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Employment Notes

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CLASS ACTION LAWSUITS AND EMPLOYMENT LAW: WHAT YOU NEED TO KNOW

John-Edward C. Hyde

For better or worse, the Americanization of Canadian law has become firmly entrenched within our legal system. With it, has come the introduction of legal strategies long favoured by plaintiffs' lawyers to the south of our borders, which are quickly gaining popularity in Canada. This is particularly true in the case of the class action lawsuit.

What is a class action lawsuit?

Class action lawsuits usually involve one or more "representatives", who seek to represent an entire group of claimants with similar claims against one or more defendants. Generally, a class action lawsuit provides for a global resolution of common issues affecting an identifiable group of persons (the "Class"). Subject to certain criteria, a Court may "certify" a case as a class action, and will manage the class action by providing both authority and direction for issues such as notice to the Class and administration of the response to notices, review of the proposed settlements (to ensure that they are fair and proportional to the claims risk and cost), and address other issues as they are raised by the parties.

Class action legislation has existed in Ontario, since the introduction of the 1992 *Class Proceedings Act*. Although heralded by many as a panacea for the economic barriers which would normally prevent people and groups from pursuing litigation, they are also known to earn big money for plaintiffs' lawyers, and cost significantly more money for companies forced to defend and/or settle such class action claims. As noted in the Report of the Attorney General's Advisory Committee on Class Action Reform (1990), a class action was defined as: "a procedural mechanism that is intended to provide an efficient means to achieve or address for widespread harm or injury by allowing one or more persons to bring the action on behalf of many". That has not necessarily been the common experience.

How is a class action started?

A class action is started as a usual lawsuit by issuing and serving a Statement of Claim. To move the matter forward, the proceeding requires certification under the *Class Proceedings Act*. Certification requires that the Courts screen potential class actions after the applicant satisfy the following five criteria:

1. That the pleadings disclose a cause of action or claim;
2. Is there an identifiable class? In other words, the Court attempts to identify persons with the potential claim;
3. Does the claim of the class member raise common issues? This does not mean that the facts or issues of law necessary be identical, but rather, that there is a common thread or element to the plaintiffs' claim;
4. The determination of whether the class action is a preferable procedure for resolution of common issues. To this end, the following factors come into play:
   a) The economics of the litigation; amount of money at issue and whether individual litigation would be cost prohibitive;

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John also assists clients in providing strategic legal and human resources advice on labour and employment matters arising out of complex mergers, acquisitions and the sale of businesses. John's background is in operations and human resources management. This experience provides him with the unique opportunity to assist clients in the formulation of practical legal solutions, specifically tailored to their needs.

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b) the manageability of the proceeding and how many individual issues might be addressed; and,

c) whether there are alternative means of adjudicating the dispute;

5. Is there a representative plaintiff or defendant who,

a) would appropriately represent the interests of the class;

b) has produced a plan for the proceeding and notifying class members; and,

c) does not have an interest in conflict with the interest of other class members?

It is also important to note that the legislation specifically provides that the certification is not to be refused solely because the relief claimed involves,

1. separate contracts;
2. different remedies for different class members; or
3. individual damages assessments.

Perhaps the most widely publicized cases as such, are those involving shareholder disputes between holders of common shares and large companies, product liability cases and cases involving negligence and the duty of care. However, lesser known, is the foray by class action lawyers into the field of employment law. From the late 1990s, the use of class action litigation in employment matters has continued to quietly expand in Ontario and throughout Canada. Emboldened by a string of successes in such cases as *Gagne v. Silcorp Limited* (claim for entitlements under the Ontario *Employment Standards Act*, by employees effected by the merger of the Macs and Beckers convenience store chains), *Webb v. K-Mart Canada Ltd.* (damages for wrongful dismissal, stemming from the merger of the K-Mart chain with Zellers and Bay department store chains), *Scott. v. Ontario Business College (1997) Ltd.* (wrongful dismissal/aggravated, punitive and exemplary damages), and *Wicke v. Canadian Occidental Petroleum Ltd.* (entitlement to overtime earnings, punitive and exemplary damages), there seemingly appeared to be no end to the options available to employees to collectively file lawsuits against employers, large and small.

