

## **When is a manager not a manager?**

It's a deceptively difficult question and getting it wrong is an expensive mistake

Two federal court decisions have recently grappled with the question of determining who is a “manager” under the Canada Labour Code (the “CLC”). Why is this important? Because big dollars are at stake depending on whether or not the employer got it right.

*McCracken v. Canadian National Railway Company*<sup>1</sup> is a class-action lawsuit in which the plaintiffs are suing CN for \$300 million. They claim that CN breached the CLC by intentionally, and erroneously, classifying some 1,550 “first-line supervisors” as “managers” to deprive them of holiday wages and overtime pay to which they would be entitled as employees.

Correct classification is not just a question for class actions. Individual employees have also recently asked the federal court to weigh in on whether they are employees or managers. In *Canadian Imperial Bank of Commerce v. Torre*<sup>2</sup>, a Branch Manager asked the court to determine if she was truly a “manager” under the CLC, or was more properly an “employee”.

Part of the confusion stems from the fact that the term “manager” is not defined in the CLC. However, there are a number of cases that have defined the factors which must be examined in determining when a “manager” really is a “manager”.

### **The “test”**

The fundamental test to determine if an employee is a manager under the CLC is whether or not the person has significant autonomy, discretion and authority in the conduct of the business of the employer.

### **When the label just won't stick**

In determining whether or not the fundamental test is met, the court will look beyond the employee's individual title and examine the nature of the work being performed. Case law indicates that an employee is most likely a manager if:

- She performs administrative rather than operational duties;
- She has the authority to work and make administrative decisions independently and without needing clearance from superiors;

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<sup>1</sup> 2010 ONSC 4520 (CanLII).

<sup>2</sup> 2010 FC 105 (CanLII).

- Her main responsibility is to direct others, which includes the power to hire, fire, discipline, review and supervise employees unilaterally;
- She does not need to have staffing or policy changes approved before they can be enforced;
- She represents the employer in collective bargaining or in discipline or grievance procedures;
- She sets a budget, determines the organization's structure, policies, controls day-to-day operations and determines appropriate staffing levels; and
- She deals with emergencies directly.

### **But...**

The degree of autonomy and decision-making authority does not need to be absolute or unfettered, so long as it is significant. Practically speaking, this means that managers can be found at the upper and lower ends of a management chain. A manager is still a manager despite a requirement to report to, and be supervised by, more senior managers within the organization. So long as the person has significant decision-making authority and responsibility, she can be a manager without having to be at the most senior level of the organization.

### **The Employee is more likely a “supervisor” if...**

The courts have indicated that there should be a distinction between a manager and a supervisor, but that distinction may not be easy to make in practice. In *Torre*, the Court looked at the factors and activities above and determined that the Branch Manager was a supervisor, not a manager. Why?

- She had no real autonomy- her job was to implement bank policies and directives;
- She could not hire or fire employees on her own, but had to clear the decision with human resources; and
- She had no decision-making authority over the branch's budget.

Traditionally, a person is not a manager if she simply conveys information between employees and senior officials in the organization.

### **Other considerations**

Who is, and isn't, a manager, will be determined by the facts and the context of the overall organization. In *Torre*, the court looked at the special nature of the employer's banking activities, the size of the organization and the scope of the Branch Manager's authority where she performed her duties as important contextual factors in determining her proper classification.

### **Important lessons for human resource professionals and employers:**

- Simply labelling an employee as a manager will not insulate your decision from the court's scrutiny;
- Getting the classification wrong leaves you liable for paying overtime and holiday pay;
- Be sure that your managers do, in fact, exercise a degree of autonomy; and
- Don't forget that roles and responsibilities change within an organization. Make sure your titles and classifications do as well. Do a comprehensive audit of your staff and their titles every few years to make sure your classification are current.

Quite simply, a manager in title may not be a manager at law. Every situation will be scrutinized on a case-by-case basis. The courts won't be satisfied just by the employee's title alone, but will examine the roles and responsibilities within the organization. Ensuring that your managers are actually managers under the CLC is difficult and the classification may change over time, but getting it wrong can be a costly mistake.