

# EMPLOYERS' ALERT

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## WHAT'S NEW at RUBIN THOMLINSON LLP

Thank you to all of you who participated in our recent survey, "Have We Turned the Corner?" The results are in and present a very interesting picture of employers' approaches to managing their workforce during the recession and the impact of the recession on workplaces and employees across the country.

Please visit our website [www.rubinthomlinson.com](http://www.rubinthomlinson.com) to see the results.

**Janice Rubin** was on BNN on Monday May 25 commenting on termination trends in the recession and the options that employees may have in dealing with a termination. You can find the video clip on our website.

**Christine Thomlinson** co-chaired the popular Six-Minute Employment Lawyer program at the LSUC on June 17.

**Janice Rubin** spoke at the Six-Minute Employment Lawyer about effective advocacy for counsel representing employees in a workplace investigation.

This alert is prepared as a service for our clients and other persons dealing with employment issues. It is not intended to be a complete statement of the law or an opinion on any subject. Although we endeavour to ensure its accuracy, no one should act upon it without a thorough examination of the law after the facts of a specific situation are considered, and without seeking the advice of legal counsel. No part of this publication may be reproduced without prior written permission of Ruben Thomlinson LLP. This has been sent to you courtesy of Ruben Thomlinson LLP.

The Canadian Imperial Bank of Commerce "CIBC" scored a big win for employers when a judge of the Ontario Superior Court of Justice decided not to certify Dara Fresco's class action for unpaid overtime.

## Class Action Claims for Unpaid Overtime: Judge says "No" to Certification

You may recall that Ms. Fresco is a teller with CIBC and started this class action lawsuit against CIBC in June of 2007 when she said that she worked many hours for the Bank for which she had not received any payment. The first step in a class action lawsuit is bringing a motion for certification of the action, or essentially persuading a judge that proceeding by way of class action is the most appropriate course of action. The motion was argued back in December of 2008, with CIBC objecting to the matter proceeding by way of class action.

To succeed on this certification motion, there is a five-part test which Ms. Fresco had to satisfy. It was the third part of this test that Ms. Fresco failed, that is the requirement to show that the claims of the class members raised common issues. The "common issue" requirement helps drive home the benefit of

the class action. By allowing one judge to decide a "common issue" on behalf of multiple plaintiffs, judicial efficiency is enhanced and access to justice is increased. Even if the individual claims would still need to be examined to determine damages, an action could be certified if determination of the "common issue" would cut down the amount of litigation otherwise involved in the individual claims.

In this case, however, the motions judge was not satisfied that there existed a "common issue" capable of determination in the absence of consideration of any individual facts. Although it seemed clear to all that there were individual CIBC employees (Ms. Fresco included) who may have worked hours for which they were not paid overtime, the judge said that each case needed to be looked at individually in order to determine CIBC's liability. The judge examined CIBC's overtime policy and found nothing illegal in the

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“There was ... no evidence that the CIBC had any systemic policy or practice which was depriving eligible employees of overtime pay.”  
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requirement that overtime be pre-approved. There was also no evidence that the CIBC had any systemic policy or practice which was depriving eligible employees of overtime pay. Rather, these were individual claims and the judge held that there needed to be an “individual examination of the specific circumstances that underlie each class member’s claim”.

### What Employers Need to Know:

This decision is good news for employers, as employees will now be far less likely to use the class action as means by which to obtain compensation for unpaid overtime. However, employers still need to keep in mind the following:

- The decision does not change the law which requires employers to pay employees

for overtime which they were “required or permitted” to work;

- The motions judge distinguished the facts in this case from one where there is a “misclassification” of employees eligible for overtime. If employers incorrectly designate as ineligible for overtime employees who, by law, would be eligible, such cases could still be open for class action certification;
- Similarly, where employers have a policy or practice of not paying employees for overtime hours worked, this could still leave them vulnerable to a class action certification; and
- Pre-approval requirements contained in overtime policies can still be used, but they must be applied and enforced. ●

## UPCOMING EVENTS

We are pleased to introduce the “**Workplace Investigation Alert**”, which is a short electronic newsletter on workplace investigation issues and cases. Like the Employers’ Alert it will be sent out on a complimentary basis. We would be happy to include anyone who is interested on our email list. To be added, please send an e-mail to: [workplaceinvestigationalert@rt-law.ca](mailto:workplaceinvestigationalert@rt-law.ca).

### July 10

**James Heeney** will be speaking at the Canadian Institute’s “Workforce Restructuring: Practical Guidelines and Legal Strategies for Reducing Employer Liability in Difficult Times” conference on July 10. James will be discussing best practices for clearly drafting termination documents.

### September 15 & 16

Our next **Conducting Internal Workplace Investigations** session will take place on September 15 and 16. We are currently accepting registrations. If you are interested in attending please contact us at (416) 847-1814 or [seminars@rt-law.ca](mailto:seminars@rt-law.ca).

### September 23

**Janice Rubin** will be speaking at the 2009 Atlantic HR Conference in Halifax on September 23. Janice will be talking about what human resource professionals need to know about workplace investigations.