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## **AGREEMENT THAT SALARY INCLUDES 100 HOURS OF OVERTIME PER YEAR BREACHES EMPLOYMENT STANDARDS LEGISLATION**

In *WAPSO, IFPTE Local 188 v. The City of Winnipeg* (unreported) ("*WAPSO v. Winnipeg*"), the arbitrator hearing a grievance commenced by the union was tasked with deciding whether the overtime provisions contained in a collective agreement were in breach of *The Employment Standards Code* (the "*Code*"), the legislation in Manitoba that sets out minimum employment standards.

The *Code* obliges employers to pay their employees 150% of their regular wage rate when those employees work in excess of eight hours a day or forty hours in a week. There are a number of exceptions to this overtime obligation, such as when an employee performs management functions primarily, but none of the exceptions applied to the majority of the employees in the bargaining unit in this case which was made up of approximately 770 members.

At the risk of stating the obvious, unless an employee falls within one of the exceptions to overtime entitlement, the *Code* makes it clear that any agreement that disentitles an employee to his or her statutory right to overtime is illegal and unenforceable.

In this case, the employer was the City of Winnipeg (the "*City*") and the union was The Winnipeg Association of Public Service Officers ("*WAPSO*") representing professional, administrative and supervisory employees of the City.

The City and WAPSO were parties to a collective agreement (the "*Agreement*") which recognized that employees were expected to work all regular hours of work *plus* 100 hours of overtime per year in exchange for their regular salary and five (5) days of compensatory time off. The Agreement stated clearly that there would be no additional compensation (monetary or otherwise) in exchange for the first 100 hours of overtime worked by an employee in any calendar year.

The concept of employers and employees agreeing that a salary incorporates and accounts for overtime has been litigated in Manitoba. The Manitoba Court of Appeal in *Nygaard v. Michalowski*, reviewing a decision of the Manitoba Labour

Board (the "Board"), considered the legality of an employment agreement that purported to pay an employee a salary in exchange for all hours of work. The employer in that case argued that such an agreement was not contrary to the overtime provisions of the *Code* because the parties had agreed that the employee's salary was in exchange for any overtime hours worked.

The Board had determined that such an agreement was contrary to the *Code's* overtime provisions. The Court of Appeal held that the reasoning adopted by the Board in reaching that conclusion was reasonable, and summarized it as follows:

- The *Code* makes no distinction, as to entitlement to overtime, between employees paid on an hourly basis and those paid by a weekly, monthly or yearly salary.
- Whether a particular employee, paid by salary rather than on an hourly basis, is entitled to overtime will depend on the circumstances of the case.
- The Board must be able to determine the actual hours worked with reasonable accuracy.
- The Board may examine whether the salary includes compensation, at overtime rates, for time worked in excess of the standard hours of work.
- Employees should be in a position to know and understand, at the outset of the employment relationship, the wage that they are being paid and the hours required of them.
- An employment agreement subject to the *Code* should clearly set out the number of hours to be worked and the rate of pay.
- An employment agreement that establishes a weekly, monthly or annual rate of pay for all hours worked violates the *Code's* provisions on hours of work and overtime.
- Such an agreement amounts to an attempt to contract out of certain of the *Code's* provisions, and the *Code* prevails over such an agreement.<sup>1</sup>

In applying the above-noted principles, the arbitrator in *WAPSO v. Winnipeg* held that parties can set up an arrangement whereby an employee is expected to work a *precise* amount of overtime in order to earn a *designated* weekly, monthly or annual salary. The catch being that, such an arrangement "must clearly establish the moment when additional overtime compensation is payable, beyond the salary, and there must be such a moment."

Applying the law to the case before him, the arbitrator concluded that the overtime provisions in the Agreement were not compliant with the *Code*. To demonstrate

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<sup>1</sup> *Nygård International Partnership Associates (Re)*, 2006 MBCA 115 , para. 59.

this non-compliance, the arbitrator used the example of an employee who works 100 hours of overtime during the first three months of a calendar year and, at the end of that three-month period, resigns or is dismissed. Because the employee had only worked for  $\frac{1}{4}$  of the calendar year, his or her overtime compensation would only cover 25 hours of overtime despite the employee having worked 100 hours of overtime. Therefore, the problem with the Agreement's overtime provisions was that it set overtime thresholds based on hours in the *year*, rather than a shorter window of time.

The arbitrator noted that if, for example, the Agreement provided "that the salary covers two (2) hours of overtime per week and one hundred (100) hours per year, and that overtime in excess of two (2) hours per week entitles the employee to overtime, it would be compliant."

This case serves as a useful reminder that, parties can certainly agree to incorporate overtime expectations and compensation into a fixed, base salary. However, setting up such an arrangement in a manner that does not offend statutory rights to overtime pay should be done carefully with an awareness of the governing principles from the case law, particularly the requirement that employees should know at the outset of employment what their wage is and the hours they are expected to work.

Finally, it is important to note even if parties agree in good faith to provisions that offend the *Code*, such good faith intentions will not save such provisions from being held illegal.

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