CITATION: *Brown v. Canadian Imperial Bank of Commerce*, 2012 ONSC 482
COURT FILE NO.: CV-08-00365119CP
DATE: 20120119

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **Michael Brown and Brian Singer**, Plaintiffs/Moving Parties

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Canadian Imperial Bank of Commerce and CIBC World Markets Inc., Defendants/Respondents

BEFORE: G.R. Strathy J.

COUNSEL: *Jonathan Ptak, Jody Brown and Eli Karp*, for the Plaintiffs/Moving Parties

Stuart Svonkin, Lauri Reesor and Sarah Whitmore for the Defendants/ Respondents

DATE HEARD: January 18, 2012

ENDORSEMENT

[1] This is a motion brought by the plaintiffs to compel the defendants' affiants to answer certain questions that were either refused on their cross-examinations or which were allegedly answered in an insufficient manner.

[2] This is a putative class action on behalf of a proposed class of employees of Canadian Imperial Bank of Commerce ("CIBC") and Canadian Imperial Bank of Commerce World Markets Inc. ("CIBCWM"). It is described as a "misclassification" case – that is, a case in which it is alleged that the defendants wrongfully misclassified the class members as being ineligible for overtime. The action was commenced in 2008. It is scheduled for a three-day certification hearing to commence in just under two weeks.

[3] I am advised that there will be an extensive record on certification. The defendants have filed 17 affidavits from 15 witnesses, most of whom have been cross-examined by the plaintiffs. In addition, prior to those cross-examinations the plaintiffs made extensive requests for documentation, to which the defendants responded, in various tranches, at some length. The fact that we are left with a relatively modest list of undertakings and refusals suggests that, by and large, few stones have been left unturned and there will be a rather comprehensive evidentiary record before the Court on certification.

[4] My objective, at this very late date, is to balance two concerns. On the one hand, I am reluctant to see the certification motion postponed. It has already been re-scheduled once and it is not in the interests of the parties or the members of the proposed class to see it further delayed. On the other hand, it is important that both parties be given a full and fair opportunity to present their cases on the motion. That being said, as I pointed out to counsel, sometimes an issue that appears to be important prior to the motion assumes no significance, or little significance, when the motion actually comes to be heard.

[5] My decision on the various issues is set out below.

1. Third Party Examination of Defendants' H.R. System and Records – Sharman Q. 99

[6] The plaintiffs wish to appoint a third party to inspect the defendants' Human Resources System and records for the entire class period. It is acknowledged that if I granted this relief, the certification motion could not proceed. Relief of this kind would be unusual in any circumstances and it would be extraordinary on a motion prior to certification. I am not satisfied that it would yield any information relevant to certification that has not already been produced and it would be a significant intrusion into the business and confidential records of the defendants. That request is refused.

2. Historical HR Records – Sharman Q. 36, 44, 55, 60

[7] In 2003, CIBC and CIBCWM introduced a single human relations software system, which provides extensive information, including payroll and overtime information, concerning class members. The defendants say that while some pre-2003 data was migrated to the new system, the data is neither comprehensive nor complete. In response to requests for data in the pre-2003 period, the defendants have replied that "human resources and payroll records for employees who would fall within the proposed class definition were maintained in a variety of different systems at different times depending on what aspects of the defendants' business the employee worked in. All of those legacy systems were decommissioned prior to the commencement of this action."

[8] In response to a request (Q. 60) for information with respect to the amount of compensation, and overtime compensation for employees between 1996 (the beginning of the class period) and 2003 (when the new HR system was introduced), the defendants have essentially stated that such information, if it exists in usable form, could only be produced through an intensive manual search.

[9] I am satisfied that the defendants' answers are satisfactory. They have responded to the questions. They are not required to go further, at this stage of the proceeding, to undertake an extensive search to attempt to locate the underlying information.

