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Making sense of overtime class actions

*What employers need to know about
why one was certified and one wasn't*

| BY LISA BOLTON |

THE ONTARIO Superior Court of Justice's February 2010 decision in *Fulawka v. Bank of Nova Scotia*, certifying a class action lawsuit against the Bank of Nova Scotia (Scotiabank) for unpaid employee overtime, may be a cause for puzzlement among some Ontario employers. The decision was released less than a year after another judge in the same court refused to certify a class action against the Canadian Imperial Bank of Commerce (CIBC) in similar circumstances (*Fresco v. Canadian Imperial Bank of Commerce*). Why did one judge certify the class action while the other did not? Were there factual differences which tipped the balance? What lessons, if any, can employers learn from these two decisions?

The claims advanced and the underlying facts in both cases were similar in a number of ways. In both actions the representative plaintiffs claimed:

- The banks' overtime policies were unlawful and violated the overtime sections of the Canada Labour Code.
- Employees were frequently required to work overtime hours in order to complete their daily work tasks.
- The banks' overtime policies required employees to obtain prior approval from management in order to be compensated for working overtime hours. However, the CIBC policy differed slightly from Scotiabank's in that it expressly permitted overtime to be

approved after it had been worked if there were extenuating circumstances.

The Scotiabank policy contained no such provision.

- Overtime was often not sought by employees because it was impractical to obtain approval in advance of doing the work, and overtime requests were rarely granted in any event.

- The banks failed to keep proper records of hours worked by their employees as required by the Canada Labour Code. CIBC had a procedure for employees to complete time records, but CIBC employees were directed not to include overtime hours in their time records without prior approval. Scotiabank did not use time sheets and did not have a system of recording the time worked by employees.

The test for class action certification

In order for certification to succeed, a representative plaintiff is required to satisfy the court that common issues exist among proposed class members that can be determined on a class basis rather than an individual basis, and that permitting the action to proceed as a class action would shorten or simplify the determination of some of the issues in the action. Absent such commonalities, a class action has little benefit over a series of individual actions tried together before a single judge.

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No problem with CIBC's policy, just the way it was applied

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A tale of two decisions

In both the CIBC and Scotiabank cases, the courts' analysis of what constituted common issues focused on the following question: Did the non-payment of overtime result from systemic failures caused by the overtime policy itself, or individual failures resulting from the application of the policy in specific circumstances? This analysis marks the dividing line between the two cases and appears to account for the different results.

In the CIBC case, Justice Joan Lax concluded the representative plaintiff failed to satisfy the commonality

requirement because the unpaid overtime claimed was not caused by an illegal policy. Rather, it was the result of a failure by the bank, independent of the policy, to pay for overtime hours that were either required or permitted to be worked — a failure of the bank to properly apply its overtime policy in individual circumstances.

Significantly, Justice Lax found the pre-approval requirement of the CIBC policy was not itself unlawful. Employers, said Lax, have the right to control employee hours of work, including overtime. Furthermore, the CIBC policy had a process to enable its employees to seek approval for overtime after it had been worked. Any alleged failure by CIBC to pay overtime was the result of the application of the policy to each individual employee, not the result of the overtime policy itself. The allegations against CIBC therefore did not raise a systemic issue common to the proposed class.

Justice George Strathy reached the opposite conclusion on Scotiabank's policy. He found Scotiabank's failure to pay overtime arose as a result of systemic failures of its policy rather than the application of the policy in individual circumstances, and identified a number of factual differences between the two cases to justify his conclusion. One significant distinguishing fact was that Scotiabank's policy, unlike CIBC's policy, did not allow for the approval of overtime hours after they had been worked even if there were extenuating circumstances. He found this created a systemic barrier that applied to all Scotiabank employees in the class action, regardless of their individual circumstances. Another distinguishing fact was that Scotiabank did not have a system-wide procedure to record overtime. This made it difficult for all employees to obtain fair compensation for their overtime work. Both these deficiencies were found to satisfy the commonality requirement for certification of a class action because they applied to all class members regardless of individual circumstances.

Lessons for employers

These two decisions provide important guidance to employers seeking to minimize the risk of a class action lawsuit by employees claiming unpaid overtime. The bottom line is that non-payment of overtime must result from the circumstances of the individual employee and not systemic failures of the overtime policy itself. More specifically, consider the following:

- Employers have the right to control employee hours of work, including overtime.
- The requirement for pre-approval of overtime work is not itself unlawful.
- If an overtime policy requires prior approval it should also include a procedure for employees to seek approval after the overtime has been worked. Otherwise the overtime policy may create a systemic barrier to overtime pay applicable to all affected employees, regardless of their individual circumstances.
- When emergencies occur, ensure any overtime worked is recorded, approved and paid.
- Establish a system to keep accurate records of all hours worked by employees, including overtime hours (whether or not the overtime has been approved).
- If it is preferable to the employer that employees not work overtime (or that overtime be limited) ensure front line supervisors communicate this expectation and hold employees accountable. ■



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