

CANADIAN Employment Law Today

Published by Canadian HR Reporter, a Thomson Reuters business ■ www.employmentlawtoday.com

CURRENT NEWS AND PRACTICAL ADVICE FOR EMPLOYERS

ISSUE NO. 543 • OCTOBER 7, 2009

Class action denied in CIBC overtime suit

*Common employer or similar harm not sufficient
to fulfil criteria needed for class action: Court*

| BY RONALD MINKEN |

THE ONTARIO Superior Court of Justice may have put a damper on the recent spate of class action overtime suits when it dismissed a motion for certification of a class action in *Fresco v. Canadian Imperial Bank of Commerce* in June. This decision has not only provided further guidance as to what is required to meet the commonality aspect of certification requirements, but also offers insight for future actions involving unpaid overtime and the difficulties that may be encountered by employees trying to obtain such certification.

In *Fresco*, the Canadian Imperial Bank of Commerce (CIBC) overtime policy required employees to obtain approval from their manager prior to working any overtime, unless there were extenuating circumstances making pre-approval impossible. In those circumstances, the employees would then obtain approval after working the overtime hours.

CIBC employees claimed this policy violated the requirement in the Canada Labour Code that employees are to be paid for overtime at a rate not less than one and one-half times the employee's regular wages when the employee is "required or permitted" to work in excess of standard hours of work. The employees said the pre-approval requirement in the policy "purports to

excuse (the employer) from paying any overtime and does not allow for payment of overtime to (employees) who were routinely required or permitted to work overtime."

Given the number of employees affected by the policy, one of the employees brought a motion for certification of the action as a class proceeding on behalf of all the current and former "front-line" service workers in CIBC's retail branches, a number estimated by CIBC to include at least 31,000 employees, seeking compensation for unpaid overtime wages due to a breach of contract and unjust enrichment on the basis the employer's overtime policy was illegal.

Individual claims too different to be lumped together: Court

After hearing the arguments put forward by both parties, the Ontario Superior Court of Justice concluded the motion should be denied. Referring to the criteria that must be met in order to certify an action as a class proceeding, and focusing primarily on section 5(1)(c) of the Class Proceedings Act, which states that the claim of the class members must raise common issues, the court found there was a lack of the required commonality between the employees.

"It is my conclusion this is not a

EMPLOYMENT STANDARDS

In This Issue

ASK AN EXPERT HIV-positive kitchen worker • Obligation to relocated employee	2
CASES AND TRENDS: Termination payments upon bankruptcy: Who's liable?	3
CASE IN POINT Employer pulls the plug on cocaine-addicted plumber	4
YOU MAKE THE CALL Corrections officer can't have gun, won't travel	8

Employer acts too quickly after employee throws tantrum, quits

AN ONTARIO EMPLOYER was too hasty in assuming an employee resigned when he left the office in a huff, the Ontario Superior Court of Justice has ruled.

Barry Upcott, 54, was a production manager at Savaria Concord Lifts, a manufacturer of elevators and home accessibility products in Brampton, Ont. He joined the company in April 2000 and by 2008 was the most senior planning manager at the company.

On the morning of May 8, 2008, Upcott was doing extra work to fill in for another planner who was away that day. He had a heated conversation with a female co-worker over a special order for the company president's son and when the co-worker didn't show up for a subsequent meeting, Upcott found out she had

Continued on page 6

Continued on page 7

Individual claims must be examined: Court

...continued from page 1

proper case for certification and a class proceeding is not the preferable procedure for resolving the claims of class members for unpaid overtime," said Justice Joan Lax. "This is not a case where questions of systemic wrongdoing can be resolved without examining the individual claims, thereby defeating the purpose of a class action."

Justice Lax went on to say it was not enough that there was "a common defendant" or "a common type of harm," finding the harm must be the same to each member of the group for it to go forward as a class action.

CIBC overtime policy not illegal

In addition to rendering a decision on certification of the action as a class proceeding, Justice Lax also found CIBC's overtime policy itself was not illegal, but rather the way it was applied was. The policy itself allowed overtime, but CIBC prevented employees from obtaining approval under the policy so they had to work unpaid overtime.

In general, the decision in *Fresco* has

provided a further interpretation of the commonality requirement that must be fulfilled under the Class Proceedings Act in order to succeed in a motion for certification of the action as a class proceeding. As Justice Lax stated, the mere commonality of either defendants or harm committed is not sufficient in meeting the requirements under the Class Proceedings Act. Instead, the commonality must exist between all plaintiffs in regards to the actual wrong committed and in the evidence which supports the allegation.

Additionally, *Fresco* provides guidance to future actions involving unpaid overtime where certification as a class proceeding is contemplated. This decision should not be interpreted as indicating an action for unpaid overtime can never fulfill the commonality criteria referred to above. However, it does stand as a warning to such actions that the criteria for certification for a class proceeding is not a simple obstacle to clear. Despite the benefits of proceeding by way of a class action, such as it being economical and efficient for both the parties involved in the action and the

courts, these benefits will not supersede or authorize the courts to ignore what is statutorily required to permit certification. Therefore, employees or other parties will have to give careful consideration on whether a case should be undertaken as a class action. See *Fresco v. Canadian Imperial Bank of Commerce*, 2009 CarswellOnt 3481 (Ont. S.C.J.).



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ASK AN EXPERT

...continued from page 2

or other factors.

In the absence of such a contractual provision, inducement and relocation are factors which the courts can consider in assessing the amount of notice required. In the well-known case of *Wallace v. United Grain Growers Ltd.*, inducement was considered to be a factor even 14 years after hiring. Inducement, or the requirement that an employee relocate, can be used to lengthen the common law notice period.

The obligation of an employee to relocate can also result in an award of compensation for moving costs in certain circumstances. There is a fairly fundamental legal principle that will apply: A party to a contract may be liable for damages arising out of the breach of that

contract to the extent that they flow reasonably and foreseeably from the breach. In other words, were the damages claimed reasonably foreseeable, and therefore "part of the deal?" A contract can provide for such, or defeat such a claim, depending on its wording. In the absence of a contract with relevant provisions, the courts will attempt to determine what the parties intended.

Claims for reimbursement of moving costs have been upheld in many cases. That said, some courts have taken the approach that an individual would have to move to obtain new employment even if proper notice had been given, and reimbursement of moving costs should therefore not form part of any award for pay in lieu of notice. Much will depend on the circumstances and the explicit, or implied, agreement of the parties.

As is often the case, a properly drafted and executed employment

agreement can address this type of issue and eliminate the uncertainty.

For more information see:

- *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CarswellBC 1907 (S.C.C.).
- *E. (S.T.) v. Bertelsen*, (1989), 10 C.H.R.R. D/6294 (Alta. Bd. of Inquiry).
- *Fontaine v. Canadian Pacific Ltd.*, 1989 CarswellNat 879 (Can. Human Rights Trib.).
- *Giguere v. Popeye Restaurant.*, 2008 CarswellOnt 2421 (Ont. Human Rights Trib.).
- *Wallace v. United Grain Growers Ltd.*, 1997 CarswellMan 455 (S.C.C.).

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