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Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

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What's in a name?

Not enough to show 'class' commonality, say Ontario's Superior Court and Court of Appeal

Think for a moment about your job title. Is it unique to you? Do all those in your organization with the same job title perform the same tasks and assume the same responsibilities? The answer to this question will likely depend on your particular job, the nature of your organization and how employees are classified within your organization.

This issue was front and centre in two recent class action certification decisions dealing with employees' entitlement to overtime pay: *McCracken v. Canadian National Railway Company*, 2012 ONCA 445 and *Brown v. Canadian Imperial Bank of Commerce*, 2012 ONSC 2377.

In both *McCracken* and *Brown,* the plaintiffs/employees disputed their managerial status and accordingly, their disentitlement to overtime. In both cases, the court found the managerial status of the employees could not be determined on a class-wide basis. Rather, an *individualized* assessment of each employee's duties and responsibilities would be necessary. As a result, the individual employees were denied the opportunity to pursue their claims collectively.

The facts in *McCracken*

In *McCracken*, the plaintiff was a former CN employee who started an action on behalf of 1,550 current and former non-unionized CN employees across Canada who held the position of First Line Supervisor ("FLS"). The primary allegation was CN had misclassified FLSs as managers and, as a result, these employees were unlawfully denied overtime pay as set out in the *Canada Labour Code*.

At CN, the FLS position is above unionized workers but below non-unionized managerial positions. FLSs serve as the main point of contact between the non-unionized and unionized workforce. FLSs enforce the rules found in the various collective agreements applicable to the unionized workers at CN. A cursory review of the job functions of FLSs suggested there might be commonality among them. However, upon closer look, the Court of Appeal noted a number of factors which led it to conclude the plaintiff had not proven the misclassification issue could be determined on a class-wide basis:

- There were 70 different job positions held by FLSs
- There was no formal job description for an FLS
- FLSs working in more remote locations exercised greater decision-making authority than FLSs working in more urban locations which had senior-level managers present in the workplace

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- Some FLSs had authority to lay-off and discipline workers while others did not.

Ultimately, the Court of Appeal held no aspect of the plaintiff's claim was "capable of common proof" because it "seizes on the superficial commonality that all class members work for CN and all share the common label of being a FLS." Further, explained the Court, there was simply "no basis in fact to support a finding that the essential misclassification determination could be made without resorting to the evidence of individual class members."

The facts in *Brown*

Certification was also refused in *Brown*, where Justice Strathy of the Ontario Superior Court identified similar problems in the plaintiffs' case. The proposed class was comprised of "Analysts", "Investment Advisors" and "Associate Investment Advisors" employed by the Canadian Imperial Bank of Commerce ("CIBC"). The plaintiffs alleged these categories of employees do not have managerial responsibilities and should not be classified as ineligible for overtime pay. As in *McCracken*, Justice Strathy concluded there was no "workable method" that would allow the question of whether employees with these job titles have managerial responsibilities to be answered in common. As Justice Strathy put it, "[c]lass members have little in common but their names."

In *Brown*, the class definition proposed by the plaintiffs was "CIBC employees at 'Level 6' or higher, who have the words 'analyst' or 'investment advisor' in either their job titles or their business titles." The problem was at CIBC a job title did not always equate to job function or responsibility. What a title meant and what functions were associated with it varied across CIBC's many departments.

Similar problems arose with respect to "Investment Advisors" who earn compensation based on commission fees generated by the products they sell to clients. Investment Advisors spend considerable time meeting with and trying to retain new clients. They have significant autonomy – some working a standard 9 to 5 work week, and others working significantly more, meeting clients at night and on weekends.

In short, in neither *Brown* nor *McCracken* could an employee's true responsibilities and duties be ascertained solely by their job title.

Lessons for employers

These decisions are reassuring for organizations with large and diffuse workforces because they highlight one of the challenges of seeking to certify a class of employees based primarily on the employees' titles.

