

## B.C. arbitrator rules in favour of ICBC employees in unpaid overtime case

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quoting Erin R. Kuzz

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**A British Columbia labour arbitrator has ordered the Insurance Corp. of B.C. to pay overtime wages retroactively to employees who worked longer shifts, but weren't properly compensated.**

The case of *Insurance Bureau of British Columbia v. Canadian Office and Professional Employees' Union, Local 378* dealt with overtime that was performed but not approved by the employer.

In his decision, arbitrator Colin Taylor wrote: "It is no defence to say the work was unauthorized. The Employer knowingly allowed the work to be done and received a benefit."

ICBC employees will work now with management under arbitrator supervision to determine how much and to whom compensation should be paid.

Taylor also ordered ICBC to ensure no work beyond employees' regular shifts occurs and, if they do, to compensate them with overtime wages — time and a half for the first hour and double from the second on.

According to the union, it had warned ICBC the company's staffing levels were inadequate and workloads were growing out of control.

The arbitrator rejected ICBC's denial of the grievance on the basis that all overtime must be pre-authorized by management. He said it is the responsibility of the employer "to enforce hours of work provisions."

The arbitrator also pointed out that the insurance company didn't have a system to ensure employees did not perform work beyond their regularly scheduled hours.

"The Employer failed to have a system in place to ensure that employees did not perform work beyond their regularly scheduled hours even though the Employer knew that certain employees continued to work beyond their scheduled hours even after being told not to do so," Taylor wrote in his decision.

The ICBC case is a good example of employers not understanding that controlling and monitoring the overtime issue is ultimately their responsibility, says Erin Kuzz of Sherrard Kuzz LLP. Failing to do so can be a liability.

"That's what we're seeing in these bank class actions. We're seeing that there were these policies that you don't get to work without approval but the reality is are those policies being enforced? That is as much a part of the issue as having the policy itself," says Kuzz.

Employment standards legislation doesn't require giving consent to overtime before it has to be paid. That makes it the employer's job to ensure it not only has a rule that says an employee can't perform overtime without permission, but that it's enforced to the point of disciplining people if necessary.

The issue of unpaid overtime has become a major concern for Canadian companies since the certification of two class actions involving CIBC and the Bank of Nova Scotia. Experts believe the bank class actions are

bringing the issue to light and could become an issue with smaller non-multinational employers in Canada.

On June 26, the Ontario Court of Appeal released its decision in the two national overtime class actions: *Fresco v. Canadian Imperial Bank of Commerce* and *Fulawka v. Bank of Nova Scotia*. In unanimous judgments written by Chief Justice Warren Winkler, the court ruled that both cases should be certified as class actions.

Fresco, a bank teller at CIBC, and Fulawka, a former personal banker at Scotiabank, each represented a class of thousands of employees.

The issue has called into question whether there are potential unpaid overtime minefields waiting in other Canadian organizations. So what should in-house counsel do to mitigate the problem? Start with one question, says Kuzz: "When was the last time we did an internal audit?"

Kuzz says: "More and more the role of in-house is becoming one of risk assessment, risk management, and compliance. I can't think of many topics that fall more squarely with risk management and compliance than this does. It is a potentially big-dollar issue."

In arbitration cases awards can be up to \$10,000 per employee.

"If an employment standards officer does a full audit and finds 200 people haven't been getting overtime, those numbers add up very quickly," she says.

It's better to do an internal audit before a government agency such as the Ministry of Labour comes calling.

"You may be creating evidence against your organization but to me that will be outweighed by a chance to fix it," says Kuzz.

Then look to see if policies are in place to address the need to get approval for overtime and ask what the mechanism is to enforce the system.

"Anyone who has a compliance role within an organization is well served to look not only at the policies but also practices in place," says Jason Beeho, partner with Rubin Thomlinson LLP.

Another reason to review policy and compliance is that there are many misconceptions about how overtime rules work, he says.

It is reasonably well known that under the Employment Standards Act in Ontario, the threshold for paying overtime wages is 44 hours in a week. But in terms of what employees can actually be asked to work and required to work the standard is no more than 48 hours in a week.

"If you're in a situation where as an employer you want a class of employees to work more than 48 hours per week and they don't fall into one of the exceptions, then you've got to go to the Ministry of Labour and get an overtime permit," says Beeho. "You'd be hard pressed to see an application granted to have people working more than 60 hours per week."

Compliance with the overtime rules should be made part of the competencies of all supervisors, says Kuzz.

Some employers probably don't even realize they are violating overtime rules. A classic example is with salaried employees.

"One of the big misconceptions is that only hourly workers are entitled to overtime," says Beeho. "It's not a foregone conclusion that because someone is a salaried employee they are then not entitled to overtime. The overtime exemptions under the Ontario Employment Standards Act and likewise under other provincial statutes are quite narrow."

The overtime problem can arise in any sector where a traditional punch-clock environment doesn't exist, making employers in sectors outside manufacturing more vulnerable.

Most jurisdictions allow for overtime-hour averaging which means the employer and employee can enter into an agreement to average the employee's hours over a certain period of time.

"I see far too few employers take advantage of that mechanism," says Kuzz.

An employer can also set up an agreement with employees to take lieu time, which is banked at the same rate as overtime — time and a half — which can save money.

Be sure to keep good records: Records from employees may be given consideration over records of employers unless the employer has very strong records to reflect the hours really worked.

"People would be shocked to learn how often disgruntled employees are tracking their real hours," says Kuzz.