

# [Bilesky v. Fox Flight Inc., \[2017\] C.L.A.D. No. 151](#)

Canada Labour Arbitration Decisions

Canada

Labour Arbitration

Toronto, Ontario

Panel: Morris Cooper (Adjudicator)

Heard: April 19 and 20, 2017.

Award: July 20, 2017.

File Nos. YM2707-10646, YM2727-3704

## **[2017] C.L.A.D. No. 151**

Complaint of Alleged Unjust Dismissal Under Division XIV - Part III of the Canada Labour Code, and Wage Recovery Appeal Under Division XVI of the Canada Labour Code Between Christopher Bilesky, Complainant, and Fox Flight Inc., Respondent

(46 paras.)

## **Appearances**

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Representing Complainant, **Christopher Bilesky**: Ellen S. Low, Whitten & Lublin/ Employment Lawyers.

Representing Respondent, **Fox Flight Inc.**: Sean G. Foran and Aislin Flarity.

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## **ADJUDICATION AWARD**

### **OVERVIEW**

**1** The issue to be determined in this Adjudication and Wage Recovery Appeal is whether or not the Complainant is an excluded "manager" under the *Canada Labour Code*.

**2** Christopher Bilesky filed his Complaint of Unjust Dismissal under the *Canada Labour Code* against Fox Flight Inc., after the termination of his employment in April, 2016. Mr. Bilesky was Director of Maintenance for Fox Flight, based in Toronto, Ontario.

**3** Mr. Bilesky had previously filed a *Canada Labour Code* Complaint of unpaid overtime. His employment was terminated shortly after submitting that overtime claim. That overtime Complaint was later dismissed on August 10, 2016, with a Notice of Unfounded Complaint. The Inspector concluded that Mr. Bilesky exercised managerial functions in his role as Director of Maintenance at Fox Flight and was, therefore, excluded from the hours of work provisions of the *Canada Labour Code*. Mr. Bilesky has appealed that determination by the Inspector.

**4** In the interests of dealing with these related matters in the context of one hearing, Mr. Bilesky's Appeal, together with his Complaint of unjust dismissal were referred to me to determine both matters, namely, the Division XVI Wage Recovery Appeal, and the Division XIV Complaint of alleged Unjust Dismissal.

**5** If Mr. Bilesky is found to be a manager, his Appeal of the Inspector's overtime determination would be dismissed, and his Complaint of Unjust Dismissal could not proceed. I have no jurisdiction as an Adjudicator under the *Canada Labour Code* to hear and rule on a Complaint of Unjust Dismissal by a "Manager", as a consequence of Section 167(3) of the *Code*.

**6** Prior to the hearing and in conjunction with counsel for the parties, it was determined that this matter would be treated as a bifurcated hearing, dealing first with the jurisdictional determination of whether or not Mr. Bilesky was a "manager" under the *Code*.

**7** The hearings on April 19 and 20, 2017 heard evidence from witnesses on behalf of both parties on the limited issue of whether or not Mr. Bilesky was a "manager" as defined within the established jurisprudence under the *Canada Labour Code*.

**8** Both parties and their counsel are to be commended for the manner and efficiency in which they handled this disputed preliminary jurisdictional hearing. Each side presented evidence in chief by way of affidavits and exhibits. The affiants were then made available for cross-examination at the hearing.

### **WHO IS THE EMPLOYER?**

**9** It became apparent early on in these proceedings that the parties were not in agreement as to the identity of Mr. Bilesky's actual employer. Fox Flight Inc. operates an air ambulance service from Pearson International Airport at Toronto. Essentially, the majority of its services are the repatriation of injured or ill Canadian patients to Canada, usually for patients whose insurance plans provide such coverage. The airplanes are essentially ambulances in the air, equipped to transfer patients with appropriate acute medical care on route. At the time of the hearing, as an air operator, Fox Flight Inc. owned four specially equipped Learjets.

**10** Originally, Mr. Bilesky had worked as an Aircraft Maintenance Engineer ("AME") and Aircraft Certification Authority ("ACA") on behalf of Quantum Aviation, an entirely independent aircraft maintenance company. Quantum had provided aircraft maintenance for the Fox Flight fleet, as a Transport Canada authorized third party maintenance provider.

**11** In November, 2010, David Fox, the founder and President of Fox Flight Inc., made a decision to bring his fleet's aircraft maintenance service in-house. He hired Mr. Bilesky, who commenced his employment as Director of Maintenance on November 20, 2010, as part of a new separate corporation, Fox Flight Maintenance Inc. This corporation became the maintenance arm of Fox Flight Inc.

