

**IN THE MATTER OF AN ADJUDICATION UNDER DIVISION XIV - PART III OF
THE CANADA LABOUR CODE, R.S.C.1985, c. L-2, as amended;**

**AND IN THE MATTER OF THE COMPLAINT OF JACK RODA RESPECTING
ALLEGED UNJUST DISMISSAL.**

BETWEEN:

JACK RODA

(The “Complainant”)

and

BANK OF MONTREAL

(The “Respondent”)

REFEREE:

John Stout

APPEARANCES FOR THE COMPLAINANT:

David Harris - Counsel

APPEARANCES FOR THE RESPONDENT:

Malcolm MacKillop - Counsel

HEARING HELD IN TORONTO, ONTARIO, ON AUGUST 10 AND 11, 2011.

AWARD

A. INTRODUCTION

[1] The Complainant, Jack Roda alleges that the Respondent, Bank of Montreal (“BMO”) unjustly dismissed him from his position as Branch Manager on June 15, 2010.

[2] Mr. Roda filed a timely complaint of unjust dismissal pursuant to Division XIV-Unjust Dismissal, section 240 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (hereinafter the “Code”). The complaint was not resolved with the assistance of an inspector assigned by Human Resources and Skills Development Canada (HRSDC) and Mr. Roda requested the appointment of an adjudicator.

[3] I was appointed by the Minister of Labour on February 11, 2011 to adjudicate the complaint in accordance with subsection 242(1) of the *Code*.

B. OVERVIEW

[4] BMO raises a preliminary objection to my jurisdiction to hear and adjudicate the complaint. In particular, BMO submits that Mr. Roda was not an “employee” but rather he was a “manager” for the purposes of Division XIV of the *Code*. BMO relies on subsection 167(3) of the *Code*, which provides, “Division XIV does not apply to or in respect of employees who are managers”.

[5] Mr. Roda denies that he was a “manager”, as defined in case law interpreting subsection 167(3) of the *Code*.

[6] The parties agreed to bifurcate the proceedings and have me hear evidence and submissions and render a written decision on the preliminary issue

of whether Mr. Roda was employed as a “manager” for the purposes of Division XIV of the *Code*.

C. THE EVIDENCE

[7] Ms. Carol D’Avolio testified on behalf of BMO and provided evidence regarding the corporate structure and duties of Mr. Roda. Mr. Roda also testified about his duties and responsibilities while employed by BMO as a Branch Manager.

Background

[8] Mr. Roda was employed by BMO from June 14, 1988 until June 15, 2010. Mr. Roda held a number of positions with BMO during his years of employment. On June 21, 2004 he was promoted to the position of Branch Manager at the Finchdale branch in Weston, Ontario. At the time of his dismissal, Mr. Roda was employed in the position of Branch Manager at the Yorkgate branch, which is located in the Jane and Finch area of Toronto, Ontario.

[9] Mr. Roda reported to Ms. D’Avolio in her capacity as Area Manager (Etobicoke North) from July 2009 until his dismissal June 15, 2010. Mr. Roda indicated that in addition to Ms. D’Avolio, he had two other Area Managers during his tenure as a Branch Manager.

[10] Ms. D’Avolio provided a hand drawn and printed organizational charts explaining the structure of BMO’s Greater Toronto Area (GTA) Division. Ms. D’Avolio indicated that Senior Vice President, Alexandra Dousmans-Curtis, oversaw the GTA Division. Underneath Ms. Curtis are three Districts with one District Vice President (GTA North District, GTA West District and GTA Central District). Each District had five Area Managers who over saw their area branches. Ms. D’Avolio has 13 branches in her area (Etobicoke North), which is

the maximum. One of the branches that Ms. D'Avolio oversaw was the Yorkgate branch. Ms. D'Avolio reports to Vice President (GTA North District) Curtis Scragg.

The Yorkgate Branch

[11] The Yorkgate branch is a full service branch providing mortgages, loans, private client and everyday banking services to BMO's clients.

[12] There is no dispute that the Yorkgate Branch was a diversified commercial and retail branch that had difficult clients and was located in a high crime area. In this regard, the branch was susceptible to fraud.

[13] Ms. D'Avolio presented a chart of the Divisional rankings of branches. The Yorkgate branch was ranked 3rd out of 13 branches in the Etobicoke North Area. The Yorkgate branch was ranked 14 out of the 60 branches in the District and 24 out of 170 branches in the entire GTA Division.

