
THIS IS A SUMMARY OF EMPLOYMENT MATTERS OF INTEREST TO THE
BUSINESS COMMUNITY, FROM A LITIGATOR'S POINT OF VIEW

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OVERTIME CLASS ACTION SUIT NOT CERTIFIED

In a recent judgment of Madam Justice Lax of the Ontario Superior Court of Justice, a class action suit commenced in June, 2007 for unpaid overtime pay totalling approximately \$500 million on behalf of current and former front line employees of the Canadian Imperial Bank of Commerce ("CIBC") was dismissed.

The action was formed in breach of contract and unjust enrichment and focused on CIBC's overtime policy which required overtime hours to be approved in advance by a manager to be compensable, except for extenuating circumstances.

The allegation was that such a requirement violated the Canada Labour Code, R.S.C., 1985, c. L-2 (the "Code"), which requires overtime pay when employees are "required or permitted" to work in excess of the threshold stipulated by the Code.

The judge refused to certify the case on the basis that the claims of the Class lacked the essential element of commonality insofar as it was not an issue which could be determined on a class wide basis.

The judge held that CIBC's policy was not illegal. She further held that even if the policy had been illegal or applied systemically in an illegal manner (which she found was also not the case), such a determination would not advance any individual Class member's claim for the unpaid wages as each individual employee would have to establish that he or she worked uncompensated overtime hours.

In coming to her conclusion, the judge made a ruling that affidavit evidence filed by the Class Plaintiff's legal counsel, which included a survey sample of potential class members registered by the law firm's website, constituted inadmissible hearsay. In respect of the affidavit evidence filed by the Class Plaintiff and other members of the Class, the judge held that such evidence supported a variety of individual circumstances which could only be resolved on an individual basis.

This case is one of the first in Canada to seek unpaid overtime pay on a class basis against a major employer and was followed by a number of similar proceedings filed against other major federal employers. These other cases will now likely also be challenged on the same basis. While the CIBC decision is likely to be appealed, the decision suggests that class claims for such relief will not be permitted to proceed and must be sought by employees on an individual basis.

Fresco v. Canadian Imperial Bank of Commerce [2009] O.J. No. 2531 (Ont. S.C.J.)

JUST CAUSE IS ALIVE AND WELL IN ONTARIO

During 2008 there was not a single reported decision in the province of Ontario finding just cause to terminate an employee's employment. That is not to say that no employees were terminated with cause. Only that none of these cases went to trial and ended in a successful result for the employer. However, there were cases in other provinces upholding terminations for just cause. This left open the question as to whether Ontario was a safe haven for transgressing employees. That question was answered in a decision of the Ontario Superior Court of Justice in March 2009.

On March 17, 2009 the Court found that an employer had cause to terminate an employee who had secretly developed a product that competed with its business.

The Company was involved in the sale of business forms, including cheques, labels and envelopes, with 60% of its revenue coming from cheques. It also, through a subsidiary, had run a web-based payroll service business in which the employee was employed as Director of Sales and Marketing. As part of that role, the employee was responsible for searching for new products and services that could be sold to the Company's customers.

In the year prior to his termination, the employee approached a subordinate within the Company, a software developer, and asked him to assist with the development of a web-based accounts payable product to take the place of cheques. The two of them worked on it primarily at home on their own time.

The subordinate eventually learned that the employee had not been truthful with him in terms of making disclosure to the Company of their activities. The subordinate believed it to be a conflict of interest and made full disclosure to the Company. Both the employee and the subordinate were thereafter terminated for cause. The employee sued for wrongful dismissal.

The Court applied the "contextual" approach and concluded, without much difficulty, that cause existed. The employee engaged in development of a product which was competitive to the payroll product and which would undermine the Company's cheque business. It fell squarely within the scope of his job responsibilities. The employee was found to have "irreparably breached the foundation of the employment relationship" and the Court further stated that the "Company was justified in concluding that he could not be trusted."

The Company was awarded copyright in the product developed by the employee as judgment in the counterclaim, on the basis that the software was developed in the course of the employee's employment.

Corso v. NEBS Business Products Limited [2009] O.J. No. 1092 (Ont.S.C.J.)

A CONSERVATIVE APPROACH TO CLAIMS FOR DAMAGES FOR MENTAL SUFFERING ENDORSED BY ONTARIO COURT OF APPEAL

The Court of Appeal issued a decision in *Amaral v. Canadian Musical Reproduction Rights Agency et al.* on May 13, 2009 confirming the trial judge's conservative approach to an employee's claim for damages for intentional and/or negligent infliction of mental distress.

Maria Amaral worked in the office of the Canadian Musical Reproduction Rights Agency for 23 years prior to her departure. Amaral's difficulties at work began when her employer began a major restructuring of its operations. When Amaral was denied a promotion to a management position, she became disgruntled. Her performance, attendance and punctuality became an issue in the workplace. After a series of meetings and reprimands, Amaral suffered a complete mental break down and took time off work. Amaral provided her employer with a doctor's note stating that she was "ill" and that she was required to be off work. No other details were provided. The employer wrote to Amaral asking her the nature of her illness and when they could expect her to return to the workplace. When Amaral did not respond, the employer decided to permanently reassign Amaral's duties to another employee and notify her that she would be assigned work within her abilities and medical condition upon her return to the workplace. Amaral then responded by filing a Statement of Claim against her employer alleging constructive dismissal. In doing so, Amaral also claimed damages for the intentional and/or negligent infliction of mental suffering arising from her employer's dealings with her prior to her departure. At trial, Amaral only pursued her claims for intentional and/or negligent infliction of mental suffering and abandoned her claim of constructive dismissal. Amaral's claims were dismissed in their entirety at trial.

On appeal, the Ontario Court of Appeal confirmed the trial judge's findings that the employer's dealings with Amaral were reasonable and proportionate and did not amount to intentional and/or negligent infliction of mental suffering. In doing so, the Court of Appeal then went on to award the employer \$40,000 in costs for the appeal. The Court of Appeal's endorsement of the trial judge's findings in this case is a clear indication that successful claims for intentional and/or negligent mental suffering will continue to be the exception rather than the rule and reserved for only the most egregious of circumstances.

Amaral v. Canadian Musical Reproduction Rights Agency Limited [2009] ONCA 399 (CANLII) (Ont. C.A.)

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