**12** Since Fox Flight Maintenance Inc. did not have a separate payroll or administration, all of its employees were on the payroll of Fox Flight Inc. According to Mr. Fox, Fox Flight Maintenance comprised approximately 25% of the expenses of the total operations, and aircraft maintenance remains Fox Flight's single largest annual expense.

**13** Incorporating Fox Flight Maintenance Inc. required taking the appropriate steps with Transport Canada to become an Approved Maintenance Organization (AMO). In accordance with the Canadian Aviation Regulations, an AMO is the only entity which can perform maintenance on Canadian aircraft. AMO certification is based on compliance with requirements and standards set out in the Canadian Aviation Regulations (CAR), as administered by Transport Canada. David Fox became the AMO Certificate Holder on behalf of Fox Flight Maintenance Inc. Under the Regulations, the Certificate Holder must appoint a Person Responsible for Maintenance (PRM), to manage the activities of the AMO in accordance with the policies set out in a Transport Canada approved Maintenance Policy Manual.

**14** Mr. Fox appointed Mr. Bilesky as the Person Responsible for Maintenance in November, 2010. Under the CAR Regulations, Mr. Fox's responsibility as AMO Certificate Holder is to provide the Person Responsible for the

Maintenance (PRM) with the financial and human resources necessary to ensure that the AMO meets the requirements of CAR.

**15** Under CAR, in addition to an approved Maintenance Policy Manual filed with Transport Canada, an Application to Transport Canada was also required in order to appoint Mr. Bilesky as the Person Responsible for Maintenance. He was then interviewed by a Transport Canada representative to establish his suitability for the position, and he had to file a document by which he formally accepted responsibility for his position, before he was subsequently appointed by Transport Canada.

**16** Mr. Bilesky held the most senior position in the structure of Fox Flight Maintenance Inc., and he reported directly to Mr. Fox. Although the technical requirements of CAR formed the basis for the decision to incorporate Fox Flight Maintenance Inc. separately from Fox Flight Inc., Fox Flight Inc. can properly be considered as Mr. Bilesky's employer, based on payroll, employment administration and his Record of Employment. It is not, however, material to the necessary determinations in this matter as to which of these two related and jointly-owned companies was the Employer.

## **WHAT DOES IT MEAN TO BE A 'MANAGER'**

### UNDER THE CANADA LABOUR CODE?

**17** The starting point for the required analysis here is the consideration of the various factors and case law which have created the legal test for the "manager" exclusion in Section 167(3) of the *Code*. These tests establish that the title of the position is rarely determinative of the conclusion, and that the focus of an Adjudicator must be on the actual duties performed by the Employee.

**18** Specifically, a Manager has to :

- a. be engaged in the administration of the employer's affairs; and
- b. be someone who has the power of independent action, autonomy and discretion on a significant range of matters within her or his area of responsibility.

**19** The over-arching principle in this well-developed jurisprudence is that each case must be determined upon its own particular facts, having regard to the actual role performed by the employee within the organization. Job titles and even organizational job descriptions are not determinative of this issue, since each case will turn on what that employee actually did in his or her role. Ultimately, a bright line has to be drawn between employees who are supervisors, (and therefore included within the *Code* provisions of unjust dismissal and overtime pay), and managers, who are excluded.

**20** As can be seen from the number of Adjudication decisions on this issue over many years, this can be a difficult task and test to apply. There are many important relevant factors, such as reporting structure, decision-making, relative compensation, independence, accountability, and so on.

**21** For this Adjudicator, the appropriate place to start requires careful consideration of why Parliament saw fit to exclude managers from the protections offered to other employees of companies governed by the *Canada Labour Code*. The absence of a formal definition of "manager" in the *Code* was not legislative laziness. A purposive approach to the *Code's* fundamental principles assists in placing the managerial exclusion into its proper context.

**22** The *Canada Labour Code* represents a significant departure from common law principles of employment and, specifically, the common law of wrongful dismissal. It was specifically intended as remedial legislation to provide non-unionized employees of Federal undertakings that are subject to the *Code* with analogous protections offered to employees that are subject to collective agreements. The *Code* requires an employer to establish just cause for the termination of employment, which can include the elimination of that employee's position. The *Code* remedy of

reinstatement with back pay represents the greatest divergence from common law principles. Employers under Provincial jurisdiction do not need a reason to terminate an employee, and can do so without cause by either providing adequate advance notice of the termination, or adequate pay or compensation in lieu of that notice.