[14] Ms. D'Avolio indicated that in terms of large branches in the GTA North District, Yorkgate placed 8th out of 21 large branches. In addition, in terms of total funds under administration, the Yorkgate branch ranked 2nd out of 13 branches in the Etobicoke North Area and 21st out of 60 branches in the GTA North District.

[15] The Yorkgate Branch was also the top branch for revenues. In terms of the treasury, the cash holding was the highest and there were four (4) ATM machines within what was termed by Ms. D'Avolio as a busy transactional branch.

[16] The Yorkgate Branch's mortgage book was the biggest book for mortgages in the area. Ms. D'Avolio indicated that Mr. Roda tripled the mortgage book since he came to the Yorkgate Branch. However, the evidence also

indicates that commercial mortgages were not dealt with in the branch but were rather dealt with off-site.

[17] Ms. D'Avolio described Mr. Roda as being the face of BMO in the Yorkgate branch. He would network and obtain referrals for the branch. She went on to indicate that Mr. Roda would also participate in community events within the mall including Jamaica Day.

[18] Twenty (20) employees (15.55 Full-Time Equivalents "FTE") were employed by BMO at the Yorkgate Branch, including Mr. Roda. At the Yorkgate branch, Mr. Roda had the assistance of two Assistant Branch Managers. One Assistant Branch Manager oversaw the Operational area and the other Assistant Branch Manager oversaw the Customer Service area. The Assistant Branch Manager Operational had six employees (5.20 FTE) working in the operational area. The positions included FSC Greeter, Financial Service Manager (FSM). The FSM position was graded from 1-5 (5 was the highest).

[19] The evidence indicates that BMO determines the following:

- The number of total employees required at the branch
- The number of employees in each position required at the branch
- The job descriptions and qualifications for employees employed at the branch
- The salary range for employees employed at the branch
- The annual increase for employees is determined by the performance review which includes an employee's self-review as well as a review by a branch manager which are both performed on forms determined and provided by the bank. The bank then determines the weight given with respect to the reviews and the range of the salaries based on a grid.

The Branch Manager position

[20] Mr. Roda was the highest level of management at the Yorkgate Branch. He was paid at Grade 37, which is the top grade for a Branch Manager. The level above Mr. Roda would be an Area Manager, which is paid at Level 38 to 40. Mr. Roda's total compensation was approximately Eighty Thousand Three Hundred and Eighteen (\$80,318.00) Dollars as a base salary plus an incentive pay of approximately Ten Thousand (\$10,000.00) Dollars that was not guaranteed.

[21] In terms of the duties undertaken by Mr. Roda on a daily basis, Ms. D'Avolio testified that he would spend approximately eighty (80%) percent of his time performing administrative duties and the other twenty (20%) percent of his time would be hands on work with clients. Ms. D'Avolio compared Mr. Roda with a Branch Manager at a smaller branch where she indicated a Branch Manager would typically spend 20% of his or her time on administrative duties and 80% of his or her time providing hands on customer service. According to Ms. D'Avolio, someone in Mr. Roda's position would be required to spend more time coaching and overseeing employees.

[22] Mr. Roda indicated that he spent approximately sixty (60%) percent of his time coaching staff in sales and dealing with staff issues and approximately forty (40%) percent of his time dealing with customers. In terms of the 40% of time spent dealing with customers, he would also be involved in dealing with a CSR or a teller. Mr. Roda agreed that he spent more time coaching at the Yorkgate Branch than he did at his earlier assignment at a much smaller branch.

[23] Ms. D'Avolio testified that Mr. Roda's strengths were with respect to the lending side and credit. She described Mr. Roda as knowing lending really well and being a good mentor.

Job Description

[24] The job description for a Bank Manager was entered into evidence and Ms. D'Avolio highlighted a number of the areas that would be applicable to Mr. Roda. Ms. D'Avolio highlighted the accountabilities portion of the job description including the following:

- Explain the branch business plan and other performance metrics to subordinates, indicating how branch/team success contributes to the area/district/division/PCG goals
- Ensures subordinates understand their role of accountabilities, task assignment and performance expectations and ensure where employees are given supervisory accountabilities and that all employees understand the relevant authority
- Communicate the maximum amount of authority an employee may exercise in his or her role balancing between the individuals qualifications/skilled knowledge and the level of authority required to effectively do the job

The “Chain of Accountabilities”

