Liability and damages in Canada's largest class action for unpaid overtime

December 15, 2020

After twelve years of litigation in *Fresco v. Canadian Imperial Bank of Commerce*, Justice Belobaba of the Ontario Superior Court of Justice recently decided two summary judgment motions on the merits – dealing first with liability and then damages.

In the liability decision, Belobaba J. found the defendant bank liable for permitting the plaintiff class members (front-line bank employees) to work uncompensated overtime hours, and for failing to record those hours in accordance with federal labour legislation.

In the damages decision, Belobaba J. found that the class members were entitled to damages for breaches of their employment contracts, and certified an additional common issue as to aggregate damages in an amount to be determined at a further hearing.

Background and legislation

In 2007, the representative plaintiff, Dara Fresco, commenced a proposed class action on behalf of 31,000 customer service employees who had worked for CIBC between February 1993 and June 2009. The core allegation was that CIBC's overtime policies and record-keeping systems contravened the *Canada Labour Code* (the Code), and as a result, thousands of front-line bank employees were not properly compensated for their overtime work.

Section 174 of the Code provides that when employees are "required or permitted" to work more than the standard hours of work (no more than eight hours per day and forty hours per week), their employer must pay them time and a half. Section 24(2) of the Code requires every employer to record the number of hours worked each day by every employee and to keep this information on file for at least three years.

Liability decision

In the liability decision, Belobaba J. interpreted section 174 of the Code to mandate pay at time and a half where employers require (or do not prevent) employees from working overtime hours. He then applied this interpretation to CIBC's overtime policies.

CIBC had two relevant overtime policies in that time period. The first required employees to obtain “pre-approval” from management before incurring any overtime. The second extended the pre-approval requirement and added the possibility of post-approval but only under “extenuating circumstances” and only if the post-approval was obtained “as soon as possible” after the overtime work was performed.

Belobaba J. determined that CIBC’s overtime polices breached the Code because nothing in the Code predicated an employee’s eligibility for overtime pay on formal approval or extenuating circumstances. In addition, CIBC did not accurately record and maintain information about the number of hours worked each day by every employee. Belobaba J. found that some employees worked overtime hours that were not recorded and were not compensated in accordance with the Code, and that CIBC permitted (or did not prevent) all uncompensated overtime hours.

Damages decision

After finding CIBC liable in the first summary judgment motion, Belobaba J. considered the issue of damages in the second. He found that CIBC was unjustly enriched for failing to pay some employees appropriately for all their hours worked, but noted that a finding of unjust enrichment added little remedy in a case that was fundamentally about damages for breach of an employment contract. Belobaba J. found that the employees involved were entitled to damages from the breaches of their employment contracts. He rejected the claim for punitive damages.

Belobaba J. certified an additional common issue of aggregate damages, which allows the plaintiff to argue that the court should determine damages without requiring each class member to prove his or her claim individually. The amount of aggregate damages would be determined at a future hearing. Before such a hearing, CIBC would need to extract the necessary time-stamped data and convert it to a usable form so that the plaintiff’s expert could complete his proposed aggregated damages report.

Takeaways

These decisions are significant as they underscore the importance of implementing overtime policies and procedures that comply with applicable employment standards legislation. Employers have a positive obligation to prevent employees from working overtime hours if they do not wish to compensate them for that time. Belobaba J.’s finding that aggregate damages might be available in this case is also significant, as the Ontario Court of Appeal had refused to certify aggregate damages in at least one other overtime case.

By

Katie Archibald

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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