

OVERTIME RULES CAN TRAP THE UNWARY EMPLOYER

In Ontario, the *Employment Standards Act* mandates the requirement to pay at least time and a half for all hours worked by an employee in excess of 44 hours per week. Employers who, for different reasons, fail to pay overtime pay have been met with two types of claims by employees:

- (i) Class action suits on behalf of all employees; and,
- (ii) Complaints by individual employees to the Employment Standards Branch of the Provincial Ministry of Labour.

The record of certification of class action claims in Ontario is contradictory. In 1998, the Ontario Superior Court dismissed a certification motion for a contemplated class action for unpaid overtime pay against Becker's Milk. The court held that the procedure available for complaints under the *Employment Standards Act* was a more efficient and cost-effective way for employees to bring such claims. The court held that a proceeding under the *Employment Standards Act* would be quick and "cost the complainant employees nothing".

In 2008, a class action was brought against KPMG for unpaid overtime. The action was certified as a class action for purposes of implementing a settlement reached with KPMG to compensate the employees. The court found that there was an identifiable class, the claim of the members of the class raised common issues, and the class proceeding was the preferable procedure.

The Ontario Divisional Court was given the opportunity to resolving the conflicting decisions in a pair of cases brought against chartered banks for overtime pay owed to tellers and customer service representatives. In the first of these decisions, *Fresco v. CIBC*, the Motions judge

refused certification on a number of grounds, including the absence of common issues among the potential members of the class. As the overtime policy imposed required pre-approval of any overtime, the motions judge concluded that the claims of the proposed class members could vary according to whether or not such pre-approval was given. The issue of entitlement could be different for each employee. The judge therefore concluded that each claim would have to be examined individually, even if systemic wrongdoing could be proven. The Motions Judge therefore refused certification.

In determining whether the motions judge erred in finding that there were no common issues that would, as the Act requires, “significantly advance the litigation”, the court examined whether allowing the action to proceed as a class action would avoid duplication of factual investigation or legal analysis. In overturning the motion judge’s decision, the Divisional Court held that the calculation of the unpaid overtime, and the method to be used in determining overtime hours, did represent common issues among the class. As well, the question of whether or not the bank owed duties to the class members to put policies in place to prevent overtime without compensation represented a further common issue. Based on the courts determination on whether or not there were common issues, it further concluded that there was a likelihood of an assessment of aggregate damages. This also weighed in favour of certification.

The Divisional Court held that the bank’s policy that overtime had to be pre-approved was not, on its own, unlawful. The Divisional Court found that an employer has a right to set hours of work in accordance with the demands of its business so long as the provisions of the applicable legislation are followed.

The Divisional Court, in a 2-1 decision, set aside the decision of the motions judge and certified the class action.

Shortly thereafter, a second case dealing with a claim by bank employees for overtime pay came before the Ontario Superior Court. In *Fulawka v. The Bank of Nova Scotia*, the court considered a certification motion on behalf of 5,000 salaried employees of Bank of Nova Scotia for overtime pay. In certifying the action and approving the settlement, the court rejected the widely held misconception that salaried employees are not entitled to overtime. The court held that, under the *Employment Standards Act*, salaried employees have the same entitlement to overtime pay as hourly employees. The Act does exempt specific professions from entitlement to overtime, including doctors, lawyers, architects, and employees who hold a managerial position. The court also pointed out that, while employers cannot contract out of the minimum requirements under the *Employment Standards Act*, employees are free to agree to better rights than those provided by the Act. In this case, the court relied on the decision of the Divisional Court in *CIBC* and granted certification of the motion and approved the class settlement.

Based on these two decisions, it is clear that employers in Ontario are still exposed to class action lawsuits for unpaid overtime, where overtime is not properly tracked and paid in accordance with the provisions of the *Employment Standards Act*.

As indicated by both the Motions Court and the Divisional Court, employees also have access to the administrative procedure under the *Employment Standards Act* for enforcing overtime entitlement. Compensation under this procedure is limited to \$10,000 per employee. The

procedure is commenced by way of a Complaint filed with the Employment Standards Branch of the Ministry of Labour. The Complaint is then investigated by an Employment Standards Officer who has the power to review the employer's records with respect to hours and payment. This is generally accomplished by way of a fact finding meeting between a representative of the employer and the administrative officer from the Ministry. If the officer determines that overtime should have been paid, an Order to Pay will be issued. This process is undertaken at no cost to the employee.

The risk for employers in such Complaints is that the Employment Standards Officer may take further steps to investigate records with respect to other employees who have not even made a Complaint. As it is a statutory obligation to pay overtime, there is nothing the employer can do to prevent such expanded investigations. It is for this reason that employers are often well advised to attempt to resolve the claim before the investigation proceeds.

Given the strict liability for such overtime payment in the Act, employers are well advised to implement proper procedures to track overtime and ensure its payment in a timely fashion.