

February 9, 2022

Phillip v Deloitte Management Services et al

CV-15-523524-CP

- Ms. Plumpton, Ms. Whitmore, Ms. Wise, Ms. Shiff and Mr. Gilchrist for Ds
- Mr. Monkhouse, Ms. Monkhouse, Ms. Singer and Ms. Cutler for P

Class action alleging misclassification of Ds' "document reviewers" as independent contractors rather than employees – Action was certified as a class proceeding in April 2017 – P's motion for summary judgment is scheduled for July 2022 - Ds have recently produced Roster Spreadsheets with names of document reviewers plus some added comments/notations relating to job performance - Ds now move to file Supplementary Affidavits from two senior managers (both of whom have filed earlier affidavits) to explain and clarify "the context" of these recently produced Roster Spreadsheets and the relevance, if any, of the added comments re job performance.

Decision: Ds motion for leave to file the two Supplementary Affidavits is dismissed.

Reasons: I am not satisfied under Rule 39.02(2) that leave to file this additional evidence should be granted on the evidence herein. P has advanced a number of compelling submissions as to why Ds' motion should be dismissed. I base my decision on the following:

- (i) P made clear to Ds (on numerous occasions) that P was interested in documents that related to the evaluation of individual document reviewer's performance. I am not completely satisfied with Ds' explanation why the Roster Spreadsheets (and added notations) were only discovered and produced so late in the proceedings, after cross-examinations had been completed and just a few months before the SJ motion;
- (ii) There is nothing unreasonable or unfair in letting the comments/notations on the Roster Spreadsheets speak for themselves without any further clarification. Any "content" or "context" points can still be made by Ds via factum submissions;
- (iii) In my view, and given my experience deciding misclassification cases, nothing will turn on these notations about job performance. Ds are entitled to make note of the document reviewer's speed or accuracy or general job performance, even if they are independent contractors, to ensure good customer service. The comments and notations in question (and the "clarifying" affidavits) will not tip the balance one way or the other in the "supervision and control" analysis and will not assist in my adjudication of the Common Issues.

Costs: P may be entitled to some costs on Ds' motion to file additional evidence – however, counsel on both sides may prefer to defer their costs submissions until the remaining procedural motions have been decided.

Signed: Justice Edward Belobaba