[25] Ms. D'Avolio reviewed a document entitled “Chain of Accountabilities” which indicated the following accountabilities for a Branch Manager:

- Daily huddle - daily with entire branch team
- Sales meeting – weekly with direct reports
- Weekly huddle – weekly with direct reports
- Walk abouts – weekly
- Coaching – bi-weekly with each direct report
- Side by sides – monthly with each direct report

[26] Ms. D'Avolio then reviewed a number of other documents that explain these accountabilities. In particular, a document entitled “The Daily Huddle” was reviewed which provided guidance with respect to the discussions for the daily huddle. In addition, another document entitled “Weekly Huddle Agenda” was provided which again provided guidance on conducting the weekly huddle.

Another document titled "Sales Meeting Agenda" was also produced which again provided a sample agenda and a timeline with respect to activities that should be undertaken during the sales meeting. A further document entitled "Walk About Observation Check List" was also produced which set out a checklist of what should be observed and providing for an evaluation between fair, good and great. According to Ms. D'Avolio, the Branch Manager can conduct the walk abouts or he can delegate this to someone else on his behalf.

[27] In terms of coaching, Ms. D'Avolio indicated that a Branch Manager is responsible but could delegate coaching to an Assistant Branch Manager with regards to employees in the CSR position.

[28] A document entitled "Passport Coaching Observation List" was produced which set out areas for employees to be rated during an observation. In addition, another document entitled "Side by Side Agenda" was also produced which dictated the activities that should occur during a side-by-side being conducted by either a Branch Manager or Assistant Branch Manager. Side by Sides are to occur approximately once per month by the Branch Manager or the Assistant Branch Manager, if so delegated.

Lending Authority

[29] A letter dated July 9, 2009, addressed to Mr. Roda from Ms. D'Avolio set out Mr. Roda's discretionary approval/unilateral limits. Mr. Roda had authority for up to Seventy-five Thousand (\$75,000.00) Dollars in personal loans and Three Hundred Fifty Thousand (\$350,000.00) Dollars for a mortgage without sending the matter to the credit department for additional approval. In terms of approving credit, Mr. Roda could act within his limits as long as there were no irregularities. If there was an irregularity, then Mr. Roda might need to contact the credit department.

[30] Ms. D'Avolio indicated in cross-examination that there is a Automated Lending Decision process (ALD) where all credit loan applications are reviewed by a computer which then prints out the standard terms and conditions for a loan and sets out the interest rate. The Branch Manager then has authority to amend the rate, but only within a pre-determined range. If the ALD program declines the application, then the Branch Manager has no authority to override, but rather must seek approval from the Area Manager.

[31] In terms of interest rates, Ms. D'Avolio indicated that Mr. Roda had discretion as long as it was within his authority.

[32] The evidence indicates that the bank determines the rate of return for GICs, but Mr. Roda had the authority to vary the rate, in a minor way, within a pre-determined range.

Budgets

[33] Ms. D'Avolio indicated that budgets were set at the Senior Vice President level and above. Once the budget is set, it is divided up within the District and the Area Manager can decide how much each branch is to be allocated.

[34] Mr. Roda did not participate in this centralized process. However, Mr. Roda was responsible to work within the budget that he was provided and meet the specified targets. Mr. Roda was also entitled to manage the expenses of the branch as long as they were within his budget.

Risk Management and Compliance

[35] In terms of risk management and compliance, Ms. D'Avolio indicated that Mr. Roda had total accountability and required no approval in this regard.

[36] Ms. D'Avolio indicated that Mr. Roda would be responsible for the internal audits in his branch. The purpose of the audit was to ensure adherence to policy and controls. A Branch Manager is required to correct any area of non-compliance.

Human Resources

[37] Ms. D'Avolio indicated that eighteen (18) of the employees at the Yorkgate Branch reported to Mr. Roda. The commercial support staff did not report to him.

[38] Mr. Roda had the assistance of two (2) Assistant Branch Managers who were to ensure that individuals were coached and provide the tools and skills to perform their duties.

[39] In terms of training, Ms. D'Avolio indicated that Mr. Roda could decide who gets training so long as it falls within his budget.

i) Hiring

[40] All vacancies for positions at the branch are posted and the grade of salary for the position is pre-determined by BMO.

