

management of the business, and the power to execute business plans or put contractual agreements into effect.

Managers are excluded from the hours of work and statutory holiday pay provisions in the *Act*. Once again, this means that employers need not pay overtime rates to managers for work in excess of the standard hours provisions, nor are employers required to pay premium rates to managers who work on statutory holidays. However, while there is no legal entitlement to overtime or premium rates for managers under the *Act* (or the *Code*), there is nothing in the employment standards statutes which prevent employers from providing similar benefits at their discretion.

Finally, there are no provisions in the *Act* which are similar to the unjust dismissal provisions in the *Code*. Accordingly, "manager" status does not affect one's rights upon termination under the *Act*.

Unjust Dismissal Results in Reinstatement of Employee

A First Nation had to reinstate an employee after an Adjudicator under the *Canada Labour Code* found that its allegations of just cause for dismissal were unfounded. The employee, Mr. Sinclair, had no disciplinary record, and the evidence indicated that he was a dedicated employee. However, when a newly-elected Band Council came into power, it decided to dismiss Mr. Sinclair, claiming that he had distributed hampers to elderly residents without authorization.

Mr. Sinclair filed a claim against the First Nation employer under the *Canada Labour Code* alleging unjust dismissal. Two witnesses testified that the real reason that the employee was fired was that he was seen by the newly-elected Band government as not being one of its political supporters.

The Adjudicator found that 'the employer had no cause whatever to discipline, let alone fire, the employee'. As a result, in exercising his right to grant a 'make-whole' remedy, the Adjudicator ordered that the complainant be reinstated to his former position and that he be provided with full back-pay.

Sinclair v. Lake St. Martin First Nation, [2005] C.L.A.D. No. 230

First Nations Employment Law

Employment Law Primer: Employment Standards for "Managers"

Like most organizations, Band Councils and other First Nations employers often hire managers to supervise staff and direct day-to-day affairs. While managers are also employees, they typically have greater responsibilities and a different relationship with their employer than regular employees. In addition, employment standards legislation applies differently to managers in several important respects.

As we noted in our last issue of *First Nations Employment Law* Issue 1 (September 2005), employment standards for provincially-regulated employers are governed by British Columbia's *Employment Standards Act* (the "*Act*"), whereas federally-regulated employers are governed by the *Canada Labour Code* (the "*Code*"). As such, the first step in identifying the employment standards applicable to managers is to determine which statute applies.

Provincial or Federal Jurisdiction?

The *Code* applies to federally regulated industries and to those employed by, or in connection with a federal work, undertaking or business. This includes, for example, banking, broadcasting, telecommunications, and interprovincial or international transportation. The *Code* also governs employment standards for First Nation Band Council employees, and those employed in activities related to Indian status, rights or privileges, such as the education of First Nations children.

The *Act* applies to employers who do not fall within the federal jurisdiction. Where a business, is owned and/or operated by First Nations Band members on a reserve, but is not involved in activities related to Indian status, rights

or privileges and otherwise does not fall under federal jurisdiction, it is governed by the *Act*.

Since it is sometimes difficult to determine whether a business is provincially or federally regulated, First Nations employers should consider seeking legal advice concerning the applicable statute, prior to making important decisions concerning employment standards for managers.

Federal: Managerial exemptions under the Canada Labour Code

As noted above, it is important to distinguish managers from regular employees because of fundamental differences in the applicable employment standards. For the purposes of the *Code*, the definition of “manager” is not a question of title, but whether the individual’s actual duties and responsibilities are sufficiently managerial in nature.

Generally, managers are expected to have the power of independent action, autonomy, discretion and decision-making authority over important aspects of the employer’s business. The term “manager” in the *Code* is interpreted narrowly; it does not include employees who share in only some managerial duties or whose management functions are entirely subject to a superior’s approval. However, where an employee performs the functions of a manager, as interpreted under the *Code*, he or she will be excluded from certain important employment standards provisions of the statute.

Managers are not subject to any of the standard hours of work provisions in the *Code*. This means that employers are not required to pay managers overtime for work beyond the standard hours under the *Code*. Similarly, managers are not entitled to premium pay for work on statutory holidays.

Managers are also exempt from the unjust dismissal provisions in the *Code*. The most significant consequence of this exemption is that reinstatement is not available as a remedy for the unjust dismissal of a manager. However, a manager who is dismissed without just cause remains entitled to notice and severance under the *Code* and may also pursue a civil remedy through the courts in the form of damages for wrongful dismissal.

Provincial: Managerial exemptions under the *Employment Standards Act*

Under the *Act*, a “manager” is a person whose principle employment responsibilities consist of supervising and/or directing human or other resources, or a person employed in an executive capacity.

The term “manager” under the *Act* is given a similarly narrow interpretation as that under the *Code*. However, a recent amendment to the *Act* expanded the definition of “manager” to specifically include those who direct or supervise non-staff resources which are linked to the immediate workplace. Finally, “executive capacity” relates to active participation in control, supervision and

Harris & Company – Labour and Employment Lawyers

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Should you require advice or assistance regarding any of these matters or wish to learn more about Harris & Company, feel free to contact any of our lawyers from our First Nations practice group:

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