



What's New in HR Law

The Perils of Unpaid Overtime: *Fresco v. Canadian Imperial Bank of Commerce*

April 28, 2020

In a [recent decision](#), the Ontario Superior Court of Justice held that the defendant bank breached the overtime obligations prescribed by federal labour law, as it failed to properly record actual hours worked and made overtime compensation contingent on pre-approval. This decision underscores the importance of ensuring that hours of work are properly recorded, and that overtime is paid in accordance with the applicable statutory requirements.

Factual Background

The representative plaintiff, Ms. Fresco, was employed by the bank. In June 2007, she commenced a class action on behalf some 31,000 customer service employees who worked for the bank between February 1993 and June 2009.

This update is for general discussion purposes and does not constitute legal advice or an opinion.

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At the core of the class action suit was the allegation that, over those 16 years, the bank's overtime policies and record-keeping systems contravened the federal *Canada Labour Code* (CLC) and, as a result, thousands of front-line bank employees were not properly compensated.

The CLC, which sets minimum employment standards for federally regulated employers, requires that standard hours of work not exceed 8 hours per day and 40 hours per week. Where an employee is "required or permitted" to work more than the standard hours of work, the CLC requires that they be paid time and a half. As per the CLC, federally regulated employers are also required to record the hours worked each day and keep this information on file for a specified number of years.

During the relevant period covered by the class action, the bank had two overtime policies. The 1993 overtime policy required "prior authorization" or pre-approval of the employee's supervisor or manager before working overtime. There was no provision for any post-approval. The 1993 policy explicitly directed employees to obtain prior authorization from management before incurring any overtime. In other words, if prior authorization was not obtained, employees were not "entitled" to overtime compensation.

The more recent 2006 overtime policy also emphasized the need for pre-approval of overtime, though it contemplated that post-approval could be obtained by employees. However, the policy stated that post-approval would only be granted in "extenuating circumstances".

The plaintiff did not claim that the employer never paid overtime or that every single class member worked uncompensated overtime. Rather, the plaintiff alleged that the restrictions and deficiencies in the bank's overtime compensation system resulted in some class members not being compensated for all hours worked. The Court agreed.

The Court's Decision

The Court noted that, in order to prove liability, the plaintiff was required to show that the employer's system-wide overtime policy and related practices were institutional impediments to class member overtime claims that were otherwise compensable under the CLC. However, in light of an earlier Court of Appeal decision in the same matter, the allegations of systemic deficiencies could not be "derailed with anecdotal examples of individual compliance" (for example, by showing that some class members were paid overtime or their work hours were properly recorded). In other words, individual differences in the treatment of members of the class are irrelevant to a determination of the systemic issues. The Court then made a determination on each of the common issues relating to liability.

The Duty to Prevent Class Members from Working Overtime (Or Not To Permit or Encourage Class Members to Work Overtime Hours)

The Court determined that neither pre-approval nor post-approval of overtime hours can be preconditions for the payment of overtime pay. Overtime must be paid whenever overtime hours were required or permitted – "full stop".

The Duty to Accurately Record and Maintain a Record of All Hours Worked By Class Members

The Court also held that actual hours of work were not recorded, and that this was a system-wide deficiency that contravened the CLC (i.e. hours worked that were otherwise permitted (not prevented) were not recorded and not compensated). The Court found that, in the vast majority of cases, the only hours recorded were the regular hours and the approved overtime hours. This was determined to be a breach of the employer's duty to ensure all hours of work are recorded and all overtime is compensated.

The Class Members Required or Permitted to Perform Overtime Work

In spite of the above findings, the Court remarked that, unless class members were required or permitted to perform overtime work, the defendant would not have a duty to compensate them for such work. This is an issue that the Court described as "essential".

To come to a determination on this essential issue, the Court asked two questions: (i) did the plaintiff establish that at least some of the class members worked uncompensated overtime hours; and (ii) did the plaintiff establish that it was more likely than not that these hours of uncompensated overtime work were permitted or not prevented by the defendant? The Court held that the answer to both questions was 'yes'.

With respect to the first question, the Court held that there was "an abundance of evidence that supports ... that some of the class members worked uncompensated overtime". In coming to this conclusion, the Court relied in part on the content of annual employee surveys, some of which suggested that employees were not being paid all overtime hours. In spite of the fact that these survey comments were anonymous hearsay, the Court refused to reject internal employee survey data that the employer itself had requested and "found to be reliable and useful".

With respect to the second question, the Court held that there was an evidentiary basis that could support a conclusion that all uncompensated hours were required or permitted by the defendant bank. The Court made this finding for five reasons:

- The bank's overtime policies contravened the relevant section of the CLC;
- The bank failed to record actual hours worked each day, contravening the *Canada Labour Standards Regulations*;
- The bank delegated the responsibility for the interpretation and enforcement of its overtime policy to more than 1,000 branch managers without any guidance or direction;
- The bank knew or should have known that some employees were working unpaid overtime; and
- The bank "looked the other way". With respect to this last point, the Court noted that, if an employer is told of the existence of numerous complaints about unpaid overtime, does nothing in response, the employer permits the employees to work overtime.

Good Faith / Bad Faith

While the Court held that the defendant breached the implied contractual terms that incorporated the provisions of the CLC regarding the recording of hours of work and the payment of overtime, the Court declined to find that the bank acted in bad faith. The Court declined to find that the bank knowingly misled its employees about the legality of its overtime policies.

Remedies

The Court's decision was limited to a determination of liability; a decision has yet to be issued on issues of remedy. Accordingly, at this time the remedial entitlements of the class members remain to be determined.

Check the Box

This decision demonstrates the importance of ensuring that employment standards, including standards pertaining to the recording of hours worked, are scrupulously followed, and that employment policies relating to employment standards, including but not limited to overtime, are drafted with a view to ensuring legislative compliance.

It is important to note that, while *Fresco* was decided in the context of the federal CLC, provincial employment standards legislation across all jurisdictions also includes requirements with respect to hours of work, payment of overtime, and record-keeping.

Employers are well advised to undertake a regular review of their overtime policies and practices to ensure compliance with employment standards obligations.

Need more information?

Should you need legal and strategic advice on litigation involving employment, labour and human rights issues, please contact [Giovanna Di Sauro](#) at 416-408-5513, or your regular lawyer at the firm.



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