Recently, the Ontario Superior Court put the brakes on class action lawsuits seeking statutory entitlements such as overtime. In the case of *Fresco v. Canadian Imperial Bank of Commerce*. the representative plaintiff Dara Fresco brought a class action lawsuit against CIBC, alleging unpaid overtime wages. The claim alleged that CIBC's overtime policy was illegal in that it violated the statutory requirements under the *Canada Labour Code,* because it required employees to obtain prior approval from a manager in order to be compensated for overtime hours worked (unless there were extenuating circumstances); and that the policy provided for paid time off at a rate of time and one half overtime hours worked, in lieu of monetary compensation at the option of employee, which was not specifically permitted by Code. The plaintiffs claimed that CIBC failed to comply with minimum requirements of the *Canada Labour Code* by failing to pay statutory overtime to class members and by failing to keep proper records of its employees' hours of work. It was further argued that the pre-approval requirement in the overtime policy purported to

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excuse CIBC from paying any overtime and did not allow for the payment of overtime to class members who were routinely required or permitted to work overtime. This kind of "off the clock" overtime case was based upon the argument that the extent of the workload and the nature of work environment forced employees to work overtime hours without claiming for them, or even seeking pre-approval.

In noting that employers have a right to manage their business (including the right to determine whether or not overtime was necessary), the Court also agreed that employees could not simply force overtime upon their employers without pre-approval. The Court found that CIBC's overtime policy was not illegal or contrary to the *Canada Labour Code* ("CLC"). Specifically the Court stated,

> [it] is the fundamental right of the employer to control its business, including employees' schedules, hours of work and overtime hours. The ability to authorize overtime is in fact one of the legal criteria used to assess whether an employees considered managerial and exempted from the hours of works provision of the CLC. An employee cannot unilaterally, and without agreement of the employer determine what is "work" (i.e. services to be paid for). Put another way, the employee cannot foist services on an employer and expect to be paid wages for them. Where an employer's overtime policy contains a provision that requires prior authorization, the employee is not entitled to work overtime hours at the employees' own initiative and then claim entitlement to overtime pay. Conversely, an employer cannot avoid its statutory obligation by knowing permitting employees to work overtime and then later take the position that overtime is not authorized.

With regard to CIBC's provision of time off in lieu of overtime hours worked, the Court considered whether or not the policy provided a greater right or more favourable benefit within the meaning of subsection 168 (1) of the code. To this end, the Court found that the provision of paid time off at a rate of time and a half in lieu of overtime hours worked, at the option of the employee, was consistent with the purpose of the legislation and at least as favourable a benefit as wages at the statutory rate.

Of particular interest however, was the Court's assessment as to whether Ms. Fresco's claim could be certified as a class action. Recognizing that this was a claim not based upon eligibility for overtime, but rather for the systemic breach of a duty to compensate eligible employees for overtime, the Court required the plaintiffs to establish evidence that CIBC did something or failed to do something which deprived or potentially deprived class members of compensation to which they were lawfully entitled. To this end, because CIBC's overtime policy, was not on its face illegal, the failure to compensate required or permitted overtime was a breach of the employment contract occurring independent of the policy and required individual examination. As the Court noted,

> Ms Fresco asserts that there is a common or pervasive or systemic policy, practice or experience of unpaid overtime at CIBC. It is unclear whether she asserts that the allegedly illegal Policy gives rise to this or whether this is advanced independent of the Policy. In either case, it is an assertion of systemic wrongdoing. It is my conclusion that there is no evidentiary foundation for this, but even if there were, this is not a case where questions of systemic

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"...the case also underscores the fact that employers should be entitled to determine the necessity of overtime, and that employees may not simply force their services upon employers by way of additional hours worked, without employer acquiescence."

