a value based and customer focused service level within the various organizations within SWISS in Moscow and between SWISS and Lufthansa Group or service providers.

[...]

21 In reply to the job offer, Ms. Cicale wrote Patrick Heymann and Carol Sullivan on July 24, 2014 raising several questions and concerns about her future at Swiss. She pointed out that the job offer was for a project of a limited duration and that she would have to look for another position within Swiss after its expiry. If none were immediately available she

questioned whether she would be expected to wait (with or without pay) and asked what the impact of this delay between positions would be upon her health insurance. She felt that she was being demoted in status from Country Manager to Project Manager with a diminution in salary. In essence, she felt that the offer was not one which she could characterize as being positive. She therefore asked whether other job opportunities similar to her present position were available given the "*uncertainty and lack of financial security [...] associated with this project.*"²⁵

22 In a further E-mail to Mr. Heymann and Mr. Sullivan on July 24, 2015, Ms. Cicale also raised questions as to the "*Manager*" level she would occupy if she accepted the job offer and the effect it would have on her flight benefits and bonus and requested that she "[...] *be granted an offer similar to that of the early retirement that has been offered to both management and staff in the U.S. [...]*".²⁶

23 In reply to Ms. Cicale's queries as to flight benefits and bonuses, Swiss referred her to the flight privileges set out on its internet pages for managers²⁷ and, with regard to its regulations on "*Performance-Based-Compensation-Abroad*", for cadre members.²⁸

24 On July 24, 2014, Patrick Heymann wrote Ms. Cicale as follows:

Dear Mina,

Pursuant to our conversation of last evening, this is to confirm that the offer of employment by SWISS presented to you on July 16, 2014 remains unchanged and is non-negotiable in its entirety.

Additionally, you can find all answers to any staff travel questions on the SWISS Intranet. As far as PBCA, please note that the regulations of the US are a percentage of your annual salary with no other differences.

On an exceptional basis, our offer to you is extended until latest *5 p.m. Friday, July 25th* with no further extensions provided.²⁹

25 On July 25, 2014, Ms. Cicale's attorney replied to Mr. Heymann's letter advising that his client was unable to accept the offer for the position of "*Project Manager Direct Sales and Customer Service Excellence USA & CA*" as submitted. Her counsel claimed that the basis on which her assignment in Canada would terminate on July 31st, 2014 was unfounded and that her agreed salary was comprised of a "*base salary of \$8,500, per month, a housing allowance of \$2,500 per month, and a monthly rent of \$2,500, per month*". Her counsel further alleged that the proposed new position was a disguised dismissal and that she was claiming the following from Swiss:

- i. an indemnity in lieu of notice equal to eighteen (18) months of her total compensation (including but not limited to health coverage);
- ii. Flight privileges in accordance with SWISS staff travel regulations for retirees for six (6) months;
- iii. confirmation that the disciplinary letter from Ms. Cicale's file will be destroyed; and
- iv. moral damages in the amount of \$ 25,000.00³⁰

26 On July 27, 2014, Arthur J. Molins, general counsel of Swiss (part of the Lufthansa Group) replied to Ms. Cicale's counsel denying any alleged wrongdoing and asserted that: "[...] *the facts surrounding additional payments in excess of \$50,000 obtained (by Ms. Cicale) [...] through a self-approving process were not authorized or known by Swiss despite (Ms. Cicale's) assertion to the contrary.*" and that Swiss had just cause for its action. Nevertheless, "*Swiss decided on a rather lenient approach [...] and out of respect for (her) years with the Company [...]* (and) *an offer of employment was made which was open for acceptance through the close of July 25, 2014.*" Since Ms. Cicale "[...] *had not responded and accepted such position [...]*" the letter went on to say:

[...] so it is our understanding based on her lack of response and your appearance on her behalf that she has resigned her employment with SWISS effective as of July 31, 2014.

Please advise you client not to report for work this week. SWISS shall pay her salary through July 31, 2014. ³¹

27 The separation of employment effective as of July 31, 2014 was confirmed by letter of July 30, 2014 of Carol Sullivan, Swiss Manager, Human Resources, U.S.A., forwarded to Ms. Cicale informing her officially as follows:

RE: Separation of Employment

Dear Ms. Cicale,

This letter to confirm your separation from Swiss International Air Lines Ltd. effective close of business July 31, 2014. As a separating employee, there are a number of issues relating to your benefits which you should be aware of, and which are outlined below. ³²

28 On September 23rd, 2014, Ms. Cicale, then living in her New York residence, filed a complaint of unjust dismissal with HRSDC which was received on September 30, 2014.

