Unauthorized overtime no excuse for not paying

Recent case in B.C. shows employers could be liable for unpaid overtime: Lawyer

I BY DANIELLE HARDER I

A RECENT DECISION on overtime in British Columbia is a cautionary tale for employers when it comes to overtime policies and enforcement, according to several management-side employment lawyers in Canada.

The case involved adjusters at the Insurance Corporation of British Columbia (ICBC) who worked extra hours without being paid.

The union testified it had warned ICBC that workloads were becoming unmanageable and staffing levels inadequate.

The arbitrator, Colin Taylor, rejected the insurer’s argument that the overtime was unauthorized. ICBC knew the work was happening and received a benefit from it, the arbitrator said.

He also noted the company didn’t have a means of tracking employee overtime to make sure people weren’t working beyond their scheduled hours.

It’s a situation that does not surprise many experienced lawyers. “Most employers have a fairly good idea about overtime rules and either turn a blind eye or don’t know it’s occurring,” says Richard Press, a lawyer with Davis LLP in Vancouver.

There are multiple ways employers end up in situations where they could be liable for unpaid overtime, he says.

Some workers like to come in early or stay late. Others agree — verbally — to an ad hoc overtime scheme where, for example, they might work nine hours on Monday and leave an hour early on Tuesday.

While many employers have overtime policies, Press says they exist in “varying degrees” and are often not enforced consistently, if at all.

“If it’s only an hour or two a year, people may not say anything,” he says. “It’s usually around the end of their employment that it becomes an issue.”

Jason Beeho, a partner with Rubin Thomlinson in Toronto, compares creating and enforcing overtime to occupational health and safety from a process standpoint. The policy needs to state when overtime will be approved and the procedures to follow to get that approval.

Managers and employees also need to be educated in an ongoing way and, if there’s a violation, there should be discipline.

“Part of the policy needs to build in the concept that this is not about prohibiting overtime, but making sure the employer has its arms all over compliance,” Beeho says, adding this can be a problem when it comes to “squaring with the cultural norms people are used to.”

Many people don’t even expect to be paid overtime, especially salaried or managerial employees who may actually be entitled, Beeho adds.

There are many misconceptions around who gets overtime and when, he says.

For example, managers are exempt from overtime so long as they’re managing people. Someone who is a manager in name only but doesn’t supervise anyone must be paid overtime.

There are also complexities to how much people must be paid, Beeho says.

While it’s fairly straightforward with hourly workers, a salaried employee who also earns a commission must be paid based on a formula of one and a half times their regular rate. That formula could conceivably change weekly based on an employee’s commissions, he adds.

While there are many complexities to overtime, employers could find themselves paying out thousands in latent liability if they overlook or don’t fully understand the rules, Beeho says.

“The risk to them is that they might think they’re on the same page as their employees when it comes to agreeing to overtime,” he says. “The unknown factor is that there may be other employees not taking that view and who expect to be paid.”

Part of the problem, according to George Waggot, a lawyer with McMillan LLP in Vancouver, is it’s difficult for many employers to get clear information.

Employment standards resources are often “heavily skewed” toward employees and more designed at workers spotting problems than employers preventing them, he says. “It’s all about what are my rights as an employee,” Waggot says. It’s vital that employers have a program to track hours of work, he says, even if it’s just ensuring employees email in and out if they’re working early or staying late.

Employers with chronic problems with overtime should also accept when they need to hire more people, instead of trying to manage extra work, he adds.

It’s often not overtime that’s the issue — it’s the culture around it, says Press.

“You have to create a mindset around overtime,” he says. “You have to explain that it’s not a negative.

Many employees think they’ll be punished.” Beeho agrees and says many of the issues around overtime can be eliminated if employers make workforce and workflow management a priority.

Press suggests even doing an audit before drafting a policy, in order to know where the overtime is happening and why, so it can be eliminated before it’s a problem.

• An overtime policy helps prevent problems before they arise

A collective agreement between ICBC and COPE from 2006 to 2010 includes an overtime clause that outlines what employees should receive for any overtime worked.

14.04 Overtime Rates
All time worked in excess of the regular daily or weekly hours of work as established in Articles 12 and 13 shall be paid at overtime rates as follows:

(a) Time worked prior to or following a regular shift or work day will be paid at one and onehalf (1 1/2) times the employee’s hourly rate for the first hour of overtime and at two (2) times the employee’s hourly rate thereafter. Overtime worked in excess of five (5) overtime hours per calendar week (i.e. Sunday to Saturday inclusive) will be paid at two (2) time the employee’s hourly rate.