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wrongdoing can be resolved without examining the individual claims, thereby defeating the purpose of a class action.

Based on the foregoing, the Court held that Ms. Fresco failed to satisfied the commonality requirement in section 5 (1) (c) of the *Class Proceedings Act*, and that such class proceeding was not a preferable procedure to resolve claims of class members. Accordingly, the motion for certification was dismissed.

What does this mean for employers?

Undoubtedly, this case is an important win not only for CIBC, but for employers throughout Canada. Although it certainly does not preclude class action proceedings in other employment law claims, it at least places certain parameters upon the assessment of the commonality of such class members and protects employers from class proceedings where employment policies are legal on their face. Finally, the case also underscores the fact that employers should be entitled to determine the necessity of overtime, and that employees may not simply force their services upon employers by way of additional hours worked, without employer acquiescence.

Is this cast in stone? Only time will tell; for Ms. Fresco and her legal team have announced that they will appeal the decision to the Ontario Divisional Court. ■

ARE WALLACE DAMAGES REALLY DEAD?

Elizabeth J. Forster

In 1997 the Supreme Court of Canada significantly changed the scope of damages that could be awarded in wrongful dismissal actions.

In the case of *Wallace v. United Grain Growers,* the court held that employers "ought to be held to an obligation of good faith and fair dealing" in the manner of dismissal. It further held that if this obligation was breached by an employer, an employee could obtain compensation from the employer by way of an extension to the reasonable notice period. After that case was decided, it became fairly routine for employees to claim an additional award of *Wallace* damages in their wrongful dismissal actions.

Last year the Supreme Court of Canada reversed itself on the question of *"Wallace"* damages. It decided that it was time to revisit the issue of *Wallace* damages, and it held that damages attributable to an employer's conduct and the manner of dismissal could only be awarded if they "fairly and reasonably" arise from the wrongful dismissal, or were reasonably within the contemplation of both parties at the time the contract was made. In such cases the damages that would be awarded would be the actual damages suffered by the employee, and not damages by way of an extension of the notice period.

With this decision, most people fairly assumed that the concept of *Wallace* damages was dead. This has not been the case.

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"Last year the Supreme Court of Canada reversed itself on the question of 'Wallace' damages [but] Since that decision, the lower courts have continued to award Wallace damages."

Since that decision, the lower courts have continued to award *Wallace* damages. In some of these cases, the circumstances giving rise to the award of *Wallace* damages do not even meet the criteria of the original award of *Wallace* damages.

Here are some examples of cases where *Wallace* damages have been awarded:

1. A company reduced an employee's commission rate from 30% to 18%, and then from 18% to 9% in a 12 month period. The employer advised the employee that this reduction was because the employee was making too much money in comparison to others in the business. The court found this amounted to constructive dismissal. The Ontario Court of Appeal upheld the trial judge's award of 3 months' *Wallace* damages on the basis that the employee was suffering from depression at the time of the reduction in pay, and that the employer had demonstrated "palpable" insensitivity in the manner in which it dealt with the employee and subjected him to undue pressure at a time when he was in poor health.
2. In an Alberta decision, the court found that an employee had signed a valid employment contract that limited her right on termination to employment standards notice only. Nevertheless, the court awarded an additional month's pay as *Wallace* damages because the employer upon termination, advised the employee that she was being terminated as she was an "unsuitable fit" but gave no explanation as to how she was "unsuitable".
3. In British Columbia, the court awarded an employee *Wallace* damages of $5,000.00 because the employee became embroiled in a conflict with a co-worker. She was summoned to a meeting to discuss the conflict. She became upset during the meeting and asked to leave. She indicated later that she was quitting, but the following day called and asked if she still had a job and was told that she had been replaced. The court found this was not a voluntary resignation as it was made in the heat of the moment. The court awarded her *Wallace* damages of $5,000.00 because the company did not communicate with her in any meaningful way about her true intentions with respect to her resignation, nor did it enquire about her emotional state or consider her financial and emotional vulnerability when she called to get her job back.
4. The Ontario Government was ordered to pay *Wallace* damages of 4 months' pay to an employee when it terminated an employee rather than reviewing her performance deficiencies with her, and following a progressive discipline approach.
5. In another case, an employee was awarded *Wallace* damages of $20,000.00 when the employee was summarily dismissed, asked to leave the premises immediately, and had great difficulty obtaining the return of his personal effects.
6. Finally, most recently the Ontario Court of Appeal upheld a trial judge's award of 2 months' *Wallace* damages where the employer sent a public pager message advising that the employee had been terminated for failure to adequately perform her duties even though this was not accurate.