[41] BMO uses a recruiting partner, "Hewitt", who deals with hiring and recruiting. Feedback is provided by a Branch Manager with respect to the need and Hewitt screens and conducts initial interviews to find capable candidates. The Branch Manager then performs a second face-to-face interview. A Branch Manager decides whom they will give a second face-to-face interview to based on their discussions with Hewitt. Furthermore, the Branch Manager is authorized to hire a successful candidate, subject to the approval of the Area Manager. Ms. D'Avolio indicated that she did not sit in on interviews for CSR's although she would sit in on ABM or FSM interviews. According to Ms. D'Avolio, there have

been no new hires for FSM or ABM at the Yorkgate branch while she has been Area Manager. Ms. D'Avolio indicated that she has never overruled Mr. Roda's recommendation about who should be hired at the branch as a CSR while she has been Area Manager.

[42] A document was entered as an exhibit, which indicates that nineteen (19) employees were hired while Mr. Roda was a Branch Manager. Six (6) of these employees were hired while Ms. D'Avolio was Mr. Roda's supervisor. Five (5) of those employees were CSR's and one (1) employee was a senior CSR. According to Ms. D'Avolio, she accepted Mr. Roda's recommendation on each of the persons who were hired while she was his Area Manager.

[43] Mr. Roda testified that a number of the 19 persons noted on the document included some transfers. Mr. Roda also indicated that he did not have a significant role in hiring. According to him, he made recommendations, but did not have the final word. However, he agreed that he did not have to interview all of the persons who were recommended to be interviewed by Hewitt. Furthermore, Mr. Roda indicated that he was not involved in interviewing for FSM positions; rather BMO would move persons in those positions around the organization.

[44] Ms. D'Avolio agreed that Mr. Roda would not have authority to hire a lawyer. However, she also indicated that she herself would require authority to retain a lawyer depending on the amount of the legal fees to be incurred.

ii) Transferring Employees

[45] According to Ms. D'Avolio, Mr. Roda had the authority to transfer an employee to another branch if the other Branch Manager would accept such an employee.

[46] The evidence indicates that there was an occasion where an employee was transferred from Mr. Roda's branch to another branch that required someone in the CSR role. Ms. D'Avolio confirmed that Mr. Roda discussed the issue with her and he did seek her approval when he wanted to transfer the employee, but he was not required to do so.

[47] Ms. D'Avolio recalled an incident where an Assistant Branch Manager was reassigned to a more suitable role. She indicated that Mr. Roda initially disagreed, but then later came around to see that the reassignment was a good decision.

[48] Mr. Roda also testified about an incident that occurred when Mr. Wagner was his Area Manager, involving an Assistant Branch Manager who was struggling in her role. According to Mr. Roda, a decision was made to switch the Assistant Branch Manager with a person in the FSM position. Mr. Wagner made this decision in consultation with the Vice-President.

iii) Performance review

[49] Mr. Roda's role was to ensure that the targets set by BMO were met and staff had the skills to reach those targets. Mr. Roda was to manage the performance of employees according to Ms. D'Avolio.

[50] Mr. Roda agreed that it was his responsibility to ensure that employees were meeting targets and he was to train and coach them to assist them in meeting their targets.

[51] Performance appraisals are conducted in a format created by BMO. The weight of relevant factors is also determined by BMO. Mr. Roda would complete performance reviews of employees at the branch, which were subject to appeal.

[52] Mr. Roda indicated that performance appraisals were a small part of determining performance and more important was employees meeting their targets. According to Mr. Roda, even if he provided a good performance appraisal, an employee still needed to make their targets, which was a major component in determining salary and performance pay (bonuses).

iv) Wages and Bonuses

[53] Ms. D'Avolio indicated that salary and bonus are all based on performance and if an employee meets targets.

[54] Ms. D'Avolio also indicated that Mr. Roda had a role in advising with respect to salary increases warranted for employees who worked under him. In this regard, she indicated that Mr. Roda would submit to her recommendations with respect to salaries for employees, subject to a scale predetermined by BMO. Salary adjustments would require the approval of Ms. D'Avolio, although she indicated that she rarely failed to follow Mr. Roda's recommendation. She indicated that as far as she was concerned, Mr. Roda knew the employees better at the branch level and she relied very heavily upon his recommendations.

[55] Mr. Roda agreed that the Area Manager would generally follow his recommendation with respect to salaries. Although he indicated that he would review salaries with the Area Manager and she would "tweak" to make sure any changes were in line with BMO's guidelines.

