

[Thuna v. Avmax Aviation Services Inc., \[2017\] C.L.A.D. No. 242](#)

Canada Labour Arbitration Decisions

Canada

Labour Arbitration

Calgary, Alberta

Panel: Michelle M. Somers (Adjudicator)

Heard: March 21 and 22, 2016.

Award: December 5, 2017.

File No. YM2707-10110

[2017] C.L.A.D. No. 242

IN THE MATTER OF an Adjudication under Section XIV Part III-Canada Labour Code (RSC 1985, c L-2) Complaint of Unjust Dismissal Between Garry Thuna, and Avmax Aviation Services Inc.

(41 paras.)

Appearances

Counsel for the Employer: Barbara Johnston, Q.C., Dentons Canada LLP.

For the Complainant: himself.

AWARD

Introduction

1 Garry Thuna ("Thuna") was terminated by Avmax Aviation Services Inc. ("Avmax") on September 24, 2014, after approximately 11 years of employment. He filed a complaint pursuant to the *Canada Labour Code* ("*Code*") at the Labour Program Office, a division of Employment and Social Development Canada, for unjust dismissal. Avmax brought a preliminary objection on the ground that the Complainant was a manager and for that reason I had no jurisdiction under the *Code* to hear the complaint. Section 167(3) states:

(3) Division XIV does not apply to or in respect of employees who are managers.

2 A hearing was scheduled for November 5 and 6, 2015. At the request of Counsel for Avmax, those dates were adjourned to March 21 and 22, 2016. The hearing on the preliminary objection went ahead on those days.

Decision

I find the Complainant was a manager.

Background

3 Avmax Aviation Services Inc. ("AASI") is a division of the Avmax group of companies, formerly known as Western Avionics, which provide aircraft maintenance, repair and leasing services in North America and parts of Africa. The Avmax group has 1,200 employees. Thuna was hired in July 2003 as Product Development Manager. When the Information Systems ("IS") manager resigned, he became more involved in assisting that department. At some point, his title became Manager, and sometimes Director, of Information Systems, his title at the time he was terminated.

Evidence

4 Thuna reported to Don Parkin ("Parkin"), the Executive Vice President and most senior executive within the Avmax group of companies. Parkin reported to the CEO of the company, John Binder ("Binder").

5 As Product Development Manager or, variously, New Product Development Manager, Thuna was responsible for setting up and building information systems infrastructure. His role was unique in the Avmax group of companies in that his work affected all its divisions. Thuna testified that his role was a technical one, and that he was able to spend money on that work.

6 In 2011, he managed the setting up of a software system called Quantum. Quantum's purpose was to track Avmax use of equipment and employee efforts with respect to its business projects. As head of the project, Thuna instructed a project management consulting company, Tricon Solutions Inc. Avmax's position was that Thuna had made the decision to hire Tricon. As evidence, they provided a letter dated September 9, 2011, from Tricon to Thuna expressing pleasure at the "opportunity to develop the partnership...". Thuna's view was that the decision to hire Tricon had been made not by him but by senior managers. On the same day as the letter, Tricon had met with Parkin, Al Young ("Young"), Vice President of Operations, and Thuna. Two days later, they submitted a proposal to Thuna by email. This process appears to have been similar to the one implemented in August 2011, when Thuna proposed that the Quantum project engage another consultant, Kevin Otto. Otto met with the Chief Financial Officer, Al Young, and another member of Avmax senior management Otto was subsequently hired.

7 In an email thread between Young and Thuna in April of 2014, Young proposes that an employee be transferred into the Quantum project as part of the Information Systems department oversight of the project. Thuna disagreed that this should occur at that time and decided that his department would take over to support the system only once it was implemented. Young complied.

8 According to Thuna, the project was a failure. His involvement ended sometime in the first quarter of 2012. In May 2014, he was consulted by an employee for his feedback on the testing process. Thuna testified his advice was not taken up.

9 Also in 2011, Thuna led the development of an Information Systems Disaster Recovery Plan ("DRPN"). The scope of his authority in the event of disaster was set out in the document as follows:

- * "Make the determination that a disaster has occurred and trigger the DRP and related processes.
- * Be the single point of contact for and oversee all of the DR Teams
- * Organize and chair regular meetings of the DR Team leads throughout the disaster
- * Present to the Management Team on the state of the disaster and the decisions that need to be made.
- * Organize, supervise and manage all DRP test and author all DRP updates." [p.4]

Parkin testified that Thuna's title was Director and that no one else could make changes to the Disaster Recovery Plan. Page 2 of the Plan states:

"It is the responsibility of the Director of Information Systems to ensure that all existing copies of the DRP are up to date."

