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## Differing Decisions Lead to Class Confusion

Just months after Justice Lax of the Ontario Superior Court refused to certify an overtime class action against the Canadian Imperial Bank of Commerce (“CIBC”) because, “[u]ltimately ... instances of unpaid overtime occur on an individual basis,” Justice Strathy of the same Court has given the green light to a similar case against the Bank of Nova Scotia (“Scotiabank”).

The claim against Scotiabank alleges that sales staff worked unpaid overtime to carry out ordinary functions of their job. The plaintiff asserted that Scotiabank’s policy put employees in a “Catch 22” by requiring overtime to be approved in advance, even though the customer-driven, unpredictable nature of the work made it almost impossible to know in advance when overtime would be required. The “culture” was allegedly such that overtime was rarely authorized, so employees rarely requested it.

Much like CIBC, Scotiabank argued that there could be no “class” action, because the issues were unique to each individual employee. For example, each employee would need to prove that overtime was worked and the number of hours worked. Whether overtime hours were pre-authorized, which hours were payable under the overtime policy and/or the *Canada Labour Code*, and the extent to which each employee had already been compensated for those hours, were also all individual issues.

However, Justice Strathy found that there was evidence, albeit disputed, that the employees regularly worked overtime and that this practice was encouraged by Scotiabank. This was not itself inappropriate, but Scotiabank’s system put the onus on the employee to obtain prior authorization. The judge suggested that while an employer has the right to protect itself against unrequested overtime hours, the balance of power in the workplace may be such that protecting employees against working unpaid hours should be the paramount consideration. He therefore concluded that whether Scotiabank had a duty to put a protective overtime system in place, and the question of whether its pre-approval requirement fulfilled this duty was common to every class member. He also held that an aggregate assessment of damages using statistical means could be appropriate to address any concerns about individual compensation issues.

Justice Strathy distinguished the CIBC decision on the basis that there was evidence that Scotiabank’s alleged failure to pay overtime was attributable to systemic conditions, while Justice Lax had found no evidentiary foundation for the claim of systemic wrongdoing by CIBC. However, the reasons in CIBC do not suggest that CIBC had a better system for recording overtime or that the overtime claims in that case were any more individual in nature than the claims in Scotiabank.

Further, while Justice Lax rejected the idea that a pre-approval requirement was illegal because, “an employee cannot foist services on an employer and expect to be paid wages for them,” Justice Strathy approached the issue from the perspective that the employer bears the burden of implementing appropriate procedures to ensure that unpaid overtime is not permitted; i.e.,

the employer is responsible for ensuring that overtime is not worked if it does not want to pay extra for it.

The CIBC ruling is under appeal and is scheduled to be argued shortly, and we expect that the Scotiabank decision will be appealed as well. ■

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