

EMPLOYMENT & LABOUR LAW ALERT –  
THE LIMITATION PERIOD FOR WRONGFUL DISMISSAL  
CLAIMS & THE BENEFITS OF A WELL DRAFTED  
TERMINATION LETTER

*One issue that employers are sometimes confronted with is exactly what to say in a termination letter. Surprisingly, employers can run into unnecessary problems as a result of saying too little.*

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Employment & Labour Law Alert

A recent case from the Ontario Superior Court of Justice, *Webster v. Almore Trading*, has raised some doubt as to when a former employee will be statutorily barred from bringing a wrongful dismissal claim against a former employer and highlights the importance of clearly capturing the terms of an employee's termination in a termination letter.

In Ontario, wrongful dismissal actions are subject to a two-year limitation period pursuant to the *Limitations Act, 2002*. Specifically, a terminated employee has two (2) years from the date a claim is discovered to bring a civil claim against his or her employer (i.e. the limitation period starts to run the moment the employee 'knew' or by reasonable diligence could have known of the material facts upon which to base a claim). In most cases, the two (2) year limitation period will start to run on the date the employee's employment terminates. That said, the *Webster* case suggests that this will not always be the case.

According to the facts set out in *Webster*, Almore Trading terminated Mr. Webster's employment on July 27, 2006 on the grounds of theft. Mr. Webster brought a wrongful dismissal

claim against Almore Trading on August 6, 2008, which was greater than two years after the date his employment was terminated. Almore Trading brought a motion for summary judgment<sup>1</sup> seeking a dismissal of Mr. Webster's wrongful dismissal claim on the basis that it was statutorily barred since it was brought two years after his termination date. Mr. Webster opposed the motion on the grounds that he *discovered* that he might have a claim on August 13, 2006 when he first consulted a lawyer and therefore his claim was brought within the two-year limitation period.

As set out in the facts, two days after Mr. Webster's employment was terminated for theft, he travelled to Jamaica on a prearranged visit. Upon his return on August 13, 2006, a friend of Mr. Webster advised him that he should consult legal counsel, which he did. Almore Trading did not lead any evidence as to when Mr. Webster was

<sup>1</sup> *What is Summary Judgment?* Summary Judgment is a procedure by which a party in a court action can bring a motion using affidavit evidence (i.e. sworn statements and documents) seeking either a dismissal of the claim or judgment (including partial judgment) depending upon who initiates the motion without the time and cost of a full trial. If the court believes there is a genuine issue requiring a trial, summary judgment will be refused.

told that he would not be receiving any pay in lieu of notice. The Court also concluded that a person with Mr. Webster's background was not likely to have known without consulting a lawyer that he could be entitled to notice or salary in lieu of notice even if dismissed for dishonesty.

The Court then summarized some legal principles respecting the *discoverability* principle, limitation periods in wrongful dismissal claims and the interplay between limitation periods and summary judgment motions:

- Ignorance of the limitation period does not relieve a plaintiff from its operation.
- *Discoverability* is largely a question of fact that hinges on the case as to when the plaintiff actually or ought to have found out about the material facts to ground a cause of action.
- Because *discoverability* is a factual analysis, it will often be inappropriate to dispose of the issue on summary judgment.
- Wrongful dismissal raises a particularly difficult issue in the limitation context since it is not

### **What does this mean?**

The *Webster* case illustrates that not all wrongful dismissal actions will be statutorily barred if they are commenced more than two (2) years after an employee's termination date. That said, the case does not stand for the proposition that the limitation period only starts to run when a terminated employee has received legal advice respecting his or her potential claim. It is also important to note that the Court did not decide when the limitation period began in Mr. Webster's circumstances, it only decided that a trial would be required to determine the issue and that his claim could not be summarily dismissed on a motion.

the dismissal *per se* that is actionable but rather the dismissal without reasonable notice or salary in lieu of notice. Accordingly, the limitation period for an action of 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. The date of *discovery* may be later than the date of dismissal.

The Court concluded that the date upon which Mr. Webster discovered his claim was a genuine issue requiring a trial and refused to grant Almore Trading's summary judgment motion to dismiss Mr. Webster's claim. In the Court's view, it was not clear that his claim must fail because it was commenced more than two years after his termination but less than two years after his return from Jamaica and obtaining legal advice.

In arriving at its decision, the Court emphasized that it was not clear as to when Mr. Webster knew he would not be receiving notice or pay in lieu of notice as a result of his termination from employment. Given this, it is our view that the Court may have been more likely to grant the motion to dismiss Mr. Webster's claim had he been provided a termination letter that clearly indicated that his employment was being terminated for cause and that he was not going to be provided with any notice, pay in lieu of notice or any further payment arising from his employment and the termination of that employment. Specifically, had Almore Trading clearly communicated this information to Mr. Webster at the time of his termination, we believe that it would have been in a far better position to prove that the limitation period commenced on his termination date.

Preparing a comprehensive termination letter can serve a number of purposes, one of which is setting up your company with the earliest possible limitation period commencement date. Termination letters, when properly drafted, can also reduce the likelihood of an employee bringing a wrongful dismissal (or related) claim in the first place, reduce exposure related to insurance conversion options, strengthen a termination for cause argument, remind the employee of obligations that survive the termination of his/her employment, etc. In our practice, we advocate clear written communication for most workplace issues, and termination from employment is no exception.

*To contact our Employment & Labour Practice Group about this Alert or any other employment or labour matter please call 416.943.0288 or email [employmentlaw@gt-hrlaw.com](mailto:employmentlaw@gt-hrlaw.com).*

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