PRELIMINARY OBJECTIONS

29 By way of contestation, counsel for Swiss raised several preliminary objections relative to the jurisdiction of the Tribunal to consider the complaint on the merits, to wit:

(1) Ms. Cicale's employment in Canada was temporary and part-time while she conserved her ongoing tasks and responsibilities in the U.S. In effect she was in the employ of an American company and her temporary partial employment in Canada which was terminated was not subject to the provisions of unjust dismissal under the *Canada Labour Code*;

(2) Ms. Cicale refused to continue her employment with Swiss as offered and her decision constituted a resignation which cannot be contested under article 240 of the *Canada Labour Code*;

(3) The position in Canada of Ms. Cicale was that of a manager and article 167(3) of the *Canada Labour Code*, Division XIV, under which the complaint of unjust dismissal was filed, is not applicable to managers;

30 Subsidiarily and under reserve of these objections, Swiss maintained that its decision to terminate her position in Canada and offer an alternative position in the U.S. was justified for valid business reasons.

31 Judgment on the preliminary objections, although having serious consequences for continuation of the hearing, was deferred until the matter as a whole had been heard and argued. It was my view that a decision on these matters would necessarily involve proof entwined with the proof on the merits of the dismissal. Having examined and summarized the proof at length, I shall now proceed to a disposition of the questions raised by these objections.

1. Is the complaint subject to the Canada Labour Code?

32 While Ms. Cicale split her functions for Swiss on an alleged 50-50 basis between Canada and the U.S., her primary job from the point of view of importance was that performed in Canada as the Country Manager whereas her continuing position in the U.S. was that of General Manager Sales and Service Centre U.S.A. While sales and service also constituted part of her job functions in Canada, as the power of attorney for Canada attests, her responsibilities for Swiss in Canada were much wider and more important.

33 Additionally, although she retained her home in New York and was officially a U.S. citizen and had to be present in the U.S. for 183 days in order to qualify for her U.S. pension and health benefits. Swiss, through Helen Del Terzo, of Payroll Human Resources, recognized that:

The second issue is her Health insurance and income taxes. Mina will be living in Canada, but her husband and son will stay in the US. As the husband and son have no other means of insurance, Mina would like to stay on the US policy. My understanding of our health policy, Mina must physically be in the US for half the year in order to stay on the local US company insurance. They do not expect to be checking it she is actually here but on paper it must add up to that she could physically be here. In adding up weekends, vacation and other personal time and a couple of weeks during the year for work, she can achieve this requirement. In speaking to LH, a problem that could arise with this would be the US government could state since she is in the States for half the year, she could be taxed on her income.³³

34 It also appeared from the proof that while in New York she worked part-time from her home and part-time at her office at J.F.K. airport.

35 Effectively her main job function and residence was in Montreal, Canada. It is also noteworthy that it was in Montreal that the alleged abuse of double billing for housing and function allowances attributable to her apartment occurred. As well, the major part of her compensation was also paid to her for her work in Montreal, Canada.³⁴

36 It is my view that given that her work was primarily in Montreal and that the incidents giving rise to her termination occurred in Montreal and involve an undertaking and business of an airline which falls within the jurisdiction of the federal government of Canada, that the provisions of the *Canada Labour Code* are applicable herein. In this regard, I refer to the decision in the matter of *El Al Israel Airlines Ltd.*, 2009 CIRB437 (CanLII) at paragraph 31, where the Board held:

By virtue of section 4 of the *Code*, the Board has jurisdiction over "the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees" (emphasis added). Section 2 of the *Code* provides, among other things, that "a line of air transportation" is a federal work, undertaking, or business. The employer admits that it operates an airline, and does not suggest that these employees work for some other, provincially regulated, subsidiary or related employer. The duties performed by the Administrators in this case are performed in connection with the operation and functioning of the airline, and are unique to the airline itself. The Board is therefore of the opinion that the work of the two Administrators, which is performed exclusively for the benefit of the federally regulated airline, falls within federal jurisdiction.

