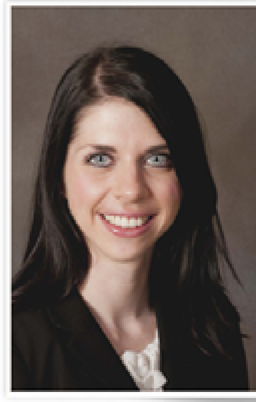
CANADIAN Employment Law Today

Overtime class actions against banks set to proceed - a cautionary tale for employers

Ryan Treleaven and Jennifer Hodgins
August 15, 2013



Last year, two class action certification decisions -- *McCracken v. Canadian National Railway Company and Brown v. Canadian Imperial Bank of Commerce* – provided much needed comfort to employers facing the daunting prospect of employee class action litigation. However, two more recent decisions serve as a warning that employers can still be exposed to class actions when their policies that apply to all employees are under fire.

In both cases, the proposed class of plaintiff employees disputed their managerial status, which had been relied upon by their respective employers in denying them overtime pay under the Ontario *Employment Standards Act*. In both cases, the court refused to certify the class because the key determination in assessing liability – an employee's managerial status – could only be made through an individualized assessment of an employee's duties and responsibilities. As a result, any member of the proposed *McCracken* and *Brown* plaintiff classes would have to pursue their claim of withheld overtime pay individually.

While the McCracken and Brown decisions are certainly welcomed by employers, they should not be taken to represent a marked departure from the court's practice of certifying reasonable employee class action claims.

Class action more likely where a company "policy" is at issue

The Ontario Court of Appeal has expressed its view that where an overtime entitlement determination can be made on a class wide basis, the matter should be permitted to proceed as a class action.

In F*ulawka v. Bank of Nova Scotia and Fresco v. Canadian Imperial Bank of Commerce*, two highly publicized decisions, the plaintiff class members claim they were denied their statutory entitlement to overtime wages by virtue of the banks' overtime policies and procedures. In both cases, the central issue for determining liability is the same for all class members – the validity of the banks' overtime policies. There is therefore no need to engage in the individualized assessment that would have been necessary in *McCracken* and *Brown*. A class of plaintiffs was therefore certified in both cases – a decision upheld by both Ontario Court of Appeal and Supreme Court of Canada.

Lessons for employers

The *Fulawka* and *Fresco* decisions serve as a strong reminder of the potential dangers posed by employee class action proceedings. For a proposed class action to be certified, the court must be satisfied the primary issues can be determined on a class wide basis and that a class proceeding is the preferable procedure for resolving the claim. It is therefore critically important employers ensure their policies and procedures do not run afoul of employment legislation. If they do, there is a greater possibility the employer could find itself on the wrong side of a class action lawsuit.

Now that the appeal process relating to certification has been exhausted and the *Fulawka* and *Fresco* cases are ready to proceed, it will be interesting to see whether a quick settlement is brokered, or whether the banks' overtime policies are finally put to the test by the courts. In these two cases, the end of the certification process is only be the beginning of the larger legal battle. Stay tuned.

For more information see:

- *Fulawka v. Bank of Nova Scotia*, 2013 CarswellOnt 3152 (S.C.C.).
- *Fresco v. Canadian Imperial Bank of Commerce*, 2013 CarswellOnt 3154 (S.C.C.).
- *McCracken v. Canadian National Railway*, 2012 CarswellOnt 8010 (Ont. C.A.).
- *Brown v. Canadian Imperial Bank of Commerce*, 2012 CarswellOnt 5072 (Ont. S.C.J.).

Ryan Treleaven and Jennifer Hodgins are lawyers with Sherrard Kuzz LLP, one of Canada's leading employment & labour law firms representing the interests of employers. Ryan and Jennifer can be reached at 416.603.0700 (Main), 416.420.0738 (24 Hour) or by visiting www.sherrardkuzz.com.

The information contained in this article is provided for general information purposes only and does not constitute legal or other professional advice. Reading this article does not create a lawyer-client relationship. Readers are advised to seek specific legal advice from Sherrard Kuzz LLP (or other legal counsel) in relation to any decision or course of action contemplated.