

LABOUR & EMPLOYMENT UPDATE

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A REASON NOT TO PAY OVERTIME

The Ontario Superior Court of Justice released on June 18, 2009 its decision in *Fresco v. Canadian Imperial Bank of Commerce*, regarding Ms. Fresco's application to have her overtime claim against CIBC certified as a class action. She put herself forward as a representative Plaintiff on behalf of current and former front line retail branch service workers. Given the numbers of employees and former employees she claimed to represent (more than 30,000), and the fact that the claims went back as far as 1993, the estimated value of the class action claim was north of \$600 million.

Ms. Fresco alleged that CIBC routinely required employees to work overtime, but failed to pay them for it, or provide them with time off in lieu of overtime worked.

While the Court declined to certify her claim as a class action, in considering the issues involved it included in its analysis statements of interest to employers regarding whether CIBC's overtime policy was illegal on its face. The policy stated that:

In order for employees to be compensated for overtime hours worked, the hours must be pre-approved by a manager in advance. Overtime, for which prior management approval was not obtained, will not be compensated unless there are extenuating circumstances and approval is obtained as soon as possible afterwards.

Ms. Fresco argued that the Canada Labour Code (the "Code") required overtime to be paid as long as it had been worked, and that therefore the policy's pre-approval requirement was a violation of the Code's minimum protective provisions, and thus could not be used as a defence by CIBC to the payment of unapproved overtime.

In deciding that CIBC's overtime policy, and in particular the pre-approval requirement, did not violate the Code, the Court said there was nothing wrong with the policy itself, and that Ms. Fresco's real allegation was that the policy was not being enforced at the branch level. What is of particular importance for employers is the Court's comments regarding an overtime policy's requirement that overtime be pre-approved. In considering the issue, the Court said that the Code permits employees to work overtime only where the employer has required or permitted the overtime work. The very language of the Code contemplates the right of the employer 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 the Code's requirement that the total hours worked by an employee in any week may not exceed 48 hours.

Basically, the Court found that there were two situations to address. The first was where an employer actually required an employee to work overtime. In that case, the answer was simple – the employer had to pay overtime, or provide time off in lieu. The second situation is more interesting, when an employee has worked overtime, but has not received pre-approval. The decision then as to the employee's overtime entitlement turns on whether or not the employer knew the employee was working the overtime hours.

The Court relied on previous cases which indicated that where employees were working overtime with the employer's knowledge, but without the employer's specific permission, as a factual matter, the employer must be seen to have either required or permitted the overtime to be worked. The Court would not permit

an employer to allow an employee to work overtime, then refuse to pay for that overtime on the basis that it had not been expressly pre-approved.

In upholding CIBC's pre-approval requirement, the Court said that it is the fundamental right of the employer to control its business, including its employees' schedules, hours of work, and overtime hours worked. The ability to authorize overtime is in fact one of the legal criteria used to assess whether or not an employee is considered managerial and therefore exempt from the hours of work provisions of the Code. An employee cannot unilaterally and without the agreement of the employer determine what is "work" (i.e., services to be paid for). Put another way, an employee cannot foist services on an employer and expect to be paid wages for them. Where an employer's overtime policy contains a provision that requires prior authorization, the employee is not entitled to work overtime hours at the employee's own initiative and then claim an entitlement to overtime pay. Conversely, an employer cannot avoid its statutory obligations by knowingly permitting employees to work overtime and then later taking the position that the overtime had not been authorized.

CIBC's policy was found to clearly contemplate that an employee unable to complete his or her assigned work during regular hours should discuss it with his or her manager who either then must approve the overtime or make other arrangements such that the employee does not work overtime. If unapproved overtime is worked, then either it was required or permitted by the manager, in which case the failure to pay is a breach of the Code and of CIBC's policy, or it was not required or permitted, in which case the employee has no entitlement to overtime compensation.

The practical significance of this case for employers in Alberta (and in Alberta the overtime provisions of the Employment Standards Code are similar enough to those in the Canada Labour Code that the Court's comments in this case can be applied here) is that employers can institute overtime policies that require pre-authorization of overtime hours worked.

One of the problems an employer faces if an employee files an overtime claim, particularly if the employee has worked overtime without the employer's knowledge or permission, is that the employer has most likely not met its obligation under the relevant Employment Standards legislation to record hours of work and overtime hours of work. Then, if the employee files in support of his or her claim a calendar or some other document on which the employee has purported to record overtime hours worked over a period of time, the employer is not able to rebut that evidence with its own records.

Based on the Ontario court's decision in *Fresco*, an employer can defend itself on the basis that the employee did not obtain pre-authorization for the overtime worked, and that the employer did not know overtime was being worked. If that is the case, then the employee has essentially taken on the management responsibility of deciding his or her hours of work, and what work will be done, and has effectively increased his or her income without prior employer approval. This is the very act of "foisting" that the Court in *Fresco* said would not be permitted. With this defence, it does not matter whether the overtime hours were actually worked or not.

As is often the case, a properly drafted employment policy regarding working and the payment of overtime can go a long way to protect an employer from claims that can be difficult and expensive to defend. ▲

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