**23** As the majority opinion recently affirmed in the Supreme Court of Canada in *Wilson v. Atomic Energy*, it is not an option for an employer governed by the *Canada Labour Code* to simply write a generous cheque in order to terminate the employment of an employee who otherwise qualifies for the *Code's* protection. The fact that the Supreme Court of Canada reversed lower Court decisions is proof of the prior divergence of judicial views on this subject.

**24** The *Code's* exclusion of "managers" means that managers whose employment is terminated can only look to the common law for their remedies, and not to the *Code*. A terminated manager in a Federal undertaking subject to the *Code* may sue in Court, and may recover monetary and other damages for wrongful dismissal, but cannot obtain a Court Judgment requiring reinstatement and back pay.

**25** The rationale for this exclusion has been expressed as an issue of management rights; namely, that an employer should have the right to remove managers who actually manage its business, and pay severance or provide notice.

**26** By excluding "managers" from these specific statutory protections, the *Code's* underlying principle is that managers who manage the company and its employees, and who are more than supervisors, cannot insist on getting their jobs back following termination of employment. Parliament's intention here is that the employer is permitted to have full confidence in its managers and, subject to writing a cheque, or facing a potential judgment for damages, managers can be fired and replaced without cause. This is consistent with the exclusion of managers from a bargaining unit in a unionized workplace where managers are a distinct group and part of "management".

**27** Many of the Adjudication cases under the *Code* have struggled with whether the manager exclusion ought to be narrowly or more broadly construed in a given fact situation. To define "manager" too narrowly would essentially mean that only the single top executive would be excluded in most organizations, since every other employee has some limitations upon her or his authority to hire or fire employees, or to engage in external contractual relations. To narrowly limit the definition of "manager" to only one or two persons with ultimate authority is risking a serious error in principle. On the opposite end of the spectrum are those persons who may have the word "manager" in their job title, but who are only supervisors, with no substantive independent managerial authority or decision-making.

### **Applying the principles to the facts**

**28** It can fairly be said that the business of flight operations and related aircraft maintenance is one of the most tightly regulated industries in the country. The CAR regulations specify the roles of individuals within a flight organization, a review of an individual's suitability by Transport Canada officials, the compilation of manuals which require specific Transport Canada approvals, and much more, are the defining aspects of this workplace. To be sure, there are other Federal undertakings subject to the *Canada Labour Code* that are governed by a regulatory environment, but I am hard-pressed to think of any workplace more tightly regulated than this one.

**29** It was not in dispute that during Mr. Bilesky's employment, he held titles of Aircraft Maintenance Engineer (AME), Aircraft Certification Authority (ACA) and as Director of Maintenance (DOM) for Fox Flight Maintenance Inc.

**30** Bilesky's role as Director of Maintenance is instructive in properly characterizing his role in the organization, according to the Fox Flight MPM. The Director of Maintenance was required to assign management functions for specific maintenance activities, and ensure that the Certificate holder (Mr. Fox) provides Fox Flight Maintenance with the required staff and facilities, and be the approved signatory of any correspondence with Transport Canada.

**31** Mr. Bilesky's counsel submitted that the individuals performing aircraft maintenance (ACA) are responsible to

the Director of Maintenance only with respect to the regulatory compliance of their work and, conversely, the Director of Maintenance is not responsible for the performance of an ACA's work. The submission is that each Aircraft Technician is personally responsible for her or his own work, directly to the regulator authority.

**32** The other submission by counsel for Mr. Bilesky is that, in terms of actual work performed, his actual role was largely operational and not administrative. Mr. Bilesky serviced the aircraft and spent most of his time on the day-to-day maintenance required to keep the fleet operational.

**33** I have placed considerable weight on the fact that Mr. Bilesky was the person responsible for drafting and preparing the Maintenance Policy Manual submitted to Transport Canada for approval. Although Mr. Fox is the Certificate Holder, Mr. Bilesky was responsible for establishing and maintaining the MPM. It was not in dispute that Mr. Fox had no capability of preparing a comprehensive and detailed technical manual such as this. Furthermore, the fact that Mr. Bilesky had to be interviewed and approved by Transport Canada, and sign his acceptance of the PRM role, is highly relevant to the proper characterization of his role.

**34** The issue of Mr. Bilesky's autonomy, discretion or independent action is obviously important. In this tightly regulated environment, Mr. Bilesky was obliged to rigorously follow the MPM. However, I cannot accept the proposition advanced by counsel for Mr. Bilesky that in this very tightly regulated work environment, Mr. Bilesky's managerial autonomy was compromised, simply because aircraft maintenance is extremely circumscribed by government rules and regulations.

