



e2r Alert!

Overtime? What Overtime?

In the recent case of *Bloomex Inc. v. Erik Camphaug, 2024*, the Ontario Labour Relations Board (“OLRB”) has, again, made an overtime award against an employer that could not produce records to dispute an employee’s claims, or calculation, of unpaid overtime hours. The employee was able to adduce evidence to substantiate additional hours being worked and the employer was unable to prove that the role did not require overtime or that they ever told the employee not to work overtime. In fact, there was evidence from the employer that established they were aware that the employee was working extra hours.

This case is in line with similar OLRB decisions like *RBC Insurance Agency Ltd. Agence D’Assurances RBC Ltee v Shahzad Ali, 2021*, where the OLRB found RBC liable for overtime worked by a commissioned employee adding to over \$40,000 in unpaid overtime. In this case the employee was permitted to work remotely, there was no policy against working overtime, employees had the chance to earn more commission by working longer hours, and RBC never attempted to track or control the excess hours being worked. As per the Ontario *Employment Standards Act, 2000* an employer will be liable to pay for work “permitted or suffered to be done by the employer” – this has been interpreted to include a ‘failure to prevent’ the employee from working overtime where the employer knows or ‘ought to have known’ that the employee was working overtime.

While the OLRB did not accept the employee’s estimate of his overtime, as he had insufficient contemporaneous records, they were able to conclude that he worked at least 8 hours of overtime per week.

While an employer may attempt to argue that there is no factual basis for overtime hours claims, or that they were ‘made up’ or fabricated by the employee, this defense does not hold up if the employee has evidence to the contrary or the OLRB can make its own determination based on the evidence presented because the employer has no

records to contradict that determination (see *2605853 Ontario Inc. (Paranthe Wali Gali 2) v. Balwant Rathour*, 2021 CanLII 55128 (ON LRB)).

Employers need to ensure they are aware of the hours their employees are working and need to ensure that all overtime is approved in advance and not simply “permitted or not prevented” through inadvertence or otherwise. Additionally, employers should have a clause in their employment agreements or employee handbooks making it clear that overtime must be approved in advance (while you are still liable for overtime hours worked, failing to get permission can result in discipline for the employee).

If you would like to discuss any of the above noted cases in greater detail, we recommend reaching out to speak to an e2r™ Advisor.