Denny's settles foreign worker class action suit

Restaurant chain must pay airfare, agency fees, overtime and shortfall from promised work hours to workers from Philippines

| BY SERGIO KARAS |

AFTER more than two years of litigation, the British Columbia Supreme Court has approved a settlement of a foreign worker class action against Denny's Restaurants. This was the first class action proceeding in Canada involving foreign workers.

IMMIGRATION

The foreign workers who constituted the class alleged that, contrary to certain contractual and other obligations, Denny's failed to provide them with the amount of work promised in their contracts, failed to pay them overtime, and failed to reimburse them for recruitment and travel costs, amongst other items. After certification of the class in March 2012, the parties embarked upon a dispute resolution process that resulted in a settlement. Denny's also began third-party proceedings against its agents in the Philippines who recruited the foreign workers, seeking indemnity to the extent that it may be liable to the foreign workers for travel costs and recruitment fee repayments. That action continues independently.

The class members alleged that despite contracts between them and Denny's, the restaurant chain failed to provide them with the hours of work agreed upon and, despite British Columbia legislation requiring a certain level of pay for overtime work, Denny's failed to pay it. In addition, many of the employment contracts stipulated that the foreign workers were not required to pay for any travel or recruitment costs, but nonetheless they were asked to do so by the third parties who acted as the chain's agents in the Philippines. The cause of action against Denny's was grounded on breach of contract, breach of fiduciary duty, unjust enrichment, and the fees paid to Denny's' recruiters abroad.

Throughout the course of the proceedings, and given the close relationship between Denny's and most of the employees who continued to work for the chain, there were allegations of improper communications between management and the foreign workers with the intent to dissuade them from participating in the class action and urging them to "opt-out" of the proceedings. Therefore, the representative worker in the case, Herminia Vergara Dominguez, obtained relief in court to restrict communications between Denny's and the foreign workers. Notwithstanding that, 19 of the 77 workers who constituted the class members opted out.

Settlement on several issues leads to big payout to workers

After what the court characterized as highly charged negotiations, a settlement agreement was reached between the foreign workers and Denny's, which the court summarized as follows:

- **Work hours:** The workers were entitled to either 37.5 or 40 hours of work per week based on the contracts. Denny's was to pay any shortfall between the hours the workers were entitled to work and the actual number of hours worked. Denny's was entitled to assert that worker was unavailable for work or limited their availability. Any disagreement could be referred to the arbitrator for a final determination.
- **Overtime:** All workers were entitled to be paid overtime (including vacation pay and interest) for work done on that basis. Denny's was to provide the initial calculation which was to be confirmed by an independent auditor. Class members had the ability to challenge the auditor's calculations to the arbitrator.
- **Airfare costs:** All workers who had not already received reimbursement would be paid their airfare costs to Canada by Denny's, with certain exceptions. The excepted class members would have their airfare determined by the arbitrator with no right of appeal. Denny's was also to reimburse return airfare, except for those individuals who secured permanent residency in Canada or obtained employment in Canada with another employer. Any disagreement could be referred to the arbitrator for a final determination.
- **Agency fees:** Workers would fill out a claim form indicating they paid agency fees, either directly or indirectly, to ICEA or Luzern, the agents in the Philippines. Denny's would establish a settlement fund in the amount of $300,000 for the purpose of paying these claims, which would be paid to a maximum of $10,000 each. If there was a shortfall, the funds would be distributed pro rata among the workers; if there was no shortfall, any remaining funds would be distributed equally.
- **Donations:** Denny's was to make a $40,000 charitable donation to Migrante British Columbia, an organization which assists temporary foreign workers and their families, and a $40,000 charitable donation to a children's charity agreed to by the parties.
- **Release:** Upon Denny's performing its obligations under the settlement, all class members would be deemed to have provided a full release of all claims against Denny's.

The court discussed at length the propriety of the settlement agreement, and canvased the case law to decide

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MORE CASES

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cers and members of management who are issued such equipment." Exceptions had to be authorized by management.

In March 2008, the three trainers were assigned to conduct a duty firearm practice session for border service officers in Windsor, to be held at the Windsor police range. On March 28, at the end of a training session, all three went out to dinner at a restaurant and bar wearing their full uniforms and sidearms.

At the restaurant, they ran into the chief of enforcement operations for the Windsor Tunnel border crossing, who came up to them and said they were violating CBSA's firearm policy. Jacques said there was no such policy enforced back in Ottawa — where they had been allowed to leave the office for short trips and errands with their sidearms — and said they didn't have a place to store their weapons at the police range. He claimed no-one had given them any directive not to wear their firearms.

The training superintendent learned of the incident and asked Christenson who gave them authorization to wear their firearms on their dinner break. Christenson replied that they had been given authorization but didn't say who gave it. The superintendent contacted other management members but none claimed to have authorized them and there was no written authorization.

The three trainers were suspended for five days each. Though they claimed to have acted in good faith, expressed regret and said they thought the policy didn't apply to them because they were trainers, not officers, CBSA felt they had "subjected yourself and the organization to unnecessary safety risks as well as tainting the image of CBSA."

The adjudicator noted employers have the right to establish rules and policies, but they must be clear. He found CBSA's firearms policy was not. The policy didn't include trainers in its listing of to whom it applied, nor did it mention any other group into which trainers would fall, so there was confusion as to whether they were subject to it — Jacques told the superintendent in the restaurant he didn't think they were violating the policy. The wording of the policy didn't indicate the list was "non-exhaustive, and it cannot be inferred that trainers are included," said the adjudicator.

The trainers' belief they weren't subject to the policy was supported by the fact they were allowed to go out for brief errands with their firearms in Ottawa, said the adjudicator. In addition, they had no directives from management in Windsor that it was any different there.

The adjudicator found that while it may have been intended for the policy to apply to all CBSA personnel who carried firearms, it was not the case in reality. Also, the CBSA code of conduct defined misconduct as "a wilful action or inaction" by an employee, though it was established that the three trainers did not act in bad faith or knowingly breach the policy. Finally, there was no evidence public perceptions were affected by the incident, said the adjudicator.

CBSA was ordered to remove the suspensions from the records of the three trainers and to reimburse each of them five days' pay and benefits. See *Christenson v. Deputy Head (Canada Border Services Agency)*, 2013 CarswellNat 988 (Can. Pub. Service Lab. Rel. Bd.). CELT

Workers given fewer hours than were promised

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whether it was in line with the general expectations of the parties and with their likelihood of success, taking into consideration several factors including the duration of litigation, risk to the parties, and good faith of the settlement. The court noted it was obvious the settlement brought about a timely resolution of the claims, as the litigation had been ongoing for more than two years, damages claimed arose from matters dating back as far as 2006, and the litigation risk if the matter moved to trial was substantial. None of the workers objected to the settlement agreement and Dominguez received a small additional payment of $2,500 for her efforts as representative plaintiff. This was in addition to the payment of approximately $16,000 that each worker in the class was expected to receive.

With regards to the opt-out notices delivered by some of the workers, the court was satisfied that it was appropriate to invalidate them and include those workers in the class.

Although this matter has come to its conclusion, the decision illustrates the high cost employers can face when not abiding by the terms of their contracts with foreign workers. This is especially true in cases where the employer's operations rely on a large number of foreign workers, and more so when most of them come from the same country and share the same background. Employers should never disregard their obligations under federal or provincial legislation with respect to any employee, and that includes foreign workers. See *Dominguez v. Northland Properties Corp. (c.o.b. Denny's Restaurants)*, 2013 CarswellBC 707 (B.C. S.C.). CELT

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