

## Employment and Human Rights Law

### Employment Law

#### ***FULAWKA v. THE BANK OF NOVA SCOTIA, COURT CERTIFIES CLASS ACTION FOR OVERTIME CLAIMS***

In a recent decision from the Ontario Superior Court of Justice, the class action lawsuit launched against Scotiabank for uncompensated overtime work was certified as a class action. The claim was initiated by Cindy Fulawka, an employee responsible for sales of various lending and investment products, on behalf of approximately 5,000 employees from 2000 to the present.

#### Basis for the Class Action

The action claims as damages \$350 million in unpaid overtime compensation. Fulawka claimed that she and other class members were routinely required to work overtime hours without pay in order to fulfill the requirements of their jobs, an alleged breach of their employment contracts and the *Canadian Labour Code*. The action also attacks Scotiabank's overtime policy which requires employees to seek approval for overtime prior to working those hours.

#### Reasoning of the Court

The court departed from a prior, similar decision of *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531. In *Fresco* a number of employees of CIBC sought certification of a class action for unpaid overtime earnings.



Unlike in *Fresco*, the Superior Court found that there was evidence of systematic wrongs in Scotiabank's overtime policy which included:

- Failure to have a proper record-keeping system for overtime;
- Placing the onus on employees to obtain prior approval for overtime; and
- Failure to provide a process for the approval of overtime.

In order for a class action to be certified by the court, the Plaintiff must establish a commonality of issues to each of the class members. In its determination, the court found that each Class Member would benefit from a determination of:

- I. Whether Scotiabank had a duty to put a system in place to ensure:
  - i. That employees at the branch level were not required or permitted to work overtime without compensation;
  - ii. That regular hours and overtime hours were properly recorded; and

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iii. That any employee who was required or permitted to work overtime hours was paid.

II. Whether the provisions of the Policy requiring pre-approval of overtime was a breach of duty owed by Scotiabank to the Class; and

III. Whether the contracts of employment of members of the Class included an implied term that overtime permitted or required would be compensated.

### Conclusion

Scotiabank has indicated that it will be appealing the decision to the Court of Appeals. If upheld, the action will proceed to trial and will have an impact on how overtime is dealt with by employers. Regardless of the outcome, this action further highlights the need for employers to be proactive in managing overtime and to have positive steps to control overtime in the workplace.

## **EMPLOYEE FIRED FOR PARTICIPATING IN VANCOUVER RIOTS:**

A Vancouver car dealership fired a part-time receptionist who had been captured in the media participating in the Stanley Cup riots last month. The dealership claimed that it received negative emails and phone calls from very upset customers. Another participant in the riots, a carpenter posted that the riots were "awesome" on his Facebook page. His page also listed RiteTech Construction as his employer, who claimed to have received numerous negative emails about the incident. The company fired the employee immediately.

When is conduct outside of the workplace cause for termination of employment?

Where an employee engages in off work activities that damages an employer's business or reputation an employer may have grounds for termination for cause. Labour arbitrators have held that there must be a clear link between the off duty conduct and the employment relationship and that the conduct must either:

- a. Harm the employer's reputation or product;
- b. Causes the employee to be unable to discharge his or her employment obligations properly;
- c. Cause other employees to refuse to work with the individual; or
- d. Detrimentally impact the employer's ability to properly carry out its business.<sup>1</sup>

With the prevalence of social media such as YouTube, Twitter, and Facebook, an employee's conduct outside of work can often have an unexpected and detrimental impact on the employment relationship. Employees should be fully aware that their actions outside the workplace, often captured and recorded as evidence in social media, can form the basis for a termination from employment.

Whether such conduct is sufficiently serious to constitute cause for termination depends on the nature of the position, business and the extent of the misconduct. Employers must exercise caution before terminating an employee based on conduct outside the workplace and an employer's response must be proportional based on a variety of factors, including the employee's responsibilities, length of service, and history of discipline. Consideration must also be given to the nature of the incident in question and whether the conduct has actually caused irreparable harm to the employment relationship.