3. Historical Overtime Policies – Sharman Q. 221, 224

[10] In 2006, the defendants introduced an overtime policy that applies to all their employees in Canada. They have also produced Technology and Operations overtime policies, prepared in

2002, which are applicable to members of the proposed class. They were asked whether there were any earlier written policies applicable to the class. The defendants replied to this question by saying that prior to 2006 different lines of business within the organization had different policies and practices with respect to overtime, not all of which were reduced to writing and not all of which necessarily still exist. The answer continued that "[W]hile a comprehensive search has not been conducted, all of the written policies that the defendants have located to date in the course of defending the certification motion in this action, and that would have applied to members of the proposed class, have already been produced. Beyond the information already provided, the defendants have not been able to determine more specifically when or for how long those policies applied."

[11] Considering that question 224 was asked in the course of cross-examination and not discovery, I am satisfied that the answer is adequate for the purposes of the certification motion. In view of the broad temporal scope of the class, and the large number of functions that fall within the "Analyst" job title, it would be unreasonable to require the defendants, at this stage, to engage in a broad search to identify the documentation, if it exists, to answer this question.

[12] I also accept the submission that the answer to question 221 would require disclosure of privileged information and the question need not be answered.

4. Associate Investment Advisors – Sharman Q. 278, Baker Q. 25, 56, 57, 58, 59, 61, 113, 137-141, 150-152, 154

[13] One of the main issues of controversy on the motion was the relevance of questions relating to Associate Investment Advisors ("AIAs"). The proposed class definition includes Analysts or Investment Advisors or those "who performed the same or similar job functions under a different or previous CIBC or CIBCWM job title." I note that the language in quotation marks is virtually identical to that approved by Lax J. in *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531, aff'd [2010] O.J. No. 3762 (Div. Ct.).

[14] Question 278 on Ms. Sharman's examination asked for the defendants' position on the exemption for AIAs under the applicable legislation. It was refused on the ground that the AIA position does not fall within the class definition because it "is not the same as or similar to the Investment Advisor position. Unlike Investment Advisors, Associate Investment Advisors are not responsible for building or managing a book of business."

[15] The questions at issue on Mr. Baker's examination were refused on the basis that AIAs are not within the class.

[16] The plaintiffs say that, based on the evidence, there is considerable overlap in the job functions of Investment Advisors ("IAs") and AIAs and that the latter fall within the class. The defendants say that the plaintiffs have been – or ought to have been aware from the outset that AIA was a distinct job title and that the plaintiffs are impermissibly attempting to expand the proposed class. They say that questions about AIAs are irrelevant because they are outside the class.

[17] The defendants' counsel says that, had his clients known of the plaintiffs' position, they might have tendered additional evidence with respect to the AIAs, just as they did with IAs.

[18] I must say that at first blush, I have some concern about a class definition that uses open-ended terms that make it difficult to determine, by objective criteria, who is in and who is outside the class, something that could cause confusion in relation to opting out as well as in determining the preclusive effect of any ultimate decision on the common issues. It has clearly caused some disagreement between counsel about whether AIAs are within or without the class. That said, the defendants have known about the proposed broad scope of the class since the outset and they have known that it could include others who perform "similar" functions to IAs under a different job title. The issue of whether this is an appropriate class definition and, if so, whether AIAs fall within the definition, will have to be resolved at the certification motion.

[19] I am satisfied that the questions are relevant and they are to be answered. They go to the class definition and the commonality questions on certification. While there appears to be an evidentiary record concerning the functions of AIAs, the defendants may apply for leave to supplement the record, if so advised.

5. Overtime Eligibility – Baker Q. 155, 156; Sharman Q. 244, 245, Sutherland Q. 89, 90

[20] Mr. Baker was asked whether he was aware that Investment Advisors are not entitled to overtime. This question was refused as merits-based. He was asked whether he knew whether Investment Advisors were entitled to overtime under the CIBCWM Policy. The same answer was given. Mr. Sutherland was asked whether he believed he was eligible for overtime. The question was refused as irrelevant and merits-based. He was also asked whether he ever worked more than 44 hours in a week. The question was refused on the basis that it went to the merits.