10 However, page 5 of the document provides:

"The Disaster Management Team that [sic] will oversee the entire disaster recovery process. They will be the first team that will need to take action in the event of a disaster. This team will evaluate the disaster and will determine what steps need to be taken to get the organization back to business as usual."

11 The Disaster Management Team comprised three members, one of whom was Don Parkin. It did not include Thuna. It appears that Thuna's role was to oversee staff, organize meetings and technical information, and recommend decisions that needed to be made to the Disaster Management Team. He would not be making the final decisions on what steps to take to control the damage. Thuna testified that the Plan lasted one week and was never implemented.

12 Avmax tendered a number of Thuna's expense claims for 2011 expenditures he had authorized, together their accompanying purchase orders or invoices, to show that he had the power to bind the company to the payment of specific sums of money for services rendered. The invoices are for various kinds of computer hardware, electronic materials, and office supplies for delivery to Thuna. Some are for small amounts, others are more substantial. In at least some cases, Thuna would pay for these with his credit card and then seek out reimbursement from his employer. In other cases, it appears the expenses are paid for by a company credit card. The expense claims are signed by Thuna and approved with someone else's signature. At some point, at the instigation of auditors, the expense claim required a third signature, that of the Vice President. In 2011, these monthly expense claims ranged from about \$10,000 to \$26,000. Other invoices contain Thuna's signature approving purchases made by Norman Janes ("Janes"). Although Janes reported to Thuna, his title was Manager Information Systems. Many of these invoices were for substantial amounts. In addition, other employees sought his approval to pay invoices at around that time.

13 The inference I am asked to draw is that Thuna had the authority to commit his employer to substantial amounts of money and the assurance that, where he paid with his own credit card, he would be re-paid.

14 To rebut this inference, Thuna produced a March 2009 email of a purchase authorization for computer hardware parts totalling about \$37,000 which had been signed by Binder. He also pointed to some email correspondence between 2012 and 2014 which indicated he made recommendations and sought approval from Parkin for a number of expenses related to another project. One was for an expenditure of \$27,000. Overall, some of Thuna's recommendations were adopted, and some were not. It also appears from a number of emails that in 2014 that Thuna had to seek approvals from Parkin on various other steps he was to take, including making changes to the Avmax website.

15 From 2009 to 2014, between six and seven employees reported to Thuna. Between 2007 and 2013 he had hired at least one staff member and terminated two. He had conducted two performance reviews of Janes and one of another employee. Documents with his signature authorized staff vacation and other absences, and he was the only management signatory on his staff's expense claims. He approved the details of a position profile for a Junior IS Support Technician who was to report to the Manager of Information Systems. He signed an authorization permitting a staff member to access any information relating to systems testing.

16 Thuna led evidence to show that when it came to company policy, Avmax was inconsistent as to its application. He pointed to the fact that, notwithstanding the provisions of the 2013 Employee Policy Manual, his performance had not been reviewed by Parkin for any year subsequent to 2007. He drew my attention to the minutes of a May 25, 2011, Managers Meeting in which employees were directed to take their vacation in the year they had earned them. Despite this policy, he had been allowed to defer his vacation to future years. I was asked to draw the conclusion that Avmax was similarly inconsistent when it came to the description implied by his title as against his actual role.

17 For example, he demonstrated that Janes had signed an employment offer letter to a staff member in Thuna's department. Janes' title on the signature line is Manager Information Systems. It appears Janes and at least one other staff member in Thuna's department also had the ability to order computer parts. I note that Thuna is always copied on those emails. It is not clear whether they sought his approval for these expenses first. Some emails in 2013 and 2014 appear to show that Janes was in charge of the day-to-day operations and assigning work to Thuna on a regular basis, while Thuna was chiefly working on the company server.

18 On one occasion in 2011, while Thuna was managing the Quantum project, one of its project managers terminated the contract of one of Thuna's staff. In September 2011, Thuna had approved the payment of courses amounting to about \$1,600. for one of the engineers on his staff. In October, the approval was rejected and, the expense having already been incurred, Thuna was made to refund the money to Avmax.

19 With respect to Thuna's ability to authorize raises for his staff, Vince Scott, the Vice President and General Manager of Western Avionics, sent an email in 2006 to managers in which he asks that employee appraisals be sent to him for pay increase evaluations. Nevertheless, in 2011, Thuna authorized an increase for Janes based on his role as a Lead Hand. Another email dated January 2013 from Binder to managers states that no raises or bonuses would be processed without his direct approval. Thuna approved raises for four of his staff on March 24, 2014. His signature appears on the Approval Manager line, as does Parkin's. Binder did not sign these. On one occasion, Thuna proposed to Parkin that an engineer on his staff be given a 40% raise. His proposal was turned down.