*Toronto District School Board v. Canadian Union of Public Employees, Local 440*, 2009 CanLII 1363 (ON LA), where the school Custodian assaulted a man at a gas station blocks from the school he worked at was terminated for cause. The man who was assaulted happened to also be a father of a child at the school.

## HUMAN RIGHTS

### **ACCESSIBILITY REGULATION IN FORCE JULY 1, 2011: New standards now apply to most provincially regulated businesses and organizations in Ontario**

On July 1, 2011, the *Integrated Accessibility Standards* regulation came into force under the *Accessibility for Ontarians With Disabilities Act, 2005*. The regulation affects most businesses and organizations in the province, although the duties imposed change depending on the size and nature of the entity. The regulation exempts private sector and not-for-profit organizations with less than 50 employees from many of the new requirements.

The regulation groups requirements into several broad categories: general (covering policies and training); information and communications standards; employment standards; and transportation standards.

#### **I. General: Policies and Training**

Every organization (except for the aforementioned small private/not-for-profit entities) must create an accessibility policy and an accessibility plan covering compliance with the regulation and Act and a plan to achieve accessibility over a multi-year period.

By 2014 to 2016 (depending again on the size of the affected entity), every affected organization must also provide training on the disability provisions of the *Human Rights Code* to a broad range of individuals, including its employees, its volunteers, and everyone who provides goods, services, or facilities on its behalf.

#### **II. Information & Communications Standards**

This group of standards cover a wide range of ways in which the affected entity communicates with the public. This includes feedback mechanisms, websites, emergency procedures, and educational and training material.

Compliance deadlines range from January 1, 2017 to "as soon as practicable" depending on the organization affected and the nature of the communication in question.

#### **III. Employment Standards**

In recruiting and hiring employees, organizations will be required to notify the public that accommodations are available, consult with applicants about their accessibility requirements, and notify successful applicants of the employer's accessibility policy.

Employers must inform affected employees of the employer's accessibility policy and take the employees' needs in this area into account in performance management and career development.

By January 1, 2014, all affected organizations will have to meet specific requirements for workplace emergency response. This includes giving individualized emergency response information to employees with disabilities and updating the information as the employee's work location, needs, and position change.

The regulation also requires the employer to develop a return to work process for each employee that has been absent due to a disability. This requirement is in addition to the existing rules under the *Workplace Safety and Insurance Act*.

These requirements apply to employees only, not volunteers.

#### **IV. Transportation Standards**

Operators of transportation services are subject to additional requirements. These include accessibility training, emergency preparedness and response policies, courtesy seating, and even steps to reduce waiting times. Buses may be required to discharge disabled passengers at a safe alternate location on the route if a regular stop is not accessible.

Those who follow OC Transpo labour relations in Ottawa will be familiar with the requirement that route stop announcements be audible; a requirement which is now included in the regulation.

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## Accessibility Regulation in force July 1, 2011 continued...

In addition, there is to be no charge for individuals providing necessary support to customers with disabilities. Non-specialized transportation providers are also prohibited from charging a higher fare to customers with disabilities, including costs for the storage of mobility aids and assistive devices.

### V. Compliance

Available fines range widely, from \$200 for a minor first infraction to \$100,000 for a major infraction by a large corporation. The regulation allows a designated director to assess penalties based on the offending entity's history, the severity of the infraction, and the impact on the affected individual.

Disputes under the regulation and its enabling statute will be adjudicated by the License Appeal Tribunal. This body already handles an extremely varied range of administrative disputes in Ontario, including regulation of cemeteries and funeral directors, the Tarion home warranty program, day nurseries, and payday loan sharks.



## WORKERS' COMPENSATION

### WSIB EXPANDED NEER WINDOW:

On July 15, 2011, the Workplace Safety and Insurance Board (WSIB) rolled out their revised New Experimental Experience Rating Plan (NEER) which increased the NEER 'window' from three to four years effective for all 2008 claims forward. The effect of this policy change is that 2008 claims will continue on employers' NEER statements until September 30, 2012. The changes only impact the 'window' at this time, and do not alter claim costs or firm limits.

The WSIB released a number of Work Reintegration policies and the draft Work Reintegration NEER policy on December 1, 2010.