One may also see Snyder, *The 2017 Annotated Canada Labour Code* at page 26 and his statement that "*Aeronautics is an operation subject to federal jurisdiction. There is an 'integral, vital or essential' relationship between the management of such operations and its Labour relations.*"

37 Accordingly, for these reasons, the preliminary objection that the *Canada Labour Code* is not applicable is dismissed.

2. Was complaint dismissed or did she resign?

38 It is the pretension of Swiss that (upon termination of her position as Country Manager Canada) Ms. Cicale's failure to accept in position in New York as "*Project Management Direct Sales and Customer Service Excellence US and Canada*" at a salary of \$8,000 per month, plus applicable bonus and flight privileges, constituted a resignation. Its counsel argued that the slight modification in function was not demeaning and was, in many respects, equivalent to her job in Canada at approximately the same salary.

39 Ms. Cicale's counsel, on the other hand, argued that the position offered in New York contained substantial changes in comparison to the terms of her employment in Canada. Specifically, the tenure of her position in Canada, while "*at will*" which could be terminated by Swiss at any time was, nevertheless, for an indefinite period whereas the

job offered in New York was for a fixed term of September 1, 2014 to "approximately" June 30, 2015, after which Ms. Cicale might "apply for any available position in the Swiss US organization".³⁵ Pointedly, there was no guarantee that an alternate unspecified position would be available and her counsel submitted that the refusal to accept the New York position, given the aforementioned substantial changes was justified and did not constitute a resignation. Rather, these degrading changes, it was argued, constituted a disguised or constructive dismissal.

40 In support of his argument, counsel for Ms. Cicale submitted the decision of *Beggs v Westport Foods Ltd*, 2011 BCCA76 (CanLII). At paragraphs 33 et seq., the Court, in reviewing an offer of return to work following the absence of an employee for an extended period of time due to an injury of which the employer had not been advised and thus had assumed that she had quit, it asked the employee to provide her address and phone number in order that the employer might "[...] advise her regarding her work schedule and her employers expectations regarding her job." Trial judge opined:

[33] [101] The offer to return to work made by the employer should have been clear and unequivocal... The language of the letter that purported to offer the job was guarded and ambivalent. It left the defendant with open options and the plaintiff with uncertainty. Again, the unequal bargaining positions.

[33] [102] She was under no obligation to accept a job which promised that the employer would "advise her regarding her work schedule and her employer's expectations regarding her job."

41 The Court of Appeal considered the trial judge's opinion and, at paragraphs 44 and 45, staged:

[44] [...] Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so "[w]her the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious" (*Mifsud v. MacMillan Bathurst Inc.* (1989), 1989 CanLII 260 (ON CA), 70 O.R. (2d) 701, at p. 710). [...] Thus, although an objective standard must be used to evaluate whether a reasonable person in the employee's position would have accepted the employer's offer (*Reibl v Hughes*, 1980 CanLII 23 (SCC), [1980] 2 S.C.R. 880), it is extremely important that the non-tangible elements of the situation - including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements - be included in the evaluation. [...]

[45] Applying this test to the circumstances of this case, I find no error in the trial judge's finding that the appellant's offer of re-employment was equivocal in its terms. The offer failed to clearly state the terms of her re-employment, including the nature of her duties, the person who would be her supervisor, or her remuneration. I agree with the trial judge that the offer was "guarded and ambivalent".

42 The leading case on this matter is *Farber v Royal Trust Co.*, 1997) 1 S.C.R. 846. The gist of the "Held" summary of this case is quoted hereinafter:

[...] Where an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been constructively dismissed. By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and the employee can treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages. To reach the conclusion that an employee has been constructively dismissed, the court must therefore determine whether the unilateral changes imposed by the employer substantially altered the essential terms of the employee's contract of employment. For this purpose, the judge must ask whether, at the time the offer was made, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed. [...] For the employment contract to be resiliated, it is not necessary for the employer to have intended to force the employee to

leave his or her employment, or to have been acting in bad faith when making substantial changes to the contract's essential terms. [...] In this case, the respondent's offer amounted to constructive dismissal, since it is clear that it substantially altered the essential terms of the employment contract. At the time the offer was made, any reasonable person in the same situation as the appellant would have come to that conclusion.