20 Thuna's salary was double that of the most highly-paid employee in his department. In December 2007, his salary rose from \$88,000 to \$126,000. He knew what his staff earned, but they did not his earnings. Thuna maintained that this increase was awarded for his technical ability and not because he managed people.

Analysis

21 In seeking to prove that an employee is not a manager and therefore not eligible to avail himself of the unjust dismissal provisions of the *Canada Labour Code*, the employer must provide evidence that, on the balance of probabilities, the work the complainant performed was that of a manager. It is a test which requires the decision-maker to look at the duties of the employee as a whole. The notion of who is a manager is to be defined narrowly. The rationale behind this widely accepted approach among adjudicators and courts is agreement that the purpose of the *Code* is to level the unequal playing field between the employer and the employee, and that it should receive an interpretation that "extends its protection to as many employees as possible": *Machtiger v HOJ Industries Ltd. (1992)*, 91 D.L.R. (4th) 491 (SCC).

22 The duties of an employee are not what the employer describes, but what they actually perform: *Gray and Qwest Helicopters Inc.*, [2013] C.L.A.D. No. 360 at paragraph 17.

In *Qwest*, Adjudicator Norrie said at paragraph 29:

"In assessing whether or not Mr. Gray was a manager for the purposes of s. 167(3) there is no single factor upon which you can make that determination. The decision must be made by considering the circumstances as a whole. The absence or existence of any one factor will not decide the matter."

The Adjudicator added that although the complainant in that case lacked absolute authority in some areas, that was not determinative in itself. Most managers must seek approval from a variety of sources from time to time.

23 Counsel directed my attention to a case cited in *Qwest* at paragraph 26. In *Leontsini v Business Express Inc. (1997)*, 125 F.T.R. 131 (Fed. T.D.), an airline station operations manager for a regional airline was considered to be a manager. She supervised 7 employees at one airport and had considerable day to day administrative authority

over the operation of that one station. She was determined to be a manager despite the fact her decision-making authority was not absolute.

24 Counsel also referred me to *Ferris v Big Freight Systems Inc.*, [2008] C.L.A.D. No. 58 (Deeley). The complainant in this transportation enterprise of 245 employees held the position of Manager of Driver Recruitment and Development, responsible for sourcing, interviewing, selecting and making job offers to drivers and for their subsequent orientation. The Adjudicator found that Ferris was a manager.

25 The facts in *Ferris* are as follows. Ferris' department had four employees. He could make recommendations for salary increases for members of his department, but they had to be approved by senior management Ferris conducted performance evaluations of two of his staff.

26 In *Ferris*, while others in his department could sign offers of employment to drivers, only Ferris could sign employment contracts for the members of the staff of his department. The final decision on the hiring of staff rested with him. Driver recruitment was a significant part of the company's operations as Ferris hired up to 150 drivers per year.

27 Ferris signed driver recruitment agreements involving the governments in the U.K. and Europe. He had final say on whether applicants would be recruited to come to Canada to work for Big Freight Systems. He had also signed termination letters on behalf of his company.

Ferris was paid substantially more than the people who worked for him.

28 Adjudicator Deeley noted that Ferris' role in driver recruitment was a critical component of the transportation industry and he could have a considerable influence on the success or failure of the business.

29 At paragraph 66, Adjudicator Deeley quotes from the case of *Desgagne v Avalon Aviation Ltd.* ([1981](#)) [42 N.R.](#) [337](#) (F.C.A.):

"What is important in determining if an employee is a "manager" is whether, in matters of consequence he can only make recommendations to persons who possess greater authority, and who will make the final decision. Does the employee make decisions or does he provide input into the decision-making process? In matters of consequence does he recommend or does he decide?"

30 In another helpful case cited in *Ferris* at paragraph 67, the Adjudicator in *Kehler v C.W.S. Logistics Ltd.* (2003) File YM 2707-5788 said:

31 "The more an employee follows pre-determined guidelines, acts in consultation with others, makes recommendations only, makes minor decisions and acts with restricted direction, the less likely that employee is a manager... Typically, a manager will have decision-making power in matters of importance, eg: company policy and planning, budget decisions, contract negotiations, participation in top level management meetings. In staffing, managers usually have final decisions to hire, fire promote and discipline employees. They normally supervise and direct staff on a daily basis."

32 The Adjudicator in *Ferris* listed a summary of the factors that have been considered in determining whether an employee is a manager. I summarize them here:

- a) If an employee's activities are mainly governed by established work procedures that require only a relatively small amount of independent decision-making, the employee is not a manager.
- b) An employee who is required to obtain the approval of a higher authority before making any decision with significant consequences to the employer is usually not a manager. unless he or she

has substantial control over staff, resources, budget and implementation of the main goals of an organization, even though they may be ultimately accountable to a higher authority.