[56] Ms. D'Avolio also agreed that any "out of cycle" salary increases would have to be approved by her although they would be considered based on the recommendation of Mr. Roda.

[57] In terms of bonuses, Ms. D'Avolio indicated that a budget is allocated with respect to bonuses within the branch and Mr. Roda would provide

recommendations to her with respect to the allocation among employees within the branch. Once again, Ms. D'Avolio indicated that she relied heavily on Mr. Roda's recommendations and they would normally stand as presented by him.

[58] Ms. D'Avolio agreed that Mr. Roda would receive an initial bonus allocation for an employee from BMO. This amount is based on the employee's performance versus a peer group. She agreed that Mr. Roda's influence would be modest in altering that number. It was put to her that his influence would be one (1) to two (2) percent and Ms. D'Avolio agreed. She also agreed that she would discuss any alteration with Mr. Roda and make what she termed a collective decision, which she would refer to her superior.

[59] During her cross-examination, Ms. D'Avolio agreed that in one situation, Mr. Roda recommended a five (5%) percent increase for an employee, which she disagreed with and provided a nine (9%) percent increase instead. However, she also indicated that Mr. Roda did not disapprove of her decision. Rather, he did not know that such an increase was permissible.

[60] BMO also has a "BRAVO" reward program. Under the BRAVO program Branch Manager and Assistant Branch Managers distribute gift cards to employees as a reward for their performance.

v) Scheduling vacations and leaves

[61] Ms. D'Avolio indicated that a Branch Manager was able to approve vacations and a leave of absence without her approval. According to Ms. D'Avolio, a Branch Manager could approve a leave of absence less than thirteen (13) weeks. However, anything over thirteen (13) weeks needed to be recommended by her to the Vice President.

[62] In terms of a personal leave of absence, Ms. D'Avolio indicated that she checked the day prior to giving her evidence and disagreed when told that Mr. Roda would indicate that he needed approval of any leave up to thirty (30) days and any leave over thirty (30) days would need a Vice President's approval.

[63] Mr. Roda indicated that there were vacation-scheduling guidelines that had to be followed, but he could schedule employees on vacation within those guidelines.

[64] Mr. Roda testified that the last time that he had to deal with a leave of absence situation was some time in early 2009; the Area Manager at that time was Mr. Wagner. According to Mr. Roda, Mr. Wagner had to approve the granting of the leave of absence. According to Mr. Roda, a Vice President needed to approve any leave of absence over thirty (30) days.

vi) Discipline and Discharge

[65] The evidence indicates that BMO has a progressive discipline process that generally follows three (3) steps of corrective action prior to an employee being terminated.

[66] Ms. D'Avolio provided a corrective action document dated July 28, 2006. Ms. D'Avolio indicated that Branch Managers have authority with respect to the first two steps in the corrective action procedure. Both step one and step two are written warnings, whereas step three is a final written warning and step four is dismissal. According to Ms. D'Avolio, a Branch Manager does not need approval for instituting a step one or step two corrective action. A Branch Manager may provide a recommendation at step three. It should be noted that the corrective action document indicates that Branch Managers may only skip levels of corrective action with the concurrence of the Human Resources Centre.

[67] In cross-examination, Ms. D'Avolio agreed that while she was the Area Manager Mr. Roda had taken no corrective action against any employee.

[68] Mr. Roda indicated that while he had authority for a step one or two corrective action, he would always call Human Resources for a recommendation and also speak to his Area Manager with respect to any step two corrective actions.

[69] Mr. Roda agreed that on one occasion Human Resources recommended a step three corrective action for an employee. Mr. Roda did not agree with Human Resources recommendation and preferred to institute a step two corrective action instead.

[70] In another situation, Mr. Roda agreed that human resources recommended the termination of an employee and he instead instituted a step three corrective action. However, Mr. Roda explained that the recommendation of termination was given before the entire story had been obtained and that upon additional information being provided, it was agreed by Human Resources that a step three corrective action would be implemented instead of termination.

[71] Mr. Roda also agreed that in another situation, he recommended the termination of an employee, which was accepted by Human Resources.

D. SUBMISSIONS OF THE PARTIES

[72] The parties made detailed submissions at the hearing and provided written legal argument. I shall not repeat those submissions and arguments in great detail. Instead I shall summarize the position of each party and set out the authorities they relied upon to support their position. I have reviewed and considered all the evidence and submissions presented in making my decision.