43 Given the difference in length of employment, the uncertain availability of subsequent employment and the diminishment of responsibilities as a "Project" rather than a "Country" manager in which she was empowered "to do all acts on behalf of Swiss [...] which may be involved with the normal exercise of business activity for the branch of Swiss [...] in the territory of Canada and in connection with the Bilateral Air Services Agreement concluded between Canada and Switzerland [...]" as well as other specific powers specified in the *Power of Attorney*, E-14 supra, I am of the view that a reasonable person would have felt that the essential terms of her contract as Country Manager for Canada were substantially changed by the offer of employment in New York, and was justifiably not accepted. Effectively, it constituted a constructive dismissal.

44 For these reasons, this preliminary objection of Swiss is dismissed.

3. Was Ms. Cicale a Manager or a Supervisor?

45 The jurisprudence on this question has set out various determinant criteria to be considered as I discussed at length in a decision rendered on June 17, 2008 in the matter of *Air Canada (Technical Services) and Laderoute*, Carswell Nat 6862 and from which I quote hereinafter at length.

46 On the question of who is a "manager", I noted:

[...] that the *Canada Labour Code* sets out no definition of the term. The jurisprudence, however, had held that the term "manager" is to be used in a restrictive sense and should be given a relatively narrow interpretation (*Avalon Aviation Ltd. v. Desgagne*, [1981] 42 N.R. 337, Fed. C.A.); *Mayhew v. Eastern Airlines Inc.* M9811 2 LAC, (3d.) 231 Can).

47 The following holdings referred to in the *Laderoute* decision are also applicable herein:

[...] Audet, Bonhomme and Gascon in *Le congédiement en droit Québécois (3^e ed., pages 42-32)* refer to the case of *Lee-Shanok c Banca Nazionale Del Lavoro of Canada Ltd.* [1987] 3 C.F. 578 (C.A.F.), Federal Court of Appeal, which sets out the following elements as guidelines to deciding whether an employee is a manager:

- a) la perception que se font les parties du travail effectué par l'employé n'est pas pertinente: seul le travail effectivement accompli importe;
- b) le directeur doit avoir un rôle administratif qui lui permette de véritablement diriger;
- c) le fait d'avoir une certaine autonomie d'action n'est pas en soi déterminant.

The Federal Court of Appeal, in *Imperial Batik of Commerce v. Bateman*, [1991] 3 C.F. 588, added a nuance as to the degree of authority required to be a manager. At pages 603-604, the Court opined:

[...] 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". [...]

In *Leontsini v. Business Express Inc.*, [1997] 125 F.T.R. 131, the Federal Court, Noel J., held at pages 137-138, the:

[...] 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 s. 167(3). Someone

who is part of management and whose primary responsibility is in fact to manage is a manager within the meaning of s. 167(3), whether that person is at the upper or lower end of the management chain.

In *M.L.M. Floor Products et Bertrand*, D.T.E. 91T-83, a decision of arbitrator, Charles Tunnel, the summary head-note of the decision states:

La jurisprudence utilise les critères suivants dans la détermination du statut de directeur: le degré d'autonomie dans l'exercice des fonctions permettant la prise de décisions qui engagent l'entreprise envers les employés et les tiers, la participation active à la définition des politiques de l'entreprise, le degré de discrétion dans l'accomplissement des fonctions et l'exercice de l'autorité finale. En l'espèce, le plaignant dirigeait ses employés quant à la façon d'effectuer le travail. Il approuvait leurs notes de frais, recommandait à son vice-président la création de postes, les salaires, l'embauchage, le déplacement ou le congédiement. Il procédait aux entrevues et retenait le meilleur candidat, dont le choix était automatiquement approuvé par le vice-président. Son autonomie était limitée au niveau de la conclusion des ententes avec les clients, mais il était néanmoins responsable des contrats de vente pour environ 22% du volume. Il était responsable des problèmes et des plaintes des clients, qu'il devait soumettre à ses supérieurs. Il avait à proposer des stratégies que la compagnie devait appliquer au plan local. Il formulait les projets de budgets annuels de son service, mais ne siégeait pas au conseil d'administration où ils étaient adoptés. Il gérait lui-même le budget de son service avec beaucoup de latitude. En conséquence, la preuve établit que le plaignant répondait aux critères généraux établis par la doctrine et la jurisprudence comme correspondant à la fonction de directeur. En ce sens, il possédait suffisamment d'autonomie, de discrétion et d'autorité dans ses fonctions de gestionnaire, et ce, même s'il devait les exercer en relation très étroite avec son vice-président. Pour ces motifs, l'arbitre décline compétence pour entendre la plainte.

