

## Clock on limitation period for wrongful dismissal claim starts on day of notice - not last day worked

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A recent decision of the Ontario Superior Court of Justice confirms that the limitation period in respect of a wrongful dismissal claim commences on the day that the employee is provided notice of the termination, not on the last day the employee works. In [Bailey v. Milo-Food & Agricultural Infrastructure & Services Inc.](#) (April, 2017), the defendant employer was successful on a motion to have the employee's claim of wrongful dismissal struck. The judge agreed with the employer that the wrongful dismissal claim was commenced more than six months after the expiration of the limitation period and was therefore statute-barred.

By way of background, civil actions in Ontario are governed by the *Limitations Act, 2002*. This act sets out the time period (referred to as a "limitation period") in which a person must commence a proceeding in respect of a claim. The failure to commence proceedings within the limitation period may be fatal to a plaintiff as the defendant may argue that the claim is statute-barred. The general limitation period set out in the *Limitations Act, 2002* is two years.

Although this appears fairly straightforward, in any particular case there may be questions as to when the limitation period begins – in other words, when the clock starts to tick. The *Limitations Act, 2002* states that time begins to run when the claim is "discovered". The term "discovered" generally refers to the day the person with the claim became aware of the essential elements of their case, such as the damage that occurred, who caused the damage, etc. The question in a wrongful dismissal case is at what point did the employee become aware that he or she was wrongfully dismissed?

Mr. Bailey was employed as a general manager of the employer's food processing facility for 43 years. In March of 2013 the employer provided notice to Mr. Bailey that his employment would end in two years. Mr. Bailey continued to work during that two year notice period. His last day of employment was in March of 2015. In December of 2015 Mr. Bailey commenced an action against the employer for wrongful dismissal. He also claimed severance pay under the *Employment Standards Act, 2000* ("ESA"), and damages for intentional infliction of mental distress, and age discrimination under the Ontario *Human Rights Code*. In his pleading, Mr. Bailey claimed that he was wrongfully dismissed in March of 2015.

The employer brought a motion to strike the action on the basis that it was commenced beyond the two-year limitation period. The employer argued that the claim was discovered in March of 2013 when notice was given and that the limitation period began to run on that day. In the employer's submission, the working notice period did not extend the limitation period applicable to the wrongful dismissal claim, or the employee's entitlement to severance. The employer further argued that the

employee's claim for mental distress should be struck to the extent that it related to any conduct beyond the two year limitation period. In terms of the age discrimination claim, the employer submitted that it was subject to the same limitation period as the wrongful dismissal claim, since it hinged on the termination of employment.

The employee argued that the limitation period began on the last day of employment in March of 2015. Since the claim was brought in December of 2015, the employee took the position that all of the claims were on time.

The judge disagreed – at least in part. After a brief survey of the case law in Ontario, he concluded that the limitation period in a wrongful dismissal action commences on the day that an employee receives notice of the termination – not on the last day of employment. The judge quoted the following passage from the decision in *Webster v. Alimore Trading & Manufacturing Co.* (2010):

Wrongful dismissal, in my view, raises a particularly difficult issue in the limitation context since it is not a dismissal per se that is actionable but rather dismissal without reasonable notice or salary in lieu of such notice, that is actionable. Accordingly, the limitation period for an action for wrongful dismissal does not necessarily run from the date of actual dismissal. It is activated when the cause of action is discovered – that is, the date that the terminated employee knew or ought to have known that he was discharged without cause and without notice or pay in lieu of notice and that a proceeding would be an appropriate way to get redress.

In applying this approach to the facts of Mr. Bailey's case, the judge held that the wrongful dismissal action arose in March of 2013, when Mr. Bailey received notice of the termination. The limitation period also commenced at that point in time. A similar rationale was applied to Mr. Bailey's claim for severance pay under the ESA. The judge stated that pursuant to the ESA, Mr. Bailey's entitlement to severance arose when he received notice of the termination in March of 2013. The limitation period also commenced at that point in time. Because the plaintiff's claims for wrongful dismissal and severance were filed well after the expiry of the limitation period, they were held to be statute-barred. The judge struck the wrongful dismissal action and the claim for severance.

The employer was not as successful with Mr. Bailey's claims relating to mental distress and age discrimination. The judge found that these claims involved allegations of conduct that continued beyond the 2013 notice of termination. Both claims were therefore well within the limitations period and were allowed to proceed.

## **In our view**

Overall, the decision in *Bailey* is positive for employers. By setting the starting point of the limitation period for wrongful dismissal at the time when an employee receives notice, as opposed to the last day of employment, the clock begins to run earlier. This means that an employer is exposed to potential wrongful dismissal claims for a shorter period of time. Any such claims must crystallize within the two year period commencing from the date of notice and employers are therefore afforded earlier certainty in terms of their exposure.

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