[73] BMO's Counsel argues that Mr. Roda was employed by BMO as a manager. It is suggested that Mr. Roda was an administrator who had the power of independent action, autonomy and discretion. It was stressed that the authority of a manager, as defined by the *Code*, does not need to be absolute. Reference was made to the highly regulated nature of the banking industry. In that context, it was acknowledged that the role of Branch Managers, including Mr. Roda, was constrained. However, it was argued that Mr. Roda, in his role, still retained sufficient independent action, autonomy and discretion to manage and administer the branch. In these circumstances, it was strenuously argued that Mr. Roda was a "manager" within the meaning of section 167(3) of the *Code* and I have no jurisdiction to hear and determine his complaint.

[74] BMO's Counsel relied on the following authorities: *Rollingson v. Royal Bank*, [2003] C.L.A.D. No. 223; *Fox v. Bank of Nova Scotia* (2003), 21 C.C.E.L. (3d) 172; *Canadian Imperial Bank of Commerce v. Bateman*, [1991] 3 F.C. 586; *Skeete and National Bank of Canada*, [1996] C.L.A.D. No. 712; *Normandeu and National Bank of Canada*, [1996] C.L.A.D. no. 712; *Keeler v. Bank of Nova Scotia* (1997), 29 C.C.E.L. (2d) 282.

[75] Mr. Roda's Counsel argues that the word "manager" as set out in section 167(3) of the *Code* has a narrow meaning, as found in the decisions of several adjudicators and the Federal Court. It was suggested that the work of Mr. Roda was not of the nature that would bring him within the definition found in these decisions. Moreover, it was stressed that a person is not a manager if they are merely a conduit between employees and a higher body who acts as the actual decision maker or makes recommendations to such higher body, which approves or disapproves the recommendations. In this situation, it was argued that Mr. Roda had no true independence, autonomy or discretion. Based on the facts in this matter, it was argued that Mr. Roda was not a "manager".

[76] Mr. Roda's Counsel relied on the following authorities: *Msuya v. Sundance Ballons International Ltd.*, [2006] FC 321; *Torre v. Canadian Imperial Bank of Commerce* [2010] FC 105; *Shek and Bank of Nova Scotia* [1996] C.L.A.D 126; *Ash and Flying Colours Corp., Peterborough, Ontario* (2011) CanLii 12005 (ON LA)

E. DECISION

[77] The issue to be decided is whether Mr. Roda was employed as a "manager" within the meaning of subsection 167(3) of the *Code*.

[78] Subsection 167 (3) provides as follows:

167(3) Non-application of Division XIV to managers – Division XIV does not apply to or in respect of employees who are managers.

[79] There is no dispute that the onus is on BMO to establish that Mr. Roda is a "manager" within the meaning of subsection 167(3) of the *Code*.

[80] The word "manager" is a statutory term that is not expressly defined within the *Code*. Accordingly, the meaning of the word must be found in accordance with legal principles.

[81] Fortunately there is a considerable amount of administrative and judicial decisions considering the meaning of the word "manager" as found in subsection 167(3) of the *Code*. Administrative decisions are not binding, but may be persuasive if well reasoned, comprehensive and widely followed. Judicial decisions are binding and ought to be followed unless overturned by a higher court.

[82] The fact that Mr. Roda was called a Branch Manager and his job description includes traditional managerial responsibilities is not dispositive. Rather, it is the nature of the work actually performed that is relevant in

determining if he is a manager within the meaning of subsection 167(3) of the *Code*, see *Msuya v. Sundance Balloons International Ltd.*, *supra*, at paragraph 24.

[83] The Federal Court has recently considered the definition of the word “manager” used in subsection 167(3) of the *Code* in a judicial review proceeding involving an employee employed by a bank as a manager of a Banking Centre. In *Canadian Imperial Bank of Commerce and Nellie Torre*, *supra*, Mr. Justice Martineau, reviewed the authorities and stated as follows in regard to the definition of “manager” under subsection 167(3) of the *Code*:

[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*, [reflex](#), [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 \(CanLII\)](#), 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” (*Msuva*, 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*, [reflex](#), [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)."

[84] Applying the principles stated by Justice Martineau to the facts in this matter, I find that Mr. Roda was not employed by BMO as a "manager" within the meaning of subsection 167(3) of the *Code*.

