Recipe for class-action overtime lawsuits still being perfected

BMO Nesbitt Burns latest employer to be hit with lawsuit

There is a growing body of case law involving class-action lawsuits for unpaid overtime. Lawyers representing employees are learning from these cases and effectively structuring proposed classes to secure certification — a turn of events that is not welcome news for employers.

In *Rosen v. BMO Nesbitt Burns Inc.*, the Ontario Superior Court of Justice certified a class comprised of current and former investment advisors at BMO Nesbitt Burns seeking unpaid overtime.

These investment advisors are compensated based on the commissions they earn — not the hours they work. As such, Nesbitt Burns does not track or record their working hours and overtime has never been paid.

Until recently, the absence of overtime pay for advisors has not been a point of contention, as most have been content with the opportunity to earn high incomes.

However, it is important to remember that even with the potential to earn incomes much higher than the average Ontario worker, a commission-based employee may still be afforded the protection of overtime provisions in Ontario's Employment Standards Act, 2000 (ESA). Furthermore, this entitlement may not be waived through contract.

Ironically, employers in federally regulated industries, such as Nesbitt Burns's parent company, the Bank of Montreal, do not face this same risk.

LEGAL VIEW

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In 2006, the Canada Labour Code was amended to exclude "commission-paid salespeople" from its overtime provisions.

As a result, banks are free to use commission-based compensation structures without fear of overtime liability, while their provincially incorporated trading arms are not.

To avoid the potential liability in the *Rosen case*, Nesbitt Burns will have to demonstrate its investment advisors fall within one of two relevant exemptions to the ESA's overtime provisions:

- the supervisory or managerial exemption, whereby employees who perform managerial functions are not entitled to overtime
- the "greater benefit" exemption, explained in more detail below.

Not surprisingly, *Rosen* shares many characteristics with the other banking class-action cases that have hit the headlines recently, particularly *Brown v. Canadian Imperial Bank of Commerce.*

Brown and *Rosen* are both "misclassification" cases in that the underlying complaint is the employer misclassified the nature of the plaintiffs' work — that it was managerial in nature — and wrongfully withheld overtime pay.

The court refused to certify the proposed class in *Brown* because the key issue — whether the plaintiffs' job activities brought them within the managerial exemption — was too individualized and could only be determined on a case-by-case basis.

The plaintiffs in *Rosen* were careful not to make the same mistake.

In *Brown* and *Rosen*, the underlying complaint is the employer misclassified the nature of the work and wrongfully withheld overtime pay.

The proposed class in *Rosen* expressly excluded any investment advisors who also held positions as branch managers or other traditionally managerial roles. The resulting class consists of advisors who are effectively the same, or have very similar job functions.

As such, the court had no trouble concluding the key issue of liability — whether the individual investment advisors fell within one of the two exemptions — could be determined on a class-wide basis.

With respect to the second potential exemption, Nesbitt Burns argued its investment advisors receive a high level of compensation and enjoy significant autonomy in their work, representing a far greater benefit than the minimum standards required by the employment standards.

While this argument is intuitively compelling, the advisors have a legitimate (though unproven) legal response.

Their position, supported by some case law, is that the "greater benefit" exemption only applies in circumstances where the comparison is directly related to a specific provision of the ESA, such as salary or benefits.

Comparing the overall benefit of their employment agreement to the specific overtime provisions of the ESA is like comparing apples to oranges — and is not permitted under the ESA, according to the plaintiffs.

This issue was not determined by the judge hearing the class-certification motion; it will be decided by the judge presiding over the common issues at trial.

It is important to remember the class-action certification process is about process, not substance. By certifying the proposed class in *Rosen*, the court concluded that, based on judicial efficiencies and other related considerations, this is an appropriate case to be heard as a class action.

However, even if the class is successful on the common issue of liability for overtime pay, it remains to be seen how the individual plaintiffs will establish the value of any overtime entitlement.

These issues will be of great interest to employers — but don't hold your breath. Nesbitt Burns has already said it intends to appeal the certification decision, meaning a ruling on the merits of this class action could be many years away.

For more information see:

- *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144 (Ont. S.C.J.)
- *Brown v. Canadian Imperial Bank of Commerce*, 2012 ONSC 2377 (CanLII), 2012 ONSC 2377, aff'd 2013 ONSC 1284 (CanLII), (Div. Ct.)

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