During a consultation period, stakeholders had until February 15, 2011 to submit their responses to the draft policy. A consultation summary report is available on the WSIB website.

This policy change is one of several cost savings initiatives recently implemented by the WSIB. The Board released the draft NEER policy along with a number of changes to work-reintegration. It is the WSIB's position that an expanded four-year NEER window will place a greater onus on employers to identify and maintain safe and sustainable work for injured employees.

## LEGISLATIVE CHANGES

### **BILL 160: AN AMENDMENT TO ONTARIO HEALTH AND SAFETY AND WORKER'S COMPENSATION**

On June 1, 2011, Royal assent was granted to Bill 160, "*An Act to Amend the Occupational Health and Safety Act and the Workplace Safety and Insurance Act, 1997 with Respect to Occupational Health and Safety and Other Matters*". The Bill represents the Ontario government's response to the Dean Panel Report, also known as the Expert Advisory Panel on Occupational Health and Safety, which recommended a number of changes to Ontario's Health and Safety infrastructure. The Bill amends both the *Occupational Health and Safety Act (OHS Act)* and the *Workplace Safety and Insurance Act, 1997 (WSIA)*.

#### Prevention Council and Chief Prevention Officer

The Minister of Labour is charged with promoting public awareness of occupational health and safety as well as the education of employers and workers about health and safety. The Ministry of Labour must appoint a new Chief Prevention Officer. The Chief Prevention Officer has been granted powers to establish standards for training programs and requirements under the *OHS Act* as well as collecting information regarding training for the purpose of maintaining records. The Officer will also provide advice to the Minister of Labour on prevention of workplace injuries and occupational diseases.

Bill 160 legislates for the creation of a new Prevention Council, comprised of employers, workers, union representatives and other OHS experts. The Council is responsible for advising the Minister of Labour on the appointment of the Chief Prevention Officer as well as advising the new Chief Prevention Officer about preventing work-related injuries.

#### Mandatory Training

In workplaces where the number of workers is regularly between six and nineteen, Bill 160 requires that a health and safety representative receive training. The specifics of what that training would entail have not yet been set.

The Bill also grants the Minister of Labour powers to collect information regarding a worker's completion of a training program and enables the Minister, with consent, to disclose that information to anyone, including potential employers.

#### Codes of Practice

The changes to the *OHS Act* encourage greater use of Codes of Practice in the workplace setting. The Minister of Labour may approve Codes of Practice instituted by an employer. Where such a Code of Practice has been approved, following that code would be considered compliance with the legal requirement. The failure to comply with an approved code would not in itself be considered a breach of the legal requirement.

#### Reprisals

Under Section 50 of the *OHS Act*, employers are prohibited from dismissing, disciplining or penalizing a worker for acting in compliance with the *Act*. Where a worker has a complaint relating to an employer's discipline with respect to this section, a complaint may be made to the Ontario Labour Relations Board (OLRB).

Ministry of Labour inspectors are given broad powers to enforce the *Act*. Inspectors may investigate any health and safety issues related to a complaint and could issue orders where a contravention of the *Act* has occurred.

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## BILL 160: AN AMENDMENT TO ONTARIO HEALTH AND SAFETY AND WORKER'S COMPENSATION continued

Under Bill 160, a Ministry of Labour inspector can refer an alleged reprisal directly to the OLRB where a worker consents and the reprisal has not already been arbitrated under a collective agreement. The decision of a MOL inspector to refer a complaint cannot be appealed by an employer. Once the referral is made, the employer will have to respond to the allegations without the ability to challenge the inspector's decision to make the referral.

### Officer of the Worker and Employer Advisor

In addition to the functions set out under *WSIA*, the Office of the Worker Advisor is also charged with providing support to non-union workers with respect to reprisal complaints. Similarly, the Office of the Employer Advisor would provide support for employers with fewer than 100 workers.

### What Does this Mean for Employers?

It remains to be seen what impact the new Prevention Council, Chief Prevention Officer, or new mandate will have on employers; however, it is clear that the legislative intent of this Bill is to enhance and expand the role of the Ministry of Labour in the workplace.

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