Perhaps the more important question is how can an employer ensure the underlying issues which arose in *Brown* and *McCracken* (claims for large amounts of unpaid overtime pay) don't arise in its own workplace? Here are some suggestions and best practices to consider:

1. **Understand which employees are entitled to overtime**
   Managerial roles, as well as employees in certain industries, are exempt from the entitlement to overtime. In some jurisdictions, including Ontario, supervisory employees are also exempt. Understand who those employees are and plan accordingly. Do not assume an employee's title settles the issue. A manager in name may not be a manager in fact, and adjudicators will decide based on the facts.
2. **Have an overtime policy**
   A written policy will explain to employees whether they are eligible to work overtime and if so, how and when it is to be reported. For example, must overtime be approved in advance or after the fact? Is there a cap on the amount of overtime which can be worked in a given period of time? Consider incorporating this policy into the Employment Contract for new employees. And remember, by law, an employee cannot "contract out" of overtime entitlement, so be sure your documents are accurate and legally enforceable.
3. **Enforce the policy**
   An employer that fails to monitor an overtime policy consistently and transparently is exposed to a finding the policy is not enforceable.
4. **Stay on top of overtime worked**
   Know which employees are working overtime and ensure these hours are consistent with the company's overtime policy. Failure to properly monitor overtime is foolhardy and dangerous. It will be no excuse to later say "I didn't approve that overtime" if the evidence shows the organization knew about it and did nothing to stop it.
5. **Include employees in the process**
   Consider asking employees to sign off on a daily, weekly, or monthly basis to confirm they did not work overtime during that period or, if they did, it was within the parameters of the company's overtime policy. This will also give employees a chance to raise any issues they may have about their entitlement to overtime pay.
6. **Keep records**
   Accurate records will be extremely helpful in defending against an employee who claims not to have been paid the correct amount for overtime hours worked.
7. **Consider an Averaging Agreement**
   The *Employment Standards Act* (Ontario), as well as employment standards legislation in other jurisdictions, permit employers and employees to agree to average hours of work over a specified period of two or more weeks, reducing the amount of overtime pay owed. In Ontario, an employee must agree to such an arrangement and it must be approved by the Director of Employment Standards.
8. **Regularly review employee classifications and job descriptions**
   Do this periodically to ensure the work employees are *actually* doing matches their job description and is consistent with their entitlement or disentitlement to overtime pay.

To learn more, or for assistance designing and implementing an overtime policy at your workplace, please contact a member of Sherrard Kuzz LLP.

Wisconsin v. Canada –

A tale of two approaches to collective action in the workplace

Controversial and divisive, in 2011 the Wisconsin legislature adopted *Act 10*, the *Wisconsin Budget Repair Bill*, to address a projected $3.6 billion state deficit. Designed to cut government spending by limiting the right of public sector employees to collectively bargain, *Act 10* was not the first time governments in Canada and the United States had sought to control public sector wage expenditures through legislation.

On September 14, 2012, Circuit Court Judge Juan B. Colás struck down portions of *Act 10* on grounds they were unconstitutional. Judge Colás ruled the law violated workers' constitutional rights to free speech, free association and equal treatment under the law. The Wisconsin Attorney General has indicated its intention to appeal the decision. Until then, it offers an opportunity to compare the efforts of Wisconsin legislators with those of their Canadian counterparts to curb government spending by controlling collective bargaining in the public sector.

Wisconsin's *Act 10*

Act 10 contained broad restrictions on the collective bargaining rights of Wisconsin public sector workers by:

- Limiting base wage increases for unionized employees to the cost of living. Any increase beyond this amount would be subject to a public referendum.
- Restricting negotiations with unionized employees to wages only. No other condition of employment could be bargained.
- Requiring unions to undergo annual recertification, or be automatically decertified.
- Disallowing "fair share" agreements (*i.e.* an agreement that all bargaining unit members (not just union members) pay a proportionate share of the costs of bargaining and contract administration).
- Preventing employers from deducting union dues from wages.

The employees challenged the constitutionality of these provisions on the grounds they infringed their right to free speech, free association and equal treatment under the law.

