

Divisional court file no.:
Court file No.: 07-CV-345166CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DARA FRESCO

Plaintiff/Appellant

and

CANADIAN IMPERIAL BANK OF COMMERCE

Defendant/Respondent

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

NOTICE OF APPEAL

THE REPRESENTATIVE PLAINTIFF DARA FRESCO (“Plaintiff”) APPEALS to the Divisional Court of the Superior Court of Justice for Ontario from the order of the Honourable Madam Justice Lax of the Ontario Superior Court of Justice dated June 18, 2009 made at Toronto denying the Plaintiff’s motion for certification as a class proceeding pursuant to section 5(1) of the *Class Proceedings Act, 1992* (“CPA”).

THE APPELLANT/PLAINTIFF ASKS that the Order be set aside and an order be granted as follows:

1. certifying the within action as a class proceeding;
2. awarding the Plaintiff her costs of the motion and this appeal on a substantial indemnity basis; and,
3. such other relief as this Honourable Court deems fit.

THE GROUNDS OF APPEAL are:

1. The Motions Court Judge erred in law and principle in her determination under s. 5(1)(a) of the *Class Proceedings Act*, by among other things:
 - i. making findings concerning, or otherwise inappropriately considering, the merits of the claims on the basis of a contested evidentiary record;
 - ii. in the absence of settled authority, finding that it was plain and obvious that the defendant's overtime policy (which formed a term of each putative class member's contract of employment) was lawful, notwithstanding that it contains terms contrary to or inconsistent with the express provisions of the *Canada Labour Code* ("*Code*"); and
 - iii. finding that it was plain and obvious that the defendant's policy and systemic practice of providing lieu time instead of overtime compensation was lawful, notwithstanding that there were no consistent or verifiable records of the use of such lieu time, that such practice is not provided for under the *Code* and that there is no settled authority that lieu time is "a more favourable benefit" than the overtime compensation mandated by the *Code*.
2. The Motions Court Judge erred in law and principle in finding, in relation to 5(1)(c) of the *Class Proceedings Act*, that there were no issues common to the class that would materially advance class members' claims for unpaid hours of work. In particular, but without limiting the generality of the foregoing, the Motions Court Judge erred in law and principle in:
 - i. deciding that a determination of the legality of the defendant's overtime policy, would not materially advance class members' claims ,
 - ii. finding that regardless of its legality, CIBC's overtime pre-approval requirement did not cause or contribute to the harm suffered by class members;
 - iii. finding that each class member's claim would need to be determined separately or individually;

- iv. failing to find that there were common issues relating to whether the defendant's practices, policies or systems (including, without limitation, those relating to the recording of all hours worked) caused or contributed to the wrongs that are alleged by the representative plaintiff;
 - v. finding that there is a principled and distinguishable difference between the type or manner of causation of harm complained of by the Plaintiff and the putative class and type or manner of causation of harm that is required to establish a defendant's potential liability on a class-wide basis;
 - vi. failing to find that there was a reasonable likelihood that the preconditions of subsection 24(1) of the CPA would be satisfied and an aggregate assessment made if the Plaintiff was otherwise successful at the trial of the common issues, and otherwise failing to find that there were common issues relating to aggregate assessment; and
 - vii. determining that CIBC had no duty to implement a system to ensure that it complied with its obligation under the *Code*, its employment contracts with the class members or otherwise to ensure appropriate compensation for hours of work, to record all hours worked and not to require or permit overtime without compensation.
3. The Motions Court Judge erred in law and principle in striking the affidavit of Charlene Wiseman (regarding the number of class members who had contacted plaintiff's counsel claiming to have worked unpaid overtime) and rejecting other evidence tendered by the plaintiff.
4. The Motions Court Judge erred in law and principle, or alternatively made palpable and overriding errors in determining, among other things:
 - i. that there was no evidence of systemic non-compensation of overtime,
 - ii. that there was no evidence that CIBC systematically failed to keep records of hours worked or lieu time utilized , and

- iii. that there were a variety of individual circumstances that give rise to unrelated bases for unpaid overtime claims that can only be resolved individually. .
5. The Motions Court Judge erred in law and principle in finding that a class proceeding would not be the preferable procedure for resolving the claims of the putative class members.

THE BASIS OF THE APPELLATE COURT’S JURISDICTION IS: The appeal is as of right, pursuant to section 30(1) of the *Class Proceedings Act* being a denial of a motion for certification.

July 20, 2009

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Proceeding commenced at Toronto

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