



Ontario Superior Court of Justice certifies unpaid overtime class action - plaintiff alleges employer's practice of avoiding overtime "systemic"

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A recent decision of the Ontario Superior Court of Justice underscores how important it is for an employer to implement overtime policies that comply with applicable legislation. In *Baroch v. Canada Cartage* (January, 2015) Justice Belobaba certified a class action that claims damages arising from an employer's "systemic" policies and practices of avoiding the requirements of federal law for the payment of overtime. The decision in *Baroch* is the most recent in a series of overtime class actions which demonstrate not only the proliferation of such claims, but also the way such claims must be framed in order to achieve class action certification.

A few previous overtime class action claims failed to achieve certification based on the way in which they were framed. In general, such claims would allege that the employer deliberately misclassified employees in order to avoid paying overtime wages. These claims would usually be defeated at the certification stage on the basis that misclassification claims were individual in nature - in other words, the merits of each employee's claim would have to be individually assessed. By contrast, in cases where the claim was framed in a general way that set out issues common to all of the proposed class members, the court would grant certification.

The proposed class in *Baroch* drew from the previous case law and, in the judge's words, "carefully framed" the action to avoid the pitfalls to certification. For example, the proposed class was defined as former or current employees who were entitled to receive overtime compensation under the legislation. The definition therefore pre-supposed overtime eligibility and therefore made it clear that individual assessments were not at issue. In addition to the strategic definition of the proposed class, the plaintiffs challenged the employer's policies and practices which were common to all class members. The alleged "systemic" policies and practices were claimed to have resulted in breaches by the employer of the employment contracts and its duty of good faith to the employees, resulting not only in damages to the employees, but also unjust enrichment of the employer.

Although the defence argued that the action was essentially an overtime misclassification case, Justice Belobaba granted certification stating:

My decision is rooted in two well-established propositions in the class action case law: one, that a plaintiff is entitled to frame and advance his case in a way that is most



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amenable for determination on a class-wide basis (and if this means focusing primarily on systemic problems, that is his right); and two, merit-based arguments are irrelevant on certification (and defendants should not waste time and money presenting evidence that is best left for the common issues trial.)

With the decision in *Baroch*, potential class actions have a clear road map to achieve certification. The key for employers is to ensure that they have policies and practices in place to comply with the overtime requirements of the applicable legislation.

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