Judge Colás agreed with the employees, making several observations and holdings. First, Judge Colás observed, while *there is no constitutional protection of collective bargaining* in Wisconsin, collective bargaining is a lawful act. Second, *Act 10* singled out and encumbered the rights of employees who chose union membership solely because of that association. Third, Wisconsin has a constitutional obligation to treat people equally where they are similarly situated, unless the state has a compelling reason not to. In this case, Wisconsin offered no compelling reason to create two classes of people: (1) unionized employees and (2) non-unionized employees. *Act 10*, to the extent it discriminated against union members, was therefore unconstitutional.

The Canadian experience

Unlike in Wisconsin, Canada's *Charter of Rights and Freedoms* provides constitutional protection for a *process* of collective action to achieve workplace goals (although it does not protect any particular form of process or guarantee any particular result). That is, the *Charter* protects activity for the purposes of making collective representations to an employer, and requires the employer to consider such representations in good faith. A law which prohibits or pre-empts meaningful consideration of significant contractual terms therefore undermines the *process* of collective action.

Despite this constitutional protection, Canadian governments have had some success unilaterally imposing terms on unionized employees. For example, in 2009, Canada's Parliament adopted the *Expenditure Restraint Act* (the "ERA"), capping increases in compensation for federal employees during the period 2006-2011. The ERA was challenged on the basis it unconstitutionally interfered with the *process* of collective bargaining. The Ontario Court of Appeal dismissed the appeal holding the ERA did not violate the *Charter* where parties have had an opportunity to engage in a meaningful process of collective representation. In this case, the parties had bargained to impasse, and there was no other process – agreed to or legislated – to force or cause a resolution. As such, the *process* of collective action having been exhausted, the government was at liberty to impose wage terms through legislation. Had the ERA sought to invalidate wage terms of an existing collective agreement, or prevent wage negotiations, the Court's decision would likely have been different.

Canada v. Wisconsin - *result v. process*

In Wisconsin, the determination of whether *Act 10* was unconstitutional focussed on *equality of treatment* and the target of the legislation. Unionized employees were treated differently than non-union employees *because of their association with unions*. Had the Wisconsin government sought to cap the remuneration of *all* public employees, the court's decision may have been different.

In Canada, the focus is on *process*, not on any particular result. If employee representations have been offered and considered in good faith, and an impasse ultimately reached, a government may take unilateral steps.

What's next?

The Wisconsin decision will be appealed. Regardless of the result, the decision offers fascinating insight into two approaches to the right to collective action. We will keep our readers apprised of further developments.

DID YOU KNOW?

According to a 2012 poll conducted by *Globe and Mail* on-line, 62% of Canadians rate 'flexible schedule' the most important workplace perk, followed by 'bonus' – 28%, 'feedback' – 5%, and 'corporate responsibility' – 5%.

MANAGEMENT COUNSEL

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Conducting an Effective Workplace Investigation

When Do You Need to Investigate?

- Legal obligation to investigate harassment, violence and discrimination.
- Policy reasons to investigate workplace misconduct.

Avoiding Common Investigation Pitfalls

- Who should conduct the investigation?
- How to effectively question participants?
- Should the complainant or respondent be placed on leave during the investigation?
- What is the union's role?
- How can surveillance and electronic evidence be effectively used?

Dealing with the Outcome of the Investigation

- How to reach a conclusion.
- Effectively communicating the outcome.
- Discipline and discharge arising from a workplace investigation.
- Returning the investigated employee to work.

DATE: **Thursday January 17, 2013; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Hilton Garden Inn, Toronto-Vaughan,** 3201 Hwy 7 West, Vaughan, ON L4K 5Z7

COST: Please be our guest

RSVP: **By Friday January 11, 2013 at www.sherrardkuzz.com/seminars.php** or to 416.603.0700
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SHERRARD KUZZ LLP
Employment & Labour Lawyers

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250 Yonge Street, Suite 3300
Toronto, Ontario, Canada M5B 2L7
Tel 416.603.0700
Fax 416.603.6035
24 Hour 416.420.0738
www.sherrardkuzz.com

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