- c) The analysis must include to what extent the employee is empowered to promote, demote, evaluate, establish company policy, and participate in budgetary decisions.
- d) Participation in policy formulation does not necessarily make a person a manager, although it may if the policy concerns important matters.
- e) The power to hire, fire, and discipline subordinate employees is an important aspect of management. Persons who only supervise staff are not managers.
- f) A manager has the power to commit the employer to the payment of specific sums of money for services rendered, as does participation in the negotiation of contracts.
- g) The size of the organization helps to determine an employee's level of authority. Similar degrees of authority in a branch office of a large highly organized bureaucratic national or international organization would not necessarily lead to the same conclusion as someone with similar authority in a small independent organization.
- h) The exercise of authority that is only sporadic or occasional should be taken into consideration but does not necessarily mean that a person is not a manager.

33 In *Re McCullagh and Executive Air Craft Lt.* 2014 CarswellNat 90 (Young), the complainant was manager of the line crew of a small airline for two years. He managed seven or eight crew members. He hired some of them, but not all. McCullagh said that although he wrote discipline letters to two employees and interviewed one of them, it was not his decision to discipline them. He had planned to fire an employee who had rolled over a fuel truck but did not do so as the employee walked away from his job first. He fired a probationary employee. He conducted three performance reviews. There was a policy about who was eligible for raises, and McCullagh decided whether the employee was eligible. He could authorize overtime although he rarely exercised it, and could give days off and permit employees to switch shifts. McCullagh would sign forms indicating whether his employees were entitled to their salary and overtime, and recorded vacation. He would assign work and make sure the work was done. He signed for courses for one of his staff. He said that when he signed a purchase order it was either for routine orders that his crew members could initiate or they had already been authorized by his manager. He had to obtain approval for ordering jackets, and a quote to submit to his manager for buying new tires instead of repairing them as suggested by the tire dealer. Adjudicator Young was satisfied that McCullagh had the power to take independent action and to exercise discretion over matters significant to the company.

Reasons for Decision

34 In the present case, Thuna was empowered to hire, fire, discipline, assign work and authorize vacation and expenses of members of his staff and did so. Although one of his employees also performed some of these duties, notably the assignment of a limited type of tasks, that fact by itself does not reduce his managerial role. He managed the work of third party consultants and although his authority was not unfettered, his role in hiring them went beyond mere recommendation.

35 Thuna enjoyed a much higher salary than the persons he managed. I am not persuaded that this was due solely to his technical skills.

36 On matters of consequence to his employer, Thuna had considerable latitude in making the decisions that fell within his area of responsibility. Information systems are crucial to the operations of almost any modern business enterprise and they were clearly important to Avmax operations. It was pointed out that the Information Systems Manager's role was unique in Avmax in that its influence spanned all its divisions. In addition, Avmax was a much larger company than the one in *Ferris* and consequently, the exercise of his authority would have had greater impact on its operations.

37 Thuna had considerable authority over the approval of expenditures and therefore the power to commit Avmax to the payment of significant amounts of money and did so, notwithstanding his authority over expenditures was not absolute.

38 Although Thuna's decision-making authority over matters of consequence was not absolute and appeared to have shifted up and down over time, I find he had substantial control over decisions on technical, financial and consultant matters that were of consequence to his company's operations. On balance, I find the scope of his independent decision-making within his sphere of responsibility was sufficient to qualify him as a manager.

39 I find the Complainant was a manager and that an Adjudicator appointed under the *Canada Labour Code* does not have the jurisdiction to hear the merits of this complaint His complaint is therefore dismissed.

Costs

40 It has now been established that an Adjudicator in unjust dismissal cases pursuant to the *Code* has the jurisdiction to award costs. The leading case is *Banca Nazionale del Lavoro of Canada Ltd. V Lee-Shanok* [1988] *F.C.J. 594*, 1988 CarswellNat 254 (FCA). Stone J.A. determined the scope of the Adjudicator's jurisdiction under s. 61.5(9)(c) of the *Code* [now s. 242(4)(c)]:

"I have no difficulty in reading it, with its broad reference to granting relief that is "equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal", as including the power to award costs. The difficulty I have is in viewing an award of compensation, gained at some considerable expense to a complainant in terms of legal costs, as having the effect of making him whole. Legal costs incurred would effectively reduce compensation for lost remuneration, white their allowance would appear to remedy or, at least, to counteract a consequence of the dismissal." [para. 25]

41 The power is bestowed on the Adjudicator as one which remedies the consequence of dismissal when it has been found to be unjust As this was not the case here, I decline to award costs in this matter.

Signed at Calgary, Alberta, this 5th day of December, 2017.

Michelle M. Somers
Adjudicator