[21] Ms. Sharman was asked at Q. 244 and 245 whether the basis for the exemption from overtime eligibility for Investment Advisors was premised on them being people managers. The question was refused on the basis that it was merits-based and subject to solicitor-client privilege.

[22] I agree with the refusals with respect to Mr. Baker and Mr. Sutherland on the basis that the answers are irrelevant. The knowledge or belief of these witnesses is not relevant to any issue on certification.

[23] I reject the objection with respect to the question asked of Ms. Sharman. The question "Why are Investment Advisers not eligible for overtime?" goes to the commonality of the class and the commonality of the issues. It does not require the disclosure of any specific solicitor-client communication. Questions 244 and 245 must be answered.

6. Class Size – Financial Consultants – Sharman Q. 118

[24] Ms. Sharman testified that prior to 2002, Investment Advisors were known as "Financial Consultants". She was asked to identify the number of such employees. The question was taken under advisement because, as stated on the record, it was not known whether this was possible.

The answer ultimately given was that as "Financial Consultant" was a "business title" and not a job title, it was not possible to give such an estimate, presumably because the record-keeping system of the defendants did not permit the question to be readily answered.

[25] In my view, the answer is sufficient. Moreover, I am not satisfied, at this time, that it is necessary for the plaintiffs to identify the number of Financial Consultants for the purposes of the certification motion or that the absence of this information has an impact on the ability of the plaintiffs to fully and fairly present their case. I am prepared to reconsider my decision on this issue should it be established on the certification motion that the number of Financial Consultants is a critical issue bearing on certification.

7. Refusals related to Employees Supervised by Laura Ross (Q. 53 and 56)

[26] Ms. Ross was asked questions about conduct of employees on the bond desk, other than Mr. Singer. Questions were asked about the working hours of those employees and whether they were required to keep time sheets. The plaintiffs say that the information is relevant to the rebuttal of attacks on the credibility of Mr. Singer. The period of time in question, when Mr. Singer was on the bond desk, is outside the proposed class period. The questions are irrelevant to the certification motion and the answers will not impact Mr. Singer's credibility one way or the other. These questions need not be answered.

8. Job Descriptions – Goa Q. 33, Allore 36, 137, Goldberg

[27] Ms. Goa was asked for the job description for the senior test coordinator position. Mr. Allore was asked for the job description for a Manager PSA. He was also asked, at Q. 137 for the job description for the "Business Specialist" job title or business title "Business Analyst." Ms. Goldberg was asked to provide job descriptions for all positions she held prior to September 2003 and to provide a job description with respect to her position as a Testing Coordinator I.

[28] The defendants essentially gave a standard answer to these questions.

[29] There is no relevance to job descriptions that fall outside the proposed class. These questions need not be answered.

9. Assistants – Baker Q. 67

[30] Mr. Baker was asked whether an Investment Advisor has authority to approve or deny overtime requests made by their assistant. The answer was refused, on the ground that the eligibility of assistants for overtime is not in issue and, even if it were, the question would go to the merits.

[31] I disagree. In my view the question goes to the functions and responsibilities of Investment Advisors and whether sufficient commonality exists to make the claim appropriate for certification. The question should be answered.

10. Alleged Hypothetical Questions – Gao Q. 80, 162

[32] Ms. Gao was asked whether she would check the overtime policy if she was uncertain about whether a subordinate was eligible for overtime. She had already testified that her manager had told her that the employees were eligible for overtime. I am not satisfied that the answer to this question will assist the plaintiffs in either advancing the motion for certification or responding to the defendants' position. It need not be answered.

11. Miscellaneous – Allore Q. 48

[33] This question was not really argued by the plaintiffs and I consider it to be irrelevant in any event.

Conclusion

[34] An order will issue in the terms set out above. The answers to questions shall be provided in writing *in lieu* of a personal attendance.

[35] As success has been divided, I am inclined to make no order as to costs, but if either party has submissions to make on the question, they can be addressed as part of the costs of certification.

G.R. Strathy J.

G.R. Strathy J.

DATE: January 19, 2012