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"...Bill 168, an Act to Amend the Occupational Health and Safety Act with respect to Violence and Harassment in the Workplace and Other Matters... is being proposed."

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Maria advocates on behalf employers, not for profit organizations, trade unions, and employees, and has been involved in matters before the Superior Court of Justice, the Federal Court, the Labour Board, the Human Rights Tribunal, the Workplace Safety and Insurance Appeals Tribunal, and other tribunals.

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Some of these decisions are remarkable in that impugned conduct does not really even meet the initial test for *Wallace* damages. They serve to show that employers should still be mindful of the factors set out in the *Wallace* case and in particular, the obligations of good faith and fair dealing. ■

HEALTH AND SAFETY UPDATE

Maria Kotsopoulos

In our April 2008 newsletter I updated you on the proposed Bill 29, an *Act to Amend the Occupational Health and Safety Act to Protect Workers from Harassment and Violence in the Workplace*. Nothing ultimately came of that proposed legislation. Now, Bill 168, an *Act to Amend the Occupational Health and Safety Act with respect to Violence and Harassment in the Workplace and Other Matters (Bill 168)* is being proposed. Bill 168 passed first reading on April 20, 2009, and it remains to be seen how quickly it will progress in the fall, if at all.

The Ministry of Labour has reported that between April 1, 2008 and September 30, 2008 Ministry of Labour inspectors made 198 field visits and issued 185 orders in relation to violence in the workplace. The mandate of Bill 168 is to add to the existing Safe at Work Ontario Program by focusing on incidents of workplace violence.

The substance of Bill 168 will add a new part to the *Occupational Health and Safety Act* dealing specifically with violence and harassment. The Act will be amended to include specific definitions of workplace violence and workplace harassment. If passed, "workplace harassment" will be defined in the legislation as "engaging a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome." "Workplace violence" will be defined as "(a) the exercise of physical force by a person against a worker in a workplace that causes or could cause physical injury to the worker; or (b) an attempt to exercise physical force against a worker in a workplace that could cause physical injury to the worker." Notably, the Bill 168 definitions do not extend to psychological injury as had been proposed in Bill 29.

The proposed legislation imposes a specific mandate on employers. First, an employer will be required to prepare policies regarding workplace violence and harassment and to review them at minimum once per year. Second, the policies dealing with workplace violence and workplace harassment will be required to be posted at in a conspicuous at the workplace, unless the number of employees regularly employed at the workplace is five or fewer. Third, employers will be required to both assess the risk of workplace violence in their workplace and develop and maintain a program to implement the policies with respect to workplace violence.

With regard to an employer's assessment, an employer will be required to consider circumstances that would be common to like workplaces, circumstances specific to its workplace and any other prescribed elements. Arising from this assessment, an employer will be required to advise its health and safety committee or health

"Under the proposed Bill, employers and supervisors will also have the duty to provide information to a worker, including personal information, about a person with a history of violent behaviour."

and safety representative (or employees in general where no such committees or representatives exist) of the results of its assessment and provide a written copy of the assessment to the committee of the representative. If the employer does not have a committee or a representative in respect to health and safety, the employer must advise workers of its assessment in writing.