**35** Mr. Bilesky's hours of work were an obvious sore spot, and his complaint that he was not being paid for his extensive overtime is what appears to have precipitated this employment dispute. Mr. Bilesky claims that he could not pick and choose his hours of work, and there was no set schedule, as everyone was on call 24 hours a day, and 7 days a week, as required by the nature of emergency aircraft operations and patient repatriation. This was not an airline with a regular schedule. Just like an ambulance, these airplanes were on call and used when a medical emergency required patient repatriation.

**36** The managerial employment expectation that Mr. Bilesky would be the person who would have to go in when necessary, and that the other aircraft technicians could elect to come in when called or reject it, represents an important distinction in determining whether Mr. Bilesky managed the maintenance operations of the organization.

**37** Relative compensation within the organization is obviously an important factor in any "manager" determination. In this regard, Mr. Bilesky's annual remuneration reflected his senior managerial role in the organization, and was comparable to the other senior managers.

**38** In support of his position, Mr. Bilesky introduced the evidence of several Fox Flight employees. The evidence-in-chief of all of those witnesses contained within their respective affidavits can be summarized as: No decisions were made at Fox Flight without Mr. David Fox's direct personal involvement. However, these witnesses were testifying largely on matters with which they had no direct personal involvement. While their evidence was somewhat relevant, I could not give it much weight.

**39** The importance of considering actual roles as distinct from titles is best seen in regards to the position of Fox Flight's Maintenance Manager. Mr. Bilesky testified that he reported to the Maintenance Manager, but that evidence was contradicted. The evidence of the witnesses established that the Maintenance Manager, at all material times, was a part-time role, basically fulfilling a regulatory requirement in the auditing of maintenance activity, with little direct supervisory contact with Mr. Bilesky as the Director of Maintenance.

**40** Another disputed contention was Mr. Bilesky's authority to hire employees. Mr. Bilesky made the determination of who ought to be hired or fired, and was the person interviewing individual candidates. Mr. Bilesky put his hiring and firing recommendations to Mr. Fox for final approval. Objectively, this makes sense. Mr. Fox had no ability to determine the credentials or qualifications of an AME technician or to assess technical skills, or staffing requirements to maintain the fleet. A similar example arose with Mr. Bilesky's appointment of a regulatory

requirement of the position of Director of Quality Management (DQM). The determination of which individual has the qualifications and experience to meet the requirements of the DQM role could only be made by an experienced and qualified individual, such as Mr. Bilesky.

**41** I put significant weight on how individual employees held themselves out to others, both within the company and externally. Mr. Bilesky used the title of Director of Maintenance in his company email signature. This makes perfect sense, having regard to his role as the approved signatory of any correspondence with Transport Canada on behalf of Fox Flight Maintenance. Mr. Bilesky properly considered himself as the primary contact person for any maintenance service providers.

**42** In making the determinations in this matter, I have placed significant weight on Transport Canada's assignments of responsibility for the various roles within the organization. Since 2005, the Person Responsible for Maintenance (PRM) is the individual ultimately responsible of the management an AMO, and not the Certificate Holder or Accountable Executive.

**43** This is a case where it was essential to consider all of the evidence, and not simply the component parts. In his evidence, his affidavit and exhibits, and evidence of his witnesses, Mr. Bilesky sought to establish that he did not meet the "manager" tests established in the jurisprudence. Mr. Bilesky's argument, his evidence, and the evidence of his witnesses was directed to make one specific point; namely, that the only person who was a "manager" at Fox Flight was its owner, Mr. Fox.

**44** On the evidence before me, Mr. Bilesky was a manager and exercised managerial authority. My determination is based to a great degree on regulatory requirements of his position, such as the regulatory requirement of an interview by Transport Canada and a written acceptance of the appointment and the obligations and authorities to manage the maintenance operations of Fox Flight.

**45** I am not concluding that all of Mr. Bilesky's evidence and submissions were without merit. However, weighing them and carefully considering the totality of the workplace in its actual operations, and its statutory and regulatory environment, I am compelled to conclude that the tipping point was passed, and that Mr. Bilesky was a manager.

**46** Mr. Bilesky is, therefore, excluded from the unjust dismissal provisions of the *Canada Labour Code*, pursuant to Section 167(3), and his Wage Recovery Appeal must also be dismissed on jurisdictional grounds.

July 20, 2017

Morris Cooper