At page 9 of his decision, arbitrator Turmel was of the view that:

2- Même si le plaignant devait obtenir l'approbation écrite de son vice-président pour l'embauchage, le congédiement et les augmentations salariales, il faut reconnaître qu'il était responsable de la performance et de l'organisation de son personnel. En ce sens, il possédait l'autorité finale. Ainsi, s'il n'était pas satisfait de la performance d'un employé, il pouvait en obtenir le congédiement, sur la foi de cette responsabilité.

Attenuating this view with regard to the lack of importance in obtaining the approval of a person higher up in the management hierarchy, complainant's counsel cited the decision of arbitrator, Marc Gravel, in *Terminal Maritime Contrecoeur Inc. (Filiiale de Logistic Corporation) -et- Francois Lemay*, rendered September 4, 1996, AZ-96143016. At page 4, Me Gravel writes with regard to the notion of a "manager":

[...] la jurisprudence a toujours interprété qu'il s'agissait d'un administrateur qui a un pouvoir indépendant d'action, qui a de l'autonomie et ce que la langue anglaise appelle de la "*discrétion*", c'est-à-dire cette habilité de choisir quoi faire, d'agir au mieux, sans surveillance.

On peut prétendre à la question de savoir si quelqu'un est un "*manager*" en vertu de l'article 167(3) en s'interrogeant pour savoir si dans les choses qui peuvent avoir une importance pour son employeur, l'employé a le pouvoir de prendre des décisions finales ou si dans des affaires de conséquences, ("*matters of consequence*") il ne peut que faire des recommandations à des personnes qui possèdent une plus grande autorité que la sienne et qui prendront la décision finale. Est-ce que l'employé prend des décisions ou est-ce que, plutôt, il fournit des données nécessaires à d'autres personnes dans le processus décisionnel.[...]

At page 5 of his decision, arbitrator Gravel cites passages from pages 6-16 and 6-17 of David Harris' book "Wrongful Dismissal" c. 1988, as to the criteria which an adjudicator should consider when determining whether or not a person is a manager:

1. Whether, in matters of consequence to his employer, the employee has the authority to make final recommendations or whether he can only make recommendations to persons who possess greater authority who in turn make the final decision (Desgagne).

2. A supervisor with some powers to provide directions to employees, yet who in important matters is clearly subject to the direction of a superior, is not a "manager" (Desgagne).

3. "Manager" implies the power to act independently and autonomously using one's discretion [...]. The word "manager" is not used in the broad sense of any person participating in management, but in a narrower sense. The definition of the term "manager" has to be considered in light of the individual's duties [...]. It has to be determined whether the individual has a reporting and recommending function as opposed to a managing or employer's function [...]. Although an individual may have disciplinary powers, the lack of the power to hire or fire employees is indicative or his not having a manager's function [...].

4. The adjudicator should attempt to discover whether the individual enjoys a certain autonomy in the exercise of his functions or is authorized to take decisions on his own which commit the enterprise [...]. An analysis should be made to see whether the individual attends the company's management meetings at which policies and administrative practices are defined [...]. An analysis should be made to see whether the individual has authority to make commitments on behalf of the enterprise, vis-à-vis employees and third parties [...]. The adjudicator should determine whether the employee has anything at all to do with discipline within the undertaking. If the individual's freedom to hire staff is limited, this is indicative of the individual's not being a manager [...].

[...]

6. Yet another factor is whether the individual takes part in company's management decisions or exercises his function under the authority of a director to whom he reports, having already obtained previous authorization [...]. Even a statement by the individual that he is a manager does not in fact define him to be a manager [...]. An analysis should be made to determine if the individual has the power to promote, demote, evaluate employee performance, negotiate administrative collective agreements, establish company policy, participate in budgetary decisions, represent management in a grievance procedure concerning unionized employees [...]. Supervisors may have specific areas in which they exercise management functions in accordance with the company's policies and procedures, yet there is a significant distinction between the exercise of such functions and the responsibility and characteristics of a manager which relates to the actual and ultimate control of the company's operation.

48 In light of the above considerations, I now turn to an examination of Ms. Cicale's functions in her position as Country Manager Canada.