[85] There is no doubt that Mr. Roda exercised administrative duties and supervised employees. However, I do not believe that his actions can be properly described as "independent", "autonomous" or "discretionary" in any meaningful sense. BMO clearly defined the role that Mr. Roda held by very strict policies, and guidelines. In my view all matters of importance decided at the branch were truly decided by persons other than Mr. Roda.

[86] After reviewing all the evidence very carefully, I find as follows:

- The activities of Mr. Roda were highly scripted by BMO, as evidenced by the "Chain of Accountabilities" and supporting documents. BMO dictated the content of the Daily and Weekly huddles and weekly sales meetings that Mr. Roda had with his employees. Even walkabouts and coaching were strictly regulated by BMO.
- Mr. Roda's lending authority was highly regulated. Mr. Roda had no independent or autonomous authority. Furthermore, his "discretionary" approval limits were subject to approval by the ALD process.

- The budget for the branch was dictated to Mr. Roda by higher levels of management.
- Management higher than Mr. Roda determines the number of employees at the branch and their salaries.
- Recruitment and hiring is centralized and initial contact is by BMO's recruitment partner, Hewitt. Mr. Roda's participation is limited to interviewing applicants for the most junior position (CSR) referred to him by Hewitt. Mr. Roda would recommend a candidate but the Area Manager makes the final decision regarding hiring and salary. Persons higher than Mr. Roda also do the hiring of persons for positions higher than CSR.
- In terms of transferring employees, Mr. Roda's role is again limited to the most junior positions of CSR and subject to agreement with others. The transfer of employees above the position of CSR is a matter dealt with by the Area Manager.
- Mr. Roda does conduct assessments. However, the assessments are regulated by BMO and the appraisals were a very small component in determining salary and performance pay. More important was employees meeting targets set by BMO.
- Mr. Roda's role in respect to salary increases was limited to making recommendations within a predetermined scale and his influence was minimal (1-2%).
- The scheduling of vacations was subject to BMO guidelines.
- I prefer the evidence of Mr. Roda that leaves of absences had to be approved by the Area Manager. That is not to say that I found Ms. D'Avolio to be misleading. Rather, her evidence was based on her inquiry on the day prior to her testimony, which was after Mr. Roda was terminated. Mr. Roda's evidence was about his own experience while he was employed, which I find is more relevant and reliable with respect to the policy in place while he was employed.
- The evidence with respect to discipline and discharge is that Mr. Roda is involved at the first two levels of discipline (warnings). He certainly has some independent authority in this regard, despite having to consult with Human Resources. However, the last level of warning and discharge are matters where he has no independent authority at all. He can recommend, but it is others who make the decision.

[87] I acknowledge the special nature of BMO's banking activities and the size of BMO's organization. These are very important contextual factors. The banking sector is highly regulated. However, Mr. Roda's administrative duties were greatly constrained and BMO kept him on an extremely tight leash in regard to all aspects of his position. He could inform and recommend, but ultimately others had the authority to decide most matters and particularly the most important matters. In my view, Mr. Roda was more of a conduit between employees and upper management in BMO.

[88] I find, based on the evidence presented in this matter, that Mr. Roda was not a manager for the purposes of Part XIV of the Code. Mr. Roda did not have a significant amount of autonomy, discretion, and authority in the conduct of the business of BMO.

[89] Finally, BMO's Counsel asserted that the *Fox v. Bank of Nova Scotia, supra*, award is the leading authority in terms of the meaning of the term "manager" in the banking sector. I disagree with this assertion. First, as noted earlier, awards issued by adjudicators under the Code do not bind me. Second, none of the judicial decisions provided to me note the award in *Fox v. Bank of Nova Scotia, supra*, as being widely accepted and the leading authority. Reference to the *Fox v. Bank of Nova Scotia, supra* award is made in *Canadian Imperial Bank of Commerce and Nellie Torre, supra*, where Mr. Justice Martineau stated at paragraphs 31 and 32 as follows:

[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.

[90] I agree with Justice Martineau that each case must be decided based on its own facts. After carefully considering the evidence and the submissions of Counsel, I conclude that Mr. Roda had little independence in his role as a Branch Manager with BMO. Mr. Roda was not a “manager” within the meaning of subsection 167 (3) of the Code.

[91] Accordingly, Division XIV applies to Mr. Roda and this matter will proceed to a hearing on the merits.

Dated this 6th day of October 2011, in the City of Toronto, Ontario.

“John Stout”

John Stout, Referee