In developing and maintaining a program of implementation of these policies, employers must include measures and procedures to control the risks identified in their assessments which are likely to expose the worker to physical injury, include procedures by which immediate assistance can be summoned when workplace violence occurs or is likely to occur or where there is threat of workplace violence made, include procedures for workers to report incidents or threats of workplace violence to the employer or a supervisor, set out how an employer will investigate and deal with incidents, complaints or threats of workplace violence and any other prescribed elements.

Interestingly, the proposed legislation includes an express provision dealing with domestic violence. The Bill proposes that if an employer becomes aware or ought to reasonably to be aware that domestic violence that would likely expose a worker to physical injury might occur in the workplace, the employer shall take every precaution reasonable in the circumstance for the protection of that worker.

Under the proposed Bill, employers and supervisors will also have the duty to provide information to a worker, including personal information, about a person with a history of violent behaviour. This particular obligation arises when a worker can expect to encounter the person in the course of his or her employment. The personal information disclosed must be limited to that which is reasonably necessary to protect the worker from injury. There is no express definition of "history of violent behaviour" in the proposed legislation, and it remains to be seen how this will be implemented, assuming passage of the Bill.

Much like Bill 29, Bill 168 includes provisions by which a worker can refuse to work where he or she is likely to be in danger by workplace violence. Interestingly, Bill 168 does not provide similar protection where the employee believes he or she is likely to be exposed to workplace harassment.

This distinction between "workplace violence" and "workplace harassment" is continued in the Right to Refuse Work Provisions in Bill 168. Whereas a worker will be permitted to refuse to work where he or she has reason to believe that he or she might be in danger by workplace violence, the Bill does not allow worker to refuse to work where he or she believes that workplace harassment is likely to occur.

As part of this movement to securing workplace safety, the government has also announced certain measures to address Workplace Violence in the Health Sectors specifically. These will be developed outside of Bill 168.

We will keep you advised as to the progress of this legislation over the Fall and Winter sittings of the legislature. In light of the probability of the passage of this Bill, employers should begin

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"In light of the probability of the passage of this Bill [Bill 168], employers should begin seriously considering their operations, the particular threats of violence and/or harassment that may exist within them..."

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seriously considering their operations, the particular threats of violence and/or harassment that may exist within them, and how to remedy these threats through the promulgation of policies and specific programs to alleviate these threats. If ensuring a safe and healthy work environment for employees was not enough, employers should be aware of the offences under the *Occupational Health and Safety Act*, which would apply to breaches of these provisions relating to Workplace Violence and Workplace Harassment. These remedies can include fines of up to $25,000.00 and imprisonment for offences. Corporations may also be fined up to $500,000.00 for each offence.

Please contact us if you require assistance in drafting a Violence in the Workplace Policy for your organization. ■

JOB-PROTECTED LEAVE FOR ONTARIO ORGAN DONORS

Goli Garakani

Bill 154, *An Act to amend the Employment Standards Act, 2000 in respect of Organ Donor Leave*, received Royal Assent on June 5, 2009. The legislation provides employees who undergo surgery in order to donate organs to other persons with up to 13 weeks of unpaid leave from their employment. Donors will have to provide at least 2 weeks' advance written notice before starting the leave, or if such notice is not possible in the circumstances, provide notice as soon as possible. Currently, the job-protected leave applies to persons who are donating all or part of the following organs: kidney, liver, lung, pancreas and small bowel. Donors will have to be employed by the same employer for at least 13 weeks in order to be entitled to the leave.

Donors are also required to provide a medical certificate in support of their entitlement to the leave if requested by the employer. If the employee is still not able to perform his or her duties after the initial 13 weeks of unpaid leave, the employee will be entitled to extend the leave for an additional period of up to 13 weeks, upon providing a medical certificate. Employers providing certain types of benefit plans will have to continue to make their benefit plan contributions during the leave, if the employee continues to contribute. Furthermore, a donor's seniority and length of service credits will continue to accumulate during the leave. ■

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