49 As quoted the *Power of attorney*, supra, E-14, granted Ms. Cicale the "[...] full power to do all acts on behalf of SWISS [...] which may be involved with the normal exercise of business activity for the branch of SWISS [...] in the territory of Canada and in connection with the *Bilateral Air Services Agreement concluded between Canada and Switzerland [...] includes but is not limited to the following:*"

- a) To make any legitimate payment, to collect accounts or income from other sources of whatever nature;
- b) To open and close bank accounts and to dispose of the funds in the n;
- c) To conclude, alter and terminate any kind of contracts related to the performance of the activities of the branch;
- d) To acquire ownership of movable property and rights of any kind;

- e) To engage or dismiss personnel and sign the respective employment contracts and to deal with all business in connection with staff problems;
- f) To issue and sign documents and public and private instruments which may be necessary for the execution of any act mentioned herein;
- g) To represent the branch before tax authorities, social insurance authorities, other competent authorities as well as before any other state or municipal authorities or private persons in the territory of Canada;
- h) To intervene and represent SWISS INTERNATIONAL AIR LINES LTD in any suit brought before any court in Canada to present petitions of any kind, to institute or desist from legal proceedings, to submit any case to arbitration, to make legal statements, to perform any act which may be necessary in the course of legal proceedings;
- i) To accept service of process and any notices on behalf of the company;

50 In addition, the proof revealed that Ms. Cicale had the authority to select new hires for the Montreal office provided that she made a valid "*business case*" to Swiss head office in Zurich as to their necessity. Personnel in Zurich did not evaluate the qualifications of the proposed new hires. Rather this was part of Ms. Cicale's functions. She regularly evaluated the goal achievement and performance of employees under her direction on an annual basis.³⁶, and she also had power to determine and recommend salary increases for the personnel under her control although Zurich had the final say on the percentage of the recommended increase, within certain parameters. But, it was Ms. Cicale who was in charge of the budget allocation for the Montreal office. She was also the principal signing officer for Swiss at the Montreal Airport (E-15).

51 In accordance with the "*Cadre Flight, Captain Ticket* of Swiss, E-53, of which she benefited, Ms. Cicale was a "*Director*", having 10 years of service and she was also a "*Senior Manger*" given her length of service. As such, in virtue of the "*Financial Authority Regulation of Swiss*" (E-57) for "*Members of the Board of Directors*" and "*Management Board*" she had a pre-approved contract and transaction spending level of \$30,000 to \$49,999. It is also noteworthy that in her complaint as filed with HRSDC she described her "*Job Title*" as "*Director*".

52 In view of the foregoing scope of the many responsibilities, functions, and powers of decision vested in Ms. Cicale as Country Manager Canada, as described in the Job Description (P-1) and the Power of Attorney (E-14), I am of the view that she was indeed a manager. Accordingly, given that under the terms of article 167(3) of the *Canada Labour Code* which stipulates that the application of Division XIV "*does not apply to or in respect of employees who are managers*", and this being the Division under which her complaint for unjust dismissal was filed, I have no further jurisdiction herein. The preliminary objection of her being a manager is, therefore, maintained and consequently Ms. Cicale's complaint of unjust dismissal is rejected.

Footnotes

- 1 E-1.
- 2 E-2.
- 3 E-3.
- 4 E-4.
- 5 E-5.
- 6 E-6.

- 7 E-7 and E-8.
- 8 8 E-11.
- 9 E-12.
- 10 Employment indefinite and cancellable at any time.
- 11 E-10.
- 12 E-13.
- 13 P-1.
- 14 E-14.
- 15 E-16.
- 16 E-25.
- 17 E-26 re payout split & E-27 re APD Statement of earnings and deductions.
- 18 P-9 en liasse.
- 19 E-9, August 7, 2012 and E-30, February 6, 2013.
- 20 E-9, August 7, 2012
- 21 E-29, April 5, 2013.
- 22 E-18
- 23 E-20.
- 24 E-21.
- 25 P-5 E-mail.
- 26 P-6.
- 27 E-53.
- 28 E-54.
- 29 P-17.
- 30 E-22A.
- 31 P-18a.
- 32 E-23.
- 33 E-25, August 8, 2012.
- 34 P-7 and P-14.

35 E-25.

36 Exhibits E-46 to E-46.

End of Document

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