

Overtime class action launched against Canada Cartage

Quoting Erin R. Kuzz

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An overtime class action has been launched against trucking company Canada Cartage, Direct Distribution Centres, and its related companies.

The statement of **claim** filed Nov. 8 in the Ontario Superior Court indicates the company required or allowed employees to work hours in excess of their standard hours of work “in order to complete the common duties of their employment.”

However, the claim states Canada Cartage and Direct Distribution Centres didn't properly compensate the employees for overtime, contrary to their contractual and legal obligations.

The lawsuit also alleges that beginning around July 2012, Canada Cartage and Direct Distribution Centres improperly reduced hourly rates of pay without reasonable notice, in order to make it look like they were paying overtime, when in fact employee weekly earnings remained unchanged.

Canada Cartage employs about 3,500 people, however some would be managerial and not eligible for overtime under the Canada Labour Code.

“We would expect a good number of the 3,500 would fall within our class definition,” says Ian Matthews of Lax O’Sullivan Scott Lisus LLP, who is representing the plaintiff in *Baroch v. Canada Cartage*.

“Canada Cartage is a national company and we expect their practices would be uniform throughout the country because they are federally regulated by the same labour laws. We are eager in hearing from people across Canada,” says Matthews.

“We’ve seen a lot of traffic on message boards from people in the trucking industry that seems to suggest this problem is widespread in the industry, not just Canada Cartage.”

Canada Cartage has 20 days to respond to the statement of claim. Calls to the company by Canadian Lawyer InHouse were not returned by press time. The class definition goes back to March 2006.

The representative plaintiff, Marc-Oliver Baroch of Mississauga, Ont., started working for the company in 2007. He was a shunter operating a truck that positioned semi-trailers to loading docks within the yard of a warehouse. The company routinely required or permitted Baroch to work between 50 to 60 hours per week. Prior to July 2012, he was only paid overtime when he worked over 60 hours a week.

Other positions held by class members include drivers, dispatchers, warehouse personnel, dockworkers, and inventory co-ordinators.

When Baroch lost his job due to outsourcing in July 2013, he was not part of a union and the vast majority of

employees with the company are not unionized.

Baroch sought legal advice and an examination of his pay stubs revealed there was a problem with how he was being compensated. It was discovered that at the same time Canada Cartage appeared to begin paying overtime in July 2012, it corresponded with “what appears to be a unilateral decrease in Mr. Baroch’s rate of pay,” says Matthews. His hourly wage decreased to \$17.34/hour from \$19.50/hour.

He was then being “notionally” paid overtime for hours worked in excess of nine hours in a day or 45 hours a week. However, due to the reduction in his rate of pay, a typical 60-hour workweek for Baroch with “overtime” still amounted to the same gross weekly earnings he made before without overtime pay.

“When we looked at the numbers it seems the reason \$17.34 per hour was chosen was because it resulted in the exact same gross weekly pay as Canada Cartage would have been paying Mr. Baroch. We characterize that in our statement of claim as reverse engineering class members rates of pay on a systemic basis which had the effect, as we allege, of not actually paying class members a cent more even though they were notionally now being paid overtime,” Matthews says.

This is the first overtime class action of its kind in the trucking industry and it may well be a byproduct spawned by greater awareness of the overtime class actions in the bank sector.

In March, two lawsuits filed on behalf of thousands of CIBC and Scotiabank employees were cleared to go ahead after the Supreme Court of Canada said it would not hear the banks’ appeals.

In *Fulawka v. Bank of Nova Scotia* and *Fresco v. Canadian Imperial Bank of Commerce* the “off the clock” cases involved plaintiffs who said they were eligible for overtime but it was not recognized and paid by the employer. Dara Fresco filed the case on behalf of bank tellers and other customer service employees, while Cindy Fulawka filed on behalf of personal or senior bankers, advisers, and small business account managers.

“I think as a result of the bank overtime cases there is a greater awareness of the issue and it extends beyond the banking sector to the more blue collar sector. I think with the greater awareness out there other employers may have taken steps to avoid detection,” says Steven Barrett, a lawyer with Sack Goldblatt Mitchell LLP.

“There are always two sides to a story but from the pleadings there certainly seem to be a lot of common issues in terms of the employer’s class-wide policies and practices, so I think given the decision in *Fresco and Fulawka* there’s a good chance that employees in a particular workplace are being systematically denied their overtime requirements or not paid at all for working extra hours are amendable to being certified,” says Barrett.

Erin Kuzz of Sherrard Kuzz LLP says in the realm of overtime class action cases where the facts are fairly consistent — either there is a policy about overtime or there isn’t one — that’s when the courts have been consistently more likely to certify the class.

“I think that’s where we’re going to see more of these,” she says. “The courts have been more prone to certifying straight overtime cases than they have to other types of cases like the misclassification cases involving managers not entitled to overtime.”

Kuzz says she is having more “proactive” conversations with employers about the overtime issue. But she cautions that in Ontario employers also have to be mindful that the Employment Standards branch can conduct an audit and it doesn’t take a class action or a complaint.

“While an employer may not have this huge-scale vulnerability in the form of a class action, there is always vulnerability to an Employment Standards auditor coming in and saying, ‘Pay these folks back a significant

amount of unpaid overtime,” she says.

So while it must be determined if the employer acted illegally and failed to pay overtime, the other question becomes how to assess damages.

“That’s very much an open question,” says Barrett.

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