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Court Dismisses Motion to Certify Class Action for Overtime Wages

Date: June 19, 2009

On June 18, 2009, Madam Justice Lax of the Ontario Superior Court of Justice released her decision, in which she dismissed the motion for certification of a proposed class action brought by Dara Fresco on behalf of current and former employees in the retail branches of the Canadian Imperial Bank of Commerce ("CIBC") with respect to her claim alleging unpaid overtime wages (*Fresco v. Canadian Imperial Bank of Commerce*). CIBC was represented by Hicks Morley and Torys. Justice Lax found that the Plaintiff failed to meet the test under the *Class Proceedings Act* (the "*CPA*") in Section 5(1)(c), as the action lacked the essential element of commonality in order to be certified as a class action.

The Plaintiff framed her claim in breach of contract and unjust enrichment. Central to these claims was her allegation that CIBC's Overtime Policy was illegal and that it violated the statutory requirements under the *Canada Labour Code* (the "*CLC*"). The Plaintiff also alleged that the provision of time in lieu to CIBC's employees, as an option under CIBC's Overtime Policy was not permitted under the *CLC*. Justice Lax noted that the cornerstone of the Plaintiff's claim was the alleged illegality of the CIBC Overtime Policy, and, in particular, the pre-approval requirement.

Justice Lax found that CIBC's Overtime Policy was not illegal and, at any rate, the determination of its legality would not materially advance any class member's claim for unpaid overtime wages. Justice Lax went on to find that:

Section 174 [of the CLC] permits employees to exceed the maximum hour thresholds only where the employer has required or permitted the overtime work. The very language of the CLC therefore contemplates the right to pre-approve overtime. In order to "require or permit" an employee to work overtime, management must be directly involved in deciding whether the employee works overtime. Indeed, a pre-approval requirement is a way to ensure that an employer complies with s. 171 of the CLC, which states that the total hours worked by an employee in any week shall not exceed 48 hours.

Justice Lax also noted that "Leaving aside the statutory framework, it is the fundamental right of the employer to control its business, including employees' schedules, hours of work and overtime hours". Justice Lax went on to conclude that it was plain and obvious that the pre-approval requirement in CIBC's Overtime Policy was not unlawful on its face.

Justice Lax also reviewed the provision of time in lieu at the rate of time and a half as an option available to the employee under CIBC's Overtime Policy and rejected the Plaintiff's claim that the provision of time in lieu was illegal. Justice Lax concluded that it was plain and obvious that the time in lieu provision in CIBC's Overtime Policy is lawful and complies with the *CLC*. The CIBC Overtime Policy offered a more favourable benefit than that under the *CLC*, as it offered employees a choice between wages at time and a half and time in lieu at time and a half. (CIBC's Overtime Policy also provided a more favourable lower total weekly threshold of 37.5 hours for the triggering of overtime, rather than 40 hours under the *CLC*.)

Justice Lax found that the Plaintiff had failed to establish an evidentiary foundation to support her allegation that a common, pervasive or systemic practice of unpaid overtime existed at CIBC. Justice Lax further held that, even if there were such an evidentiary foundation, the case was not one which could be advanced by a class action because any issues of systemic wrongdoing could not be resolved without an examination of the individual claims.

Justice Lax held that the test for commonality under Section 5(1)(c) of the *CPA* was not met as there was no asserted common issue capable of being determined on a class-wide basis that would sufficiently advance the litigation to justify certification.

This case illustrates the complex and uniquely challenging nature of class action litigation in the employment context.

Hicks Morley's team was led by John Field and comprised of Lauri Reesor , and Elisha Jamieson. If you have any questions arising from this FTR Now, please contact John Field at 416.864.7301.

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